EUROPEAN COMMISSION

Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS

Financial markets infrastructure

Brussels,

MARKT/G2/MNCT D(2005)

Subject: **EU Clearing and Settlement**
Legal Certainty Group
Questionnaire
Horizontal answers

This document sets out the answers received from members of the Legal Certainty Group expert in the legal systems of the EU to the questions in the questionnaire agreed upon by the Legal Certainty Group.

This version, as at	**24 April 2006**, incorporates:
Section I	25 out of 25 sets of answers
Section II	24 out of 25 answers
Section III	25 out of 25 answers
Section IV	25 out of 25 answers
Section V	24 out of 25 answers

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: C107 03/062 . Telephone: direct line (32-2) 292 13 95. Fax: (32-2) 299 30 71.

http://europa.eu.int/comm/internal_market/
E-mail: martin.thomas@cec.eu.int

1. QUESTION NO. 1

WHAT ARE SECURITIES? DOES A CONCEPT OF SECURITIES SUCH AS IS USED IN THE DIRECTIVE FOR MARKETS IN FINANCIAL INSTRUMENTS 2004/39/EC EXIST? IF NOT, PLEASE DESCRIBE THE CONCEPTS USED. WHAT DISTINCTIONS (E.G. BEARER, REGISTERED, PHYSICAL, DEMATERIALISED, BOOK-ENTRY) ARE MADE AND WITH WHAT CONSEQUENCES?

1.1. Belgium

1.1.1. *Introductory remarks about the Belgian legal framework for securities holdings*

The core legislation relating to fungible securities holdings is Belgian Royal Decree no. 62- which is a law and not merely a regulation- of 10 November 1967 as coordinated by Royal Decree of 27 January 2004 ("**Royal Decree 62**"; an English translation is attached). Royal Decree 62 governs the terms on which a settlement institution (the Belgian central bank, the central securities depositaries (CIK and Euroclear bank both designated as settlement institution by a Royal Decree of August 22, 2002) and its clients ("affiliates")[1]) may hold financial instruments on a fungible basis if the Royal Decree 62 regime is chosen as applicable. Pursuant to article 17 of Royal decree 62, affiliates of a settlement institution may benefit from most of the regime of this Royal decree 62 for the financial instruments deposited with them by their own clients as soon as the account holder has agreed to deposit such securities under the fungible regime of Royal Decree 62 without the need to have such deposited securities being in turn sub-deposited with the settlement institution.

Some Belgian securities fall outside the scope of Royal Decree 62 because they are governed by specific statutes which set out rules similar in substance to the provisions of the Royal Decree: The dematerialised debt instruments of the Kingdom of Belgium and other public sector entities (Act of January 2, 1991); certain short- or medium-term dematerialised debt instruments called "billets de trésorerie" and "certificats de dépôt" (Act of July 22, 1991) issued by Belgian issuers or foreign issuers specifically issuing these securities under the regime of the Act of July 22, 1991; and dematerialised securities of certain Belgian companies (Articles 468 et seq. of the Company Code).

1.1.2. Answer to question 1

What are securities? Does a concept of securities such as is used in the Directive for Markets in Financial Instruments 2004/39/EC exist? If not, please describe the concepts used.

[1] In this questionnaire, the terms account holder or intermediary will be used to refer to account holders with the CSD or its direct participants.

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: C107 03/062 . Telephone: direct line (32-2) 292 13 95. Fax: (32-2) 299 30 71.

http://europa.eu.int/comm/internal_market/
E-mail: martin.thomas@cec.eu.int

A consolidated definition of "securities" is found in Article 2 of the Act of 2 August 2002 (Law relating to the supervision of the financial sector and financial services, hereafter referred to as "Law of 2 August 2002"). In simplified terms, it defines "financial instrument" as one of the following categories:

Shares, bonds and other instruments negotiable in capital markets

Units in collective investment undertakings

Money market instruments

Futures, forward rate agreements, swaps, currency options

Financial Instruments as defined by the Law of 2 August 2002 broadly corresponds to the definition of Financial instruments used in Directive 2004/39/EC.

In the answers to this questionnaire, we will use the terms "financial instrument" and "security" interchangeably.

What distinctions (e.g. bearer, registered, physical, dematerialised, book-entry) are made and with what consequences?

For the purposes of holding securities on a fungible basis, Royal Decree 62 makes no distinction between financial instruments in physical, dematerialised, bearer, registered or other form chosen by the issuer (cf. Royal Decree 62, article 2)

1.2. Czech Republic

Introductory remark:

The following answers are given in respect of legal system of the Czech Republic. The sources of law relevant to subject-matter of the questionnaire are:

1.2.1. Act n. 591/1991 Coll., on securities as amended (hereinafter "Securities Act") and

1.2.2. Act n.256/2004 Coll., on capital market undertakings (hereinafter "Capital Market Undertaking Act")

Securities Act[2] applies to shares, interim share certificates (scrips), share subscription certificates, unit certificates of collective investment funds, bonds, investment coupons, coupons, option warrants, bills of exchange, cheques, bills of lading, warehouse certificates, and agricultural warehouse certificates. Securities Act applies also to foreign securities. Foreign securities are defined as securities issued abroad. Securities Act is intended to cover private law matters.

Capital Market Undertaking Act deals with regulation of services in the field of capital market and public offering of securities. Capital Market Undertaking Act applies to investment instruments, which are:

[2] The following answers are given in respect of legal system of the Czech Republic. The sources of law relevant to subject-matter of the questionnaire are:*Act n. 591/1991 Coll., on securities as amended (hereinafter "Securities Act") and *Act n.256/2004 Coll., on capital market undertakings (hereinafter "Capital Market Undertaking Act").

1.2.3. shares or similar securities representing a share in a company, which shares or securities may be traded in on the capital market;

1.2.4. bonds or similar securities representing a right to receive repayment of an outstanding amount, which bonds or securities may be traded in on the capital market;

1.2.5. securities giving the right to the acquisition of the securities referred to under (a) or (b) above, which securities are regularly traded in on the capital market, save for payment;

1.2.6. securities issued by a collective investment fund;

1.2.7. instruments that are usually traded in on the money market (money market instruments);

1.2.8. derivatives.

The definition of securities in Capital Market Undertaking Act is derived from the definition in the Directive 93/22/EEC on investment services in the securities field. The concept of securities as is used in the Directive for Markets in Financial Instruments 2004/39/EC is not implemented yet.

Securities may exist both in physical or dematerialized form. Capital Market Undertaking Act provides for any fungible securities to be issued as dematerialized in central registry of securities operated by CSD.

For the understanding of the situation in the Czech law, it is necessary to mention that CSD has not started its operation at the time of the response to the questionnaire. As long as the first central securities depository does not start its operation, dematerialized securities are registered by public law entity, the Securities Centre. Pursuant to interim provision of Capital Market Undertaking Act the operation of Securities Centre is governed by the legislation that had been in force before the act came into force on 1st May 2004. The legislation relevant for the operation of Securities Centre is Securities Act in wording before the amendment made by the Capital Market Undertaking Act. Differences between the legal regulation of securities register of Securities Centre and CSD will be referred to in the answers to the particular questions. Legislation governing the operation of Securities Centre may be also referred to as transient legislation.

As to the securities that can be dematerialized in Securities Centre, only those classes of securities defined by the law are eligible.

The only exceptions when dematerialized securities can be kept outside the CSD are

short term debt securities kept in securities registry operated by central bank (Czech National Bank);

unit certificates of collective investment funds issued in securities registry operated by entities different from CSD. Entities entitled to operate a registry for dematerialized unit certificates are investment firms, banks, management companies, provided that these institutions are licensed to provide investment service of safekeeping of investment instruments.

Securities Act in section 38 also provides for the issuer to deliver securities in physical form to safekeeping on behalf of securities owners. In this case the legal provisions dealing with dematerialized securities are applicable.

1.3. Denmark

Securities are defined in the Securities Trading Act Art 2 as follows:

1.3.1. Shares and other negotiable securities equivalent to these,

1.3.2. bonds and other negotiable securities equivalent to these,

1.3.3. any other securities normally dealt in giving the right to acquire such securities as listed in item 1 or 2 hereof by subscription or exchange or giving rise to a cash settlement,

1.3.4. units in collective investment undertakings and special-purpose associations,

1.3.5. money-market instruments listed on a stock exchange as well as certificates of deposit and commercial papers,

1.3.6. financial-futures contracts and similar instruments,

1.3.7. future interest-rate agreements (FRAs),

1.3.8. interest-rate, currency and equity swaps,

1.3.9. commodity instruments, etc., including similar cash-settled instruments,

1.3.10. options to acquire or dispose of any securities under items 1 to 9 and options for equity and bond indices, including equivalent cash-settled instruments,

1.3.11. negotiable mortgage deeds on real property or bills of sale, and

1.3.12. other instruments and contracts as decided by the Danish Securities Council (Fondsrådet).

The Danish Securities Council shall be entitled to lay down rules to the effect that specified instruments be exempted from this Act.

1.4. Germany

1.4.1. What are securities?

Securities are certificates representing a right the exercise of which requires possession – and normally presentation – of the certificate. A more narrow definition is: Securities are certificates where the rights arising out of the security follow the right to the security. We use the wider definition.

Some kind of securitization by certificates is the key element of the German definition of securities from a civil law perspective. Basic forms of securities issued on capital markets are

Bearer bonds (Inhaberschuldverschreibungen) defined in Section 793 Civil Code (Bürgerliches Gesetzbuch – BGB)

Share certificates of stock corporations (Section 10 Stock Corporation Act – Aktiengesetz – AktG)

Certificates of units of collective investment undertakings (Investment-anteilscheine, Section 33 Law on Investment in Funds - Investmentgesetz).

From a civil law point of view the bearer bond as defined in Section 793 para 1 Civil Code is the most interesting type of security as it is the basic form used for various purposes:

'If someone has issued a certificate in which he promises to the bearer thereof to effect a performance (Leistung) (bearer bond), the bearer is entitled to demand performance according to the promise, unless he is not entitled to disposition in respect of the certificate.'

Based on such definition, a variety of capital- and moneymarkets securities have been created:

Bearer bonds issued by whatever type of issuer

Warrants representing whatever type of right

Certificates of deposit

Certificates representing a trust relationship in respect of foreign shares held by an intermediary as fiduciary trustee.

It is important to note that the a.m. definition of bearer bond does not specify the kind of performance (Leistung). Performance, therefore, may mean payment of an amount of money, either stipulated in the terms and conditions of the certificate or to be calculated in accordance with such terms and conditions; a dividend coupon is typically a bearer bond, issuance and delivery of other securities, e.g. shares; a warrant is typically a bearer bond, rendering services as trustee holding foreign shares for the benefit of the holder of the certificate; e.g. a global bearer certificate issued by Clearstream Banking AG and representing rights with respect to foreign shares.

The a.m. certificates may be issued in form of single certificates or global certificates. It depends upon the terms and conditions of the relevant issue whether the investor is entitled to request issuance of single certificates or whether the issuer's obligation is limited to the issuance of one global certificate. Regarding shares of stock corporations the shareholder's entitlement to certification of his share may be excluded or limited pursuant to Section 10 para 5 Stock Corporation Act by the Articles of Association, however, at least one global share certificate has to be issued by the corporation. With respect to safe custody of global certificates Section 9 a Securities Deposit Act (Depotgesetz) provides for the possibility of collective safe custody by a central securities depository (CSD - Wertpapiersammelbank) to the effect that the global certificate is legally treated as though it were a bulk of single certificates.

Securities in dematerialised form exist in Germany with respect to Federal Bonds (Bundesanleihen) and bonds issued by any State of the Federal Republic of Germany. Federal Bonds as well as bonds of the Federal States (Länder) are issued by entry in the Federal Debt Register or in the debt register of the respective State. By registration of Clearstream Banking AG as Germany's Central Securities Depository in such debt register a co-called collective registered claim (Sammelschuldbuchforderung) is created which is deemed to be a collective holding of single bonds (Section 8 para 2 of the Law on the Reform of the Law governing the Federal Debt Register and the

Administration of Federal Debts of 11 December 2001 (Bundeswertpapierverwaltungsgesetz, BGBl. (2001) I, 3519) with respect to Federal Bonds and, with respect to State Bonds Section 2 of the Ordinance regarding Administration and Purchase of Registered Debt of the Reich of 5 January 1940 (RGBl. (1940) I, 30) and Section 2 of the Second Ordinance regarding the Treatment of Bonds of the German Reich in Banking and Stock Exchange Trading of 18 April 1942 (RGBl. (1942) I, 183) which ordinances are still applicable pursuant to Art. 2 of the Law amending the Securities Deposit Act, dated 24 May 1972 (BGBl. (1972) I, 801).

Concept of securities as used in the MiFID 2004/39 EC?

The a.m. definition of securities has been developed for civil law purposes, i.e. to establish the legal basis for creation and transfer of securities in general. The common element is that the rights arising out of and represented and evidenced by the security are transferred by transferring the title to the security. This is the concept for bearer securities (bonds, share certificates, warrants) and for registered bonds or share certificates provided they are endorsed in blanc. If held in collective safe custody at a CSD they may be transferred by book entry (Effektengiroverkehr).

Under civil law aspects there are other types of securities evidencing rights/claims against the issuer which may, however, not be transferred by transferring the title to the security certificate. In such cases the transfer of rights/claims is effected by assigning such rights/claims. Title to the certificate evidencing such rights/claims follows by operation of law pursuant to Section 952 Civil Code. Such certificates do not fall under the civil law definition of securities.

The Directive for Markets in Financial Instruments 2004/39/EC defines Financial Instruments, Transferable Securities and Money-market Instruments (Art. 4 (17-19)). The scope of Art. 4 (18) defining transferable securities is broader than the German civil law definition of securities. Regarding shares, only shares in stock corporations are securities. All other types of companies (GmbH, partnership, limited partnership, civil law company) do not securitize their shares which therefore may be transferred only by assignment but not by book entry. They may not be held in custody by custodian banks and they may not be credited to securities accounts. Such definition is also broader than the definitions set forth in Section 2 para 1 Securities Trading Act (Wertpapierhandelsgesetz – WpHG) and Section 1 para 1 Securities Deposit Act although the latter definition includes all securities which are fungible (vertretbar) except money. However, even such broader definition would not include shares of GmbH, partnership etc.

Derivatives are not securities in Germany unless represented by a (global) certificate as in case of warrants.

1.5. Estonia

Provisions concerning the definition of different types of securities and enabling their classification may be found in different legal acts: inter alia the LOA, the SMA, the CC and the ECRSA.

Provisions of the LOA are intended to cover the private law aspects attached to "securities" by defining both the classical and modern concept:

Section 1 of § 917 of the LOA provides the "classical concept" of securities, defining "securities" as instruments (in Estonian "dokument") to which patrimonial rights are attached in a manner, which precludes the exercise of the right without the instruments. As a general rule securities embraced by the "classical concept" are transferred and provided as security, pursuant to the provisions concerning movable property.

Section 2 of the § 917 of the LOA broadens the definition by also including these rights under the term "securities" (from now on "book-entry securities"), which, in the cases provided by law, are expressed and transferred only by the making of a registry entry. This is known as "modern concept" of securities and is intended to cover mainly the financial instruments that are registered with the Central Register.

§ 2 of the SMA provides a definition and classification of securities similar to that used in the Directive for Markets in Financial Instruments 2004/39/EC.

In addition, based on form, provisions of the LOA distinguish between the following types of "classical securities" and impose certain additional requirements as to the transfer of the different types of securities:

A bearer security (in Estonian "esitajaväärtpaber") – a security that grants the holder of the security the right to demand performance of an obligation arising from the security or to exercise any other right arising from the security.

A negotiable security (in Estonian "käskväärtpaber") – a security which grants the person indicated on the security or another person ordered thereby the right to demand performance of an obligation arising from the security or to exercise any other right arising from the security. If the name of the person entitled on the basis of the security is indicated on the security, the security is presumed to be an order security.

A registered security (in Estonian "nimeline väärtpaberr") – a security which grants the person indicated on the security the right to demand performance of an obligation arising from the security or to exercise any other right arising from the security, and which is not an order security.

§ 2 of the ECRSA requires mandatory registration of the following securities with the Central Register:

1.5.1. debt obligations issued by the Republic of Estonia, the local governments of the Republic of Estonia and other legal persons in public law;

1.5.2. debt obligations issued by legal persons in private law registered in Estonia, the public offer prospectus of which shall be registered with the Financial Supervision Authority pursuant to the Securities Market Act;

1.5.3. the shares of public limited companies registered in Estonia;

1.5.4. the units of investment funds registered in Estonia which are traded on a regulated securities market;

1.5.5. the units of pension funds registered in Estonia;

1.5.6. subscription rights for shares, and for securities subject to entry in the register which are publicly issued or publicly tendered.

The provisions of the ECRSA also make it possible to register other financial instruments with the Central Register registration of which is not prohibited by law. The range of Central Registry eligible instruments is thus wide. The latter is in line with the G 30 recommendations relating to the range of depository eligible instruments.

The responses below are provided only with regard to the rules and practices applicable to book-entry securities because little importance is placed on securities embraced by the "classical concept " and only book-entry securities are primarily held via intermediaries.

1.6. Greece

1.6.1. Greek Law acknowledges and uses the term "securities" ("axiografo", which corresponds to the German term "Wertpapier"), but it does not entail general rules on securities, except for the provisions of the GCC on bearer securities (see below). The term "axiografo" is a broad one, containing all possible variations of securities and financial instruments. Save for the term "axiografo", other terms are also used in Greek legislation to describe the notion "securities". Some of these terms, being used as equivalent to or narrower than the term "axiografa" – as the case may be –, are for example the following: "financial instruments", "titles", "transferable securities", "letters of credit" etc. Law 2396/1996, implementing Directive 93/22/EEC, introduced the term "financial instruments" as a global term, including all kind of securities. Greek legal doctrine extensively analysed the theory of securities, whereas "Securities Law" (Law of Axiografa) constitutes a specific domain of Commercial Law.

Provisions for specifically named securities, being the subject of specific rules, i.e. shares, bonds, debentures, bills of exchange, checks etc. are included in Greek Law. For securities that are not explicitly specified and regulated by law ("no-name" securities), general GCC rules apply, depending on the nature of each security. Therefore, with regards to bearer securities, rules on transfer of movables apply, whereas in respect of transfer of registered securities, rules on assignment apply. Greek Law

distinguishes bearer securities from registered ones[3]. GCC contains specific provisions on bearer securities (Articles 888-900). Special reference is made to Article 891, prohibiting the issuance of bearer securities which incorporate a pecuniary obligation of the issuer, unless such bearer securities are expressly regulated by law.

Greek Law contains "stock exchange driven" rules on securities issued by Greek entities. These rules concern securities listed a) in the ATHEX as well as b) in the ESSM (HDAT), which are the two Greek regulated markets in the meaning of Directive 93/22/EEC. The interaction between Company Law and Securities Legislation is immanent throughout these rules, although this interdependence is not always consciously considered by the legislator.

More specifically:

Greek Securities Legislation initially introduced, through Law 1806/1988, the immobilization of shares listed in the ATHEX. In this sense, the said Law introduced the "securities depository receipts" issued by the ACSD – in bearer and registered form –, which have been explicitly acknowledged by Law as "securities". The said Law inaugurated a direct relationship between the beneficial owner of these receipts and the issuer of the relevant shares.

In furtherance to the above, Law 2396/1996 introduced the dematerialization of shares issued by Greek Sociétés Anonymes listed in the ATHEX as well as in any Stock Exchange operating in Greece (articles 39-61). The dematerialisation procedure lasted until the end of 1999, and as of 2000 all shares listed in the ATHEX have been dematerialised, in book-entry form. According to the same Law, all shares listed in the ATHEX are registered in the records of the DSS, without serial numbers, in book-entry form. The DSS is administered and operated by the ACSD[4], which operates as a société anonyme and is supervised by the HCMC. Shareholders of the ACSD are the ATHEX SA (31,18%) and the Hellenic Exchanges Holding SA (61,82%).

Bearer shares as well as registered shares are recorded in accounts held with the DSS in the name of each shareholder (end-customer/investor system). These accounts are kept and operated (administered) by the account Operators of the DSS. Such Operators handle the respective "Investors' Sub-Accounts", whereas the shares of each investor are kept with

---

[3] Regarding shares issued by a Greek Société Anonyme, these may be issued either as registered or bearer, to the discretion of the issuer (Article 11a of Law 2190/1920). An *ex lege* obligation to issue registered shares applies to cerain types of companies, especially for those being subject to prudential supervision rules.

[4] Apart from the rules set by Law 2396/1996, DSS is also governed by its Regulation (the DSS Operation's Regulation), which has been resolved by the Board of Directors of the Hellenic Capital Market Commission. The basis of such Regulation is regulatory.

the sub-account administered by the Operator chosen by the investor (see article 13 of DSS Operation's Regulation).

Greek Legislation (see below under 3.1.b.) sets forth detailed provisions in respect of the holding and administration of accounts held within the DSS and the relevant shareholders' rights. Greek Law establishes a direct relationship between the issuer of the shares and the account holder. Nevertheless, it must be noted that these rules, governing company law issues, may only be enforced on shares issued by Greek Companies Limited by Shares (sociétés anonymes).

Article 58 of Law 2533/1997 extends the application of rules on dematerialization of shares issued by Greek companies and listed in the ATHEX to all kind of corporate bonds and debentures issued in Greece[5] or governed by Greek Law – in bearer or registered form –, except for Government bonds (see below under c). Therefore, articles 39, 40 and 45-58 of Law 2396/1996 apply by analogy to corporate bonds and all other debentures issued by Greek entities or governed by Greek Law, except for Government bonds. Thus, the rules mentioned above under a. govern the registration of bonds in book entry form within the accounts of the DSS through a financial intermediary, as well as all relevant bond holders' rights. These rules establish, inter alia, a direct relationship between bond issuers and account owners (end investors, identified as bond holders).

Law 2198/1994 provided for optional dematerialisation of government securities. By virtue of the said law, dematerialised government securities are registered, in book-entry form, within the BoGS. The System's participants, acting as operators of accounts held therein, are credit institutions, investment firms (securities firms members of the ATHEX) and Central Securities Depositories[6], as determined by virtue of regulatory Acts issued by the Governor of the BoG. Articles 5 - 12 of Law 2198/1994 provide in detail for the investors' rights against the Participants and the Greek State as issuer, as well as for the Participants' and the issuers' obligations (see below, under 2.3.). Contrary to the DSS, the BoGS cannot identify end investors, because only Participants hold accounts in the BoGS' electronic records.

1.6.2. Law 2396/1996, by virtue of which Greek Legislation has been harmonized with Directive 93/22/EEC, introduces in Article 2(1) thereof the term 'financial instruments' and its subcategories, corresponding to

[5] This provision should best be read as "issued by Greek entities".

[6] The relevant Act of the Governor of the BoG introducing the Operating Regulations of the BoGS mentions in chapter 3 thereof "Clearing and Securities Settlement Systems" instead of Central Securities Depositories. This verbal imprecision does not affect, in any way whatsoever, the real meaning of the provision.

Section B of the Annex of the said Directive. The same applies for the term 'transferable securities', as defined in Article 2(6) of the same Law, corresponding to the provision of Article 1 No 4 of the said Directive. The particular Law, which introduced these terms, does not explicitly associate them with the analogous terms already existing in previous Greek Legislation.

While introducing the segregation principles of Directive 93/22/EEC into the Greek legal system through Law 2396/1996, the latter also provides for the safeguarding of the customers' (investors') rights on (all kinds of) securities held by Greek intermediaries – including securities held in book entry form – especially in case of the intermediary's insolvency (article 6 of Law 2396/1996). Nevertheless these rules – being in origin prudential rules, but strongly interacting with elements of company, civil and insolvency law – can only apply to Greek credit institutions and investment firms, irrespectively of the country in which they are acting. More specifically, article 6 of Law 2396/1996 - implementing, inter alia, the segregation principle to Greek financial intermediaries by prohibiting them from using securities that belong to their customers – explicitly provides that, **in case of insolvency** of a credit institution or an investment firm, which holds customers' securities, the latter should be separated from the intermediary's assets and "handed" to the customers[7]. This provision explicitly covers securities evidenced by book entries in the intermediaries' accounts, even in cases where the customer does not have any right in rem on these securities, so long as the investor is the beneficial owner of the securities held with the intermediary, i.e. in an omnibus account (article 49 of law 3283/2004, adding section 2 in para. 3 of article 6 of law 2396/1996). This provision also covers cash accounts in respect of investment firms. A draft law recently presented before the Parliament, extends the application of the aforementioned rule,,to the case of investment firms' dissolution and liquidation without them being insolvent. (article 44 para. 8-9 of the draft law)[8].

1.7. Spain

The Spanish legal system distinguishes between securities and financial instruments.

Although a legal definition of securities does not exist, however, Royal Decree 291/1992 on securities issuances and Initial Public Offerings, defines securities to the effects of their submission to the verification and registry in the Comisión

---

[7] According to Article 6 para 3 of Law 2396/1996, in case an investment firm or a credit institution is declared bankrupt, the securities belonging to its customers (investors) are separated from the bankruptcy property and are delivered to their owners with the reservation of any charges established thereon, (in such latter case they are delivered to the pledgee). Therefore, in the case of bankruptcy of an financial intermediary acting as Custodian of the dematerialised securities, there is no risk to investors, except in case of fraud of the financial intermediary.

[8] The mentioned draft law is titled "Listing of transferable securities in regulated markets, independence of the Capital Market Commission, Investment Portfolio Firms, Investment Intermediary Firms, amendments to the stock exchange legislation and other provisions". It is expected that the particular law will be passed during coming summer.

Nacional del Mercado de Valores (Spanish Securities and Exchange Commission) in the following way:

1.7.1. The shares of public limited companies (sociedades anónimas) and participative quotas (cuotas participativas) issued by Savings Banks and the Confederación Española de Cajas de Ahorros, as well as any type of securities such as pre-emptive rights, «warrants» or other similar securities that, directly or indirectly, may lead to their subscription or acquisition.

1.7.2. Bonds and similar securities representing parts of a loan, issued by private or public persons, whether their return is implicit or explicit, and securities that grant the right, directly or indirectly, to their acquisition, as well as derivative securities that grant rights over one or more maturities of principal or interest of bond issues.

1.7.3. Bills of exchange, promissory notes, certificates of deposit and any other analogous instruments unless they are issued individually and, in addition, they are derived from previous commercial operations, which do not imply the receiving of repayable funds from the public.

1.7.4. Mortgage based securities (cédulas, bonos y participaciones hipotecarias).

1.7.5. Participations in investment funds of any nature.

1.7.6. Any other patrimonial right, whatever it may be called, that, by its legal nature and transmission regime, is suitable of being generally traded in a financial market. In particular, participations or negotiable rights referred to securities or loans shall be deemed included in this paragraph.

The following will not be considered negotiable securities for the purposes of Royal Decree 291/1992:

1.7.7. Participations in limited liability companies.

1.7.8. Shares in partnerships and limited partnerships.

1.7.9. The contributions to the capital stock to cooperative companies of any type.

1.7.10. Shares forming part the capital stock of mutual guarantee company.

1.7.11. Shares of the managing entities of the Stock Exchanges and other managing bodies of the organised secondary markets, of Sociedad de Bolsas, IBERCLEAR, and the associative shares of the Confederación Española de Cajas de Ahorros

In relation to the definition of financial instruments, article 2 of the Securities Market Act declares itself applicable to the following:

1.7.12. Any type of contract that is traded on an official or unofficial secondary market.

1.7.13. Financial forward contracts, financial option contracts and swaps, provided that they relate to transferable securities, indexes, currencies, interest rates, or any other type of underlying of a financial nature, independently of the way in which they are settled and regardless of whether they are traded on an official or unofficial regulated market.

1.7.14. Contracts or operations for instruments not envisaged in a) or b) above, provided that they may be traded on official or unofficial secondary markets, and even though the underlying is not financial, including, for that purpose, goods, commodities and any other fungibles.

What distinctions (e.g. bearer, registered, physical, dematerialised, book-entry) are made and with what consequences?

1.7.15. Form of representation: physical certificates or book-entry: As it has already been stated, the issuer of securities in Spain has the option of representing its securities by means of physical certificates or in book-entry form. As an exception, when securities are going to be listed in a Spanish Regulated Market they must be represented by means of book-entries.

1.7.16. Registered or bearer securities: No general rule exists granting the issuer the capacity to choose issuing the securities in registered ("nominativos") or bearer form, so this is decided according to the law ruling the creation of each type of security.

An express legal regime concerning bearer and registered for shares of public limited companies ('sociedades anónimas') does exist, and is briefly described as follows:

As established in article 9 of the Companies Act ('Ley de Sociedades Anónimas), the issuer of shares represented by physical certificates must include in the document their bearer or registered form (he can therefore freely choose).

Nevertheless, in certain cases, the Law provides that shares must be in registered form, according to the issuer's special corporate purpose. Examples of companies where it is mandatory to have their shares in registered form are banks, insurance companies, certain utilities (highways and television stations), et al.

When shares are represented in book-entry form and listed in a Spanish Regulated Market (a Stock Exchange) such freedom of choice between registered and bearer shares does not exist. Shares may only be treated as registered in the cases foreseen under previous letter b) (this is, when it is mandatory for the issuers to have registered shares). In these cases financial intermediaries send the issuer, on a daily basis and through IBERCLEAR, the purchase and sell transactions in order to make it possible for the issuer to maintain his own shareholder's register.

For the rest of securities in book-entry form (public and private debt or notes, warrants, et al) the same principle applies, and therefore they will only be treated as registered in case a Law would expressly impose it.

1.8. France

1.8.1. What are securities? Does a concept of securities such as is used in the Directive for Markets in Financial Instruments 2004/39/EC exist? If not, please describe the concepts used.

France has introduced about twenty years ago a mandatory general and irreversible dematerialisation of securities mode.

Two concepts are available under French law:

- "financial instruments" which is a financial law concept,
- "securities" which is a corporate law concept.

1.8.2. The concept of financial instruments as reflected in the Directive for Markets in Financial Instruments 2004/39/EC exists in France and corresponds substantially to the provision of Article L. 211-1 of the Monetary and Financial Code ("**MFC**").

Those are:

- shares and other securities that afford or may afford direct or indirect access to equity or voting rights, transferable by book entry or by physical delivery;
- debt instruments transferable by book entry or by physical delivery, each representing a claim on the legal entity or "fonds commun de créances" which issues them, other than payment instruments ("effets de commerce") and loan notes ("bons de caisse");
- units or shares in collective investment undertakings ("organismes de placements collectifs»);
- forward financial instruments;
- and any equivalent financial instruments issued under foreign law.

Under Article L. 211-1-II of the MFC, forward financial instruments include:

- forward financial contracts on public instruments, securities, indexes or currencies, including equivalent instruments which contemplate a cash settlement;
- interest rate forward contracts;
- swap contracts ("contrats d'échange");
- forward financial instruments on commodities or on greenhouse gas emission allowances which either give rise, in the context of trading, to registration by a clearing house of financial instruments or to periodical margin calls or provide for the possibility for the seller to make a cash settlement instead of a physical delivery of the underlying commodities;

- purchase or sale option contacts related to financial instruments;
- any other forward market instruments.

Forward financial instruments also cover the equivalent of the above mentioned instruments under foreign law.

Article L. 211-2 of the MFC defines securities ("valeurs mobilières") as follows:

> "Are securities ("valeurs mobilières") securities ("titres") issued by legal persons, public or private, transferable by book entry or delivery, which grant identical rights by class ("categories") and which give access, directly or indirectly, to a portion of the equity capital of the legal person issuing those securities or to a general claim ("droit de créance general") over its assets. Are also securities units in "fonds communs de placement" and "fonds communs de créances".
>
> The nearest equivalent to the concept of Transferable Securities as defined in Directive 2004/39 of April 21, 2004 would be the concept of "valeurs mobilières" which would include the financial instruments listed in 1 (shares) and 2 (bonds) above (in relation to Article L. 211-1 of the MFC).
>
> Whether securities described under c) of the definition of Transferable Securities under the Directive (securities giving rise to a cash settlement determined by reference to indices or measures…) do qualify as "valeurs mobilières" is a matter subject to debate. Those would include "warrants" which are indeed issued in series and are recorded in book entry. "Valeurs mobilières" would however include collective investment undertakings which do not fall under the definition of Transferable Securities under the Directive.
>
> There is another notion used by the Euronext Rules – "Titres" – and this could be a more appropriate translation of what the Directive calls "transferable securities". Another summa divisio approach which is gaining importance is the differentiation of "titre financier" from "contrat financier". "Titres financiers" are transferable securities, and differ from "contrats financiers" which are not represented by a book entry in an account and are as a result not transferable by book entry. This concept is however not reflected in current legislation.

1.8.3. What distinctions (e.g. bearer, registered, physical, dematerialised, book-entry) are made and with what consequences?

Pursuant to the dematerialisation law n° 81-1160 dated December 30, 1981 as codified in Article L. 211-4 of the MFC, all securities issued in whatever form in France and subject to French law are dematerialised and required to be registered in an account by way of book entry (see also question 4).

Despite the introduction of dematerialisation, French law has maintained the traditional distinction between securities (a) in registered form ("titres nominatifs") and (b) in bearer form ("titres au porteur").

The investor has the choice between the two forms of securities unless the "statuts" otherwise provide (Art. L. 228-1 Commercial Code; art. L. 211-4 of the MFC).

Bearer securities are held in accounts maintained with an authorised financial intermediary ("intermédiaire habilité - teneur de compte conservateur"). With bearer securities, the name of the investor remains unknown to the issuer although French law authorizes the issuer if the "statuts" so permit to seek identification of holder of bearer securities (Art. L. 228-2-CC).

Registered securities are held in accounts maintained with the issuer. Holders of registered securities may also designate an authorised financial intermediary ("*intermédiaire habilité*") to administer their accounts held with the issuer. Such securities are then held through an administration account ("*titres nominatifs administrés*") (Article R. 211-4 of the M&FC ; Article 332-59 and followings of the *Règlement Général* of the *Autorité des Marchés Financiers* ("**AMF General Rules**")). When registered securities are held through an administration account, transactions need to be processed through that account exclusively.

1.9. Ireland

There is no single meaning attributed to the term "securities" for the purposes of Irish law; it is defined in different ways for different purposes. The concept of "transferable securities" used in the Directive for Markets in Financial Instruments 2004/39/EC does not reflect general Irish law in this matter, being broader in some respects (encompassing derivatives, generally) and narrower in others (excluding, for example, money market instruments).

The Investment Intermediaries Acts 1995 to 2000, as amended (the "**IIA**"), implement in part Council Directive 93/22/EEC of 10 May 1993 and incorporate references to transferable securities (including examples of them) and non-transferable securities but does not purport to define the term "securities":

"transferable securities including shares, warrants, debentures including debenture stock, loan stock, bonds, certificates of deposits and other instruments creating or acknowledging indebtedness issued by or on behalf of any body corporate or mutual body, government and public securities, including loan stock, bonds and other instruments creating or acknowledging indebtedness issued by or on behalf of a government, local authority or public authority, bonds or other instruments creating or acknowledging indebtedness, certificates representing securities, or money market instruments"

"non-transferable securities creating or acknowledging indebtedness issued by or on behalf of a government, local authority or public authority".

A security would generally be considered to comprise a financial asset which may or may not, depending on its terms, be transferable and can encompass debt or equity but not cash. Certain derivatives may fall within the ambit of definitions of "security" for certain specific statutory purposes (e.g. insider dealing rules) but would not generally be considered to comprise securities.

Irish law recognises the distinctions referred to above (bearer, registered, physical, dematerialised, book-entry). The consequences of those distinctions can only be addressed in specific circumstances. However, the "category" into which such securities will fall will affect how ownership of the securities is evidenced and transferred. Bearer securities are evidenced by possession of the instrument constituting them and are transferred by delivery of that instrument. Ownership of registered securities is evidenced and transferred by registration (all Irish equities are registered securities). The distinction will also be relevant to whether physical certificates are issued in respect of the securities or whether they are dematerialised, such as securities enabled for holding and transfer through that part of CREST which relates to the settlement of Irish securities ("**CREST Ireland**").

Unlike the position in the UK, "electronic transfer of title" is not available for Irish securities in uncertificated or dematerialised form in CREST Ireland. In the case of transfers of registered securities through CREST Ireland, legal title to the securities is still determined by reference to the register of securities maintained by the issuer of the securities or on its behalf by its registrar. The register is updated by the issuer or its registrar upon the receipt of an instruction to register a transfer of title (a "**RUR**") which is sent to the registrar following a match being made in the CREST system between a selling instruction and a buying instruction in respect of a security (see further our responses to question (17) below). Settlement will be achieved in CREST by "delivery versus payment" so that no transfer of title will take place without the corresponding bank guarantee that the necessary payment will be made. Between settlement and registration, a transferee has the protection of an equitable interest in the securities being transferred. Unlike the position under CREST UK, the carrying out of debit/credit instructions within the CREST Ireland system will not affect the legal title.

In that way, for shares, registration of the CREST member on the register of members of the issuer is prima facie evidence of its legal title to the shares in question. Investors typically would not be CREST members themselves (for cost reasons) and would hold shares and other securities through intermediaries, which intermediaries would be CREST members. Consequently, there is no distinction between the rights of an investor against an intermediary by virtue only of the fact that the securities are transferable through CREST Ireland. Finality of settlement may, however, be subject to additional safeguards in respect of securities cleared through CREST Ireland pursuant to the European Communities (Finality of Settlement in payment and securities settlement systems) Regulations 1998 (the "**Settlement Finality Regulations**") which implement the Settlement Finality Directive in Ireland. See further our responses to question (20) below in this regard.

1.10. Italy

The concept of "securities" can be translated into Italian law as "valori mobiliari", which in reality better corresponds to the notion of "transferable securities". Such concept played a pivotal role in the regulation of financial intermediation prior to the implementation of the Investment Services Directive 1993/22/EEC (**ISD**).

The concept of "strumenti finanziari" (i.e., "financial instruments") has replaced in the language of the legislator the one of "transferable securities" and is

currently laid down in article 1, paragraph 2, of Legislative Decree No. 58 of 1998[9], known as the Financial Law Consolidated Act (**FLCA**), as amended. Consequently, the concept of securities such as is used in the Directive for Markets in Financial Instruments 2004/39/EC, albeit known and used by the Italian legal doctrine, is now superseded in the context of the regulation of financial markets.

As to the definition of securities as outlined in the instructions of the present questionnaire: "financial instruments (excluding cash balances) that embody entitlements and that can be subject to book-entry and transfer (irrespective of whether the holding can be characterised as direct or indirect)", these include shares and equity securities; bonds and debt securities; units in investment funds; money market instruments; and any other traded securities that entitle their holder to acquire any of the foregoing instruments.

The definition of "strumenti finanziari", as of itself, does not make any distinction among bearer, registered, physical, dematerialised, book-entry instruments. The notion of bearer and registered instruments is laid down in the provisions of the civil code disciplining the broader legal category of "titoli di credito"- physical documents that embody entitlements (comparable, to some extent, to the common law notion of negotiable instruments) - which encompasses shares, bonds, bills of exchange, instruments representing entitlements to goods.

The distinction between "bearer" and "registered" pertains to the ways in which transfer of the rights embodied in papers takes place, respectively, by virtue of delivery of the document or by virtue of a registration both on the document and on the issuer's register. It should be noted that, under Italian law, all corporate shares must be issued in registered form.

As to the definitions of dematerialised and book-entry securities (as opposed to physical securities) these are laid down in two different sets of rules: the FLCA and Legislative Decree No. 213 of 1998 (**Euro Decree**). The FLCA governs the central depository system (Sistema di gestione accentrata) and "immobilised"

---

[9] Pursuant to article 1, paragraph 2, of the FLCA, financial instruments are:

a) shares and other equity securities negotiable on capital markets;

b) bonds, government securities and other debt securities negotiable on capital markets;

b-*bis*) financial instruments negotiable on capital markets provided for by the civil code;

c) units in investment funds;

d) securities normally traded on money markets;

e) any other normally traded securities that give the right to acquire the instruments referred to in the preceding letters and the indexes relating thereto;

h) futures contracts on financial instruments, interest rates, currencies, commodities and related indexes, including where they are cash-settled;

g) swaps on interest rates, currencies, commodities and stock indices (equity swap), including where they are cash-settled;

h) forward contracts relating to financial instruments, interest rates, currencies and commodities, including where they are cash-settled;

i) options to acquire or dispose of instruments referred to in the preceding letters and related indexes, as well as options on currencies, interest rates, commodities and related indexes, including where they are cash-settled;

h) combinations of the contracts or securities referred to in the preceding letters.

financial instruments represented by book-entry. The Euro Decree provides for a system of mandatory dematerialisation, with regard to financial instruments traded or intended to be traded on regulated markets as well as to financial instruments widespread among the public. Financial instruments which are not subject to mandatory dematerialisation can be subjected to such regime at the option of the issuer.

Sources of law:

Royal law decree No. 1148 of 25 October 1941, as amended by law no 1745 of the 9 December 1962;

Articles 1992 ff. of the Civil Code ;

Legislative Decree No. 58 of 1998, the Financial Law Consolidated Act (**FLCA**);

Legislative Decree No. 213 of 1998 (**Euro Decree**).

1.11. Cyprus

CONTENT AND STRUCTURE OF A LEGAL SYSTEM

General aspects

The Cyprus Securities and Stock Exchange Law of 1993 contains a definition of securities which is very similar to the one contained in the Directive for Markets in Financial Instruments 2004/39/EC. No distinctions are made between bearer and registered or between physical, dematerialised and book-entry securities.

1.12. Latvia

Securities are defined in the FIML. According with the FIML financial instruments (hereinafter – securities) are agreements that simultaneously give rise to financial assets of one person and financial liabilities or equities of another person. FIML shall apply to the following financial instruments:

1.12.1. transferable securities – securities that are negotiable without any restrictions:

shares and other transferable securities equivalent to shares that ensure a holding in the capital of a commercial company (hereinafter, "shares"),

bonds and other debt securities,

other marketable transferable securities whereto the right to acquire the transferable securities referred to in Subparagraphs a) and b) hereof by subscription or exchange is attached,

certificates representing shares – transferable securities that are issued to substitute the shares of an issuer registered in another country and entitle their acquirers to exercise the rights attaching to the substituted shares. Certificates representing shares shall not be traded simultaneously with the shares that they substitute. The substituted shares shall be blocked at the holding bank that issued the certificates representing shares;

1.12.2. units of investment funds and other transferable securities that certify a holding in investment funds or collective investment undertakings similar to investment funds;

1.12.3. money-market instruments – short-term debt instruments (Treasury bills, certificates of deposit, commercial paper) and other instruments traded on money markets;

1.12.4. financial derivatives – financial instruments (contracts) whose value changes depending on an agreed interest rate, price of transferable securities, price of commodities, exchange rate, price or interest rate index, credit rating or change in a similar variable, and whose value is influenced by one or several financial risks that are inherent in the underlying primary financial or other asset and transferred among counterparties to the transaction. To acquire a financial derivative, no initial investment is required or the required initial investment is small (unlike for other contracts that depend on changes in market conditions), and the settlement in respect of the contract takes place on a future date;

1.12.5. commodity derivatives – financial derivatives whose underlying primary asset is a commodity.

Only dematerialised securities may be issued. in public circulation. There are no distinctions between the book-entry of bearer and registered securities if the securities are in public circulation.

1.13. Lithuania

The concept of securities does not absolutely coincide with the one used in the Directive for Markets in Financial Instruments 2004/39/EC. (On the other hand the member states are obliged to adopt transposition measures for the Directive in 24 months after the entry into force of the Directive (i.e. until 30 April 2006).)

Following Art. 3 of the Law on Securities Markets, securities which are eligible to be placed on securities markets are shares of public companies and depositary receipts in respect of shares; debt securities; securities giving the right to acquire shares of public companies, depositary receipts in respect of shares or debt securities by subscription or exchange, including equivalent cash-settled instruments. Units of collective investment undertakings, money-market instruments, financial futures contracts, including equivalent cash-settled instruments, forward interest-rate agreements, interest rates, currency, equity and equity index swaps, options to acquire or dispose of securities or other investment instruments, including equivalent cash-settled instruments as well as options on currency and on interest rates are deemed to be securities for the purpose of financial intermediaries and their regulation, stock exchange, securities market supervision and liability issues (Art. 3(3) of the Law on Securities Markets). The above mentioned financial instruments as well as derivative contracts relating to commodities and other instruments which are placed on the regulated securities market of the EU member state or in respect of which the application for placing on market is filled are deemed securities for the purpose of prohibition of insider dealing in securities trading and prohibition to manipulate market.

Financial instruments which are eligible for transfer within the SSS are absolutely dematerialized, i.e. are recorded by entries in the personal securities accounts opened in the name of securities owners. There is no immobilization of securities

in Lithuania. All dematerialized securities issued in Lithuania are registered, i.e. it is possible to identify their legal owner by the personal securities account identification system. Nominee registration or transfer in the name of a nominee is possible in case of foreign account managers (custodians).

1.14. Luxembourg

Luxembourg law does not provide for a single definition of securities or financial instruments.

The Securities Act does not contain an exhaustive list of all kinds of securities and financial instruments to which it applies. Indeed, the legislator has adopted a pragmatic approach which is to provide for a definition which potentially would enclose any new instrument created by the financial markets. Indeed Article 1 provides:

"This law applies to securities and other financial instruments within the broadest possible sense which are deposited or held in an account with a depository and which are or are declared to be fungible, whether they be materialized or dematerialized, in bearer form, to the order of or in registered form, subject to Luxembourg law or a foreign law, and irrespective of the form in which they have been issued under their governing law."

By contrast, Article 112 of the Commercial Code, as previously the 1971 Grand Ducal Regulation, provides for a comprehensive definition of securities in the context of pledges.

This Article 112 will be repealed by the draft law n° 5251 implementing the EU Directive 2002/47/EC on financial collateral arrangement. The new legislation will reintroduce a definition of securities and financial instruments.

In simplified terms, the draft law n° 5251 defines, with the broadest meaning possible, financial instruments as:

1.14.1. all securities and other instruments, including, but not limited to, shares in companies and other instruments comparable to shares in companies, participations in companies and units in collective investment undertakings, bonds and other forms of debt instruments, certificates of deposit, loan notes and payment instruments;

1.14.2. securities which give the right to acquire shares, bonds or other instruments by subscription, purchase or exchange;

1.14.3. term financial instruments and instruments giving rise to a cash settlement (excluding instruments of payment), including money market instruments;

1.14.4. all other instruments evidencing ownership rights, claim rights or securities;

1.14.5. all other instruments related to financial underlyings, indices, commodities, precious metals, produce, metals or merchandise, other goods or risks;

1.14.6. claims related to the items described in sub-paragraphs a) to e) above or any rights pertaining to these items,

whether these financial instruments are in physical form, dematerialised, transferable by book entry or delivery, bearer or registered, endorseable or not and regardless of their governing law.

What distinctions (e.g. bearer, registered, physical, dematerialised, book-entry) are made and with what consequences?

The law distinguishes between securities in bearer form, to the order or in registered form, materialised or dematerialised. However, once the securities are deposited or held in a securities account, i.e. "immobilised", there is no difference made as to the applicable settlement regime (cf Art. 1 Securities Act).

1.15. Hungary

The definition of securities is given in the Civil code (Act 4 of 1959), stipulating that the unconditional and unilateral obligation that is expressed in a form outlined by law, has certain assecories, and which obligation is qualified as security by law can only be regarded a security. The more detailed regulation of securities can be find in the Capital Market Act (Act 120 of 2001).

Securities can exist in physical form or can be dematerialised. Dematerised securities are by law registered securities, bearer securities can only be in physical form, but the issuance of new bearer securities in no longer possible, moreover, the formerly issued bearer securities had to be transformed to registered securities.

If a security is issued in dematerialised form, later it cannot be transformed to physical form.

1.16. Malta

Maltese law uses the term "securities" in various places and for different reasons.

Regulation:

The most comprehensive definition is that used in the first schedule to the **investment services act (cap 370, laws of malta)** (the "isa") which is then

mirrored in the first schedule to the **financial markets act (cap 345, laws of malta)** (the "fma"). The purposes of those definitions are similar to that in the directive 2004/39/ec i.e regulation, but include more than the directive definition of "transferable securities". The definition in the isa is as follows:

1.16.1. **Securities**, including shares and stock in the capital of a company, debentures, debenture stock, loan stock, certificates of deposit, bonds, notes and any other instruments creating or acknowledging indebtedness.

1.16.2. ((NOT IN FMA) **Certificates** or other instruments which create or acknowledge indebtedness and which upon issue confer the right to claim the debt created or acknowledged thereby at some time in the future, subject to the condition that the claim thereunder may be reduced to below the value or price of the certificates or instruments at the time of issue.

Subarticle (1) above shall not apply to:

(a) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services;

(b) a cheque or other bill of exchange, a banker's draft or a letter of credit; or

(c) a banknote, a statement showing a balance in a current, deposit or savings account or (by reason of any financial obligation contained in it) to a lease or other disposition of property, or a contract of insurance, other than a contract of a kind specified in article 7 of this Schedule.

1.16.3. **Units** in a collective investment scheme.

1.16.4. **Warrants, options, certificates** or other instruments, including any record whether or not in the form of a document, entitling the holder to subscribe for, acquire, sell or otherwise dispose of, underwrite or convert any instrument or an interest in any instrument falling within this Schedule or for any currency.

1.16.5. **Certificates** or other instruments which confer property rights in respect of any instrument falling within this Schedule.

1.16.6. **Futures and foreign exchange contracts** entered into for investment purposes or foreign exchange acquired or held for investment purposes.

1.16.7. **Rights under a contract for differences** or under any other contract the purpose or intended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property of any description or in an index or other factor designated for that purpose in the contract.

1.16.8. (NOT IN FMA) (1) Subject to the following provisions of this article, rights under a contract the effecting and carrying out of which constitutes business of insurance within the meaning of class III, linked long term, under the description of classes of long term business contained in the Second Schedule to the Insurance Business Act.

Where the provisions of a contract of insurance are such that the effecting and carrying out of the contractM:

constitutes both long term business within the meaning of that Schedule and general business within the meaning of the Third Schedule to that Act; or

by virtue of article 5(3) of that Act constitutes long term business notwithstanding the inclusion of subsidiary general business provisions, references in subarticle (1) to rights and benefits under the contract are references only to such rights and benefits as are attributable to the provisions of the contract relating to long term business.

Subarticle (1) does not apply to rights under a contract of reinsurance.

Rights falling within subarticle (1) shall not be regarded as falling within article 6 of this Schedule.

There are also the following references in other laws:

Company Law :

Article 2 of the ***Companies act (cap 386 laws of Malta)*** *refers to shares and debentures and exists for the purpose of company law treatment of shareholder and bondholder rights, recordantion, prospectuses, transfers and related matters*

c. Civil Law:

*A number of articles in the **Civil Code (cap 16)** deal with securities in relation to the mode of transfers and distinguishes between securities which are registered and securities to bearer which are transferred by physical delivery.*

Other laws :

There are some other specific laws, such as those relating to government borrowing which deal with government bonds, stock and treasury bills. These laws address the terms and conditions of the offering but also comply with constitutional requirements for government lending which must be approved by parliament.

1.17. Netherlands

Under Netherlands Law no single definition of securities exists. Every Act dealing with securities or securities markets contains a definition of securities for the purpose of that particular Act. Please note that Section 1(a) of the Securities Trade Supervision Act (in Dutch: "Wet toezicht effectenverkeer") contains the following definition:

"For the purposes of this Act and of the provisions based thereon, and in so far as not otherwise provided:

1.17.1. "securities" means

shares, debt certificates, profit and founders' shares, option certificates, warrants and similar documents of value;

rights of joint ownership, options, futures, entries in share and debt registers, and similar rights, conditional or otherwise;

certificates representing securities as referred to above;

scripts representing securities as referred to above."

In addition thereto, Section 2 of this Act provides that:

"Securities within the meaning of this Act shall not include:

documents of value which are used solely as instruments of payment;

apartment rights."

This definition will be brought in line with the MiFid definition when the MiFid will be implemented into Netherlands Law. Obviously, the definition of securities contained in the Securities Trade Supervision Act has been drawn up with a view to regulatory supervision and not with a view to the possible transferability of the securities concerned.

From a private law point of view, Netherlands Law distinguishes between debt securities and shares and between bearer securities and registered securities. If securities are held through a custodian located in the Netherlands, a distinction should be made between interests in securities consisting of co-ownership rights in collective deposits of the relevant kind within the meaning of the Securities Giro Administration and Transfer Act (in Dutch: "Wet giraal effectenverkeer"), ownerships rights with respect to bearer securities physically held in the

Netherlands by a depository on behalf of the investor on an individualised basis, or, contractual rights with respect to (a) bearer securities physically held in the Netherlands by a depository on behalf of the investor on a fungible basis or (b) bearer securities physically held outside the Netherlands on behalf of the investor's depository, or (c) registered securities registered in the name of the investor's depository. Please note that securities subject to the Securities Giro Administration and Transfer Act are securities which are specially designated by Euroclear Netherlands (formerly known as Necigef), the Central Securities Depository provided for in the Act, as falling under the Act. These securities may be bearer securities as well as registered securities.

Depending on the characterisation of the securities or interests in securities concerned, different rules apply with respect to their creation and issue, their transferability and the requirements for transferring or creating a security interest in the securities.

1.18. Austria

1.18.1. There is **no definition** of a "security" in Austrian statutory law. Definitions have been formulated in legal literature and perhaps the most popular definition is "**securities are documents where the rights arising out of the document follow the right to the document**." They are considered to be "tangibles" (Sachen) representing the rights which they certify. The rights may be extensively evidenced on the security as e.g. by the printed terms and conditions on bonds or the securities may have a more general wording only, referring for the detailed rights to other instruments like share certificates which refer to the articles of association of the issuer, a company limited by shares.

Securities may be "mass paper" like bonds, share certificates, investment fund certificates, warrants etc. or individual documents like bills and cheques or what might be considered a mixture: certificates of deposit.

The above description means, that the concept of securities which is used in the Directive for Markets in Financial Instruments 2004/39/EC is **different**. The Austrian concept is narrower. Nevertheless the provider of a securities account (in Austrian terminology a "custodian") **may accept** to safe-keep instruments which do not fall under the Austrian definition of securities (in physical or electronic form). The Austrian Central Securities Depositary, Oesterreichische Kontrollbank Aktiengesellschaft, Vienna determines, which "objects" it willaccept for safekeeping and administration (section 5 para 3 General Business Conditions of the CSD). Any individual securities account provider (custodian or, what is generally said, any bank) may decide for itself which instrument it will accept from its customers for safekeeping and to be booked on the securities account which is maintained in the name of the customer (depositor). What is of interest for this questionnaire are the generally accepted fungible securities that are traded on securities exchanges.

The types of securities relevant for this questionnaire are narrowed by the (Securities) **Deposit Act** ("Depotgesetz") dated 22 October 1969 on the Safekeeping and Acquisition of Securities, Federal Law Gazette 1969/424 as amended (the "**Act**"). The Act tells in section 1 para 1 which securities fall under the Act: "Share certificates, interim share certificates,

profit participating certificates ("Genussscheine"), profit sharing bonds ("Gewinnschuldverschreibungen"), notes/bonds, mortgage bonds, municipal bonds, bank bonds, medium term notes ("Kassenobligationen"), cashier's notes ("Kassenscheine"), investment certificates and other securities if fungible as well as accessory certificates (interest-, profit share-, revenue- and renewal (talon) certificates, but not paper money". It should be noted that the Act is a statute which is **amended from time to time**, when the development of securities trading and business requires it. There should be no problem to amend the definition of securities which fall under the Act, as long as the basic Austrian understanding of what a security is will be maintained in the list of any additional securities that should fall under the Act. Otherwise an amendment will require more efforts.

1.18.2. Distinctions of securities and consequences?

i. Distinction in view of the person entitled/owner:

Bearer securities ("Inhaberpapiere") where the person entitled to the security and to the rights represented by the security is the bearer who is deemed to be the owner of the security. Bearer debt securities, in particular notes and bonds, have developed from sections 363 to 365 Commercial Code (dated 10 May 1897), which is of German origin and has been introduced in Austria on 24 December 1938). Bearer securities are transferred by agreeing on the transfer as part of a certain deal (purchase, donation, pledge, etc. the "titulus") and by handing them over by hand or in any other way which is recognised by civil law (the "modus" or perfection).

Registered securities ("Namenspapiere") are in the name of a person. They are transferred by agreeing on the transfer (purchase, donation, pledge, etc., the "titulus"), **endorsed** and handed over in the same way as bearer securities. In order to make registered securities tradable (fungible) they may receive a blank endorsement or be registered in the name of a trustee (compare DTC and its system, "Cede & Co") or they are held by an trustee (they bear a blank endorsement or are registered in the name of the trustee) which issues a corresponding number of bearer certificates which entitle the holders to one registered security each.

Market practice in Austria prefers bearer securities, since they are easy to handle. The owners of bearer securities may be identified in the chain of **securities** accounts providers, from any international central securities provider like Euroclear and national CSDs down to the banks which provide the securities accounts for their (private, corporate or governmental) customers. The "twisting" of registered securities into the equivalent of bearer securities as described above under "Registered securities" means that the distinction between these two types of securities is not fundamental.

ii. Distinction in view of the rights represented by the securities:

The securities might be **debt** or **equity** instruments. There are many types of securities of each class and it is sometimes hard to make the correct classification. Then there are **warrants** which entitle the holder/owner to other securities.

iii. Distinction in respect of the issuer:

Securities may be issued by companies operating in various areas of production and trade ("corporate bonds", share certificates etc.), by banks in general ("bank bonds", "subordinated bonds", "supplementary capital bonds", "hybrid capital", equity etc.) or by specialised banks ("mortgage bonds" which are secured by a cover fund of mortgages) or by banks that are authorised under their banking licence to issue "covered bank bonds" (which are covered by a pool of debt securities or loan indebtedness of public entities like the Republic of Austria, its states and communities) or certificates of deposit which may only be issued by banks.

iv. Physical and dematerialised securities:

Austrian law does not provide for dematerialised securities, except for some form of governmental bonds which come close to dematerialisation. For the purposes of this questionnaire it does not seem appropriate to go into details of the rather unique statutory framework which allows for a kind of dematerialised federal bonds.

Foreign dematerialised securities may be held by Austrian securities accounts providers (banks and the Central Securities Depositary) and are treated for purposes of safekeeping equally with physical securities.

v. Form of securities:

Securities may be issued as individual instruments (debt instruments in certain denominations e.g. EUR 1,000, 10,000, 100,000 or equity instruments in certain denominations like share certificates in denominations of EUR 10, 100, 500, 1,000, etc. or no par value share certificates) or in global form. **Global securities** may be in physical form representing (i) a certain number of securities of a certain denomination, e.g. in case a company issues shares in the nominal value of EUR 10 each and a global share certificate for e.g. 50 of these shares is issued ("Großstück") or (ii) in the form of a global security that represents an entire issue. In that case no individual securities will be printed and no delivery of securities to the owner of the security is possible and therefore contractually excluded. Nowadays this form is common for debt securities and has been introduced not so long ago (by Federal Law Gazette 1996/304 amending section 10 para 6 of the

Companies Act) for share certificates. Global securities are held in most cases by the Austrian CSD in case of debt securities whereas global equity securities will be held frequently by other securities account providers too. Holders/owners of securities which are represented by such a global security are co-owners of this global security in proportion to their holding. Acquisition of co-ownership is made in the same way as the acquisition of an individual security. Since delivery of individual certificates is not possible, the importance of book entries increases, but is still considered to be a bookkeeping exercise which evidences the holding of securities. "Bookkeeping follows the facts" and may – and in practice does - serve as a token for the perfection of transfers.

1.19. Poland

1.19.1. There is no general definition of "securities" in Polish Law. The greater part of the doctrine proposes that for a specific instrument to qualify as a security is not dependent solely on the will of the issuer, nor on the agreement between a debtor and creditor, but only from provisions of law (the principle of securities numerus clausus).

According to the provisions of the Polish securities law – the Law on the Public Trading in Securities of August 21 1997 (Article 3):

"Securities, within the meaning of this act, shall be shares, rights to shares, subscription warrants, depository receipts, bonds, mortgage bonds, investment certificates and also other securities issued under appropriate provisions of Polish or foreign laws.

Securities, within the meaning of this act, shall also be transferable property rights attached to the securities specified in par.1.

Securities shall also be property rights other than those specified in par.2, whose price directly or indirectly depends on the price of securities specified in par.1 and 2 (derivative rights) and in particular futures contracts and options.

From the day of admission to public trading, securities shall also be property rights other than those specified in par.2 and 3 provided that they have been registered with the depository for securities.".

Securities in public trading (including securities traded in the regulated market) are dematerialized, which means that they only exist – and are transferred - in the form of electronic entries on securities accounts. All dematerialized securities are in essence transferable, although there are certain exceptions (e.g. related to so-called employee shares, obtained free of payment by the staff of a privatised industry, which cannot be transferred during the period defined in legal regulations, or related to the need to acquire authorisation to transfer another type of security.

As a rule, only securities admitted to public trading in the jurisdiction of Poland may exist in dematerialised form, as well as certain types of securities, which may exist in dematerialised form irrespective of whether they are admitted to public trading or not and for which the issuer has decided that they would be issued in dematerialised form (bonds, bank securities, investment certificates issued by closed investment funds).

The distinction between dematerialised securities and those existing in paper form is significant essentially in terms of the transfer of rights from securities and rules for ascertaining rights from a securities debtor (i.e. issuer). The transfer of rights from securities in paper form always requires the issue of a document, although the transfer of rights from registered securities takes place as a simple transfer of assets, whereas the transfer of securities on the basis of a transfer order requires a written declaration by the seller (endorsement). The transfer of rights from dematerialised securities, on the other hand, requires a correct entry in the registration system maintained for these securities, rather than the issue of a document, although opinion is divided as to whether control over dematerialised registered securities results only in an ordinary transfer of assets (a greater chance of raising against a purchaser the charge that a securities issuer would be entitled to from a seller), or in further-reaching consequences (where the ability to make such charges against a purchaser is limited to cases where securities are purchased with the intent of causing harm to the issuer).

As to the question of showing rights, it is worth highlighting that to exercise rights arising from securities in paper form requires essentially the possession (delivery) of this document (this will not be the only requirement for securities other than bearer securities, aside from the case of registered shares where a deciding factor is an entry in the share register, where persons entitled to those shares are registered), whereas the exercise of rights from dematerialised securities requires in essence only an indication of the ownership balance which is reflected in the entries in the registration system for these securities, according to the existing balances for a given day.

Of securities existing only in the form of entries in securities registration systems, and securities transferred this way, there is an essential difference between bearer securities and registered securities. Bearer securities are easily transferable (the exception being the so-called employee shares mentioned above), whereas for registered shares, restrictions may be placed on their means of transfer. Any breach of these restrictions affects the effectiveness of the transfer of rights from such securities on their purchaser.

1.20. Portugal

According to article 1. CVM, “securities” are any documents representing identical juridical situations, which can be traded on the market. The following are explicitly considered to be "securities" under the CVM:

1.20.1. Shares;

1.20.2. Bonds;

1.20.3. Equity instruments;

1.20.4. Units in collective investment schemes;

1.20.5. Covered warrants;

1.20.6. Rights detached from the securities described in a) to d) provided that the same applies to all the issue or series or is described in the issue conditions.

Concept of “securities” as used in the MiFID 2004/39 EC

The Directive for Markets in Financial Instruments 2004/39/EC does not define “Securities” but only “Transferable Securities” (Art. 4 (18)). The Directive also defines “Financial Instruments” and “Money-market Instruments” (Art. 4 (17 and 19)).

1.20.7. According to the Directive "Transferable Securities" means those classes of securities (which are furthermore included in the definition of “financial instruments”) which are negotiable on the capital market, with the exception of instruments of payment, such as:

shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;

The concept of “Securities” as currently provided for in article 1. CVM is similar to that of the MiFID. The examples provided in one and the other circumstances are, nevertheless, not entirely coincidental, because:

The concept of "securities" under article 1. CVM explicitly covers units in collective investment schemes and covered warrants, which are considered “Financial Instruments” under the Directive, but are not included in the definition of “Transferable Securities”

Regarding shares, only shares in stock corporations are, under Portuguese Law, considered to be securities. All other types of companies (“sociedades por quotas”, “sociedades em nome colectivo” e “sociedades em comandita”) do not securitize their shares which, therefore, may be transferred only by assignment.

Please note additionally that treasury bills and commercial papers are, under certain circumstances considered “Securities” under Portuguese Law (the Directive, includes such instruments in the definition of "Money-market instruments")

1.20.8. Distinctions made under Portuguese Law and respective consequences

According to article 46. CVM, securities are represented by **book entries** or by **physical certificates** depending on whether they are represented by registrations in an account or by paper documents. As mentioned before, securities represented by physical certificates which are In The System are transferred the same way irrespective of the different form of representation and irrespective of the fact that such securities are nominative or to the bearer.

Under Portuguese law, the securities forming part of the same issue, even when carried out in series, must obey to the same form of representation, except for the purposes of trading abroad.

According to article 52. Cod.VM, securities are **nominative** or **to the bearer**, depending on whether the issuer has the ability to be constantly informed of the identity of the respective holders.

In the absence of bylaws clause or decision of the issuer, securities are considered to be nominative.

Except for legal, bylaws or provisions resulting from special conditions established for each issue, bearer securities may, at the holder's initiative and expense, be converted into nominal and vice-versa.

Conversion occurs:

By entry in the individual registration account of the book entry securities or certificated securities integrated in a centralised system;

By substitution of certificates or amendments to their text, made by the issuer.

1.21. Slovenia

Dematerialised Securities Act (ZNVP) gives a very general (broad) definition of (dematerialised) securities. ZNVP defines a (dematerialised) security in Paragraph 1 of Art. 3 as: "A dematerialised security is a statement of the issuer entered in the central register (registry) of dematerialised securities by which the issuer undertakes to fulfill all liabilities (obligations) under the security (embodied in the security) to a person who is as a legal holder of the security entered into the central register (registry)."

Term »issuer's liability« is used in the (legally more precise) meaning of »issuer's obligations« (versus »holder's rights«). Therefore a dematerialised security according to ZNVP means any financial instrument that embodies entitlements i. e. holder's rights that can be exercised against the issuer and holder's right to effect legal dispositions with security (and at the same time with the rights, embodied in the security), such as transfer of the security to another holder or establishing a third party right (e. g. pledge, usufruct), the object of which is that security.

Pursuant Article 7 of ZNVP all "serial securities" (i. e. "transferable securities" in the meaning defined in Article 4 of the Directive for Markets in Financial instruments 2004/39/EC) shall be issued (and are issued) as dematerialised securities. Also practically all companies, which were privatized in the transitional period of transformation of publicly "owned" companies (during the period 1992 to 2000),[10] had to (and did) issue their shares as dematerialised securities (Par. 1 of Art. 96 of ZNVP). Therefore at present day (April 2005) following securities are issued as dematerialised securities:

All transferable securities that are traded on Ljubljana Stock Exchange (i. e. organised market of securities − either on stock exchange listing or on free market). Pursuant point 4 of Par. 1 of Art. 233 and point 4 of

[10] Prior to the year 1990 all companies in Republic of Slovenia were publicly owned (i. e. in the so called »social ownership«.

Art. 241 of Securities Market Act (ZTVP-1) a prerequisite for admission to the organised market is that securities are issued as dematerialised securities.

Most (over 95 %) of all shares of stock companies with its registered seat in the Republic of Slovenia.

All debt and money market securities issued by the Republic of Slovenia (government bonds and treasury bills).

All debt securities (bonds) issued by banks and companies (commercial bonds).

In other words: all "transferable securities" in the meaning defined in Article 4 of the Directive for Markets in Financial instruments 2004/39/EC that are (were) issued in Republic of Slovenia are (were) issued as dematerialised securities.

ZNVP sets forth a coherent set of provisions rules regulating all legal issues of dematerialised securities. KDD Rules comprise detailed provisions of those issues. The basic legal concepts of dematerialised securities as set in ZNVP and KDD Rules are following:

The basic legal concept of dematerialised securities

ZNVP applies the following definitions of legal terms, used in its provisions:

Central registry of dematerialised securities is a central electronic database into which are entered the rights arising from dematerialised securities, holders of these rights at any given time and any possible (all) rights of third parties (third party rights) to such securities (Par. 1 of Art. 3. of ZNVP).

Pursuant Par. 2 of Art. 3 of ZNVP central registry of dematerialised securities are maintained by Clearing and Depository Corporation (hereinafter referred to as "KDD"). KDD acts as a central "depository" (and the only central depository) of all dematerialised securities issued in the Republic of Slovenia.

KDD also maintains and operates the securities settlement system. Securities settlement system is designed for settlement of all transactions executed on the LJSE (hereinafter referred to as "stock exchange transactions"). Pursuant Article 257 of the Securities Market Act (ZTVP-1) all stock exchange transactions shall be settled through the securities settlement system, operated by KDD.

Pursuant Art. 29 of KDD Rules **maintenance of the central registry** means the making of (executing) entries in the central registry with respect to:

the issue, annulment (cancellation) or replacement of dematerialised securities;

the transfer of dematerialised securities between the accounts of holders;

the entry (registration), modification or deletion of third party rights in dematerialised securities or of legal facts related to dematerialised securities

All (holders') securities accounts are maintained directly in the central registry.

The accounts are maintained by entering and executing:

(1) Orders of transfer of dematerialised securities to other account and

(2) orders of entry (registration), modification or deletion of third party rights in dematerialised securities or of legal facts related to dematerialised securities.

The concept of "final client level" type of dematerialisation has been applied by ZNVP. By that concept the holder of the securities, registered on his account of dematerialised securities (i. e. "on whose behalf dematerialised securities are entered in the central registry"), is at the same time legal (and beneficial) holder ("owner") of those securities (Art. 16 of ZNVP). Therefore all end clients' accounts are maintained directly in the central registry. See also answer to Q3 for further details.

Due to the concept of "final client level" dematerialisation as described above, intermediaries in the meaning of a legal person holding dematerialised securities on behalf of another person (as another person's fiduciary, depository or custodian) do not occur.

They are being "replaced" by **KDD registry members**. A KDD registry member is an investment firm (in the meaning defined in Article 4 of the Directive for Markets in Financial instruments 2004/39/EC) that renders (investment) services of dematerialised securities' account maintenance.

An entity (investment firm) is eligible for membership if it fulfils the requirements for a registry member, determined by the Securities Market Act (ZTVP-1) and KDD Rules and regulations. An entity is eligible for membership if it has (Art. 14 of KDD Rules):

1.21.1. status of a stockbroker:

a stockbroking company with its registered office in the Republic of Slovenia and licensed by the agency (Securities Market Agency) for performing services in respect of securities pursuant to ZTVP-1,

a stockbroking company from an EU member state and entitled, directly or through a branch office, to perform services in respect of securities in the Republic of Slovenia,

a branch office of a foreign stockbroking company licensed by the agency to establish a branch office in the Republic of Slovenia.

or

1.21.2. − a status of a bank:

a bank or savings bank with its registered office in the Republic of Slovenia, and licensed by the Bank of Slovenia for performing services in respect of securities pursuant to the Banking Act (hereinafter referred to as "ZBan"),

a bank from an EU member state and entitled, directly or through a branch office, to perform services in respect of securities in the Republic of Slovenia,

a branch office of a foreign bank licensed by the Bank of Slovenia to establish a branch office in the Republic of Slovenia, and licensed, pursuant to ZBan, to also perform services in respect of securities in the Republic of Slovenia.

An eligible entity joins the (securities) settlement system by executing with the KDD contract on accession to the system of dematerialised securities accounts maintenance. Pursuant Art. 15 of KDD Rules under the contract on accession to the system of dematerialised securities accounts maintenance, KDD undertakes to allow the registry member to use the information system of dematerialised securities accounts maintenance in accordance with the requirements and in the manner set forth in KDD rules and regulations and, to the extent required:

to open and close accounts and sub accounts maintained by the registry member pursuant to KDD rules or regulations,

– to enter orders, as the registry member may be authorised pursuant to KDD rules or regulations,

to access data regarding accounts and sub accounts from Item 1 and

to perform other acts with respect to maintenance of accounts or sub accounts from Item 1, as may be permitted by the information system of dematerialised securities accounts maintenance,

provided the registry member pays KDD for its use of these services the compensation determined by the tariff of KDD.

System of dematerialised securities accounts maintenance is defined in Par. 1 of Art. 34 of KDD Rules as the legal relationship between registry members and KDD setting forth their mutual rights and obligations with respect to maintenance of dematerialised securities' accounts.

Information system of dematerialised securities accounts maintenance is defined in Par. 2 of Art. 34 of KDD Rules as a computer system maintained by KDD and the various procedures performed by KDD to

1. open and close holders' accounts and sub accounts in the central registry,
2. enter orders of account holders of their disposal of securities and enter orders of entitled person's disposal with the third party right or exercise of this right, through remote access via a communications network,
3. execute those orders mentioned in Point 2 of this Paragraph and other orders to transfer dematerialised securities or orders to enter, modify or delete third party rights on dematerialised securities recorded in the central registry,
4. enter data on other entries regarding the transfer of dematerialised securities between holders` accounts and on entries or deletions of third party rights or legal facts recorded in the central registry, and make these entries in the central registry
5. access data of holders' accounts, transfer such data via a communications network; and

6. do such other acts as required to manage holders' accounts and sub accounts and to manage of the share register or register of recorded dematerialised securities.

Two **types of dematerialised securities accounts** are maintained in central registry (Art. 31 of KDD Rules):

holders' accounts (see answer to Q3)

auxiliary accounts, which are maintained with respect to maintenance of central registry (see answer to Q2).

Bearer and registered dematerialised securities

Dematerialised securities may be issued either as a registered security or a bearer security (Art. 5 of ZNVP).

Same rules of transfer of dematerialised securities to other account and of entry (registration), modification or deletion of third party rights in dematerialised securities or of legal facts related to dematerialised securities apply to both types of dematerialised securities.

The only (legally relevant) distinction is:

1. With registered dematerialised securities KDD is authorised pursuant Par. 1 Art. 65 of ZNVP to maintain a share ledger or a register of registered securities on behalf of and for the account of the issuers
2. The transfer of rights arising from registered securities or registration of third-party rights to registered securities in the central register shall have the legal effects of an appropriate entry in the share ledger or register of registered securities with respect to the issuer (Par. 2 Art 65 of ZNVP). Legal effect of an entry of a transfer in a share ledger of registered shares pursuant Art. 232 of Companies Act (ZGD) is notification to the issuer (share company) of a transfer (i. e. of a new share holder). The same legal effect has an entry of a transfer in a register of registered securities with respect to the issuer pursuant Art. 223 of Obligation Code (OZ).

1.22. Slovakia

The Act on Securities and Investment Services No. 566/2001 Coll. as amended (further referred to as „the Act") stipulates that: „A security means any instrument or record representing a determinable financial value made in a form specified by the law, carrying rights as defined herein and in separate laws, in particular the right to demand certain assets or exercise certain rights against persons specified by the law."

1.22.1. The Act also lists Investment Instruments where the following securities belong to:

shares;

bonds;

shares in mutual funds;

substitutable securities carrying the right to acquire securities referred to in letters a) and b), or the right to settlement in cash, other than those specified in Article 2, paragraph 2, letters g), i) to k);

securities issued outside the Slovak Republic carrying equivalent rights as the securities specified in letters a) to d);

money market instruments in the Slovak currency and in foreign currencies;

financial-futures contracts allowing also for financial settlement of the liabilities arising thereof, involving investment instruments, interest rates, funds in the Slovak and a foreign currency, or financial market indices;

options to acquire or sell investments instruments and equivalent instruments allowing also for financial settlement, mainly options for funds in the Slovak and a foreign currency (currency options) and interest-rate options.

interest-rate, currency and equity swaps.

1.22.2. The Act makes definition of form and type of securities. A security may have the form of:

a certificate (hereinafter "a security in certificate form"); or

an entry in a securities register established by the Act (hereinafter "a security in book-entry form").

The issuer shall decide about the form of securities, unless the Act or a separate law stipulates that a specific security must have one of the forms defined in the previous sentence. Bearer shares, shares in a closed-end mutual fund, bearer shares in open-end mutual funds, bonds, shares in co-operatives, and treasury bills must have the form of book-entry securities.

The security in certificate form or physical security must comply with definition of security as stipulated by the Act. Security in a book-entry form represents entry in the registration recognized by the Act. Such registration is:

(1) registration administered by the central depository

(2) central registry of short-term securities administered by the National bank of Slovakia (further referred to as “NBS”) for state treasury bills or treasury bills issued by the NBS

(3) registration of units of the open-end unit trusts administered by depository of the open-end unit trust

Securities can be deemed as book-entry or dematerialised securities only if they have the form of entry in the above stated registrations.

Further to that the Act recognizes the following types of security: registered security, order security or bearer security.

The issuer shall decide on the type of securities, unless the Act or a separate law stipulates that a security may have only one specific type from the types defined in the previous sentence. Owner of a bearer security is a person who in case of dematerialised security has this security in its securities owner’s account or in case of physical security holds this security. Owner of registered security in dematerialised form is a person who has this security in its securities owner’s account. In case of registered physical security owner is the person whose name is

written on a security as the owner of security or to whom the security has been transferred to by means of endorsement.

1.23. Finland

1.23.1. Securities are defined generally in Chapter 1, Section 2 of the Finnish Securities Markets Act (SMA, 495/1989, as amended). SMA applies to a security which is transferable and issued or meant to be issued to the public together with several other securities with similar rights. A list of examples of securities is provided in the said provision:

a share or other participation in a company or the right to a dividend, interest or other proceeds or to subscription connected thereto;

a unit in a bond or other corresponding obligation of the debtor or the right to interest or proceeds connected to the said unit or obligation;

a combination of the rights referred to in subparagraphs 1 and 2;

a right to purchase or to sale relating to the said rights;

a unit in a fund or a unit in an undertaking for collective investment in transferable securities comparable thereto; as well as for

a right other than one referred to above based on a contract or an obligation.

1.23.2. Certain securities are, however, excluded from the scope of the SMA. Excluded is a security which alone or together with other securities produces:

1) the right to dispose of a certain apartment, other premises or real estate or a part of real estate; or

2) the right to use or to obtain commodities other than securities referred to in the Consumer Protection Act (38/1978) and offered by the issuer if the value of the security is based mainly on the said right.

If a derivative contract fulfils the criteria of public issuance together with several other similar rights, the contract may be considered a security (e.g. covered warrants). However, standardized derivative contracts as defined in the Act on Trade in Standardised Options and Futures (772/1988) are not considered securities in Finland, while some of the provisions of SMA are applied to such derivatives. Such standardized derivative contracts are not certificated or issued in a dematerialized security form.

In respect of MiFID (2004/39/EC), SMA covers securities that can be characterised to belong to paragraph (1), (2), (3) and, to the extent explained above, to paragraph (6) of the MiFID Annex I, Section C.

In accordance with the SMA, a security can be issued in a physical (certificated) form or in a dematerialized format as a book-entry security. Securities incorporated in the Finnish book-entry system are covered by special legislation (Act on the Book-Entry System (826/1991) and Act on Book-Entry Accounts (827/1991)).

It shall be noted that the securities traded on the Finnish market are predominantly incorporated in the book-entry system and that the considerations on physical

securities have much less practical relevance except in respect of non-Finnish securities.

The concept of a registered security has a different meaning in the Finnish dematerialised book-entry system than in immobilised systems with separate registrars. In one sense all dematerialised securities are registered because they shall be deposited in a book-entry account in the name of the investor or, in case of a foreign owner, in the name of a custodian (nominee). APK maintains and updates the shareholder list and other corresponding lists of owners on the basis of the account holder information. However, as only lists pertaining to shares and other securities entitling to shares are accessible to the issuer, bonds and other debt-rated securities have to certain extent similar characters as a bearer security.

With respect to legal title and proprietary rights, the owner of a security is determined on the basis of entries in the respective book-entry account, but since these entries update the list of owners automatically, the notion on registered vs. bearer security lacks relevance in the Finnish book-entry system. It shall be noted that Finnish law recognises the concept of a nominee and that the nominee is not considered to have the legal title to the securities, but rather the ultimate owner.

When the book-entry system was introduced, actual possession as a legal fact was replaced with a registration in the book-entry system that is maintained by means of automatic data processing.

In legal terms Finnish dematerialised book-entry securities can be described as physical securities turned into electronic form.[11] When a company joins the book-entry system, the physical share certificates shall be withdrawn from circulation and invalidated. In place of the invalidated certificates the shareholders receive an equivalent amount of book-entry shares into their accounts opened in the book-entry system. According to the law no physical security shall be issued on the existence or contents of a book entry.[12] Unlike physical certificates, book-entries can per definition not be transferred as such outside the book-entry system. The accounts are kept in a data system operated by APK and regulated and supervised by APK. APK is by law obligated to act as an account operator for international links and for investors not using the services of a commercial account operator (bank or broker).

Regarding physical securities outside the book-entry system, they can be issued in either registered or bearer form. Nevertheless, in accordance with Chapter 3, Section 9 of the Finnish Companies Act (734/1978), share certificates in Finnish companies can only take the form of registered shares, i.e. a transfer of a share is valid against the issuing company if it has been duly registered in the shareholder list.

1.24. Sweden

In respect of what legal system are the following answers given?

In Sweden most of the securities (and all listed) traded in financial markets are dematerialised with a Central Securities Depository (CSD). The securities are

---

[11] See section 2(3) Act on the Book-Entry System

[12] See section 2(2) Act on the Book-Entry System

consequently evidenced only by electronic entries in a book-entry system. The most important common features of the Swedish book-entry system in this context are the following. i) Book-entry system with dematerialised securities. ii) Holding system in which the investor has the right to have securities registered on a CSD Owners Account in his own name. iii) The operation of the CSD and the book-entry system are carefully regulated in law. iv) The holding system is generally flexible and offer a number of possibilities and options, for example owners accounts, nominee accounts, service accounts and clearing accounts. v) The operation of the CSD accounts on behalf of each CSD vis-à-vis account holders is managed by Account Operators appointed by the CSD. vi) The only CSD in Sweden VPC is also operator of a securities settlement system.

VPC was founded in 1971 as a limited company to manage centralised share certificate. Dematerialisation followed in 1989. VPC and APK, the Finnish CSD for dematerialised book-entry securities, have merged under the common name NCSD. In Sweden the relevant law regulates criteria and qualifications for the CSD as well as the establishment of ownership and limited rights to financial instruments and also the maintenance of CSD registers. The CSD is subject to authorisation, supervision and control by the Swedish Financial Authority (Finansinspektionen).

According to legislation the main principle for the Swedish book-entry system is that the owner of a dematerialised security has the right to be registered as owner of the securities in an Owner Account in the CSD. The registration on the account gives the holder of the account a legitimate capacity as owner, but is not constitutive, in the sense that the account holder is materially the right owner of the securities on the account. The registered rights and other information in the accounts have legal effect. All rights and restrictions regarding an owner or securities, which are registered on a CSD account, are given priority and legal protection against competing rights. The CSD and the Account Operators have legal liabilities regarding registrations; therefore third parties may rely upon information registered on the account.

The Nominee Account is an account where the account holder is a custodian that has special authorisation in accordance with the relevant national regulations. The custodian is registered on behalf of its customers, the owners of the securities. In this case the rights of the owners of the securities are not registered in the CSD account but exclusively in the books or records of the custodian. The custodian is not allowed to hold securities of its own in an Nominee Account. In many cases the customer of a custodian is itself a foreign custodian with customers of its own. Banks and securities firms dominate as authorised custodians as well as account operators. Foreign banks and brokers, clearing organisations and CSDs can be authorised custodians and account operators in a Swedish CSD.

In Sweden the book-entry system is built on the principle of registration. The legislation regarding CSD accounts (both Owner's Account and Nominee Account) gives the account holder with a registered holding of securities on the account an interest that is effective against the CSD, the account-operator and third parties. The decisive factor is the time of the registration of a disposition or transaction on the securities account.

In general the Owner Account and Nominee Account in the CSD are very well covered by legislation and the CSDs own rulebooks'. An example is the legislation regarding the relationship between the owner of the securities and the

CSD/account-operator. However concerning account holding with custodians – other securities accounts – there has so far been less regulation through national law in Sweden. Custody relationships are mainly covered by agreements between the parties. The situation regarding other securities accounts than CSD accounts is therefore more complex. A general distinction has to be made between CSD-accounts (owner account and nominee account) and other securities accounts.

The book-entry system is mainly regulated in the Financial Instruments Accounts Act (SFS 1998:1479) and the CSD's own rulebook. The Financial Instruments Accounts Act could also be applied to units in a collective investment undertaking. In such cases the register of units of an investment fund shall be maintained by a CSD. However, in general, the management company instead maintains a register of holders of units in the fund. In that event section 31 of the Promissory Notes Act (1936:81) shall apply in respect of issues concerning transfer and pledging of a unit in a collective investment undertaking.

The answers to this questionnaire are based on rules regarding the book-entry system for dematerilised securities. It should be noted that Sweden is not totally dematerialised. Only a minority of Swedish limited liability companies have incorporated their shares in the book-entry system. From the aim of the questionnaire the legal issues relating to physical securities have no or only marginal relevance.

Answer to queston 0

Financial instruments and traded securities are defined in the Financial Instruments Trading Act (SFS 1991:980) Chapter 1 Section 1 as follows:

"Financial Instruments" means traded securities and other rights or obligations intended for trading on a securities market.

"Traded securities" means shares and bonds, as well as other equity or debt instruments which are intended for public trading, fund units, and the rights of shareholders against persons with whom share certificates in foreign companies are deposited on behalf of such persons (depositary receipts).

The securities traded in the Swedish market are with a few exceptions dematerialised. Shares, bond, and other equity or debt instruments are dematerialised in accordance with the rules in The Financial Instruments Accounts Act and registered in a Swedish CSD register. Fund units are issued and registered in registers held by the fund companies.

There is a legal discussion in Sweden regarding the definitions of traded securities and financial instruments compared with the definition in ISD of transferable securities. These questions are part of the work regarding the implementation of MiFID.

Answer to question 1

If a Swedish company decides to dematerialise the shares of the company the shares must be registered in a Swedish CSD register. There are rules in chapter 3 in the Companies Act (1975:1385) regarding the transposition of a company to a CSD-company (a company with dematerialized shares) and also in the Financial Instruments Account Act, see Chapter 4.

A CSD may also register debt instruments or other Swedish or foreign financial instruments in a Swedish CSD register on behalf of the issuer. Registration of debt

instruments and some pre-emptive rights to shares shall take place in accordance with an agreement between the CSD and the issuer.

Where the financial instruments have been issued in a country other than Sweden, registration may also take place in accordance with an agreement between the CSD and the undertaking with comparable duties in such country, provided the financial instrument has been detached for such purpose.

The operation of the CSD accounts on behalf of the CSD vis-à-vis account holders is handled by account operators appointed by the CSD.

1.25. United Kingdom

In English law, securities are a type of transferable financial asset. The meaning of securities at general law changes over time. Originally the term meant secured debt obligations. However, the connotation of a security interest has now been lost.[13] The term is now used more widely to include equities and other readily transferable financial investments,[14] including depositary receipts and units in unit managed funds. It seems likely that warrants are securities. However, it seems unlikely that futures, options and swaps are securities at general law.[15] The term does not include cash.[16]

The English Law Commission has published proposals for reforming the UK law relating to company security interests. "Security" is defined[17] broadly, with reference to market practice and the terms of issue.[18] In turn, the term "investment property" is defined[19] (broadly) to comprise securities, security entitlements, securities accounts, commodity contracts or commodity accounts. Special rules

---

[13] "…finally, we do not consider there is any requirement for a security to confer a proprietary interest in the fund or assets to which it relates". Letter, Dilwyn Griffiths, HM Treasury, to Iain Saville, CRESTCo, 19 July 2000.

[14] *Re Douglas' Will Trust, Lloyds Bank v Nelson* [1959] WLR 744 per Vaisey J at 749. See also *Re Rayner* [1904] 1 Ch 176 per Romer LJ at 189, per Stirling LJ at 191. and *In re Gent and Easton's Contract* [1905] 1 Ch 385.

Leading Counsel has advised (broadly) that the term is now widely used synonymously with market investments (advice obtained from CRESTCo in the context of the dematerialsiation of MMIs, Richard Sykes QC).

[15] There are a number of statutory definitions, and these tend broadly to track the meaning of the term at general law as indicated above.

[16] Broadly speaking, cash is taken to mean a debt claim against a deposit taking institution, represented by a positive balance to a cash account maintained by that institution. However, money market instruments such as CDs, which are referred to as "near cash", and all manner of cash backed securities, are included.

[17] In regulation 2(1) of the draft Companies (Personal Property Security) Regulations.

[18] "security" means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer –

(a) which is represented by a certificate in bearer or registered form, or the transfer of which may be registered in books maintained for that purpose by or on behalf of the issuer, or, where the primary record of entitlement to the asset as against the issuer is the register of the operator of a settlement system on the operator's register,

(b) which is one of a class or series, or by its terms is divisible into a class or series of shares, participations, interests or obligations, and

(c) which -

i. is, or is of a type, dealt in or traded on securities exchanges or securities markets, or

ii. is a medium for investment and by its terms expressly provides that it is to be treated as a security governed by these Regulation."

[19] In regulation 2(1) of the draft Companies (Personal Property Security) Regulations.

relating to perfection and priorities apply to security interests in investment property.[20]

1.25.1. Does a concept of securities such as is used in the Directive for Markets in Financial Instruments 2004/39/EC exist?

The definition of transferable securities in recital 18 of the Directive for Markets in Financial Instruments (MIFID) is narrower than the general English law meaning of securities, because of the restriction to capital market assets. Three examples of transferable securities are given in recital 18 (broadly, equity, debt and derivatives). As indicated above, it seems unlikely that derivatives are securities in English law. Further, a large number of assets which are securities in English law are not included in the examples (e.g. money market instruments and units in collective investment schemes).

The definition of financial instrument in recital 17 and Section C of Annex I of MIFID includes some items that are securities in English law. These are: transferable securities subject to the comments above (paragraph 1); money-market instruments (paragraph 2) and units in collective investment undertakings (paragraph 3). However, the types of derivatives listed in paragraphs 4 to 10 are probably not securities in English law.

If not, please describe the concepts used.

[N/A]

1.25.2. What distinctions (e.g. bearer, registered, physical, dematerialised, book-entry) are made and with what consequences?

Securities are broadly categorised according to three different questions. The first question is the nature of the rights of the holder against the issuer, and the chief categories are debt and equity. The direct holder of debt securities is owed a debt by the issuer, and is generally entitled interest and the repayment of capital at the agreed maturity date.21 Corporate and non-corporate entities alike may issue debt securities. A very wide range a debt securities are traded in the capital markets, including treasuries, domestic and international corporate bonds and notes (whether secured or unsecured) and money market instruments.

An equity is an ordinary share in a company. It follows that only companies can issue equities. The direct holder of an equity is a shareholder. Equities generally involve more risk than debt.[22] However, equities offer the possibility of capital

---

[20] The Regulations also use the term "financial asset". This terms is defined (in regulation 2(1)) to include (broadly) (a) securities, (b) assets which function in the market as securities, (c) property held by an intermediary for a client and agreed by the parties to be treated as a financial asset, and (d) a credit balance in a securities account. Financial assets have the benefit of rules including those regulating to attachment (regulations 16 and 21) and good faith purchaser (regulation 32).

[21] Other rights are generally provided under the terms of issue of the securities, including rights to receive information, vote, and enforce restrictive covenants.

[22] Shareholders have no automatic right to income, which is paid as dividends on a discretionary basis out of available profits. Moreover, shareholders are generally entitled to the return of their capital only on the winding up of the company, and only to the extent that sufficient assets are available after the payment of all creditors.

gains; increases in the value of the company are reflected in the value of the shares.[23]

The second question according to which securities are categorised, is the manner in which ownership of the securities is evidenced and transferred. The traditional categories are bearer and registered securities. A bearer security is issued in the form of a paper instrument.[24] Ownership of the security, and the right to be paid under it, are conferred by possession, and transferred by delivery (i.e. by transfer of possession)[25]

In contrast, ownership of registered securities is evidenced and transferred by registration. A registrar acting for the issuer maintains a database known as a register on behalf of the issuer. Details of the holders of the securities and of their holdings are entered on the register. A transfer is completed by amending the register to show the details of the transferee's holding.[26]

A third distinction is made according to whether paper instruments or certificates are issued by the issuer of the securities. Such paper based securities are known as "certificated securities", and are issued in accordance with the general principles of securities law. A statutory regime for the dematerialisation of securities within the UK settlement system, CREST, is created by the Uncertificated Securities Regulations 2001 (SI 2001/3755) (as amended). Securities so dematerialised are known as uncertificated securities

---

[23] Also, shareholders have voting and other rights protected by company law.

[24] The issuer's promise to pay the bearer (i.e. holder) of the instrument appears on its face. By a legal fiction, the instrument constitutes the security, which is therefore treated as a tangible asset. Of course, a debt is an intangible thing, but it is deemed to be "locked up" inside the paper instrument.

[25] i.e., very broadly, physical control.

[26] *Société Generale de Paris v Walker* (1895) 11 App Cas 20. Certificates may be issued, but these merely represent, and do not constitute, the securities.

2. QUESTION NO. 2

IN WHAT MANNER ARE SECURITIES CREATED AND ISSUED? WHAT STEPS ARE NECESSARY TO HAVE (EXISTING OR NEWLY ISSUED) SECURITIES VALIDLY HELD AND TRANSFERRED WITH THE INVOLVEMENT OF INTERMEDIARIES?

2.1. Belgium

Securities may be issued (namely for "sociétés anonymes") in bearer form (physical paper certificate), in registered form in the issuer records or in dematerialised form , meaning only represented in book-entry form through accounts held with a specific class of intermediaries (recognised as "account keepers") maintaining dematerialised securities accounts with a CSD (see articles 460 and following of Companies Code). This last category is for the moment only operational for public debt securities and some form of commercial paper ("certificats de dépôts" and "billets de trésorerie") directly issued and held in the settlement system operated (as a business unit and not as a separate entity) by the Central Bank of Belgium; dematerialisation should be available in a near future for private issuers in general under company law.

Immobilisation of book-entry securities requires:

For bearer securities, a physical deposit of the certificates with an intermediary ,which in turn may (or may not) deliver the securities to a settlement institution (classically CIK for Belgian bearer securities), which will safekeep the certificates in its vaults; an opening of a securities account in the name of the investor (and another account generally in the name of its intermediary with a settlement institution or another intermediary affiliate of CIK/EB in case of sub-deposit) under the fungibility regime organised under Royal Decree 62.

For registered securities, they can be held under the regime of Royal Decree 62 provided they remain fungible which requires in principle a registration of a collective position held on behalf of various clients in the single name of the intermediary acting through nominee arrangement or similar structure authorised under applicable law (commissionaire). Because of the penal prohibition to vote for securities for which the registered voting shareholder would not be the final owner (article 651, 1° of the Companies Code), this is generally interpreted as preventing at least in practice Belgian registered securities from being immobilised.

Dematerialised securities can be immobilised in the books of an intermediary on the basis of a direct securities account of dematerialised securities maintained in the settlement system of NBB in the name of the intermediary (on behalf of clients).

2.2. Czech Republic

The only requirement to issue dematerialized securities stipulated in law is an order of the issuer to the CSD, which order has to contain all the data registered in central securities registry of CSD. Other conditions are to be set in regulations issued by CSD.

Issue of dematerialised securities in the Securities Centre under transient legislation is carried out by registration in register of issues and owners accounts upon the issuers order. Issuer is required to announce the issue of securities to the Securities centre in advance.

2.3. Denmark

The way in which a security is created depends on the type of security in question. E.g. a mortgage is created by signing a mortgage, a share is created by forming a new corporation etc.

To have securities held through the Danish CSD ("Værdipapircentralen"), which is the same as to dematerialise the securities, the securities must be registered in the Danish CSD. Securities registered in a CSD are called book entry securities. Negotiable securities registered in the Danish CSD (negotiable book entry securities) are called "electronic securities" ("fondsaktiver").

The Danish CSD is considered an intermediary. Consequently, securities held through the Danish CSD are considered held with an intermediary. An account holder (even e.g. a consumer) may have an individual account with the CSD. It is also possible to use a chain of intermediaries, e.g. an account holder may hold its securities through a bank, which hold all securities owned by its customers on an omnibus account at the Danish CSD (maintained in the name of the bank). For each account in the Danish CSD an account manager must be specified (only certain entities can act as an account manager). An account manager is not considered an intermediary.

2.4. Germany

Creation of a security has to be understood under German law as producing the security certificate in print or other written form, with terms and conditions in case of bonds or warrants which are either printed on the reverse side of the bond or warrant or attached to it in case of global bonds or global warrants.

Issuance (Begebung) of a security requires an intentional act by the issuer to the effect that the rights and obligations represented by the security shall become effective. The most common step for all types of securities designated for trading on capital markets is to deposit the single security certificates or global certificate with Clearstream Banking AG as CSD to be credited to the securities accounts of its participants (custodian banks) which, in turn, credit the securities accounts of their customers as ultimate investors in the respective issue. At the moment when such credits become effective, the securities are issued.

In case of dematerialised securities (Federal Bonds, State Bonds) the creation of the securities is replaced by entering a registered claim (Schuldbuchforderung) into the Federal or State Debt Register (Section 7 para 2 of the Law governing the Federal Debt Register or Section 2 of the Ordinances applicable to State Bonds - see Question 1).

If Clearstream Banking AG as CSD is registered as nominee for such claim (then called Sammelschuldbuchforderung), the Federal or State Bonds are issued in the same manner as bonds represented by single or global certificates which have been deposited by the issuer – or his agent bank respectively – with the CSD, i.e. by crediting the securities accounts as described above. Such registration (book entry) of the CSD in the Debt Register is treated as though it were a bulk of single bond certificates or a global bond certificate (legal fiction pursuant to Section 8 para 2 Law governing the Federal Debt Register). Transfer by book entry follows more or less identical rules.

What steps are necessary to have (existing or newly issued) securities validly held and transferred with the involvement of intermediaries?

The securities have to be deposited with the CSD for collective safe custody or, in case of dematerialised Federal or State Bonds, the claims have to be registered in the name of the CSD in the Federal or State Debt Register, both in case of existing or newly issued securities.

2.5. Estonia

Without considering the rules on the registration of public offers of securities and the publication of prospectuses, the only requirement is to have securities registered with the Central Register.

Key phasesof the registration proceeding are as follows:

An issuer submits the registration application to the Estonian CSD

Provided that the application meets all requirements, the Estonian CSD allocates an ISIN code to the securities to be issued and credits them to the securities accounts provided by the issuer.

Except under certain exemptions (e.g. fund units issued by a pension fund), securities credited to the securities accounts are immediately eligible for holding and transferring with the involvement of intermediaries (i.e. eligible to be credited to a nominee account).

2.6. Greece

2.6.1. Shares and corporate bonds are issued by means of a decision taken by the relevant corporate body. Government bonds are issued following to a Decision of the Minister of Finance. Law 2190/1920 on Sociétés Anonymes and Law 3156/2003 on corporate bonds provide for the issue of the relevant securities. The transfer of securities held in book entry form within a Register constitutes, from a legal point of view, an assignment of rights (or claims - art. 455 s. of the GCC) and takes the form of a debit entry in the seller's account and a credit entry in the account of the purchaser.

2.6.2. Concerning securities held within the DSS, specific provisions of Law 2396/1996 regulate the dematerialisation procedure for shares of Greek Companies, listed in the ATHEX by way of registration of these shares in book entry form within the DSS, which is administered/operated by the ACSD (see in detail above under 1.1)

Rights of “ownership” in the shares are created through registration of the securities in the accounts held through Operators within the DSS. Law 2396/1996 (as modified by Law 2533/97 and Law 2651/1998) states that the beneficiary is the person registered in the records of the DSS. Therefore, the effect of issuance and of transfer, charge and any kind of change thereon is valid as a result of and from the date of registration, it being a constitutive one (article 47 of Law 2396/1996). Furthermore, according to Article 58 of Law 2533/1997, same rules apply by analogy for corporate bonds and any other kind of debentures, except for Greek Government bonds, issued in Greece or governed by Greek Law and listed in the ATHEX: Thus, by virtue of the Law, these securities have to be registered in book entry form within the DSS. In both cases, the transfer of securities takes effect with their registration (crediting) in the account of the transferee (buyer), having firstly been deregistered (debited) from the account of the transferor (seller), both being held in book entry form

within the DSS. This registration is in effect constitutive of each party's respective rights (both, shareholders' and bondholders' rights), i.e. each party's rights take effect at the moment of the securities registration as described above.

The establishment of property rights as well as of a pledge or usufruct or any other charge in the securities held in book-entry form and the prohibition of their disposal are valid erga omnes as from their registration in the records of the DSS. For the establishment of a pledge or other charge upon book-entry securities, the relevant contract must be notified to the ACSD, in order for it to make the respective registration. In respect of registered shares, the ACSD forwards to the issuing company, without delay, every relevant document relating to the granting of a pledge or other charge on the shares. Same applies for registered bonds. Throughout the duration of the pledge or other charge, the securities remain blocked. This means that they are registered in a special account and cannot be transferred to any other account without the consensus of the pledgee.

2.6.3. Concerning Government Securities, Law 2198/1994 provides for the registration of all kinds of Greek Government bonds, treasury bills and any other securities issued by the Greek State within the BoGS.

The entitlement to securities held within the BoGS must be considered at two levels.

Each Participant holds two different accounts in the System, an «own portfolio account» and an «investor/customer portfolio account» which is a single account pooling together all the securities of the Participant's customers (omnibus account). At the level of each Participant's omnibus account, separate accounts are kept within the investors' accounts by category of securities with the same characteristics.

Pursuant to the applicable regulatory prudential rules on segregation, Participants are obliged to keep separate records per customer. A Participant can transfer securities to a third party according to Art. 6 para. 2 of Law 2198/1994 but such a transfer does not produce effects for or against the Greek State (as issuer) or the BoG (as operator and administrator of the BoGS) but only between the parties involved.

The law provides for segregation of securities according to which the entitlement to dematerialised securities held in the BoGS cannot be challenged by other financial intermediaries intervening in the multi-tier holding of such securities.

Transfer of book-entry government securities held within the BoGS

Transactions between Participants are registered in the BoGS. Rights on securities registered within the BoGS are transferred by debiting and crediting to the relevant securities' accounts held by the Participants within the BoGS. For example, in case of transfer of securities held by the Participant for own account to another Participant, the BoG debits the sellers/Participants account, according to his transfer order, and credits the buyers/Participants account. The latter, when giving the relevant transfer order to the BoGS, indicates which of his own accounts (own account or investors account) should be credited. Clearing and settlement of securities held with the BoGS take place at the end of each banking day, except for monetary policy or TARGET issues purposes, where settlement follows immediately after the transaction.

Transactions between a Participant and its client must not necessarily be registered within the accounts held by BoGS, except for transfer of securities registered in the Participant's own account to a client or vice versa. In the event that a Participant sells government securities to his customers/ investors, having purchased those securities on the same day from another of his clients, no registration of the transaction within the BoGS takes place, but only within the clients accounts held by the Participant.

In case of Greek Government bonds held within the BoGS by the ACSD acting as a Participant, the latter further proceeds with registration of the said bonds to the DSS, in the end-investors' accounts held by their Operators. Nevertheless, this registration does not create any rights for the account holder (final beneficiary) towards the BoG or the ACSD as Participant of the BoGS, contrary to what is valid in respect of shares and corporate bonds or other debentures, except for Greek Government bonds. This registration does not have a constitutive character, although this could be highly relevant in case of insolvency of the DSS Operator, according to Article 6 of Law 2396/1996, as explained above. Furthermore, the identification of the end customer is of importance for tax reasons.

2.6.4. With regards to securities issued by non-Greek entities registered with the DSS or the BoGS, there are no rules governing the creation of the relevant rights.

Lack of specific rules is noted regarding the registration of securities issued by Greek entities with foreign securities depositories or custodians. Therefore, with regards to rights in rem deriving from the securities in material form, Greek Law rules on the transfer of securities not listed in a Greek regulated market apply. These rules vary between bearer and registered securities.

Concerning collateral security imposed on securities held in book entry form, article 9 para 4 of Law 2789/2000 (implementing article 9 para 2 of the SFD 98/26/EC), stipulates the following: When collateral security is established on securities, or rights in securities, in favour of a participant within the operational context of a System – as defined in Law 2789/2000, according to article 2 of the SFD – or in favour of a National Central Bank or the European Central Bank, and their right is lawfully recorded on a system, register or any other registration system, account or on the books of a National Central Bank or of the European Central Bank, the right in question – in particular as regards its lawful establishment, validity, and the procedure of compulsory liquidation upon execution – shall be governed by the substantive law of the Member State where recording was made.

Therefore, when securities are provided as collateral and are recorded on a register, account, or centralized deposit system located in Greece, then the respective rights are governed by the Greek laws. The same applies where securities issued by Greek entities are held within a European registration system (financial intermediary) outside Greece, in the name of an entity, and the former (i.e. the financial intermediary) holds an account of such securities within the DSS or within a Participant of the BoGS: hence rights concerning the establishment, validity etc of the said collateral will be ruled by the law governing the said European registration system (i.e. jurisdiction of its establishment). Nonetheless, the pledgee, who acquires

rights against the pledgor, cannot exercise his rights against the DSS (or the Account Operator within the DSS) or the Participant.

Further analysis on transfer of securities held within the BoGS or the DSS see below under (17).

2.7. Spain

2.7.1. The procedures by which securities are validly issued depends on their nature and on the legal status of its issuer. Concerning the latter, the issuer must comply with all the rules upon which it is construed (its governing law and articles of association, i.e. *lex societatis*).

As a general rule, the process of creation and issuance of securities can be divided into several phases: (i) Corporate agreement to issue the securities; (ii) Subscription of the securities, in some cases through the signing of a subscription bulletin; (iii) Payment of the securities; and (iv) "Circulation" of the securities, as shall be detailed briefly.

These four phases are subject to diverse formalities, according to the type of issuer and security.

In general terms, to create equity securities (i.e., shares, convertible bonds) the granting of a public deed of issue and its recording with the Mercantile Registry is necessary.

On the other hand, to issue private corporate bonds (i.e. commercial paper) that are going to be listed in a Regulated Market or subject to an IPO, private corporate issuers are only required to make a registration of a Prospectus with the *Comisión Nacional del Mercado de Valores*, the Spanish supervisory agency ("CNMV").

Thirdly, for the issuance of Public Debt, the public issuer will be required to obtain the administrative authorisations requested by applicable law and the publication of the terms and conditions of the issuance in the Official Gazette.

Of course, when the securities are issued as part of an IPO, it is necessary to comply with *ad hoc* obligations, such as the drafting and recording with the CNMV of a Prospectus and the legal documents related with the issuance.

2.7.2. The final requirement for making the securities transferable, once issued in observance of the rules listed above demands for the physical certificates to be delivered, or to be credited in the accounts of the holders in the relevant book-entry system, whatever the case.

In order for the recording of the securities that conform to the issue in the book-entry registry to take place, the issuer must deposit before the entity appointed as responsible for the maintenance of such register – IBERCLEAR in the case of securities to be listed in Spanish Regulated Markets-, according to article 6 of the Securities Markets Act, a document which must contain the following statements, apart from the representation by book-entry and the appointment of the entity in charge of the book-entry registry: The denomination, face value and the rest of characteristics and conditions of the securities are stated. This document will be:

The publishing of the characteristics of the issue in the relevant Official Bulletin corresponding to the issuer, in the case of Public Debt issued by the Spanish State, its Autonomous Regions, Municipal entities or other public corporations and international organisations.

The Prospectus filed before the Comisión Nacional del Mercado de Valores, if it were to be compulsory for the issuer to fulfil such an obligation.

In other cases, such as equity securities, a public deed duly registered in the Mercantile Registry.

Once all the above procedures have finished, it is necessary for the participant entity in IBERCLEAR, acting as the issuer's agent for the issuance, to send a communication (generally an electronic communication) containing the detailed data of the amount of securities that have to be registered or credited in the account of each Participant. The recording of the issue in IBERCLEAR'S central register is the one that determines that the securities are duly constituted as book-entry securities.[27].

What steps are necessary to have securities validly held and transferred with the involvement of intermediaries?

Once the securities have been recorded following the aforementioned procedures and steps, they are deemed to be duly recorded in the accounts held by IBERCLEAR as CSD and its participant entities, which maintain the detailed registers or accounts on behalf of their clients. It must be born in mind that only securities recorded in securities accounts that are opened in IBERCLEAR (opened in favour of its participants) and its participant entities (opened on behalf of their clients) are considered by Spanish Law as authentic securities that generate a valid direct legal relationship between the issuer and the investor.

In Spain, the transmission of property in book-entry securities follows the existing general rule of the Spanish legal system that requires the existence of a valid agreement and the delivery of the physical securities for a transfer of title to happen. In relation to 'dematerialised securities', the Securities Market Act has substituted physical delivery of securities by giving to the recording or crediting of the securities in the securities account of the buyer the same effects that are afforded to delivery of physical securities. In this sense, article 9 of the Securities Market Act states that "*Transfer of book-entry securities takes place by means of account transfer. The inscription of the transfer in favour of the acquirer will produce the same legal effects than the delivery of the physical securities*". The same applies to the creation of a security interest, which is only perfected and binding *erga omnes* when recorded in the relevant securities account.

[27] Article 8 of the Securities Market Act reads "Securities represented by book entry shall be classified as such by virtue of their entry in the relevant book entry records which shall, as appropriate, be central, from which point they shall be subject to the provisions of this Chapter. The contents of securities so recorded shall be determined by the instrument envisaged in article 6. (…)"

2.8. France

2.8.1. Corporate law

Share issue

The extraordinary general meeting of shareholders only has the capacity to authorise a capital increase involving the issue of shares and may delegate to the board of directors or to the management board ("directoire"), as applicable, the powers needed to authorise such an issue.

The extraordinary general meeting may itself determine the terms and conditions of each issue. It may also delegate to the board of directors or to the management, as applicable, the powers needed to determine the terms and conditions thereof.

A joint-stock company (i.e. "société anonyme") may issue two types of shares: ordinary shares and preference shares. Preference shares may be voting preference shares or non-voting preference shares and may grant any temporary or definitive right, whatever its nature.

According to Article L. 228-10 of the Commercial Code, shares may be traded only after the registration of the company in the commercial and companies register ("Registre du Commerce et des Sociétés"). In the event of an increase in capital, the shares may be traded when this increase is carried out. Article 228-21 provides that shares may continue to be traded after the company is dissolved and until the end of the winding-up of the company.

Bond issues

The issue of bonds by a joint-stock company which has not established two balance sheets duly approved by the shareholders must be preceded by a verification of its assets and liabilities.

As a matter of principle, the issue of bonds is prohibited for companies whose capital is not fully paid up.

The board of directors, management board ("directoire") or managers ("gérants"), as applicable, have the capacity to decide or to authorise the issue of bonds. However, the articles of association ("statuts") may reserve such a right to the general meeting of shareholders or the shareholders meeting may otherwise decide to exercise such right.

The board of directors or management board ("directoire") may delegate to one of its members or to the general manager (or to one or more deputies with the agreement of the general manager) or to the president respectively the powers needed to issue bonds within a period of one year, and to determine the terms and conditions of issue. Special rules apply in respect of credit institutions.

2.8.2. Book entry requirement

Dematerialisation

Pursuant to the dematerialisation law n° 81-1160 dated December 30, 1981 as codified in Article L. 211-4 of the MFC, all securities issued in whatever form in France and subject to French law are required to be registered by way of book entry in an account maintained by the issuer of the securities or by an authorised financial intermediary[28].

Creation

Article 4.1 of the EUROCLEAR FRANCE S.A. Operation Rules provides that EUROCLEAR FRANCE S.A. records in its books in an issue account ("compte émission") the aggregate of all securities included in an issue which are subject to its operations. Issuers have an account with Euroclear France.

The issuer must at or following the issue deliver to EUROCLEAR FRANCE S.A a "lettre comptable", in which the issuer makes an application to EUROCLEAR FRANCE S.A to create an issue account. The issuer must also deliver to EUROCLEAR FRANCE S.A all documents evidencing necessary corporate authorisations and approvals with respect to the issue of securities.

Moreover, authorised financial intermediaries have to make an application to become members of EUROCLEAR FRANCE S.A. If EUROCLEAR FRANCE S.A. admits the authorised financial intermediary, it opens an account held in the name of the new member. Bearer securities are maintained in such account. Registered securities are recorded in the accounts held with EUROCLEAR FRANCE S.A. in the name of the issuers.

In respect of each financial instrument, entries in the issue account ("compte emission") held with EUROCLEAR FRANCE S.A. need to be matched with entries in the accounts held with EUROCLEAR FRANCE S.A in the name of EUROCLEAR FRANCE S.A members (Article 540-1 of the AMF General Rules and Article 4.2 of EUROCLEAR FRANCE S.A Operating Rules).

Under Article 3.1 of the EUROCLEAR FRANCE S.A. Operation Rules, EUROCLEAR FRANCE S.A. may register:

- all financial instruments mentioned by Article L. 211-1-I, paragraphs 1, 2 and 3 of the French Monetary and Financial Code, which include debt

---

28 However, two types of securities may still be represented in tangible form:

- Under Article 9 of Decree n° 83-359 of may 2, 1983 and Article 540-1 of the AMF General Rules,, EUROCLEAR FRANCE S.A. may create certificates evidencing French financial instruments subject to Article L. 211-4 of the MFC if such certificates are dedicated to circulate outside France. Under Article 8.1 of EUROCLEAR FRANCE S.A. Operation Rules, such certificates are in bearer form.
- Securities issued by French issuers outside France may also be represented in tangible form, on the basis of Article L. 211-4 of the MFC, which limits the scope of dematerialization to securities issued on French territory and subject to French law. This possibility has been used in respect of bonds until a recent past but is now phasing out and will therefore not be addressed in this questionnaire.

and equity securities and shares in collective investment undertakings ("parts ou actions d'organismes de placement collectif");

- all similar financial instruments issued under foreign law.

Pursuant to Article 3.2 of the EUROCLEAR FRANCE S.A. Operation Rules, EUROCLEAR FRANCE S.A. will automatically admit to its operations financial instruments listed on a French regulated market, provided that such financial instruments are only transferable by book entry pursuant to the regulations or the terms and conditions of issue ("contrat d'émission").

2.8.3. Transfer

Securities recorded by book entry are transferred by way of transfer from one account to another account (Article R. 211-2 of the M&FC (See also below question 11)).

2.9. Ireland

This will depend on the nature and contractual terms of the relevant securities but, generally, bearer securities are issued upon execution and delivery of the instrument representing the security, registered securities are issued when the holder is first registered in the register. In addition to contractual issues, the issue and transfer of equities will be subject to the requirements of company law regarding, for example, available authorised but unissued share capital and compliance with statutory pre-emption rights.

As regards intermediaries, those operating in and subject to regulation in Ireland will be subject to regulatory requirements including compliance with client asset rules, such as maintaining segregated client accounts. Intermediaries in fact, often operate as trustees; in order to create a valid trust, the three certainties must be established – intention (to create the trust), beneficiary and subject matter. The certainties of intention and beneficiary would generally be established by the custody/trust agreement. Certainty of subject matter can cause difficulties, especially given the practice of intermediaries to segregate its customers assets from its own assets but not from those of other customers (i.e. maintain omnibus client accounts in respect of fungible assets). There is no Irish authority on whether such segregation will satisfy the requirement for certainty of subject matter. More recent English authorities, which are of persuasive authority in the Irish courts, only, suggest that this may be sufficient but, in the absence of Irish authority, it is unsafe to assume that a specific trust has been established over specific assets unless segregation is effected from all other customers' assets. However, in the absence of such segregation, a trust may have been created in favour of all relevant customers (all of which will be beneficiaries having equitable co-ownership rights in common, in proportion to their entitlement).

Assignments of equitable interests are, pursuant to the Statute of Frauds (Ireland) 1695, required to be effected in writing. However, on the basis of English authority, it may be that a book-entry transfer would be treated as a novation rather than an assignment[29], so that this requirement should not apply.

---

[29] R v Preddy [1996] AC 815

Section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 imposes requirements for the legal assignment of a debt or legal chose in action; it must be in writing and express written notice must be given to the obligor or debtor. To the extent that an intermediary acts as trustee, any transfer of rights held by the intermediary will be a transfer of an equitable interest and not of a legal interest.

2.10. Italy

The corporate law procedure for the creation of the securities is the one provided for the creation of physical instruments. Only immobilised and dematerialised securities can be validly held and transferred by way of book-entry with the involvement of intermediaries.

Securities are immobilised by way of endorsement in favour of the CSD. The CSD shall ascertain that the securities are correctly endorsed; fully paid-up; comply with specific requirements and are not subject to any limitation in their circulation. It should be noted that, under Italian law, endorsement in favour of the CSD does not give rise to a fiduciary relationship.

For the dematerialisation of newly issued securities, the issuer shall notify to the CSD the overall amount of the issue, the date for the placement and the settlement. One the placement stage is concluded, the issuer must communicate to the CSD all details necessary to identify the features of the issue (including, inter alia, type of security, relevant code, amount issued, overall value of the issue, splitting (if any) and related rights) for the opening of the issuer's account and the name of the intermediaries to which the securities will have to be credited.

In case of dematerialisation of already immobilised securities, the CSD shall (a) cancel the securities; (b) register the securities on the accounts opened by the issuer and on those held by the intermediaries with the CSD, notifying the issuer and the intermediaries thereof (upon receipt of such communication the intermediaries will enter on their own accounts and on the investors' accounts the corresponding registrations); (c) transmit the securities to the issuer by post. Any securities previously held by the issuer shall be cancelled by the issuer.

The following elements are required for a valid transfer of securities:

a. *execution of an agreement or other deed constituting a good title for the transfer;*

b. *transfer order by the transferor's intermediary in favour of the transferee;*

c. *debiting and crediting of the accounts held by the transferor's and transferee's intermediaries with the CSD;*

d. *debiting and crediting of the transferor's and transferee's accounts with the relevant intermediaries.*

Should the transferor or the transferee not hold accounts with intermediaries which in turn maintain an account with the CSD, further steps will be needed. Similarly, in case the transferor and the transferee maintain accounts with the same intermediary, steps (c) will be omitted.

2.11. Cyprus

Securities are created by registration of such securities in the requisite register or by the legal incorporation of the entity for which the securities have come into being under the Companies Law 113. The said registers are kept with the entities

concerned e.g. a company registered under the Companies Law 113 is obligated to maintain, usually at its registered office, a register of members (Art 105) containing details of the shareholders. It is also obligated to maintain a register of holders of debentures (Art 83). Pursuant to the Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996 and the relevant regulations issued a CSD has been created (Art 3) which is controlled by the CSE. The CSE is the only capital market in Cyprus and moreover it is a public body. Consequently its' acts and omissions fall in the ambit of administrative law. All listed securities, their transfers, pledges and liens are registered in this CSD and they are dematerialised. The transfer of securities is effected once the transaction is registered in the CSD (Art 14).

The transfer of securities is regulated by the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001. Pursuant to these regulations a person intending to trade on the CSE must open a depository account as well as a trading account (Arts 9, 10). In the context of the trading account such a person must also name a licensed member of the Stock Exchange (licensed investment firm) who will act as his intermediary for the purposes of finalising any transfers of securities. The transferor is bound by the acts of this intermediary (Art 10).

2.12. Latvia

Securities in general are created by decision of shareholders meeting if the issuer is a private company or decision of other competent authority if the issuer is another legal person. According to the Commercial law securities (stocks or debt securities) could be issued in dematerialised or materialized form; however, (according to the FIML) only dematerialised form is permitted if the securities are meant for public circulation (admitted to regulated market) . All securities that have been issued in Latvia and have been put in public circulation shall be registered in the LCD. But it is not prohibited to register in LCD securities that have not been put in public circulation. To register the issue of financial instruments in the LCD the issuer has to become the LCD participant in the issuer status and has to conclude agreement with the LCD. To have securities validly held and transferred with the involvement of intermediaries the issuer shall open the issuer account with the LCD where whole volume of issue is registered.

LCD has the exclusive rights to make book entries and to account the publicly circulated financial instruments in the cases and pursuant to the procedure set out in the Law, and to ensure their identification (by assigning an ISIN code).

The LCD securities safe-custody system is based on two accounting levels:

1. LCD ensures securities accounting by maintaining issue accounts for issuers and corresponding (omnibus) accounts for LCD participants - banks and brokerages.
2. Banks and brokerages open and service individual securities accounts for the customers. The title to securities is registered with the accounts of securities owners opened with banks and brokerages. LCD carries out settlement between omnibus accounts.

2.13. Lithuania

Before launching the primary securities trading, an issuer must conclude with an account manager an agreement stipulating the procedures of opening and managing personal securities accounts. An account manager authorized by the issuer must

open personal securities accounts issued by the issuer to each owner who has not delegated by a written statement the management of the account to another account manager. Notably, account managers shall be entitled to open and manage personal securities accounts only after becoming participants of the CSLD.

If an issue of securities in Lithuania by a foreign issuer is contemplated, then such issue will be subject to requirements set forth by both laws of its domicile (primarily corporate regulation: power and authority to issue certain types of securities and rights attributable to the holders of securities) as well as Lithuanian law (to the extent public offering of securities in Lithuania is concerned, primarily including requirements for the prospectus, periodic reports, notification of material events, etc.). Notably, if a foreign issuer does not intend to offer its securities publicly and rather contemplates on private placement to Lithuanian investors, then aforementioned Lithuanian laws regulating securities markets will not be triggered.

If, however, the intention is to issue securities to the regulated markets then prospectus have to be prepared and filed with the LSC and the securities have to be enrolled into Current Trading List or Official Trading List of VSE and consequently would need to comply with other relevant Lithuanian legal requirements.

If, alternatively, an issue of securities by a company organized and existing under the laws of Lithuania is being considered, then the following key facts pertaining to regulation of companies and the issue of their securities under Lithuanian law should be outlined:

There are two types of companies under Lithuanian law: a private limited company (UAB) and a public limited company (AB). The differences of each of the two types in terms of minimum share capital and limitations as to the number of shareholders. Private companies organized and existing under Lithuanian law may neither issue their shares nor bonds for the public circulation and consequently may not be traded on regulated markets. While both shares and bonds of public companies may be offered publicly. Public companies may make private placements of their securities as well; however, they would nevertheless be required to prepare and file the short version of prospectus (a memorandum) with LSC in respect of such privately placed securities as well as to comply with periodic disclosure and certain other requirements.

After subscription of securities and filling a prospectus and registering thereof with the LSC (if applicable) follows opening of issue registration account with the CSDL or the particular corrections to already opened account has to be maid. Before opening the issue registration account the CSDL will allocate ISIN code (International Securities Identification Numbering code, granted in compliance with ISO standard 6166) to the securities issue. After opening of securities issuer registration account (or making adjustments to the previously opened account) the CSDL makes necessary entries in the securities issue registration account and in the general securities accounts of account managers. The CSDL informs account managers about opening of securities issue accounts. Account managers after receipt of such notice immediately open (or make adjustments) to personal securities accounts for investors and make corresponding entries in them according to the procedure established by the CSDL.

In certain cases the account of primary securities trading may defer:

In case the investor having paid for the subscribed securities is guaranteed that the securities issue concerned is to take place, he shall immediately gain the

ownership right to the securities and a record thereof shall be made in the personal securities account of the investor. The account manager managing the accounts of issued securities of the issuer shall file reports on securities offering results to the CSDL. On the basis of the said reports the CSDL shall open a securities issue registration account and (or) credit the number of securities traded during the corresponding period to that account. It shall also open general securities accounts for account managers, and (or) credit the number of securities traded by an individual account manager to these accounts, make statements of these accounts and hand them over to the account managers.

In case the investor having paid for the subscribed securities in full or in part is not guaranteed that the securities issue concerned is to take place, he shall gain the right to claim for the delivery of the securities he has subscribed to after meeting other conditions that do not depend on investor's will. These investor's claims shall be immediately recorded in the technical accounts. Upon meeting all conditions of securities issue, the CSDL in conformity with the applicable procedure shall open a securities issue registration account (unless it has been earlier opened in cases prescribed by law), and it shall also open general securities accounts for the account manager managing personal accounts of issued securities of the issuer, and make corresponding entries therein as well as issue statements of the accounts concerned and hand them over to the account manager managing the accounts of issued securities of the issuer. Having received statements of the general securities accounts, the account manager managing the accounts of issued securities of the issuer immediately shall according to the established procedure change the entries in investors' personal claims to securities accounts by the entries in personal securities accounts, evidencing the title to the issued securities.

In case primary trading is conducted on VSE, having received a notification from VSE on the concluded transactions of publicly traded securities, the account managers shall immediately open technical securities and technical cash accounts intended for settlements of transactions concluded on VSE during the primary trading and record therein the number of securities and the amount of cash required for settlement of these transactions. Recording of these entries shall have no impact on the ownership right to the securities or cash. Having made entries in general securities accounts, the CSDL shall issue statements of these accounts and deliver them to the account managers, who shall immediately make corresponding entries in personal securities and cash accounts, thereby formalizing the transfer of title to the securities traded through VSE and cash. Upon termination of public trading of securities on VSE, the CSDL, having received from the issuer's agent the report on securities offering results and other applicable documents shall open securities issue account.

2.14. Luxembourg

The amended law of 10 August 1915 on commercial companies (the "Companies Act") defines how a Luxembourg company may issue shares, bonds and other instruments. Securities may be issued (namely for "sociétés anonymes") in bearer form (physical paper certificate), in registered form in the issuer records or, for certain types of companies governed by separate laws (e.g. securitisation companies), in dematerialised form.

Immobilisation of book-entry securities requires:

1. For bearer securities, a physical deposit of a global certificates with an intermediary ("depository"), which in turn may (or may not) deliver the securities to a securities settlement system which opens a securities account in the name of the investor or more generally in the name of its intermediary with the securities settlement system.

2. Registered securities may also be immobilised (and held on a fungible basis) by registration of a collective position held on behalf of various clients in the single name of the intermediary acting through a nominee or fiduciary arrangement or similar structure authorised under the law applicable to the securities.

2.15. Hungary

The issuer decides on the form of the security, applies for the ISIN code and announces the issue to the Hungarian Financial Supervisory Authority. If the security is to be in physical form, it shall be printed by an authorised printing house. If all securities are printed one by one, securities can be deposited on a deposit account at a depositary according to the decision of the owner of the security. If the securities are immobilised, i.e. only one or few pieces are printed, these securities are deposited at a depositor, and the depositaries of the owners open accounts at that depositary, under which the securities are registered.

If the securities are dematerialised, the owners open securities accounts at the investment services provider of their choice, and the issuer instructs the CSD (KELER) to credit the relevant quantity of securities to the accounts of the concerned investment service providers, who in their turn distribute the securities among the accounts of the owners. To initiate this process the issuer has to sing a document containing all the relevant date of security defined by law, which document is deposited at the CSD.

2.16. Malta

As there are various types of issuers and various types of instruments, the reply to this question will vary depending in the circumstances.

Companies : shares – as a general rule, any issue of shares is to be decided upon by ordinary resolution of the company (art. 85 of the companies act), unless the memorandum or articles of association (m&a) of the company require a higher percentage. However the m&a of a company may permit the general meeting to authorise by ordinary resolution the board of directors to issue shares up to a maximum amount as may be specified. The said authorisation may be for a maximum period of 5 years. Where the permission is not contained in the m&a, the same authority may be given to the board by extraordinary resolution. The same principles apply to all securities which are convertible into shares or which carry the right to subscribe for shares.

If the company's shares are not listed, the shares are issued in registered form. If the company's shares are listed on the malta stock exchange (mse), then the shares fall within the framework of the central securities depository (csd) and the shares become dematerialised. The csd holds the updated register for the company secretary and at the same time holds the record keeping functions for the mse in so far as relates to the securities accounts opened by the mse for all its account holders. The issuer register is focused on the shareholders in one particular issuer while the securities accounts hold all holdings of each account holder in all relevant issuers

The csd is regulated by the bye-laws of the mse. There is a degree of uncertainty in this area as whereas previously the mse was the only stock exchange recognised by law, now the mse is merely a recognised investment exchange in terms of law. Accordingly, there is a lingering doubt as to whether the bye-laws issued by the mse have the status of laws and this places the whole dematerialisation process as being outside the parameters of the law. In our view the process of dematerialisation should ideally be regulated by an ad hoc law.

Companies : bonds – these are issued by the board of directors of a company in physical form. If the company's bonds are listed on the mse they are issued in dematerialised form and the above argument applies.

Government securities: (debt instruments) issued by the central bank of malta as agent for the government pursuant to provisions of law governing the particular offer.

Units in collective investment schemes: most of these are companies and so refer to (a) above but it is possible to have schemes which are not companies and so units are issued in prysical form or dematerialised form. As these are not traded on the exchange, they are issued by the manager of the funds and confirmed by contract notes to the investors.

Other securities : there are no markets for other types of securities which are therefore issued, when used, by bilaterial signed agreements.

2.17. Netherlands

The way in which a security is created depends on the type of security in question. Generally speaking, a deed of issue and delivery will be required, which deed may only be executed after the requisite corporate action has been taken. To have (existing or newly issued) securities validly held and transferred with the involvement of intermediaries, the securities have to be deposited with an intermediary or, if it concerns securities subject to the Securities Giro Administration and Transfer Act, with Euroclear Netherlands (formerly known as Necigef), the Central Securities Depository under this Act or with an Admitted Institution within the meaning of this Act (generally speaking: a licensed credit institution). The procedure differs depending on whether the securities involved are bearer securities or registered securities. Bearer securities are actually deposited with the depository or, as the case may be, with Euroclear Netherlands physically. The securities issued are booked in the new issues account of the Admitted Institution acting as a representative of the issuer (Listing Agent) at the time of issuance. As soon as the securities have been paid up in full, they are credited to the custody accounts of the Admitted Institution of the subscribers. Registered securities may be delivered to Euroclear Netherlands for inclusion in the collective deposit maintained by it. This requires a deed of issue and delivery between the issuer, Euroclear Netherlands and the Admitted Institution that is acting in the capacity of Listing Agent. The deed effects the issue of the securities to the Listing Agent and then effects the delivery of the securities to Euroclear Netherlands for inclusion in the depot. The securities are credited to the custody account of the Listing Agent, and transferred from that account to the subscribers or the Admitted Institution of the subscribers.

2.18. Austria

2.18.1. Securities need a **written document** to be created (the kind of special dematerialised government securities is not discussed in this questionnaire

since it is a rare exception). The written document (paper) represents either an individual security (bond, share certificate etc.) or a global security. The latter is nowadays common. The document, signed by the issuer (by hand or in facsimile), **must be issued** ("begeben"), which is usually done in a contractual framework which provides that the consideration for the security(ies) is paid against issue of the securities ("closing"). Without payment for the security, the security will not be validly issued. In case instalments would be provided, they must be reflected in the terms and conditions of the security (very unusual in Austria). Issue of debt instruments does not require the involvement of courts or administrative agencies. In case of public offerings a prospectus must be published according to the Austrian Capital Markets Act. The procedure connected therewith does presently not require the involvement of a governmental office. The adoption of the Prospectus Directive (2003/71/EC) which is currently underway may provide for a governmental agency.

The **usual procedure** for the creation of debt securities (notes, bonds) which is of interest for this questionnaire is the handing over of a global security by the issuer to the lead manager against payment of the agreed price. In case of issue of share certificates for increase of the share capital, the court will be involved in whose jurisdiction the issuer has its seat and where it is registered in the Companies Register ("Firmenbuch"). The court will monitor that the price for the shares is available to the company before it authorises the registration of the increase of share capital. Once this authorisation is granted, the global share certificate will be handed over to a custodian (securities account provider) which may be the Austrian CSD. In case of debt issues the global security will be handed over to the Austrian CSD and in case of international placement it might be an ICSD.

The **investors** in the securities will have paid the purchase price to their bank/custodian (securities account provider) which passes the subscription moneys on to the lead manager of the syndicate. When the **delivery against payment** has taken place, the holder of the global security (in most cases the CSD) will allocate such number of securities to the respective accounts of its customers, i.e. the banks maintaining securities accounts with it, as such banks have subscribed (for their own account or that of their customers). The CSD would not know whether the banks bought the securities in their own name or for their customers, but there is a refutable statutory presumption in the Deposit Act that the securities account provider is not owner of the securities (section 9 para 2 Deposit Act). In case the securities are held by the Austrian securities account provider with a foreign account provider, the Austrian account provider must inform his foreign partner expressly and in writing in case the securities do not belong to him (section 9 para 4 Deposit Act).

2.18.2. Once the securities account providers (banks/custodians) received their allocation of newly issued securities on their account which they hold with the CSD, they are in a position to allocate these securities to their customers in the respective number they have subscribed and paid for.

The CSD holds the (fungible) securities (generally in form of a global instrument) in collective safe deposit ("Sammelverwahrung") forming a "pool" of these fungible securities which cannot be distinguished or allocated to certain owners. When the CSD receives the global security it

acquires ownership according to section 383 Commercial Code as buying commissioner for the account of its principals. There are special rules contained in the Deposit Act relating to commissionary business (sections 13 to 20 Deposit Act). The Deposit Act provides that the commissionary must send the principal a list of the securities which were bought and that ownership of these securities passes then to the principal, if it has **not already been acquired for other legal reasons**. One would say that nowadays the electronic book entry is equivalent to the sending of a list of securities which were bought and a statement of account. One could also argue that "the other acquisition of ownership" mentioned in the Deposit Act could be made by the CSD acting on behalf of personally unknown, but identifiable customers, being investors, for whom he acquires property as their agent. In that case the book entries would serve as a token for perfection.

2.19. Poland

Securities that do not exist in the form of a document, understood to mean an instrument incorporating predefined rights against an issuer, and whose transfer results in the transfer of all inherent rights in these securities, are created the instant they are entered for the first time on securities accounts or in another system of registration managed according to applicable laws by authorised institutions. In principle, dematerialised securities are created the instant they are issued (by the issuer), whereas the consequences of their issue takes place the instant they are registered in the appropriate registration system managed for such securities, along with the indication in that system of the person entitled to them. Of course, a securities issue requires prior organisational measures by the issuer including sometimes court registration. To have securities validly held and transferred with the involvement of intermediaries, for securities admitted to public trading, the issuer is obliged to conclude an agreement for the registration of such securities in safekeeping with the National Depository for Securities (KDPW), which manages the central register for securities admitted to public trading in Poland. If prior to being admitted to public trading, securities were issued in the form of documents, then the registration should be preceded by the securities being placed in custody with an institution authorised to perform brokerage activities in Poland, or to manage securities accounts in Polish jurisdiction, and which opens a register for persons entitled to these securities. Once these securities have been admitted to public trading and registered by KDPW, entries in this register become the only form in which these securities exist, while documents which embodied these securities previously ceased to be valid in law. With respect to securities issued in the form of a document outside the Republic of Poland the requirement to deposit securities with an institution authorized to conduct brokerage activity or operate securities account in the territory of Poland may be substituted through registration of the securities by an institution performing outside the Republic of Poland the tasks of central registration of securities or settlement of transaction concluded in securities trading.

For securities not admitted to public trading, which according to legal regulations may be issued in dematerialised form, it is essential for an issuer to conclude an agreement for the maintenance of the registration of these securities with an entity so-entitled, or the opening of such a registration system by the issuer himself, if he is so-entitled.

2.20. Portugal

The issuance of securities requires, in any case, an intentional act by the Issuer in accordance with its governing law and articles of association, usually a shareholders or directors resolution. Sometimes registration with the Commercial Registry is also required (for instance in what shares are concerned).

Creation of securities represented by physical certificates requires the producing of the security certificate in print or other written form. Under article 106.-1 Cod.VM, in order to be integrated In The System, securities represented by physical certificates must be deposited in the centralised securities system, after which such securities will be registered in an account and - from that moment on and until exclusion from the centralised securities system - such securities will be transferred by debiting and crediting book entry accounts. Deposit in the centralised securities system will include creation of an Issue Securities Account and of Individual Ownership Accounts, as better described below in the answer to question (3).

Book entry securities are created by registration in the necessary accounts, which will include, from a procedural point of view:

Registration in the Issue Securities Account and in Individual Ownership Accounts, held either with a Financial Intermediary or with the Issuer.

Registration in the relevant accounts which make up the relevant centralised securities system where the securities have been integrated (and which are better described below in the answer to question (3)).

Once In The System and once registered in the Individual Ownership Accounts, securities can be validly held and transferred by debiting and crediting the Individual Ownership Accounts (for a definition, please see below, answer to question 3. and seq.), with the involvement of Financial Intermediaries[30].

2.21. Slovenia

Pursuant Par. 1 of Art. 11 of ZNVP on the issue of dematerialised securities, the issuer shall issue and give the KDD an order to issue dematerialised securities on behalf and for the account of the issuer by entering in the central register the information about the essential components of dematerialised securities and to credit them to the accounts of their holders who have subscribed and paid such securities (hereinafter: "issuing order").

Pursuant Art. 4 of ZNVP a dematerialised security shall consist of the following essential components entered in the central registry:

1. code of the type of security;
2. code of the security class if more than one class of the same type of security was issued,
3. name of the company, registered office and registration number of the issuer;
4. name of the company or name of the person to whom a security is made out, or a code designating that a security is a bearer security;

[30] For a definition of Financial intermediary, please see footnote 3 above.

5. detailed designation of issuer's obligations arising from the security (embodied in the security);
6. par value of the security (if applicable);
7. aggregate par value of the entire issue;
8. date of entry of security in the central registry.

KDD performs following steps in the process of dematerialised securities issue:

step 1: Entry of dematerialised securities issued in the central registry (Art. 56 of KDD Rules): KDD records in the central registry the dematerialised securities being issued by entering in the central registry:

1. the uniform identification of such securities (ISIN code) and their designation code (i. e. a code by which securities are registered on the accounts of the holders)

2. their essential components

step 2: Entry of dematerialised securities issued in the control account (Art. 57 of KDD Rues): KDD enters the entire amount of dematerialised securities being issued in the control account for issue opened for this issue. A control account for issue is a type of an auxiliary account, maintained in the central registry only for purposes of managing risks of possible mistakes in the process of securities issue.

step 3: Transfer of dematerialised securities by debiting control account and crediting of holders' accounts (Art. 58 of KDD Rules): KDD enters and executes orders to transfer dematerialised securities being issued by debiting the control account for issue and crediting holders' accounts which the issuer states in its order to issue as those persons entitled to the appropriate number of such dematerialised securities being issued.

Upon completion of step 3 (upon transfer of dematerialised securities crediting holders' accounts) the securities are (legally) issued. At that moment the rights of holders' of the securities (embodied in the security) and the obligations of issuer (embodied in the security) arise (Par. 1 of Art. 6 and Art. 15 of ZNVP).

2.22. Slovakia

A security is deemed to be issued at the moment it contains all particulars defined by the Act or in a separate law and when it becomes the possession of its initial owner in a way established by law.

The date of issue of an issue of securities is the day when the first security from the issue can first become the property of its initial owner in a way established by law. The date of issue of an issue of securities shall be set by its issuer, unless stipulated otherwise by a separate law. Before the date set for the issue of an issue of securities, an issuer of a fungible security may not issue a security from the issue.

After the issuer gains consent of the Financial Market Authority (further referred to as "FMA") with issue of securities i.e. prospectus is approved by the FMA, the issuer concludes an agreement with the central securities depository on registration of issue of book-entry securities and afterwards registers the issue. Registration of issue of book-entry securities, meaning the entry of data on securities into the issuer's registry maintained by the depository, precedes the issue of securities. If securities are issued in dematerialised form, the day when data on book-entry security were entered in the securities owner's account is considered to be the day of security issue.

No activity is required from intermediaries in order to issue securities, because issue of dematerialised securities is arranged exclusively by the central securities depository and the issuer. Newly issued securities are credited to beneficial owner's accounts even though intermediaries – members of the central securities depository, maintain these accounts. Existing dematerialised securities are simply transferred to account administered by the intermediary by means of book-entry.

2.23. Finland

Dematerialised book-entry securities

Dematerialised book-entry securities shall be incorporated in the book-entry system. The process of incorporation is provided in Chapter 4 of the Act on the Book-Entry System. Regarding shares in Finnish companies, the process is governed by provisions in Chapter 3a of the Finnish Companies Act. Regarding shares in UCITS (mutual funds) the respective provisions are included in Chapter 10 of the Act on Common Funds (48/1999) and regarding participation rights in Finnish co-operatives, in Chapter 21 of the Act on Co-operatives (1488/2001).

The ground rule applicable to Finnish securities to be incorporated in the book-entry system is that any physical document issued to evidence the security shall be invalidated when the security is dematerialised. No physical security shall be issued or exist on the existence and contents of a book entry security. In respect of shares in a limited liability company and in a UCIT as well as of participation rights in a co-operative, the entity that has decided to incorporate its securities in the book-entry system shall set a registration date by which the holders of certificates shall submit their certificates to be incorporated in the system. After the registration date, an outstanding certificate only entitles the holder to claim the book-entry securities and to receive the dividend, yield or other proceed from the securities. These principles provide full dematerialization. Incorporation is granted by the central securities depository (Finnish Central Securities Depository Ltd., 'APK') upon application by the issuer.

This being said, non-Finnish securities may be accepted in the book-entry system, if APK has ensured that the respective underlying securities may not become subject to circulation while being recorded in the book-entry system. Non-Finnish securities can be incorporated in the book-entry system either through 1) a link established between APK and a foreign CSD or 2) upon application by the foreign issuer connected with an arrangement blocking the underlying securities for the benefit of account in the Finnish book-entry system.

Within the book-entry system, securities are held and transferred with the involvement of intermediaries who operate the book-entry accounts by entering registrations to the accounts (account operators).

Physical securities with certificates

Before the book-entry system was introduced in the beginning of the 1990s, actual possession of a physical document was the principle way of evidencing ownership, a right of pledge or another limited right to a security. Banks held most of the physical certificates in their vaults. The deposits however had to be segregated investor by investor. Physical certificates were not fungible in Finland and shares in a Finnish company had to be registered in the name of the owner.

Legally speaking, Finland is not even today totally dematerialised. Issuing physical securities is still legally a valid method to put securities into circulation, although all listed shares have been dematerialised for example. While from the market

practice point of view overwhelming majority of Finnish securities traded on the regulated markets are fully dematerialised, the fact remains that in terms of the total number of more than half a million Finnish limited liability companies only a minority of less than 200 companies have incorporated their shares in the book-entry system. Also some bonds are still issued in a physical form, although the number of dematerialised bonds keeps growing. Thus it is warranted to assess also the legal issues outside the book-entry system when addressing the Finnish legal system, even though it must be recognised that from the market practice perspective legal issues relating to physical securities have only marginal relevance.

Regarding physical securities, a security is considered to be issued and put into circulation when the security certificate has been transferred from the issuer or its agent to the possession of a holder. Bearer securities (bonds predominantly) can be held with intermediaries on behalf of the owners of the securities, whereas in terms of certificated Finnish shares, the intermediary cannot be registered as a nominee in the shareholder list. Thus, even if the share certificate is held with the intermediary on behalf of the owner, it shall be registered in the shareholder list in order to achieve validity towards the issuing company and its shareholders.

2.24. Sweden

A securities account reflects the securities credited to the account and the registered rights in these securities. According to the Financial Instruments Accounts Act a CSD registers are comprised of CSD book-entry accounts opened for owners of financial instruments, which are registered in accordance with the Act. A person, who is listed, as the owner on a securities account shall, subject to the limitations set forth in the account, be deemed to have the right to dispose of the financial instrument.

Relevant laws:

The Financial Instruments Accounts Act,

The Securities Operations Act (SFS 1991:981),

The Companies Act (SFS 1975:1385)

The Accounting Act (SFS 1999:1078)

The Annual Reports Act (SFS 1995:1554)

There is of course also some tax legislation but it seems to me a question for FISCO.

2.25. United Kingdom

The point at which securities are created is a matter for judicial and academic debate.[31] A simple approach is to equate creation with allotment. Allotment "…is an appropriation by the directors or the managing body of the company of [securities] to a particular person".[32] Company law imposes a number of preconditions to the allotment of securities. These in include (broadly): (for shares) the availability of an equal number of unallotted authorised shares;[33] (for shares and

---

[31] See Ferran, *Company Law and Corporate Finance, 1999, OUP,* 290.

[32] *Spitzel v The Chinese Corporation Ltd* (1899) 80 LT 347, per Stirling J.

[33] As specified in the memorandum. Purported allotments in excess of authorised share capital are void. *Re A Company ex parte Shooter* [1990] BCLC 384, 389, cited in Ferran, *282.*

rights to shares) authority to allot;[34]and (for equity securities) compliance with pre-emption requirements.[35] Shares are to be taken to be allotted for the purposes of the Companies Act 1985 when a person acquires the unconditional right to be included in the company's register of members in respect of those shares.[36] Return of allotments of shares must be registered within one month.[37]

Although the terms "allot" and "issue" are often used interchangeably,[38] the better view is that securities are issued when the holder is entered into the register in respect of those securities.[39]

---

34 By ordinary resolution of the company in general meeting or in the company's articles. Companies Act 1985 s. 80

35 Companies Act 1985 s. 89.

36 Companies Act 1985 s. 738(1)

37 Companies Act 1985 s. 88.

38 Ferran, 290.

39 Ferran, 291.

3. QUESTION NO. 3
WHAT IS A SECURITIES ACCOUNT? WHAT IS ITS ROLE AND FUNCTION? WHAT ARE THE RELEVANT CUSTODY, COMMERCIAL, ACCOUNTING AND TAX LAWS?

3.1. Belgium

A securities account is not explicitly defined in Belgian legislation. We consider it as an agreement between the account holder and the intermediary to record in book-entry form assets (generally in fungible form) held by the latter in the name of or on behalf of the former, and for this purpose to submit the entitlement to such assets to a specific law that will govern the correlative rights of the account holder. **In fact, in our opinion, a securities account is nothing more than an account agreement** which will in fact create, subject to the conditions organised by the law governing the account agreement (which also may impose specific duties on the intermediary in terms of accounting treatment, etc.), the rights and obligations of the parties relating to the securities deposited with the intermediary. For accounting purposes, it records an off balance sheet obligation of the intermediary. For the purposes of Royal Decree 62, it records the entitlement of the client against its intermediary (see below for further explanation of the nature of this entitlement).

What are the relevant custody, commercial, accounting and tax laws?

Companies Code, Royal Decree 62, Civil code (deposit contract; see articles 1915 and following); there is no specific accounting law (even if the general accounting legislation is applicable as a rule) except for dematerialised securities held in NBB settlement system (see Royal Decree of 23 January 1991 on Belgian State debt securities), including commercial paper (see Royal Decree of 14 October 1991 relating to “billets de trésorerie” and “certificats de dépôts”). Reference is made to the contribution of the Tax WG for tax legislation.

3.2. Czech Republic

Section 94 (1) of Capital Market Undertaking Act distinguishes between two types of securities accounts:

owner account, which account may be opened for the owner of the credited securities;

customer account, which account may be opened for the person, who is not the owner of the credited securities;

CSD may open owner account and customer account for dematerialized securities. Owner account, but not customer account, can be opened also by investment firm, bank, management company or foreign securities depository, provided these institutions are holders of customer account in CSD.

As to the holder of securities account, there is no restriction for CSD to open owner account for anyone. Customer account, on the other hand, can be opened only for investment firm, management company, foreign investment firm, management company or central securities depository /section 92 (3) and 110 (2) of Capital Market Undertaking Act/.

In case that only foreign securities, physical securities in safekeeping or derivatives are credited to securities account, owner account and customer account in separate securities register (i.e. separate from central securities register of dematerialized

securities) may be opened by CSD, investment firm, bank or management company.

Dematerialized units of collective investment funds can only be credited to owner account /section 97 (7) of Capital Market Undertaking Act/ in securities register operated either by CSD, management company, investment firm or bank (see also question 1)

The function of securities account is expressed in section 94 (1) of Capital Market Undertaking Act. Following this provision, securities credited to owners account are deemed to be owned by the account holder, unless the opposite is evidenced on the ground of the law or judicial decision.

Transient legislation governing operation of Securities Centre (see question 3) recognizes only securities account opened for the owner of the securities. However, this legislation applies only to dematerialized securities. Physical securities in safekeeping and foreign securities are governed by abovementioned provisions of Capital Market Undertaking Act.

3.3. Denmark

A securities account reflects the securities credited to the account and the registered rights in these securities (the account holders right of ownership, a pledgee´s right according to the pledge etc.). The function of the account is (at least with respect to CSD-accounts) to create an authority to dispose over the electronic securities credited to the account in favour of a third party. In other words, a third party acting in good faith can rely on account holder´s authority to dispose over the CSD-account (subject to registered pledges) even if it turns out that the securities had been wrongfully credited to the account (except if the credit is void because of forgery or duress under threat of violence, cf. answer to Question no. 7). Further, the account may to some extent function as evidence of the account holders rights over the securities credited to the account.

3.4. Germany

A securities account (Depotkonto) in Germany is part of the accounting system applicable to banks safe keeping securities for customers. A securities account may be kept by a custodian bank for its private or institutional customers (usually the ultimate investor but also other banks) or by a CSD for its customers/participants in the central delivery system which are custodian banks as intermediaries between the CSD and the ultimate investor. Securities which are credited or debited to the securities account have been purchased or sold by the account holder (customer).

Any credit or debit, as a rule, evidences the acquisition or loss and transfer of title to the securities purchased or sold. However, with the exception of book entries pursuant to Section 24 para 2 Securities Deposit Act, such credit entry as such as a technical act does not constitute the acquisition of title (ownership) to the securities (for details see Questions 7 and 12 below).

There are specific and general rules applicable to maintaining securities accounts. The most specific rules are set forth in Section 14 Securities Deposit Act.

Section 14 Securities Deposit Act is supplemented by detailed instructions issued by BaFin on 21 December 1998 (Announcement regarding the Requirements for a Proper Custody Business and for a Proper Fulfilment of Delivery Obligations). Section 10 of this Announcement specifies what has to be recorded and how. The so-called custody ledger is the technical means to carry the securities accounts for

customers. It is divided into as many individual accounts as there are customers for which the bank holds securities in safe custody. It is a statutory book (Handelsbuch) within the meaning of the general provisions governing statutory books in Section 238 et seq. Commercial Code and subject to the General Accounting Principles (Grundsätze ordnungsgemässer Buchführung). It is also subject to Section 154 General Fiscal Code (Abgabeordnung - AO) which is generally applicable to opening and maintaining bank accounts. Name and address as well as account number are the key accounting items. The securities held in custody are recorded by name of issuer, particulars of the issue and nominal amount or number of shares. Securities accounts have to be reconciled with the customer on a yearly basis. Account statements as of year end are sent to the customers with the request to verify the accuracy and substance and to notify the bank promptly on any errors.

Entries in the Federal or State Debt Register for Federal or State Bonds are not treated as securities accounts within the a.m. definition although they are the legal basis for the creation and issuance of such bonds. The entry of an individual investor according to Section 9 para 1 or of a CSD according to Section 8 para 1 Law governing the Federal Debt Register replaces the creation and issuance of bond certificates. Transfer of rights in respect of such entries take place outside the debt register by (i) assignment from seller to purchaser in case of single registered claim or (ii) transfer within the German book entry system for clearing and settlement of securities transactions (Effektengiroverkehr) in case of collective registered claim.

3.5. Estonia

Legal acts do not provide definition of a securities account.

Based on functional analysis one can define a securities account as a facility for recording ownership and other real rights (e.g. pledge and financial collateral arrangement) to securities registered with the Central Register for securities.

Provisions of the ECRSA (which is the main source of law regarding such a securities account):

1. Provide a procedure for opening securities accounts with the Central Register – Under the general rule the Estonian CSD opens the securities accounts upon application of the investor that is forwarded to the Estonian CSD by account operators. Account operators the their access to the Central Registry for this purpose;
2. Set forth the of data (name of the investor, business or social identity code etc.) that is to be recorded in the Central Register when opening the securities account;
3. Distinguishes between different types of securities accounts: (i) an ordinary securities account, (ii) a securities account for recording shared ownership (common ownership versus joint ownership), (iii) a pension account and (iv) a nominee account; and
4. Provide basic principles in relation to registry acts (securities transfer, registration of pledge, registration of a financial collateral arrangement and recording freezes restricting temporarily disposal of securities) made to securities accounts.

3.6. Greece

As explained above, Greek Law entails specific rules on accounts of securities held within the BoGS and the DSS.

a. Concerning the securities accounts held within the BoGS for Greek Government securities, see above unččder 2.3.a. As mentioned, there are two types of Participants accounts held for each Participant within the BoGS, the "own portfolio account" and the "investor/customer portfolio account".

At the tier of each Participant, the latter is obliged to keep separate accounts per customer. Furthermore, separate accounts (records) must be kept within each investor's account by category of securities with the same characteristics. The function of such accounts is to distinguish between the securities of each investor and to trace the actions performed on the securities (transfer, pledge, etc.).

b. In relation to securities accounts held within the DSS, the regulatory based Regulation on the DSS40 provides that an account is opened with the DSS for each type of security, being divided in the investors' accounts, identified per name. Those accounts are further divided in sub-accounts, administered by the Accounts Operators – which are credit institutions or investment firms –. It is understood that an investor can hold more than one sub-account for the same type of securities with more Account Operators.

The Account Operator is the only entity having the right to administer its customers' sub-accounts, through transfer orders transmitted to the DSS. In principle, the ACSD may not transfer, charge or block any securities registered in a sub-account held with an Account Operator without the latter's consent41.

As explained above, rights of ownership on the listed shares / listed corporate bonds are created through the registration in the securities accounts held within the DSS. Law 2396/1996 states that the person registered in the DSS records is the beneficiary of the securities registered within the relevant accounts. Therefore, registration is constitutive of the shareholders' rights, which are created erga omnes as a result of and from the date of registration, as already mentioned above under 2.2.

Regarding tax issues, tax applies only in terms of securities transfer and, thus, no tax issues arise while the securities are held/registered in a securities account.

3.7. Spain

Although securities account is a concept capable of producing effects in several dimensions, the Spanish legal system does not contain a legal definition of such concept. 42

---

[40] The DSS Operation's Regulation has been resolved by the HCMC, by virtue of law.

[41] The Regulation on the DSS makes provision for some exemptions.

[42]However, it cannot be inferred that within the scope of the registry, clearing and settlement system, the concept of "account" may be used in a precise manner with its literal and common meaning. The concept of "account", in its natural meaning, it is referred to the accounting that has to be held on every bilateral legal relationship, on which the patrimonial/proprietary effects for each of the parties thereto are determined by adding and subtracting several reciprocal considerations. The net balance of such considerations would be the "account". This is the case, for instance, of loans in cash accounts, on which the disposal of the amounts borrowed by the borrower creates a negative balance, and on the contrary, the excess on the repayment, would create a positive balance.

In relation to such a concept, the following should be noted:

- The "securities accounts" are the elements (cells) that make up the book-entry registry of securities held by means of book-entry. In these accounts the relevant inscriptions over securities take place, producing material or substantive effects between the parties involved *–inter-partes–* and against third parties *–erga omnes–*. In this manner, the amount or number of securities published by the securities account goes beyond the existing legal relationship between the account holder and the account provider, because it has full effects *erga omnes.* The inscriptions made by the intermediary that holds the securities account produce full authentication effects (as a public notary) and as such, cannot be amended or modified unless: (i) a court resolutions instructs so, or (ii) where the mistake stems from a mere arithmetical of factual error that may be evidenced by confronting the document used to make the inscription or entry.

- As a result, the book-entry "registry" is conformed as an ownership-in-securities registry made up not with paper books (as the Real State Registry), but with several securities accounts on which securities are inscribed and held in the name of their owners.

- Only the inscriptions of the securities accounts forming part of the securities registry system described in section A.2 of the **Introduction** above, may produce the material (constitutive) effects and, in particular, the entitlement effect before the issuer and third parties, that will be explained below. The securities accounts is an essential instrument for the existence of the security held by means of book-entry. It is on such accounts where the inscriptions that create the owner's rights in the securities take place, proving ownership and allowing its exercise and transfer of title.

- The concept of "securities accounts" is commercially linked to the "*contrato de depósito de valores*", securities custody agreement (either as a closed deposit or an administrated deposit). [43]

[43] Opening and maintaining securities accounts in the name of their clients is for the financial intermediaries that participate in a securities registry system, is the key commitment to comply with part of their obligations as provider of custody services, and according to the terms of the securities custody agreement entered into with their clients. But a distinction has to be made between the obligations arising from the contractual relationship and those arising from its participation in a registry system. As an example, the responsibility of the intermediary as entity in charge of the registry is subject to a very strict regime: it will be held liable for damages that the account holder may suffer, save in the case that the damage is produced due to the exclusive fault of the account holder.

Notwithstanding the above, it is a common commercial practice, the execution of a single **agreement for the opening of account, deposit and administration of securities, physical or dematerialised**. However, this contractual framework contains two different legal relationships with separate effects within the Spanish legal system: the first one in relation with the physical securities, and the other one with the securities held by means of book-entry. In respect of the first, the intermediary will be obliged to have custody of the physical securities, reflecting such position in the account opened in the name of the client. This reflect will not produce material (constitutive) or modificative effects over the entitlement of the client on the securities. These effects are produced exclusively with the inscriptions referred to securities held by means of book-entry. This is why only in this latter scenario the concept of "securities account" is properly used.

Hereinafter, when in the answers to the questionnaire the term "securities accounts" is used, it has to be understood as referred to those securities accounts that meet the characteristics above mentioned (opened according to a contractual relationship between the intermediary and its client; an element forming part of the securities registry system, and thus, referring to securities held by means of book-entry; and whose inscriptions produce material effects on the clients' rights and entitlement not only inter-partes, but also erga omnes).

In other cases (indirect holdings of securities through account providers that are not participants in IBERCLEAR, or physical securities deposited with an intermediary) the securities account is limited to be an evidence or accounting expression of the legal relationship –whatever its nature may be– between the account provider and its account holder.

Custody laws:

Among others, we would like to highlight the following main norms:

a. Articles 5-12 de la Ley 24/1988, de 28 de julio, del Mercado de Valores (Securities Markets Act).

b. Real Decreto 505/1987, de 3 de abril, de creación de un sistema de anotaciones en cuenta para la Deuda del Estado (Royal Decree creating a book-entry system for Public Debt securities).

c. Orden Ministerial de 19 de mayo de 1987 (Ministerial Order of 19 May 1987 developing Royal Decree 505/1987).

d. Real Decreto 116/1992, de 14 de febrero, sobre valores representados mediante anotaciones en cuenta y compensación y liquidación de operaciones bursátiles (Royal Decree of securities held by means of book-entry and clearing and settlement of Stock Exchange transactions).

e. Orden Ministerial de 21 de Julio de 1992 (Ministerial Order of 21 July 1992, on requisites and procedures for participanting in the IBERCLEAR system).

f. Orden Ministerial de 7 de octubre de 1999 (Ministerial Order of 7 October 1999, general code of conduct in portfolio management).

g. Orden Ministerial de 27 de Marzo de 2003 (Ministerial Order of 27 March 2003, authorising the merger of CADE and SCLV to form IBERCLEAR and approving IBERCLEAR internal Regulations).

Accounting laws / Tax laws

To be determined the scope that should be given to this answer.

3.8. France

A securities account is an account maintained in the name of the owner with the issuer or an authorised intermediary in which securities are recorded in book entry form (see in this respect (1) above). Its role and function are to record the rights of the owner of securities so recorded. Maintenance of securities accounts is regulated.

Only the following entities are allowed to maintain securities accounts (Art. L. 542-1 of the MFC):

- issuers;
- credit institutions;

- investment firms;
- legal entities established in France whose only or principal purpose is to maintain securities accounts (subject to licensing by the Comité des Etablissements de Crédit et des Entreprises d'Investissement); within the limits of the AMF rules, the above institutions which are not established in France;
- the Treasury (Trésor), Banque de France, financial services of La Poste, Caisse des Dépôts et Consignations, Overseas Monetary Institution (Institut d'Emission d'Outre-Mer) and the Monetary Institute for Overseas Departments (Institut d'Emission des Départements d'Outre-Mer).

Furthermore, EUROCLEAR FRANCE S.A maintains current accounts for issuers and authorised intermediaries which by virtue thereof are participants (Article R. 211-6 of the M&FC).

Pursuant to Article L. 621-7-IV of the MFC, the AMF General Rules do determine in respect of maintenance and custody of financial instruments central depositaries and DVP systems:

- the conditions of exercise of the operations of maintenance and custody of financial instruments by legal entities which proceed with transactions involving offerings to the public ("appel public à l'épargne") and authorised intermediaries authorised to act in this respect under the conditions set forth in Article L. 542-1 of the MFC. The AMF General Rules (Art. 332-1 to 332-102) regulate (i) the conditions under which the activity of custody is exercised (e.g. rules of ethics, liability, accounting rules,…) and (ii) the rules to be complied with in respect of maintenance of securities accounts (accounting rules, principles of segregation, …);
- the conditions of authorisation by the AMF of central depositaries and the conditions under which the AMF approves their operating rules;
- the general principle of organisation and operation of DVP systems (Article 550-1 to 550-11) and the conditions under which the AMF approves their operating rules without prejudice to the authority of Banque de France pursuant to Article L. 141-4 of the MFC.

The regime of securities accounts is determined by the AMF General Rules (Article 332-1 to 332-102).

Cash received by an intermediary for the account of a customer including inter alia dividends interests, repayment of principal, are credited to the related cash account of the customer as soon as such proceeds are available to the custodian (Article 332-37 of the AMF General Rule).

See also in this respect (4) below.

Relevant tax laws are incorporated in the Code Général des Impôts. In view of the complexity of tax matters related to securities, we do not believe that review of those is within the purpose of this analysis.

3.9. Ireland

There is no single meaning attributed to the term "securities account" for the purposes of Irish law; generally, it would be considered to be an account on which interests in securities represented by book-entry are entered. Its function is to record those interests (the nature of which will depend on the agreement between the intermediary and the holder) and dealings in them. There is no single body of "custody, commercial, accounting and tax laws" that addresses, or is relevant to, a securities account; it is affected by a significant body of such law deriving from a variety of sources, including primary and secondary, or 'delegated' domestic legislation, legislation deriving from the European Union and, of course, judicial precedent. It will also be affected by regulatory requirements of the Irish Financial Services Regulatory Authority (known as the Financial Regulator), as a constituent part of the Central Bank and Financial Services Authority of Ireland regarding, for example, client asset rules.

3.10. Italy

A securities account is the account opened with a licensed intermediary in pursuance of an agreement for the custody and administration of securities. The function of a securities account is the custody of the securities. The contract between the client and the custodian is qualified as "deposit" under Italian law. In addition to its principal role as depositary, the custodian also performs the duties of an agent in the collection of dividends and nihil cost shares, exercise of option rights, conversion rights, etc.

It should be stressed that in case of dematerialised securities – where the opening of a custody account is mandated by - law legal authors tend to take the view that the agency element is preponderant, since no physical asset is entrusted to custody.

Sources of Law:

The general provision regulating securities accounts is Article 1838 of the Civil Code;

Articles 85 ff. of the FLCA;

Articles 28 ff. of the Euro Decree.

3.11. Cyprus

As set out above there are two personal securities accounts involved in the possession and transfer of securities provided in the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001. The depository account is a static account containing all the securities owned by any particular person. For the purpose of trading a person needs to open a trading account.

3.12. Latvia

There is no special definition of securities account in Latvian legislation. According to the Law securities account reflects the ownership rights to financial instruments. A book entry in a person's financial instruments account shall be evidence to entitlement to financial instruments, except in the cases referred to in Paragraph 3 hereof (Article 125, Law). Paragraph 3 provides that an investment brokerage firm, a credit institution or the LCD shall be entitled to open a financial instruments account in which the financial instruments held by a particular person are accounted for (nominal account).

3.13. Lithuania

Securities are held in two-tier system in Lithuania:

3.13.1. the upper (first) tier is operated by the CSDL. The first tier include **general (omnibus) securities accounts** opened and managed by the CSDL, securities issue registration accounts with the CSDL as well as client accounts of account managers registered abroad that are opened and managed by the CSDL in the name of the account managers, indicating that they act as account managers (applied only with respect to foreign central or international depositories). Securities issue registration accounts and general securities accounts are opened with the CSDL for every securities issue made by any of the issuers. Securities issue registration accounts and general securities accounts are opened for the purpose of the securities circulation control and they shall give no proof of ownership to the securities. The securities issue registration account of the CSDL shall record the total number of securities issued by a certain issuer. The general securities account are opened with the CSDL on behalf of an account manager and shall record the total number of securities of one issue held by that account manager (Art. 10.1.1 of the Rules on Accounting of Securities and Their Circulation, approved by 29 December 2003 resolution No 22 of the Lithuanian Securities Commission (the Rules on Accounting and Circulation of Securities)).

3.13.2. he second tier shall comprise **personal securities accounts** opened and managed by account managers (current, special, pledged securities or securities transferred as financial collateral (without transfer of title) accounts opened in the name of a pledgee or financial collateral holder, accounts of clients of account managers registered abroad that are opened in the name of the account managers) and technical securities accounts. Personal securities accounts are opened on behalf of the owner of the securities. Accounts of securities pledged or transferred as financial collateral (without transfer of title) may be opened on behalf of the pledgee or financial collateral holder (in addition specifying the owner of the securities). Accounts of the clients of the account managers registered abroad may be opened on behalf of those account managers, indicating that they act as account managers. In compliance with the procedure established by these Rules, personal securities accounts shall also register restrictions of securities transferability and other encumbrances as well as investors' claims during the primary trading in securities (Art. 3.2 of the Rules on Accounting and Circulation of Securities). In other words, the ownership right to the securities is tied to the record made in the personal securities account managed by the intermediaries. Notably, in very exceptional cases the CSDL may open personal securities accounts as well; if so, the ownership right to the securities shall be proved by the records made in such personal account. Personal securities accounts are not construed as securities themselves under Lithuanian law. Hypothetically it is possible a person might hold a securities account however with no records recorded therein (an empty account). Securities accounts should be deemed as a technical facility containing special parameters prescribed by law. The main function of securities account is to formalize (perfect) particular rights to securities, including ownership to securities, since dematerialized securities are considered as legal fiction.

There are several laws regarding securities holding, management and accounting:

the 18 July 2000 Civil Code;

the 17 December 2001 Law No. IX-655 "On Securities Market";

the 13 July 2000 Law No. VIII-1835 "On Companies";

the 5 July 1995 Law No. I-1018 "On Investment Companies"

the 3 June 1999 Law No. VIII-1212 "On Pension Funds";

the 15 April 2004 Law No. IX-2127 “On Financial Collateral Arrangements”

the 2 July 2002 Law No. IX-1007 "On Income Tax of Residents";

the 20 December 2001 Law No. IX-675 "On Profit Tax".

The securities holding, management and accounting is also subject to a number of legal regulations of the Government of the Republic of Lithuania, the Ministry of Finance, the LSC, the Board of the BoL, the Board of the CSDL and the Board of VSE.

3.14. Luxembourg

A securities account is not explicitly defined by Luxembourg law, it merely refers to an “account” in which securities are deposited or held (Art. 1 of the Securities Act). Thus, it is to be considered as an agreement between the account holder and the depository to record in book-entry form assets held by the latter on behalf of the former. Such account agreement, with exception to some specific provisions under the Securities Act in terms of investor protection, is to be governed by the rules applicable to ordinary accounts. For accounting purposes, securities deposited or held by a depository must be segregated from its own assets and booked off balance sheet. For the purposes of the Securities Act, the securities account records the entitlement of the client against the depository (see below for further explanation of the nature of this entitlement).

What are the relevant custody, commercial, accounting and tax laws?

It is very difficult to provide an exhaustive list of all relevant legislation, the most important being: the Commercial Code, the Securities Act, the Companies Act, the Civil Code (deposits: Art. 1915 and following), the law of 1 August 2001 concerning the transfer of ownership by way of security, the law of 20 December 2002 relating to undertakings for collective investments, the amended law of 5 April 1993 relating to the financial sector, the law of 22 March 2004 on securitisation, the law of 15 June 2004 on risk capital investment companies, the law of 27 July 2003 on trust and fiduciary contracts, the law of 3 September 1996 on the involuntary dispossession of securities, the amended law of 4 December 1967 on income tax.

3.15. Hungary

A securities account is a registration of the dematerialised securities and the rights emerging from them for the benefit of the owner. The owner of a dematerialised security shell be the person on whose account the security is credited. Dematerialised securities can be traded only though debiting/crediting a securities account. Securities accounts of the owners of securities are kept by an investment service provider, the securities accounts of the investment service providers are kept by the clearing house. The main rules are outlined in the Capital Market Act, the details can be found in Gov. Reg. no. 284/2001. The most important tax regulations are in Act 117 of 1995 and Act 81 of 1996.

3.16. Malta

Maltese law has no definition or reference to securities accounts but these are used in practice by intermediaries, such as stockbrokers or investment advisors, by the central bank of Malta and by the Malta stock exchange. These accounts are ledger book pages where a customer's holdings (acquisitions and disposals) in particular securities are entered by the administrator of the book entry system, usually the issuer, and which are then confirmed by contract notes.

The function of the security account is to keep a record of the holdings of a customer's assets, distinct from the assets of another customer of the same issuer or intermediary and the intermediary's own assets. Intermediaries who hold assets as part of the services they render are required to be authorised under the ISA.

This includes advisors, stockbrokers, managers and custodians who are referred to as "subject persons" in the **investment services act (control of assets) regulations**, (l.n.240 of 1988) which is the main body of law which regulates authorised persons holding assets while rendering an investment service.

The regulations state that such assets will be deemed to remain in the ownership of the customer at all times. This rule applies even to fungible securities which are segregated by appropriate records. Consequently these assets are not included in the balance sheet of the intermediary and for purposes of taxation, the intermediary is disregarded and reference is only made to the customer.

It is the customer's duty to declare income for tax and the customer is granted an option either to receive income gross or net of a 15% final witholding tax. Intermediaries are usually recognised by the inland revenue as paying agents for the purposes of tax and can withhold tax when a customer selects the final tax option.

This rule does not apply to the central securities depository of the Malta stock exchange which holds securities for account holders of the exchange and has no function in relation to taxation. It is the holder of the account who may be an intermediary, such as a custodian, who carries out such functions.

The CSD is only a provider of registrar and securities account services to issuers and the MSE.

3.17. Netherlands

A securities account is an administrative record opened in the books of an intermediary in the name of an investor, reflecting the holding and administration of the investor's securities. An account is primarily a tool to record which rights with respect to securities the investor has against the intermediary. Further, a function of the account is to create a means to dispose over the securities credited to the account without having to move any underlying securities. Last, the account may to some extent evidence the account holder's right over the securities credited to the account.

3.18. Austria

Section 11 para 1 Deposit Act provides that a depositary (securities account provider) must keep a ledger of deposits (commercial books of account or book records) into which each securities account as well as kind, nominal amount or number of pieces, number or other characteristics of the securities held for this account must be entered. In case the account holder authorised separate safekeeping, safekeeping in a sum, irregular safekeeping or the pledging of

securities, it must be entered into the ledger of deposits. The ledger of deposits may be replaced by records which are equivalent to book records.

The securities account is not different to the accounts which must be kept pursuant to the relevant provisions of the Commercial Code in its sections 189 and 190. These accounts are part of the books which a merchant (professional-"Kaufmann") must keep. The ledger of deposits is subject to the General Accounting Principles according to the Commercial Code.

Pursuant to section 132 Federal Tax Code ("Bundesabgabenordnung") the books and records and related proofs must be kept for seven years after the end of the calendar year for which the last entry into the books has been made.

In relation to the securities account holder the securities account serves as information of the credit and debit of securities to the account and must be reconciled with the customer. The general terms and conditions of Austrian banks provide certain rules for maintaining securities accounts.

Under the general rules of civil law which ask for physical transfer of securities ("tangibles") for perfection ("modus") **or an equivalent legal act**, the book entry **may serve as a token** for the transfer of the securities (section 428 General Civil Code). ("Besitzanweisung", instruction to hold the securities in the name of a certain other account holder).

3.19. Poland

Securities accounts - within the definition used in the questionnaire - are part of the registration system for dematerialised securities, in which entries enable to determine persons entitles to rights in securities and their ownership balances. Dematerialised securities only exist in the form of entries on securities accounts. A contract which obliges its party to transfer dematerialised securities shall transfer the securities when an appropriate entry is made in the securities account.

3.20. Portugal

When speaking of securities accounts one must distinguish as follows:

First, there is the **Issue Securities Account**, which is an account held with the Issuer of the securities, which must necessarily mention (article 44. CVM):

a. The issuer's identification, particularly its name, headquarters, corporate number, the register of companies where it is registered along with the respective registration number;

b. The complete characteristics of the securities, namely the type, the rights that, in relation to that type, are especially included or excluded, the form of representation and the nominal or percentage value;

c. The quantity of securities that make up the issue, the series they refer to and, in the case of continuous issue, the up-dated amount of securities issued;

d. The amount and the date of release payments foreseen and carried out;

e. The changes that occur in any of the details in the abovementioned sub-articles;

f. The date of first registration of ownership or the delivery of the certificates and the identification of the first holder, as well as, if it is the case, the financial intermediary with whom the holder entered into a contract for the registration of the securities;

g. The sequence number of securities represented by physical certificates.

The information mentioned in paragraphs a), b) and c) above must be reproduced (i) in an account opened by the Issuer with the management entity of the centralised securities system, when the securities are integrated in such a system or (ii) in an account opened by the Issuer with the Financial intermediary that renders securities registration services to the issuer, when that is the case.

Secondly, there are **Individual Ownership Accounts**, which can be held either with the Issuer or with a Financial Intermediary. There are some Special Individual Ownership Accounts which can be held directly with the national centralised securities system (e.g. for listed securities which are pledged or encumbered).

Please note that Individual Ownership Accounts are the only "securities accounts" for the purposes of this questionnaire, because such Individual Ownership Accounts are the only ones that are maintained either by the Issuer or by Financial Intermediaries where positions for clients (investors) regarding securities are entered by way of book entry.

In what concerns **book-entry securities integrated in a centralised securities system** (which necessarily includes book-entry securities that are listed on a regulated market, as well as any book entry securities which the respective Issuer has decided to integrate in a centralised securities system), such securities must be registered in Individual Ownership Accounts opened with a Financial Intermediary which is a participant to the centralised system where the securities are integrated. The same applies to Securities represented by physical certificates when integrated in a centralised securities system (which necessarily includes securities that are listed on a regulated market and securities that are represented by a single physical certificate, including also any securities represented by physical certificates which the respective Issuer has decided to integrate in a centralised securities system). As mentioned before, under Portuguese law (articles 105., 106.-1 and 107. CVM), the provisions relating to book entry securities in a centralised system apply to securities represented by physical certificates when such securities are integrated in a centralised system. This is so because after being deposited in the centralised securities system, the securities represented by physical certificates are registered in an account and - from that moment on and until exclusion from the centralised securities system - such securities are transferred by debiting and crediting book entry accounts.

Securities which are not integrated in a centralised securities system, can either be registered in Individual Ownership Accounts, opened with a financial intermediary appointed by the Issuer or in Individual Ownership Accounts, opened with the Issuer or with a Financial Intermediary that represents it.

According to Portuguese law, (i) book entry securities to the bearer; (ii) securities distributed by public offer and other securities belonging to the same category, (iii) units in a collective investment scheme and (iv) securities issued jointly by more than one entity; in any case, **when not integrated in a centralised system**, must necessarily be registered with a single Financial Intermediary appointed by the Issuer. If the Issuer is a Financial Intermediary, the registration must be made with

another Financial Intermediary. The Financial Intermediary must adopt all the necessary measures to prevent and, with the Issuer's collaboration, correct any discrepancy between the quantity, total and category, of securities issued and the quantity of securities in circulation.

In addition to the information detailed in paragraphs a), b) and c) above, regarding the Issue Securities Account, the Individual Ownership Accounts must contain the following information (article 68. CVM):

a. The identification of the holder and, in case of co-holders, the identification of a common representative;

b. The debit and credit entries of quantities of securities acquired and sold, with identification of the account where the respective debit and credit entries were made;

c. The total amount of securities existent at any moment;

d. The allocation and payment of dividends, interest and other income;

e. The subscription and acquisition of securities, of the same or different type, to which the registered securities confer rights;

f. The detachment of inherent rights or securities and, in this case, the account where they are registered;

g. The constitution, amendment and term of usufruct, pledge, judicial seizure or any other legal status that burdens the registered securities;

h. Blockage of securities and its cancellation;

i. Legal actions proposed relating to registered securities or to the registration itself and the respective decisions;

j. Other references required by the nature or by the characteristics of the registered securities.

The details mentioned above must include the date of registration and the abbreviated reference of the documents used as its basis.

Thirdly, when securities are integrated in a centralised securities system, there are a number of accounts that must be taken into consideration, including the **Securities Accounts Opened at the Centralised Securities System Level**, which were not specifically mentioned. These are "control accounts" as better described below, because centralised securities systems consist of inter-linked groups of accounts, which, among other, allow control over the amount of securities in circulation and their inherent rights.

Centralised securities systems may only be managed, in Portugal, by entities that fulfil the requirements established by special legislation. The operational rules necessary for the functioning of centralised systems are established by the respective managing entity, being subject to registration with CMVM.

Please note that integration in a centralised system:

i. covers all securities of the same category;

ii. depends on a request made by the issuer; and

iii. is made by registration in an account opened with the centralised system.

Please note additionally that any securities that are not compulsorily integrated in a centralised system may be excluded at the request of the issuer.

As mentioned before, a centralised securities system consists of inter-linked groups of accounts, through which the constitution and transfer of securities is processed and which allow control over the amount of securities in circulation, and their inherent rights. A centralised securities system governed by Portuguese law, must, at least, be constituted by the following accounts:

a) The Issue Securities Accounts, above mentioned;

b) The Individual Ownership Accounts, necessarily opened with Financial Intermediaries which are Participants to the Central Securities Depository;

c) The Issue Controlling Accounts, opened by each of the issuers with the system's managing entity;

d) The Accounts for the control of Individual Ownership Accounts, opened by the Participant Financial Intermediaries with the system managing entity.

If the securities have been issued by an entity subject to foreign law, the Issue Securities Account described above may be opened with a Financial Intermediary authorised to conduct business in Portugal, or be replaced by information provided by another centralised system with which there is adequate co-ordination.

The accounts described in paragraph (d) above are global accounts opened in the name of each one of the Financial Intermediaries authorised to manage Individual Ownership Accounts and the sum of the respective totals should be, in relation to each category of securities, equal to the sum of the total of each one of the individual registration accounts.

The accounts described in paragraph (d) above should separately disclose the amount of securities held by each Financial Intermediary acting as registering entity and holder.

The centralised system managing entity is liable for damages caused to financial intermediaries and issuers as a result of the omission, irregularity, error, shortcomings or delay in performing registrations and in transferring information that it should provide, except if it is the fault of the injured parties.

The centralised system management entity has the right to redress against the financial intermediaries for the compensation paid to the issuers, and against these, for the indemnities paid to financial intermediaries whenever the facts on which liability is based are imputable, in either case, to the financial intermediaries or the issuers.

Fourthly, Specific Individual Ownership Accounts must be opened with the centralised system's management entity, relating to pledged securities or securities, which may not be transferred or, for any other reason, may not fulfil the requirements of trading on a regulated market.

The centralised system managing entity must adopt the necessary measures to prevent and correct any discrepancies between the amount, total and category of securities issued and those in circulation.

3.21. Slovenia

3.21.1. The dematerialised securities account is defined in Art 17 of ZNVP:

a) The dematerialised securities account (hereinafter: securities account) shall include securities held by individual holders, which have the same legal ownership position and which are subject to the same authorisation for registration of orders for transfer of securities to another securities account or authorisation for registration of third-party rights to individual securities.

b) The legal ownership position shall be the same within the meaning of the preceding paragraph when holders of dematerialised securities are the same persons and when there exist no third-party rights to such securities, or if the same third-party rights are registered.

c) The authorisation for the recording (entering) of orders shall be the same within the meaning of the first paragraph of this Article when the holders authorise the same member of the Clearing and Depository Corporation (KDD registry member) to register (enter) orders for transfer of dematerialised securities to other securities accounts or to register third-party rights to their securities by signing an agreement on the management (maintenance) of a dematerialised securities account, a stockbroking agreement or on the basis of any other legal transaction.«

In more detail dematerialised securities accounts (i. e. holders' accounts) are defined by KDD Rules. Pursuant Art 32 of KDD Rules:

Holder's account *is an* account *of dematerialised securities that records dematerialised securities:*

1. owned by the same person; and
2. with respect to which the same registry member or KDD is authorised to enter holder's orders to dispose of securities.

Third party rights on dematerialised securities and legal facts, recorded in the central registry with respect to dematerialised securities, are entered in the sub account maintained within the holder's account of such dematerialised securities.

Maintenance of holder's account *means the entry of holder's orders to dispose of securities.*

Maintenance ***of sub account*** *means the entries of orders of persons entitled to dispose of the third party's right or exercise this right.*

Pursuant *Art 32 of KDD Rules the following types of holders` accounts are* maintained in the central registry:

1. registry account,
2. client account,
3. house account,
4. portfolio account and
5. custody account.

A registry account is a holder's account maintained by KDD.

A client account is a holder's account maintained by a registry member for the holder on the basis of a contract on dematerialised securities account maintenance concluded with the holder, or on the basis of another contract.

A house account is an account of dematerialised securities held by a registry member who maintains this account.

A portfolio account is a client account maintained by a registry member who performs for the holder securities management services (with respect to performance of these services).

A custody account is a client account held by an investment fund, mutual investment fund or a fund of assets for covering technical provisions of a pension company and maintained by a registry member who performs custody services for this fund pursuant to ZISDU-1 (The Act on Investment funds and Management Companies).

The holder of dematerialised securities, registered on his (holder's) account of dematerialised securities (i. e. "on whose behalf dematerialised securities are entered in the central registry"), is at the same time legal (and beneficial) holder ("owner") of those securities (Art. 16 of ZNVP). See also answer to Q1.

The relevant laws, regulating the dematerialised securities accounts are:

Dematerialised Securities Act (ZNVP):

defines the legal nature of dematerialised securities accounts,

sets the legal rules for transfer of dematerialised securities and for acquisition of third party rights on dematerialised securities.

the Securities Market Act (ZTVP-1):

in chapter 7 regulates legal relationship (rights and obligations) between a holder and stockbrocking company (investment firm) that maintains holder's dematerialised securities accounts

Due to the fact that the holder of dematerialised securities account is at the same time legal (and beneficial) holder ("owner") of dematerialised securities entered (registered) in this account no specific accounting and tax laws apply to dematerialised securities account, i. e. general accounting and tax laws regulating investments in securities and transactions with securities apply.

3.22. Slovakia

A securities account where the book-entry securities registered with the central securities depository are held is an account for holding of securities by the beneficial owner. Such account can be opened by the central securities depository directly in its registration or by the member of CSD. In the securities owner's account are registered mainly data on owner of account and on securities registered in this account. Securities account is used for keeping the evidence of ownership of securities and for effecting transfer of securities, blocking securities, for creation of lien on securities and other services. The securities owner's account as defined above is subject to the Act No.566/2001 Coll. on Securities and Investment Services as amended. Except for the previously mentioned act, the Act No.429/2002 Coll. on The Stock Exchange has a direct effect on securities account and Act No.431/2002 Coll. on Bookkeeping as amended and Act No.595/2003 Coll. on Income tax as amended have an indirect effect on securities accounts.

3.23. Finland

In the dematerialised book-entry system, an account is the unit of registration of rights pertaining to securities credited in the account. As a main rule, book-entry securities are not held in fungible pools in Finland. Instead, securities are registered in investor-specific accounts kept in the investors' names on the level of the CSD. Book-entry securities may also be credited to a special account (custodial nominee account) to hold a collective securities position. Book-entries owned by foreign individuals, corporations or foundations may be credited to such custodial nominee account administered by a custodian on behalf of the beneficial owners.

The custody and accounting relating to the book-entry system is governed by the Act on Book-Entry Accounts (827/1991). The Act contains provisions on:

the operation of book-entry accounts,

the entries in these accounts and the legal effects of these entries

the provisions on strict liability for errors in the book-entry system

the secured position of a bona fides buyer against the seller's creditors and other third parties.

Regarding physical securities and non-Finnish securities that have not been incorporated in the book-entry system, the Finnish law does not recognize any specific meaning for a 'securities account' outside the book-entry system. The practitioners use rather a reference to 'a custody holding'. There is no written law in respect of custody accounting relating to such holdings, either.

By virtue of chapter 4, section 5 a, paragraph 5, of the SMA, the Finnish Financial Supervision Authority has issued a prudential regulation on treatment of customer assets (No. 201.13) by intermediaries. The regulation deals with segregation, custody, processing as well as clearing and settlement of customers' cash funds and other assets (customer funds), pledging of customers' securities and safeguarding the customers' position in clearing and settlement. Furthermore, the Financial Supervisory Authority as published a guideline on agreements for safekeeping and administration of securities (including safe custody), book-entry accounts and portfolio management.

The tax laws applicable to securities holdings are generally the same irrespective of whether the holding is maintained in the book-entry system or outside the system. The most important tax laws in this respect are:

Law on Income Tax (1535/1992)

Law on Trade Taxation (360/1968)

Law on Withholding Tax (627/1978)

Law on Asset Transfer Tax (931/1996)

Tax treaties

3.24. Sweden

Securities registered in the CSD may be credited to/registered in a book-entry securities account in a Swedish CSD. The legislation is flexible and the CSD could register "Financial Instruments" in a book-entry securities account. "Financial Instruments" means traded securities and other rights or obligations intended for

trading on a securities market. Even foreign securities could be registered in a Swedish CSD.

A person who is listed as the owner on a Swedish CSD book-entry account shall according to the Financial Instruments Accounts Act and subject to the limitations set forth in the account, be deemed to have the right to dispose of the financial instrument.

Cash can not be credited to such an account but generally the account should contain a payment address, for example a bank account.

3.25. United Kingdom

The regulatory regime established by the Financial Services and Markets Act 2000 imposes a number of requirements on securities custodians operating in the UK, including the general segregation of client assets from house assets and the use of custody agreements.

Under English law intermediary holding client securities as custodian is generally characterised as a trustee. No formalities are required to establish a valid trust of non-land assets. However, there must be certainty of intention (to create a trust); certainty of beneficiary (i.e. the identity of the client must be known or ascertainable); and certainty of subject matter (i.e. the custody asset must be ascertained).[44] In practice certainty of intention and of beneficiary are satisfied by the execution of a custody agreement in customary form. In previous years there has been an active debate about the requirement for certainty of subject matter in relation to omnibus client accounts (where the like assets of more than one client are held in a single client account by the custodian). Today, the prevailing opinion is that the requirement is either inapplicable in relation to intangible assets[45]and/or satisfied where the client account is segregated from the custodian's house account.[46]

Sections 136 and 53(1)(c) of the Law of Property Act 1925 imposes certain formalities on the transfer of intangible assets. Section 136 is considered to be inapplicable to the transfer of rights in securities held by intermediaries, for two reasons. Firstly, on the basis that the intermediary is a trustee, the transferred asset is equitable and not legal, and therefore cannot be subject to a legal assignment. Secondly, legal effect of book entry transfer is understood to be novation and not assignment.[47]

Section 53(1)(c)requires dispositions of equitable interests to be in writing. While it is theoretically possible that this might apply to book entry transfers of rights in securities held by intermediaries, a number of arguments are available that it is not applicable, and it is not the practice of London custodians to comply with the section.

The UK settlement system, CREST, unlike those of other jurisdictions, is a direct holding system. This means that participants in CREST hold their securities

---

44 *Knight v Knight* (1840) Beav 148.

45 *Hunter v Moss* [1993] 1 WLR 934, [1994] 1 WLR 452.

46 *Stapylton Fletcher Ltd (in administrative receivership) Re* [1994] 1 WLR 1181.

47 *R v Preddy* [1996] AC 815.

directly from their issues, and not through an intermediary. Of course, the participants may themselves be intermediaries, holding securities indirectly for their clients.

4. QUESTION NO. 4

WHAT SECURITIES MAY BE CREDITED TO SECURITIES ACCOUNTS? MAY CASH BE CREDITED TO SECURITIES ACCOUNTS AND, IF SO, DOES THE ACCOUNT-HOLDER HAVE A RIGHT ENFORCEABLE AGAINST THIRD PARTIES OR AGAINST THE INTERMEDIARY ONLY? WHAT IS THE NATURE OF SUCH RIGHT?

4.1. Belgium

All financial instruments as defined by the Law of 2 August 2002.

To define its scope of application, Royal Decree 62 explicitly refers to the definition of financial instruments in the Law of 2 August 2002.

May cash be credited to securities accounts and, if so, does the account-holder have a right enforceable against third parties or against the intermediary only? What is the nature of such right?

Under Belgian law, cash may not, per definition, be recorded in a securities account, but nothing would prevent an intermediary from opening a cash account related to a given securities account (for example by giving it an identical account number) to show the link between the assets recorded in the two.

The nature of a depositor's right to cash recorded in a cash account is classically a claim enforceable against the intermediary.

4.2. Czech Republic

Dematerialized securities, physical securities in safekeeping, foreign securities and other investment instruments can be credited to securities account. Dematerialized securities may be credited only to accounts opened by CSD and intermediaries that are the holders of customer account in CSD. Cash can not be credited to securities account.

4.3. Denmark

Securities registered in the CSD may be credited to a securities account in the CSD. Cash may not be credited to such an account. It is difficult to define the "nature" of a right over securities credited to an account, as the approach in Danish law is "dynamic" is the sense that instead of trying to determine a (superfluous) "nature" of a right it is directly analyzed against whom an account holder can enforce his rights (the intermediary, third parties etc.). See answer to Question no. 12. Probably, the only general characterisation that can be made is that the nature of the account holders right is not merely contractual as it has some effects against third parties.

4.4. Germany

As defined under Question (3) the purpose of a securities account is to record securities held in safe custody for customers either in Germany or abroad. Such securities are either issued in form of single or global certificates or are deemed to be securities by way of fiction in case of Federal or State Bonds for which the CSD is registered in the Federal or State Debt Register. It is customary in Germany to credit to a securities account also 'Schuldscheindarlehen' (loans evidenced by written acknowledgement) although they are not transferred by transferring title to the certificate but by assigning the claims evidenced by the certificate. They may not be transferred within the central clearing and settlement system by book entry. Transfer of such claims requires individual assignments outside the clearing and settlement system.

In principle, a securities account may also be used to record other investments of customers acquired from or through the custodian bank, e.g. shares in (limited) partnerships, civil law associations etc. Cash, however, may not be credited to a securities account.

4.5. Estonia

As a general rule there are no "instrument-based" restrictions as to the types of securities that may be credited to a securities account.

There are however the following exceptions to the general rule:

a. the only securities which may be held in a nominee account are securities in the acquisition of which the owner of a nominee account acts as the mandatory agent of the client or on the basis of another similar relationship, and securities received as income from securities held in a nominee account. It is prohibited to hold other securities in a nominee account;

b. units of pension funds may not be held in a nominee account; and

c. units of a mandatory pension fund may only be credited to a pension account (special type of securities account).

The Estonian CSD is not a licensed credit institution, which is why no cash may be credited to securities accounts with regard to securities accounts opened with the Central Register.

4.6. Greece

4.6.1. The following securities can be credited regarding the DSS:

Shares issued by Greek Sociétés Anonymes.

Bonds issued by Greek entities governed by Greek Law, except Greek Government bonds (Art. 58 para 2 of Law 2533/1997).

Greek Certificates of Depository Rights (Depository Receipts) (ELPIS) (Article 59 of Law 2396/1996).

4.6.2. Regarding the BoGS

Greek Government Securities.

Cash cannot be credited to the above mentioned (under a. and b.) securities' accounts.

4.6.3. Regarding the accounts held by credit institutions and investment firms as custodians (and/or for settlement purposes), both hold cash accounts. Investment firms have to separate own money and customers' money kept in credit institutions, keeping money owed to their customers in different deposit accounts from own money. Money held by investment firms within financial intermediaries (credit institutions or other custodians) for clients' account are usually not identified by the end customer's name within the financial intermediary holding the money. Therefore, the cash account holder within the investment firm does not have any right against the (upper tier) financial intermediary, i.e. by claiming that he is the beneficial owner of such money, but only against the investment firm, keeping his account. In case of insolvency of the investment firm keeping cash accounts, Article 6 para 3 provides for investors' protection, as explained above under 1.2.

4.7. Spain

Only securities that according to its legal regime may be held by means of book-entry (including those coming from foreign CDSs in the terms established in section B a) and b) of the **Introduction**) may be credited to securities accounts with the scope and effects described in answer to question 3 above.

May cash be credited to securities accounts and, if so, does the account-holder have a right enforceable against third parties or against the intermediary only?

No. Only securities held by means of book-entry are capable of being credited to securities accounts. As a consequence, the possibility of crediting cash amounts there is excluded.

On the other hand, it is a common commercial practice that the opening of a securities account requires the simultaneous opening of a cash account linked to the securities account, with the aim of crediting dividends or interests in securities, or debiting the fees agreed by the intermediary and its client. However, these are two different legal relationships over different objects. In fact, cash accounts are always held with credit institutions that are authorised to perform deposit-taking activities. Participants in IBERCLEAR that are not credit institutions –i.e. investment firms– may open and maintain a securities account in the name of their clients, but they also require the opening of the relevant cash accounts with a credit institution. Clients have to authorise the investment firm to credit and debit amounts in their cash accounts.

What is the nature of such right? N/A

4.8. France

4.8.1. What securities may be credited to securities accounts?

Pursuant to the law on dematerialisation n° 81-1160 dated December 30, 1981 as codified in Article L. 211-4 of the MFC, all securities issued in whatever form in France and subject to French law are required to be registered in an account by way of book entry.

Since 1984, it has been an obligation for:

- shares and other securities equivalent to shares,
- bonds and other debt instruments,

- securities issued by collective investment undertakings ("OPCVM").

Since 1993, it has been also an obligation for negotiable debt instruments ("titres de créances négociables").

According to the Euroclear France operating rules, Euroclear France may admit to its operations securities issued under a foreign law provided that the nature of such securities is equivalent to the financial instruments contemplated under 1 or 2 or 3 of paragraph I of Article L. 211-1 of the MFC (see (1) above).

4.8.2. May cash be credited to securities accounts and, if so, does the account-holder have a right enforceable against third parties or against the intermediary only? What is the nature of such right?

Cash is not credited to securities accounts. However, for each securities account there is a corresponding cash account. If the intermediary is a credit institution, the cash account is a current account. In the event the intermediary is not a credit institution, an additional protection is provided for by Article L. 533-8 of the MFC which prevents intermediaries other than credit institutions from using for their own account cash deposits made by their clients[48].

4.9. Ireland

Given that there is no single meaning attributable to the term "securities account", the assets that may be credited to an account described as such will depend on the terms and conditions pursuant to which that account was established. It is unusual to credit cash to the same account as securities, particularly where it is intended that the holder has a proprietary interest in the securities (cash so credited comprises a debt – a contractual right – from the deposit holder to the depositor). The nature of the right of the account-holder to assets credited to any account will depend on the terms and conditions applicable to the account but, where both cash and securities are credited to the same account, it may be more difficult to establish a proprietary interest to the securities. This may breach certain duties of trustees to segregate trust assets.

4.10. Italy

Shares and equity securities; covered warrants, bonds and debt securities; units in investment funds; money market instruments; and any other traded securities that give the rights to acquire any of the foregoing instruments.

Cash cannot be credited to a securities account.

4.11. Cyprus

Only dematerialised securities may be credited in the two accounts described above. Of course there are also the upper tier registers described above (Q2) where listed securities are registered as well as all transfers, pledges, liens connected thereto (Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996 Art 5). In these registers are also inserted the names of all

---

[48] See in this respect, H. de Vauplane and J-P Bornet, *Droit des marchés financiers*, Litec, 2001, n° 1167.

persons entitled to ownership, liens etc. These registers constitute proof of ownership etc.

4.12. Latvia

There are no special restrictions what type of securities may be registered in securities accounts. Only restriction is that securities should be in dematerialised form.

Cash may not be credited to such an account. According to the FIML investment brokerage firms are not allowed to hold the cash accounts for customers. There are special requirements for investment brokerage firms how to hold customers cash resources. The investment brokerage firm shall account the cash resources that belong to each customer and are held by that investment brokerage firm and these resources may not be used to meet creditor claims on that investment brokerage firm.

4.13. Lithuania

The following securities may be credited to securities accounts:

i. *securities of Lithuanian and foreign issuers registered with the LSC (i.e. shares of public companies and depositary receipts in respect of shares; debt securities; securities giving the right to acquire shares of public companies, depositary receipts in respect of shares or debt securities by subscription or exchange, including equivalent cash-settled instruments);*

ii. *securities not to be registered with the LSC, when the accounting thereof is carried out by the CSDL and account managers (in a two-tier securities accounting system);*

iii. *securities of investment variable capital companies and foreign securities not to be registered with the LSC when the accounting thereof is carried out by investment variable capital companies and account managers (in the second tier of securities accounting).*

Cash may not be credited to securities accounts. Securities and funds transfers are processed in different systems. Securities are processed in the SSS, operated by the CSDL. Funds are processed in the payment system "LITAS", operated by the BoL.

Dematerialized securities are deemed intangible assets owned in the right of the ownership by the investors. However the legal doctrine of ownership to intangible assets and its legal nature is not properly elaborated in Lithuania. On the one hand, the investors rights to the dematerialized securities are of absolute nature, i.e. in case of bankruptcy of an intermediary, the creditors thereof shall not be entitled to the clients' assets. Also securities may be pledged or be restricted in other ways. If such restrictions are perfected, e.g. by transfer of the pledged securities to a special account, such restriction shall be binding upon third parties. However, it is obvious that status of dematerialized securities and their owners' entitlements are subject to special regulation and not all the rules applicable to protection of ownership right applicable to tangible property are applicable to dematerialized securities. Currently it is not clear whether the rights of investors that acquired securities of the same issue might be construed as joint ownership rights and whether the investors should bear the pro rata risk in case of loss of securities. In addition, the protection of bona fide purchaser of the securities is problematic under Lithuanian law (please, refer to answer to question 24 of the questionnaire). Regarding implementation of the rights deriving from the securities (e.g. right to dividends (profit), voting right) the

situation also differs. In some cases the investor might have direct access rights to the issuer whereas in other not.

4.14. Luxembourg

All securities and other fungible financial instruments as defined by the Securities Act may be credited to securities account.

May cash be credited to securities accounts and, if so, does the account-holder have a right enforceable against third parties or against the intermediary only? What is the nature of such right?

Under Luxembourg law, cash may not, per definition, be recorded in a securities account, but the depository would be permitted to open a cash account related to a given securities account to show the link between the assets recorded in the two.

The depositor's right to cash recorded in a cash account constitutes a claim enforceable against the intermediary.

4.15. Hungary

Dematerialised securities can be credited to a securities account. Cash cannot be credited to a securities account, it is credited to a so called client account, or if the investment service provider is a credit institution, to the bank account of the owner.

4.16. Malta

As securities accounts are the subject of contract between the parties and are in fact whatever the administrator of the account wishes them to be, they can hold cash – subject to the rules relating to the taking of deposits and the relative banking laws which do not permit persons to take deposits for banking purposes.

Authorised intermediaries who are permitted to hold client's monies may receive funds from clients for the purposes of administering the investment portfolio, in which case that cash can be accounted for in the securities account as is the case with proceeds of sale of securities.

4.17. Netherlands

It will depend on the arrangement between the investor and its custodian what securities may be credited to a securities account. As stated in the answer to Question (1), depending on the nature of that arrangement, the investor's interest in the securities may consist of

i. *co-ownership rights in collective deposits of securities of the relevant kind (in Dutch: "verzameldepots") within the meaning of the Securities Giro Administration and Transfer Act";*

ii. *ownership rights with respect to bearer securities physically held in the Netherlands by a depository on behalf of the investor on an individualised basis; or*

iii. *contractual rights with respect to:*

   a) *bearer securities physically held in the Netherlands by a depository on behalf of the investor on a fungible basis, i.e. securities which are not held on an individualised basis; or*

   b) *bearer securities physically held outside the Netherlands on behalf of the investor's depository, or*

c) registered securities registered in the name of the investor's depository.

Cash credited to an account will always constitute a claim of the account holder against the bank and will therefore be characterised under Netherlands Law as merely a contractual right and not as the ownership of funds.

4.18. Austria

4.18.1. For the answer what securities may be credited to securities accounts, please see the answer to question (1) a) above.

4.18.2. Cash may not be credited to a securities account.

4.18.3. We consider the question "**does the account-holder have a right enforceable against third parties or against the intermediary only**?" to relate not only to cash, but also to securities. In that respect our answer is:

The account holder is deemed to be the owner of the securities which are credited to the securities account. His right of ownership is enforceable against any and all third parties including the account provider.

4.19. Poland

The securities accounts – within the definition in the questionnaire – are used to register securities admitted to public trading in Poland (this refers to the type of instruments referred to in Article 3 of the Law on the Public Trading in Securities of August 21, 1997, mentioned above in (1)), as well as securities not admitted to public trading, if these are capable of being and have indeed been issued in dematerialised form (bonds, bank securities, investment certificates issued by closed investment funds).

Cash is not and cannot be registered on securities accounts. Cash is registered on cash accounts used for the purpose of servicing securities accounts, managed by entities providing brokerage services, which are not banks, or bank accounts, if securities accounts are managed by banks. The holder of a cash account or a bank account does not own the cash held on these accounts, however has a right to demand the return of these assets from the entity managing such an account. The rights of a cash account holder or a bank account are therefore enforceable only against the entity managing such an account.

Securities registered on the securities accounts of investors are not owned by the entities managing securities accounts (in the books of these entities, client securities are recorded as non-balance positions). This means that securities registered on securities accounts do not form part of any bankruptcy estate of the entity managing such accounts. Bearing this fact in mind, as well as the fact that securities exist in dematerialised form, it may be stated that the rights of the holder of a securities account to register securities in them are broadly effective,, i.e. they are equally effective and binding on third parties.

4.20. Portugal

All Securities In The System may be credited to securities accounts.

Cash may not be credited to Securities Accounts.

The holder of an Individual Ownership Account is the owner of the securities registered or deposited in such account. The nature of the ownership right of the account holder is that of a right in rem.

In the case of insolvency of the depository, securities will not form part of the insolvent Financial Intermediary estate, with the right of the holders prevailing to demand the securities be separated and given back.

4.21. Slovenia

Only (dematerialised) securities may be credited to (dematerialised) securities accounts. Cash may not be credited to (dematerialised) securities accounts.

4.22. Slovakia

Only dematerialised securities registered with the central securities depository can be credited to securities account. It is not possible to credit cash to securities account.

4.23. Finland

Any security incorporated in the book-entry system can be credited to a book-entry account. Cash may not be credited to a book-entry account, but the account shall contain information of the payment address of the account holder. This payment address may be a bank account number. However, book-entry securities accounts and cash deposit accounts are separate legally and operationally.

Outside the book-entry system, it depends on the service provider (intermediary) which securities it accepts to the 'custody holding'. The bank intermediaries normally accept cash deposit in connection with the 'custody holding'. Such deposits are treated in the same way as any other commercial bank accounts.

4.24. Sweden

There is no such requirement.

4.25. United Kingdom

An account is a record of entitlement.[49] A securities account is a record of entitlements in relation to securities.

What is its role and function?

Its role and function is to record the entitlement of the custody client to the securities held for it by the intermediary. The nature of these rights depend on the terms of the agreement between the client and the intermediary. It is customary for these rights to be proprietary (i.e. beneficial ownership). In this case, the account is the client's root of title. It provides evidence of the client's property rights, and thus protects the client's assets from the claims of the intermediary's creditors.

What are the relevant custody, commercial, accounting and tax laws?

The detailed UK financial services regulatory requirements relating to the custody of client securities are contained in the Client Asset Sourcebook (CASS). This forms part of the Financial Services Authority Handbook, and is available on line on http://fsahandbook.info/FSA/handbook.jsp. CASS includes requirements relating to: custody arrangements, segregation, registration, recording and holding of client assets, client agreement and client statements, use of client assets and stock lending, and operations.

---

[49] *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75.

The commercial law relating to custody has not been codified. It is generally argued that the law of global custody draws on the law of trusts as well as the law of agency. A number of textbooks are available. These include Benjamin and Yates, The Law of Global Custody, 2nd Ed., 2003, Butterworths, and A. O. Austen-Peters, Custody of Investments: Law and Practice, 2000, Oxford University Press.

There is not a separate accounting regime for securities accounts. In accordance with general accounting principles, indirectly held securities appear as assets on the balance sheet of the beneficial owner, and not as an asset on the balance sheet of the intermediary.

There is not a separate taxation regime for securities accounts. A discussion of the relevant provisions relating to: stamp duty; stamp duty reserve tax; settlements and direct assessment; enforcement in the UK of tax assessed under the laws of another jurisdiction; withholding tax; manufactured overseas dividends; information reporting requirements; taxation of savings income; and value added tax is contained in chapter by Gerald Montagu in The Law of Global Custody, 2nd Ed., 2003, Butterworths.

5. QUESTION NO. 5
MUST THE INVESTOR BE RECORDED BY NAME ON THE BOOKS OF AN UPPER-TIER INTERMEDIARY OR OF THE ISSUER?

5.1. Belgium

Generally no, but pursuant to Belgian law (certain doctrine), it has been considered that Belgian registered shares should be registered in the issuer's register in the name of the investor (beneficial owner) or at least, that because of the penal prohibition to vote on Belgian securities through nominee (see article 651,1° of the Companies Code), only the ultimate beneficial owner as registered in the issuer books can vote in the general assembly.

Only securities for which the investor's name is not required to be recorded at the level of an upper-tier intermediary or the issuer are capable of being held on a fungible basis (through a pooled or collective position held by the intermediary in its name on behalf of its clients; see next answer) pursuant to the provisions of Royal Decree 62. Consequently, Belgian registered shares do not qualify for the holding on a fungible basis.

5.2. Czech Republic

The investor is recorded in owner account opened in his name by investment firm. Investment firm is obliged to inform CSD about the identity of securities owners only for the purpose of drafting of account statement of the register of issues. CSD is obliged to administer register of issues of dematerialized securities pursuant to section 94 (9) of Capital Market Undertaking Act. The main function of account statement of the register of issues is to inform the issuer of people who are entitled to exercise rights of the securities owner. Besides the aforementioned register of issues, the list of owners must be administered in case of dematerialized registered securities. Legal provision regulating particular types of securities provide for the register of dematerialized securities to be considered to be the list of securities owners. The option to administer separate list of shareholders is available to stock company. There is no obligation to record owners of registered dematerialized securities on the books of upper-tier intermediary.

5.3. Denmark

There is no such requirement.

5.4. Germany

No, there is no legal requirement for upper-tier intermediaries to do so. In case of issuing registered shares or registered debt securities (*Namens-schuldverschreibungen*) the issuer may record the name of the investor unless a nominee-concept (e.g. for German Government bonds) is used.

In case of registered shares only the registered person is recognised as shareholder by the issuing company (Section 67 par 2 Stock Corporation Act).

5.5. Estonia

There are two basic options available to the investor in terms of holding structure:

a. holding securities in a securities account opened in investor's name directly with the Central Register – in this case the investor's name appears directly in the list of owners of securities in question (e.g. the shareholders' register);

b. holding securities via a nominee account – in this case owner of the securities account appears in the list of owners of securities instead of investior.

Except the restrictions set forth in a) – c) in response to question (4), no mandatory holding structure is prescribed or imposed by law.

5.6. Greece

This obligation applies only to securities registered in book entry form within the DSS, operating on an 'end investor' basis (see above under 1.1.a.). DSS does not technically acknowledge collective holdings 'for account' (omnibus accounts). Nevertheless, the obligation to register the end investor in the DSS, representing a prudential rule, could not be imposed to foreign credit institutions and investment firms. The latter are not prohibited by Greek Law to invest on ATHEX, acquiring securities held with the DSS, via an omnibus account, i.e. to hold these securities in an omnibus account under their own name held with an Operator in the meaning of DSS, which acts as custodian and administrator of this account. However, the omnibus account would not be identified as such with the DSS, but only with the Operator.

5.7. Spain

With the aim of being duly recognised (entitled) as owner of the securities, including before the issuer, the name of the owner has to appear as such in the relevant level (tier) of the registry structure, that is:

a) In the case of non-listed securities, the registry is maintained by a sole financial entity. Thus, the securities account in the name of the owner has to be held with such entity. Therefore, there is no upper-tier intermediary in this case.

b) In the case of listed securities, the registry is structured in a two-tier system (accounts held with IBERCLEAR -central registry-, and accounts held with its participants –detailed registries-). The name of the account holder appears: (i) in the tier corresponding to IBERCLEAR (accounts opened and maintained by IBERCLEAR) for securities owned by its participants; (ii) exclusively in the "detailed registries" or securities accounts opened and maintained by participants in IBERCLEAR. In this latter case the name of the owner is not required to be recorded in the central registry held by IBERCLEAR.

Only those account holders whose name appears in the corresponding tier will be recognised as such (entitled to proprietary rights erga omnes) with full effects.

On the other hand, in the case of shares that, by mandatory operation of law, are registered shares (banks, insurance companies, etc…), as outlined in the answer to question 1.2.c) above, the name of the owner is also sent to the issuer, so that it can compound and maintain the corporate registry of registered shares (through a complex procedure by virtue of which brokers send every day an electronic file with detail of buys and sells and the name of investors to the issuer). This corporate registry of shareholders (only applicable to registered shares) is only relevant for lex societatis purposes, i.e., it provides entitlement against the issuer, but not against third parties. Both registries –the book-entry registry and the issuer's shareholder registry- shall have the same content. However, due to the fact that an issuer could not deny the inscription in the latter to an investor that appears in the registries held by IBERCLEAR and its participants, even when there no express

rule to solve discrepancies, it is understood that in the case of inconsistencies, the content of the book-entry registry will prevail.

5.8. France

An investor (i.e. owner) is not recorded in the books of an upper-tier intermediary.

A - Principle

Securities whatever their form are required to be recorded in the name of their **owner** under the conditions contemplated by section II of Article 94 of the budget law (loi de finance) for 1982 (law n° 81-1161 of December 30, 1981 (i.e. the dematerialisation law), now codified in Article L. 211-4 MFC).

Securities (valeurs mobilières) issued on French territory and subject to French law whatever their form are required to be recorded in an account maintained with the issuer or an authorised intermediary[50].

Securities (*titres*) of companies represented by shares which are not admitted to trading on a regulated market with the exception of SICAVs are required to be recorded in an account maintained by the issuer in the name of the owner of the securities. However, those rights may be held through an administrative account maintained with an authorised intermediary. Under those circumstances, transfer may only occur through such intermediary through which correspondent transfers in the books of the issuer will be made.

As an exception to the rules set forth in the preceding paragraph, securities admitted to the operations of a central depositary may be recorded in an account maintained with an authorised intermediary to the extent permitted (i) in the articles of association ("statuts") of the legal entity issuing these securities when they constitute equity capital related securities or (ii) in the terms and conditions of the issue when constituting other securities ("titres"). This rule purports to allow the issuance of bearer shares by companies whose shares are not traded on regulated markets.

B - Exception

A far as equity securities ("titres de capital") (i) listed on a regulated market and (ii) whose owner is not domiciled on French territory, are concerned, Article L. 228-1 of the French Commercial Code contemplates the creation of a book entry in the name of a registered intermediary ("intermédiaire inscrit"). The registered intermediary must report its status as a registered intermediary upon opening of its account either with the issuing company or a financial intermediary.

See also in this respect (6) below.

5.9. Ireland

There is no specific legal requirement to this effect and it is usual for investors to be identified by a code rather than name on the books of upper-tier intermediaries. Applicable regulatory requirements would require the account with an upper-tier intermediary must indicate that it is a client account. Whether a specific account must be maintained by an intermediary for each account-holder in order to establish a specific trust is unclear, given the lack of relevant Irish authority (see our response to (2) above regarding the need for certainty of subject matter) but, in the

---

[50] See footnote n° 1.

absence of authority, we would recommend that it is. It is not necessary for the investor to be named on the records of the issuer; it is usual for registration to be effected in the name of the intermediary or its nominee, with an indication that it is held on behalf of a client. In the case of equities, as outlined above, section 123 of the Companies Act 1963 (the "**1963 Act**") provides that no notice of any trust, express, implied or constructive, shall be entered on the register of members or be receivable by the registrar. No note regarding client interests will, therefore, be noted on this register. Regulation 22 of the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996 (which provides the legal framework for paperless securities settlement systems) (the "**CREST Regulations**") provides that the operator shall not be bound by or compelled to recognise any express, implied or constructive trust or other interest in respect of uncertificated units of a security, even if the operator has actual or constructive notice of the said trust or interest.

5.10. Italy

The investor must not be recorded by name in the books of an upper-tier intermediary nor in the books of the CSD.

With regard to registration in the books of the issuer, this is obviously contemplated only with regard to registered shares in accordance with corporate laws. The shareholders' books kept by the issuer shall be updated for the purposes of monitoring shareholding by the tax administration.

The introduction of securities into a central depository system shall not affect the legal obligations arising from title to such securities. In particular, the requirements concerning the updating of the shareholders' register for issuers shall be unaffected.

With regard to dematerialised/immobilised securities, the intermediary is under an obligation to communicate the details of the investors within a given timeframe from the date of payment of profits or the date of issue of the certifications issued to enable investors to participate to the shareholders' meeting.

Among Italian scholars, the question has arisen as to whether registration on the books of the issuer still performs its original function to entitle the exercise of the corporate rights attaching to the securities.

Sources of Law:

Article 5 of Law No. 1745 of 29 December 1962;

Article 84 of the FLCA.

5.11. Cyprus

The investor is recorded by name in the two accounts described above. Date of birth as well as ID number are recorded.

5.12. Latvia

The investor must be recorded by the name by intermediary (if the securities are publicly traded) or by issuer (if non- publicly traded). The LCD does not have to record the investors by name. . LCD opens two accounts for intermediary: one for securities that are owned by intermediary itself and another one for intermediary's customers. According to the LCD rules issuer has the right to identify the owners of its securities by submitting request to the LCD. LCD forward this request to the intermediaries; they shall to submit the require information in due time.

5.13. Lithuania

Since 1 January 2004 the issuers who had managed themselves personal accounts of securities issued by them have had entrust management of these accounts to intermediaries. The intermediaries manage records of identification of the investors. The identification of an investor is not recorded by an upper-tier intermediary (the CSDL), except for the cases than the CSDL manages personal securities accounts as a first-tier account manager. The CSDL as an upper-tier intermediary opens general securities accounts and records only the total number of securities of one issue held by that account manager in its name and in its clients' name. The issuer is entitled to request at any time that the account managers present a list of owners of its securities. This right is exercised by submitting an inquiry to the CSDL. The CSDL shall provide, depending on the choice of the issuer, either a list of account managers or a list of securities owners. In the latter case intermediaries shall be obliged to submit the CSDL with the list of the investors upon the request of the CSDL.

5.14. Luxembourg

No, securities that can be transferred by way of book entry must not be recorded in the name of the investor on the books of an upper-tier intermediary or of the issuer.

5.15. Hungary

Hungarian law knows only the share register, there is no registration for bondholders. Registration in the share register is not obligatory, but only those shareholders can execute the rights emerging from the share, who are listed in the share register. The share register is kept by the issuer or it can appoint a CSD or an investment service provider to keep the share register.

The investor is recorded by name at the investment service provider where he holds his securities account. Being recorded by name on the books of an upper-tier intermediary is not obligatory just a possibility.

5.16. Malta

The law does not require that an investor be registered as holder of shares in his own name and it is possible for other persons to be registered as holders of securities unless expressly prohibited from doing so or there are conditions. The laws assume that it is only the registered security holder who has legal rights for as long as he is registered and no other person may make claims against the issuer.

Some restrictions exist in relation to the holding of shares in regulated companies (such as banks) and the maximum holdings a particular person may have. In such cases the use of intermediaries poses a problem but this can be solved contractually by appropriate clauses in the memorandum and articles of association of the issuer. These kind of clauses cause some administrative problems for custodians and other intermediaries because they create limitations on holdings which a custodian cannot, on it own, supervise.

The same applies to upper-tier intermediaries who are usually not concerned to know who the investor is and will recognise only the holder of the account in its books. Where regulatory laws intervene to control holdings, the issuer and all intermediaries, except those contractually excluding such a role, will be concerned to know that compliance with the law is taking place and so may require appropriate declarations about the underlying investor and his holdings, directly, though the intermediary or other intermediaries.

5.17. Netherlands

There is no such requirement.

5.18. Austria

No (see answer to question (2) under a), last paragraph).

5.19. Poland

(5) An investor owning dematerialised securities does not need to be identified at a higher level. For example, the owners of securities admitted to public trading are not identified at the level of KDPW, i.e. the entity managing the central register for these securities.

In respect to registered shares, the issuer of these shares is obliged to maintain a share register into which shareholder data for these registered shares is entered. Entries to the register are made at the request of a purchaser of registered shares. An entry in the register has a legitimising effect, i.e. the issuer considers the person entered in the share register as a shareholder.

5.20. Portugal

Portuguese Law does not recognise the concept of "upper-tier intermediary". There is no jurisprudence on the matter, as far as we are aware of. An "upper-tier intermediary" would fall into category of a "nominee", which is also not recognised as such in what securities are concerned under Portuguese law (please see answer to question (6) below).

Ownership over securities is only granted through registration in Individual Ownership Accounts, which can be opened either with a Financial Intermediary or with the Issuer, as mentioned before.

Only when Individual Ownership Accounts are held with the Issuer, must the investor be recorded by name on the books of the issuer. This is true even when the securities are nominative, because, as mentioned before, the fact that the securities are nominative merely gives the Issuer the right to be constantly informed of the identity of the respective holders (article 52. CVM) - the investors, however, will not have to be recorded by name on the books of the Issuer.

Because Portuguese law does not recognise the concept of upper-tier intermediary, if an Individual Ownership Account is held in the name of an upper-tier intermediary, the upper-tier intermediary will be regarded - for all effects and from a Portuguese law perspective - as the owner of the securities held in such account.

Please note additionally that any records kept by an "upper-tier intermediary" - including any sub-accounts - will not be considered to be In The System and will have no *in rem* effects, which means that the investors so recorded will not have, from a Portuguese law perspective, any ownership rights over the securities

5.21. Slovenia

Investor (holder) of registered dematerialised securities, which are registered on his dematerialised securities' account in the central registry, is at the same time considered to be registered in the share ledger or register of registered securities with respect to the issuer (Par. 2 Art 65 of ZNVP).

See also answer to Q1.

5.22. Slovakia

No, if securities are registered in securities owner's account maintained by the intermediary (member of the CSD) in issuer's registry there is only information on intermediary in whose administration is the account with the beneficial owner. Only if beneficial owner keeps the securities owner's account directly with the central securities depository the name and other information on owner is recorded in issuer's registry. Also in the books of upper-tier intermediary the name of the investor does not have to be recorded although intermediary can open only securities accounts, which are deemed to be the beneficial owner's accounts.

5.23. Finland

As a main rule, investors are recorded by name on the list of holders of rights in the book-entry system. Regarding Finnish companies, Finnish shareholders may not be represented by a nominee and thus Finnish shareholders shall always be recorded by name on the books of the issuer. Non-Finnish shareholders are entitled to nominee register their holdings and thus such shareholders will not be recorded on the books of the issuer. In respect of fixed income securities in the book-entry system, Finnish holders have the possibility to use a nominee. However, nominee registration is excluded in respect of mutual funds (UCITS).

Outside the book-entry system, nominee registration is not recognized on the sharelolder list. Therefore all shareholders in a Finnish company not incorporated in the book-entry system should have their ownership recorded on the list of shareholders. For bearer securities, record on the books of upper-tier intermediary or of the issuer is not called for.

5.24. Sweden

For an owner of securities registered in the book-entry system there are two options. He can be registered on a securities account in the CSD as owner of the securities in the account (Owner Account). Another alternative is that the securities can be credited to an account held in the name of a person who is acting on behalf of the true owner (Nominee Account). A CSD may grant certain legal persons the right to be registered as nominees in respect of financial instruments. A nominee must maintain one or more book-entry accounts for the financial instruments managed by the nominee.

The Financial Instruments Accounts Act stipulates that a book-entry account for nominee-registered financial instruments must set forth information regarding: 1. the nominee's company name, company number or other identification number, and mailing address; 2. a notice that the instruments are managed on behalf of a third party; 3. with respect to shares, the information referred to in Chapter 4, section 18, first paragraph, subsections 1-5, and the second paragraph; and 4.with respect to debt instruments, the information referred to in Chapter 4, section 19.

As follows directly from the law it must be registered on the securities account that it is an Nominee Account. There is no general requirement that the identity of the true owner(s) is registered (or disclosed to the CSD).

In chapter 3 section 12 in the Financial Instruments Accounts Act there is a disclosure rule for shares.

section 12 Upon demand by the central securities depository, a nominee shall provide information to the securities depository with respect to the shareholders

whose shares are managed by him. The information shall include the shareholders' names, personal identification numbers or other identification numbers, and mailing addresses. The nominee shall, in addition thereto, state the number of shares of different classes owned by each shareholder. The information shall relate to the circumstances at the time determined by the central securities depository.

Upon request by a Swedish CSD registered company, the central securities depository shall demand the submission of such information regarding the company's shareholders as referred to in the first paragraph.

Swedish CSD registered companies are entitled to access at the central securities depository information which has been provided in respect of the company's shareholders.

Where special cause exists, the Swedish Financial Supervisory Authority may grant a nominee an exemption from the obligation to provide information pursuant to the first and second paragraphs.

5.25. United Kingdom

Generally, freedom of contract prevails between the client and the intermediary, so that any type of securities can be so credited.

May cash be credited to securities accounts and, if so, does the account-holder have a right enforceable against third parties or against the intermediary only? What is the nature of such right?

While there is no express legal prohibition against crediting cash to a securities account, it is not customary and would be problematic in most cases for the following reasons. Many custodians are banks, and operate custody cash accounts as bank accounts.[51] A credit balance in a cash account records the debt of the bank to the depositor.[52] Thus, the rights of the custody client are proprietary in relation to securities, but merely personal in relation to cash. The effect of crediting both types of asset to the same account might compromise this distinction, at least as a matter of evidence, and thus run counter to the general duty of trustees to segregate trust assets, and the FSA Principle for Business No.10 ("A firm must arrange adequate protection for clients' assets when it is responsible for them").

Must the investor be recorded by name on the books of an upper-tier intermediary or of the issuer?

The investor need not be recorded by name on the books of an upper-tier intermediary. Where the investor is a managed fund, it is customary for the fund to be identified by an alphanumeric code rather than by name. However, the title of the account must make it clear that the assets belong to a client.[53]

The investor need not be recorded by name on the books of the issuer. CASS 2.2.10 permits a range of alternative names in which legal title may be registered, including but not limited to the name of the client. It is understood that, in many cases, the name of the intermediary or its nominee would appear in the issuer's

---

[51] In accordance with the rule in *Space Investments.*

[52] *Carr v Carr* (1811) 1 Mer 541

[53] CASS 2.2.5.

register, together with a brief client designation. A full indication of the name of the beneficial owner in the register is not permitted.[54]

[54] Companies Act 1985, s. 360.

6. QUESTION NO. 6

MAY SECURITIES BE CREDITED TO A SECURITIES ACCOUNT IN THE NAME OF A PERSON OR ENTITY WHO IS ACTING ON BEHALF OF ANOTHER (I) WHERE THE EXISTENCE OF THE OTHER IS NOT INDICATED AND (II) WHERE THE EXISTENCE BUT NOT THE IDENTITY OF THE OTHER IS INDICATED? MAY THE SECURITIES ACCOUNT BE OPENED IN THE NAME OF THE PERSON OR ENTITY WHO IS MAINTAINING THE ACCOUNT? MAY SECURITIES BE CREDITED TO A SECURITIES ACCOUNT IN THE NAME OF A PERSON OR ENTITY WHO IS ACTING ON BEHALF OF MORE THAN ONE OTHER, I.E. SUCH THAT THOSE OTHERS HOLD A COLLECTIVE SECURITIES POSITION, RATHER THAN SEGREGATED INDIVIDUAL POSITIONS PER PERSON? IS THE PERSON OR ENTITY IN WHOSE NAME THE SECURITIES ACCOUNT IS CREDITED (IF DIFFERENT FROM THE PERSON OR ENTITY MAINTAINING THE ACCOUNT) CONSIDERED TO BE AN INTERMEDIARY? DOES THAT PERSON OR ENTITY HAVE TO DISCLOSE WHETHER IT IS ACTING ON BEHALF OF INVESTORS AND, IF SO, THEIR IDENTITIES?

6.1. Belgium

Yes, both scenarios are possible under Royal Decree 62. The application of the two scenarios is, of course, subject to the regulatory regime applicable to the account holder, which may or may not require it to label client accounts as such.

When working under the fungible holding regime of Royal Decree 62, the account holder opens its account with the upper tier in its own name. If the assets credited to the account are proprietary assets, it will be acting in its own name and for its own account. If the account is opened in its own name but for the account of one or more third parties (clients), the account holder will, under Belgian law, be acting as a commissionaire (we are not aware of any identical concept in common law, Anglophone jurisdictions, but it seems to be similar to the concept of an agent for an undisclosed principal in English law). The rights and obligations relating to the account will flow between the account holder and the upper tier irrespective of whether the assets credited to the account belong ultimately to a third party.

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes, but as a measure of asset protection, article 12 of the Royal Decree 62 provides that if the settlement institution is itself the owner of a number of financial instruments, and there is an insufficiency of securities, the entity maintaining the account shall only be entitled to the number of financial instruments remaining after the total number of financial instruments of the same category which it holds for account holders has been restituted to such account holders.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, enabling the pooled holding of assets in omnibus accounts is the very purpose of Royal decree 62.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

We are not sure to understand this question. We would like to consider the following example:

Upper tier

Account holder 1

Client 2

(Account holder 1 is maintaining a securities account with an upper tier intermediary on behalf of Client 2 (one of account holder 1's clients). The account is opened in the name of "Account holder 1/Client 2). In this example, Account holder 1 is the intermediary of Client 2. Client 2 might be an intermediary for investors who have opened accounts with Client 2. The fact that Client 2 is mentioned at the level of the upper tier does not make it an intermediary at the same level of Account holder 1. The upper tier intermediary has no account relationship with Client 2.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

Such disclosure is not required under the rules of Royal Decree 62 but may be required for anti-money laundering or tax purposes.

The Financial Action Task Force 49 Recommendations, the European Council Directive 2001/97/EC of 4 December 2001 and the article 5 of the Belgian Act of 12 January 2004 on preventing the use of the financial system for the purpose of money laundering and terrorism financing state that in case of doubt on the question whether the clients are acting for their on behalf or in case of certainty that they do not act for their own account, financial institution (such as Euroclear Bank) are required to identify the individual(s) for the account of whom the account is opened or the transaction is conducted.

However the article 6 of the above mentioned Belgian Act provides for an exemption to this identification requirement when the clients are also credit or financial institutions established in a state whose legislation imposes equivalent obligations as those set forth in Directive 97/308/EEC. The member states of the Financial Action Task Force on money laundering are presumed to satisfy this condition.

Furthermore, article 22§2 of the Royal Decree of 8 October 2004 on the prevention of money laundering and terrorism financing states that institutions that perform clearing and/or settlement services, and that implement appropriate procedures enabling them to ascertain that the clients for whose benefit those services are performed apply satisfactory mechanisms for the prevention of money laundering and terrorism financing may decide, in the context of this activity, not to identify and verify the identity of the customers of the clients for whose benefit they perform those services.

Indeed, as settlement institutions operate in Belgium in a fungible account structure, it is not possible for such systems to identify the customer for whom a counterparty is acting for each transaction without changing fundamentally their system. In this respect, the Euroclear contracts for example require the counterparties to take all measures in order to identify their customers and to control that these measures are applied on an ongoing basis, during the whole duration of the commercial relationship with the bank.

6.2. Czech Republic

There is no general restriction for account holder to act on behalf of another even if the existence is not indicated. On the other hand, customer account can be held by entities specified by law (investment firms etc.), which account must indicate to the upper-tier intermediary, that the account holder is not the owner of the securities credited to the account. Investment firms with registered office in Czech Republic are required to hold customers securities on customer account. Securities held by the intermediary on behalf of more than one customer can be credited to one customer account. The identity of the owner or owners must be disclosed upon request of upper-tier intermediary for the purpose of statement from register of issues.

6.3. Denmark

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of another (i) where the existence of the other is not indicated and (ii) where the existence but not the identity of the other is indicated? May the securities account be opened in the name of the person or entity who is maintaining the account? May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person? Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary? Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

Securities can and may be credited to an account held in the name of person who is acting on behalf of the true owner (nominee accounts). A nominee account may be used even if the are several true owners (of the collective position recorded on the account). If the nominee is a financial business it must have the consent of its customers in order to pool the customer securities on an omnibus account.

In principle, a nominee account may be opened in the name of the person maintaining the account. In practice, a CSD (maintaining a CSD-account) is not likely to act as nominee. An account manager may act as nominee with respect to the account managed.

If the nominee account is a CSD-account it must be registered on the CSD-account (and thus disclosed to the CSD) that it is a nominee account, but there is no requirement that the identity of the true owner(s) is registered (or disclosed to the CSD). See Securities Trading Act Art. 72(2). Even if it is not registered that the account is a nominee account, the true owners are in most cases entitled to the securities on the account in case of bankruptcy of the nominee (provided the true owners can prove that they are the true owners), cf. answer to Question no. 15. Consequently, the requirement to register that the account is a nominee account may to some extent be seen as a public law requirement rather than a rule of private law. Of course, tax law may require the true owners to disclose their identity for taxing reasons.

Generally, a nominee is considered to be an intermediary (maintaining the securities on the nominee account on behalf of the true owners). However, if there is only one true owner (the nominee account is maintained for one person only) it is questionable if the nominee can be considered intermediary at least for conflict of law purposes.

6.4. Germany

A: Under German Law, both is feasible between custodians and between custodians and CSD since there is no legal requirement to segregate proprietary and customer assets. This is a consequence of the general presumption of section 4 Securities Deposit Act that all securities held by a custodian bank with another custodian bank are customer assets (Fremdvermutung).

On the level custodian to investor the identity of the account holder – usually the investor – has to be disclosed due to Section 154 of the German Fiscal Code (Grundsatz der Kontenwahrheit und –klarheit) and Section 2 Money Laundering Prevention Act (Geldwäschegesetz - GwG).

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes, (if "maintenance" is not understood in a mere technical/ operational way) that is a legal requirement due to account opening and maintenance principles deriving from German Fiscal Code and Money Laundering Prevention Act (see above).

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, collective securities positions are legally possible on upper tiers of the custody chain between custodians and between custodians and CSD. On these upper tiers the securities may be commingled with those of other customers and proprietary assets. In relation to the investor the positions in securities have to be individualised account by account in the book-keeping system. In case of jacket safe custody (Sonderverwahrung, Section 2 Securities Deposit Act) they have to be segregated from assets of other clients and proprietary assets of the custodian bank.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

No, not necessarily. To offer custody services in Germany as a business a licence as custodian bank pursuant to Section 1 para 1 No. 5 of the German Banking Act (Kreditwesengesetz - KWG) is required. On upper tiers of the custody chain, the account holders and often the person or entity in whose name the securities accounts are credited are licensed custodian banks or intermediaries as well. On the level Custodian and investor, the investor could either be an intermediary (proprietary assets) or a private person.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

Between custodian banks there is no legal requirement to disclose either the acting on behalf of a third person or its respective identity. Due to Section 4 para 1 Securities Deposit Act, the upper tier custodian bank, has to treat all securities as not belonging to the lower tier custodian bank unless the latter confirms explicitly that he is the owner thereof.

In case the custodians fulfill certain criteria, i.e. banks or financial institutions licensed for proprietary trading, they have to report securities transactions on organised markets pursuant to section 9 Securities Trading Act and submit data to

the Banking Supervisory Authority (Bundesanstalt für Finanzdienst-leistungsaufsicht - BAFin) enabling the identification of the investor.

6.5. Estonia

Yes, the licensed participants of the securities market (i.e. mainly investment firms and credit institutions) have the right to own a special type of securities account (defined in the ECRSA as a nominee account) so as to hold securities in their own name but on behalf of another person(s).

There is a requirement that a notation must be made to identify a securities account as a nominee account. Based on provisions (mainly § 6) of the ECRSA one can presume upon existence of such notation that:

a. securities credited to this account are held in the name of the account owner but on behalf of another person(s);

b. owner of the nominee account maintains the records about persons on whose behalf the securities are held in the nominee account.

Nominee account is opened in the name of intermediary.

Yes, collective securities position is permitted, meaning that the owner of the nominee account can act for more than one person through one nominee account (i.e. use the same nominee account for holding securities for more than one person).

The owner of the nominee account (the person in whose name is the account opened) acts as the intermediary in relation to third parties and persons, whose securities are held in a nominee account.

It follows from the provisions of the ECRSA and a notation (indicating that the account is nominee account) that the owner of the nominee account acts on behalf of investors.

As to the disclosure, please see question no. 25.

6.6. Greece

6.6.1. Regarding securities held within the DSS, these could only be registered within the end-customer's account. Otherwise, in case they are held by a financial intermediary, there is no indication in the accounts (held within the DSS) on whether these contain securities belonging to the intermediary or to his customers. Thus, in case of omnibus accounts, segregation of securities is possible only at the level of the financial intermediary who effects the securities transactions, according to the rules governing the financial intermediary (home country control).

The aforementioned does not prohibit, under certain circumstances, trading through members of the ATHEX in omnibus accounts and splitting the securities in the settlement phase by them, in the name of the end investor/beneficiary. In such an event, the corresponding securities will be registered in the latter's account held within the DSS.

6.6.2. Concerning Government securities held within the BoGS, please refer to 2.3., above.

6.6.3. Apart from the above mentioned systems, which are specifically regulated, freedom of contract applies regarding the manner in which financial intermediaries, acting as custodians, keep omnibus accounts, i.e. in case of securities listed in a regulated market outside Greece, with an upper tier

custodian in Greece or abroad. Thus, the financial intermediary, being obliged to keep the full identification elements of his client in his records, can agree with the upper tier custodian – and the latter has the right to enter in such an agreement, if governed by Greek Law – that the latter opens a) accounts in the names of the end customers or b) an omnibus account without any further segregation at his level or segregating the securities in sub-accounts as individual positions under code numbers etc. The financial intermediary is in any case obliged to inform the upper tier custodian that he is acting on behalf of investors.

6.7. Spain

No. Securities must be credited to securities accounts in the name of their owner. In general terms, the Spanish legal system does not recognise the full effects against third parties to fiduciary legal relationships (*fiducia cum creditore*). The applicable rule is the presumption of the duly entitlement of the one that appears inscribed in the registry as such[55]. As a consequence, the issuer will be only obliged towards the owner according to the registry, and its obligations will be fulfilled when performed before him.

However, it is not possible to prevent someone from opening an account in its own name, but acting of behalf of others. In case the "owner according to the registry" is acting on behalf of another investor, this relationship will be maintained exclusively among them. This is the reason why, in the case of insolvency of the registered owner, the securities credited on his account will be subject to the insolvency proceedings, unless it is fully evidenced before the court or insolvency authority, that such securities, but not others, were acquired on behalf of a third party. Such circumstances will be decided according to the applicable *lex concursus*, that may not be Spanish law.

Finally, the use of "omnibus accounts" is allowed when its use is indispensable for conducting activities on behalf of clients in foreign markets (Article 2 of Ministerial Order of 7 October 1999). But this implies that the account is opened in the name of the Spanish account provider by another foreign account provider. Therefore, it would be an account opened "outside Spain", usually under a foreign law.

May the securities account be opened in the name of the person or entity who is maintaining the account?

No. The securities accounts are opened in the name of the owner of the securities that are credited, or are to be credited in such account.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

There is no rule that prevents anyone to open an account in its own name, but acting of behalf of others. However, as stated above, there is a legal presumption

[55] Article 11 of the Securities Markets Law: "Any person appearing as the legitimate owner according to the book entry records shall be presumed to be the legitimate owner and, as a result, may demand of the issuer any benefits to which the security represented by book entry gives entitlement".

that the account holder is the owner of the securities, and cannot be said that those others hold a "collective securities position". The legal nature of the relationship between the registered owner and the others will be determined by the law applicable to such relationship that may not be Spanish law.

There is a particular case in which there is an express recognition of holdings on behalf of third parties: In the case securities accounts opened between CSDs, by virtue of the agreements foreseen in article 44 bis 7 of the Securities Markets Law, and articles 43 and 76.2 of Royal Decree 116/1992.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

No, because it is presumed that the account holder is the owner of the securities credited therein.

In the case securities accounts opened between CSDs, by virtue of the agreements foreseen in article 44 bis 7 of the Securities Markets Law, and articles 43 and 76.2 of Royal Decree 116/1992, the investor CSD acts as mere intermediary.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

No. As explained above, the person that appears entitled in the book-entry registry will be presumed to be the owner. The existence of agreements or deals between the registered owner and third parties will not produce effects beyond their contractual relationship.

It must be taken into account that in order to comply with the obligations arising from the regulations on "significant stakes" (major shareholders) the disclosure of the final investor to the CNMV may be required.

6.8. France

6.8.1. May securities be credited to a securities account in the name of a person or entity who is acting on behalf of another (i) where the existence of the other is not indicated and (ii) where the existence but not the identity of the other is indicated?

As a principle, securities are evidenced by a book entry in the name of their owner. Under the French indirect holding system, only the holder of the securities account opened in the books of the authorised financial intermediary which is at the end of the chain and is acting for own account is the owner of the securities held with that authorised financial intermediary. The other securities accounts in the chain of upper tier authorised financial intermediaries are only mirrors of such a securities account down at the lower level of the chain. The book entries recorded in the books of an upper-tier authorised financial intermediary do not reflect per se the rights over the relevant securities. Such upper-tier accounts may be collective accounts (see below in respect of segregation).

i. With respect to registered securities

With respect to equity securities ("titres de capital") only, Article L. 228-1 of the French Commercial Code provides for an exception to the above principle. As far as equity securities (i) listed on a regulated market and (ii) whose owner is not domiciled on French territory, are concerned, Article

L. 228-1 of the French Commercial Code contemplates the creation of a book entry in the name of a registered intermediary ("intermédiaire inscrit"). The registered intermediary must report its status as a registered intermediary upon opening of its account either with the issuing company or a financial intermediary.

Article L. 228-1 of the French Commercial Code reads indeed as follows:

“However, when securities representing equity shares of the company have been admitted for trading on a regulated market, and when the owner thereof is not domiciled on French territory, within the meaning of Article 102 of the French Civil Code, any intermediary may be registered on behalf of that owner. Such registration may be in the form of a collective account or several individual accounts, each corresponding to one owner.

The registered intermediary shall be bound, when opening its account with either the issuing company or authorised financial institution acting as custodian, to disclose, in the manner set by a decree that it is acting in its capacity as an intermediary holding securities on behalf of another party".

In accordance with the provisions of Article 151-1 of Decree n° 67-236 of March 23, 1967 (as modified by Decree n° 2002-803 of May 3, 2003) such registered intermediary must report its status as registered intermediary either with the issuing company or with an authorised intermediary licensed by the AMF whether such intermediary is a custodian ("teneur de compte conservateur") or a central depositary under circumstances where the registered intermediary has opened an account in the books of such central depositary.

Pursuant to Article L. 228-3 of the French Commercial Code and of Article 46 of Decree n° 2002-803 of May 3, 2002, any intermediary registered as such in accordance with Article L. 228-1 of the French Commercial Code shall be required to reveal the identity of the owners of securities in a registered form or giving access immediately or on a deferred basis (à terme) to the equity capital of the issuer within 10 working days following request of the issuing company or of its agent.

The registration of such intermediary on behalf of the owner of the securities entitles such intermediary to forward the vote or proxy of the owner.

Special rights linked to registered securities such as double voting rights may only be exercised to the extent information disclosed by the registered intermediary permits control of compliance with the conditions required to exercise such rights.

Article L. 228-3-2 of the French Commercial Code indeed provides that:

"any intermediary meeting the requirements set out by paragraphs 3 and 4 of Article L. 228-1 of the French Commercial Code may, pursuant to a general management authority over the securities, forward for a meeting of shareholders the vote or proxy of an owner of shares, as defined in paragraph 3 of that Article L. 228-1".

Under Article L. 228-3-2 of the French Commercial Code, a vote or proxy issued by an intermediary either not having reported its capacity as such or not having disclosed the identities of the securities’ owners under Articles

L. 228-2 or L. 228-3 of the French Commercial Code, may not be taken into account.

ii. With respect to bearer securities

As to the identification of the owner of securities in bearer form, the articles of association ("statuts") of the issuing company may require at any time the entity in charge of securities clearing (i.e. EUROCLEAR FRANCE S.A.) to provide it with the following information regarding holders of securities: name or corporate name; nationality; year of birth or of incorporation; address; number of securities held by each of them and conferring, immediately or in the future, votes at general meetings; if relevant, any restrictions affecting the securities (Article 228-2 of the French Commercial Code).

In other circumstances, (i.e. when no provision is being made to such effect in the articles of association of the issuing company) Article L. 228-3-2 of the French Commercial Code provides that before dispatching proxies or votes for purposes of the general meeting the registered intermediary is required at the request of the issuing company or of its agent to provide the list of non resident owners of the securities to which such voting rights relate. Such list is provided under the conditions contemplated under Article L. 228-2 and Article L. 228-3 of the French Commercial Code. Under such circumstances, only a list is to be provided but the procedures contemplated under Article L. 228-3-2 would not apply.

6.8.2. May the securities account be opened in the name of the person or entity who is maintaining the account?

No.

6.8.3. May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

With respect to the registered intermediary ("intermédiaire inscrit"), Article L. 228-1 of the French Commercial Code provides that:

"when securities representing equity shares of the company have been admitted for trading on a regulated market, and when the owner thereof is not domiciled on French territory, within the meaning of Article 102 of the French Civil Code, any intermediary may be registered on behalf of that owner. Such registration may be in the form of a collective account or several individual accounts, each corresponding to one owner."

On the basis of the above, a segregated individual position per person is an option but not a requirement. Recording is possible in the form of a collective account.

6.8.4. Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

No.

6.8.5. Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

Yes. See in this respect (a) above.

6.9. Ireland

There is no statutory prohibition on the intermediary with whom that account is held effecting that credit but, in the case of (i) this may comprise a breach of regulatory requirements applicable to the person or entity named as the account holder or may have implications for the interest in the securities held by the other person on whose behalf that interest is intended to be held. The position at (ii) is not unusual but dealing with undisclosed principals may create difficulties for the intermediary.

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes, an intermediary may open an account on its books in its own name. This response does not purport to address the legal, regulatory or other implications of this for the parties. An intermediary may also, and commonly does, open an account in its own name with an upper-tier intermediary (subject to it being designated a client account).

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, if those others agreed. This response does not purport to address the legal, regulatory or other implications of this for the parties.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

There is no single meaning attributed to the terms "securities account" or "intermediary" for the purposes of Irish law and so this question has no specific meaning as a matter of that law. However, on the basis of the definition of "intermediary" set out in this Questionnaire, this would appear to be the case, assuming that it is not also the beneficial owner of the securities credited to that account.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

There is no such general legal requirement. However, depending on the circumstances in which it is acting, the relationship sought to be established, the contractual arrangements between the intermediary and the investors and the regulatory requirements applicable to the intermediary, it may be subject to contractual or regulatory requirements in this regard.

6.10. Italy

With regard to (i) the answer is positive but, obviously, the account (and the securities) will be in the name of the person opening the account. With reference to point (ii) the ability to act in one's own name but on behalf of a third party in the

opening of an account is limited under Italian law to fiduciary companies and (where the opening of the account is made in the context of the provision of a core or non core investment service) to banks and investment firms acting in a fiduciary capacity.

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

This can be done only in the context of a sub-deposit made by an intermediary with another intermediary, provided that the investor has consented thereto and that the liability of the depositor will remain unaffected.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary? Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

The person or entity must be an intermediary or a fiduciary company. Yes, it must disclose whether it is acting on behalf of investors but not their identity.

6.11. Cyprus

(3) According to a recent amendment in the Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996 this is possible (Art 6). In this context neither the identity nor the existence of the beneficial owner need be revealed. The accounts are opened in the name of the custodian or the trustee. The only condition is that the custodian or trustee have the right to offer such services in the Republic of Cyprus under the relevant law and regulations. These provisions have not been activated yet pending promulgation of the relevant regulations. Such a trustee or custodian is mostly treated like any other person holding securities and therefore the opening of depository accounts and trading accounts is governed by the same rules. The trustee or custodian is not obligated to reveal the fact that he is acting for third parties or the identities of these parties. Moreover, it should be said that the central register has the same role and effect as the registers required by the law of incorporation of the issuer. So if the issuer is a Cyprus entity then the register, according to Art 112 of the Companies Law 113, does not contain any notice of trusts and the registered shareholder is the recognised owner of the security. The cestui que trust has remedies only against the trustee.

6.12. Latvia

Securities may be credited to an account held in the name of person who is acting on behalf of the beneficial owner (nominee accounts). A nominee account may be used even if there are several beneficial owners (of the collective position recorded on the account). If the nominee is a financial business it must have the consent of its customers in order to pool the customer securities on an omnibus account.

In principle, a nominee account may be opened in the name of the person maintaining the account.

If the LCD or intermediary opens the nominee account they must identify that it is a nominee but there is no requirement in the FIML that the beneficial owner of securities that are registered in nominee account must be registered by name or disclosed to the LCD. At the same time the FIML obliges the intermediary to identify its clients and if the client isn‘t a beneficiary, then he must disclose the information about true beneficiaries of assets that are kept in the nominee account. Even if it is not registered that the account is a nominee account, the beneficial owners are in most cases entitled to the securities on the account in case of bankruptcy of the nominee (provided the beneficial owners can prove their ownership).

Generally, a nominee is considered to be an intermediary (maintaining the securities on the nominee account on behalf of the beneficial owners) as the Law provides that the holding of securities is one of the non- core investment services. However, if there is only one beneficial owner (the nominee account is maintained for one person only) it is questionable if the nominee can be considered intermediary in the understanding *of FIML.*

6.13. Lithuania

(6) – 1. May securities be credited to a securities account in the name of a person or entity who is acting on behalf of another (i) where the existence of the other is not indicated and (ii) where the existence but not the identity of the other is indicated?

Regarding the item (i), practically it is possible not to disclose the existence; however then the person in whose name the securities account is opened shall not be deemed as acting on behalf of another in respect of the third parties and intermediary.

The answer to (ii) is yes. Art. 45 of the Law on Securities Market provides a general rule that securities must be credited to a personal securities accounts which has to be opened in the name of their owner. Only two derogations from the general rule are allowed under the Law on Securities Market:

(i) accounts of collateralized securities may be opened in the name of the holder of the collateral, indicating the owner of the securities;

(ii) accounts of clients of account managers registered abroad may be opened in the name of the account managers, indicating that they act as account managers. Notably, following Art. 7.5 of the Rules on Accounting and Circulation of Securities, on request of the LSC, the data from such accounts must be submitted to it, disclosing the clients of the account managers registered abroad, to whose benefit the securities have been acquired (unless it goes contrary to the legal acts of that foreign country). Such accounts may be opened either in the firs-tier with the CSDL (for foreign central or international securities depositories) or in the second-tier with other account managers (in other cases).

(6) – 2. May the securities account be opened in the name of the person or entity who is maintaining the account?

In respect of the second-tier accounting the account managers may open personal accounts recording therein securities owned by them. However such assets have to be segregated from their clients' assets.

In respect of the first-tier accounting, the CSDL, as an upper-tier intermediary, opens general (omnibus) securities accounts in the name of the second-tier intermediaries recording that securities of the second-tier intermediaries' clients' are credited in the account. However such accounts do not provide a proof of ownership (please, refer to the answer to question 3).

(6) – 3. May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person.

Yes, the holding companies of investment funds that are jointly owned by the investors may open securities accounts in their name. However it shall be recorded in the account whether securities are held for the clients of institutional investor or for the institutional investor himself.

(6) – 4. Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

N/A

(6) – 5. Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

In case of general accounts opened with the CSDL no identification of particular clients is required in any case.

6.14. Luxembourg

Yes, both scenarios are possible under Luxembourg law. However, the regulatory regime applicable to the account holder may require the depositor to segregate proprietary from client assets.

When working under the fungible holding regime of the Securities Act, the first tier intermediary will open an account with the upper tier intermediary in its own and

not in the underlying clients' name. If the assets credited to the account are proprietary assets, it will be acting in its own name and for its own account. If the account is opened in its own name but for the account of third party(ies) (clients), the first tier intermediary will, under Luxembourg law, be acting as either a commissionaire (agent acting an undisclosed basis) or as fiduciary (within the meaning of the law of 27 July 2003 on trust and fiduciary contracts).

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes, but to ensure investor protection, Article 12 of the Securities Act provides that if the settlement institution is itself the owner of a number of financial instruments, and there is an insufficiency of securities, the entity maintaining the account shall only be entitled to the number of financial instruments remaining after the total number of financial instruments of the same category which it holds for account holders has been returned to such account holders.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, the pooled holding of securities in an omnibus accounts is the very purpose of the Securities Act.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

The concept of intermediary is not used in the Securities Act, which mostly deals with the bilateral relations between the depositor and the latter's depository.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

The law does not require such disclosure. The focus of the law is on the segregation of client assets from own assets which is mandatory (Art. 12 of the Securities Act).

However in the context of treaties for the avoidance of double taxation, the identity of investors may be disclosed if so requested by the investor to obtain a tax refund or the application of a specific withholding tax rate.

Pursuant to Article 3 of the law of 12 November 2004 relating to the combat against money laundering and the financing of terrorism (implementing the EU Directive 2001/97/EC), every professional of the financial and insurance sector and various other professions have the obligation to identify their customers, i.e. the "beneficial owner" of assets, unless their customers are submitted to equivalent identification requirements under Luxembourg or foreign law.

6.15. Hungary

Securities can be credited to an account in the name of another person, but the existence of the other have to be indicated. The basic situation is that the intermediary opens an account at a CSD and indicates that for a certain quantity he act on behalf of another person. It is the decision of the investor or the intermediary whether the identity of the investor is indicated. It is also possible to open an account as a nominee, in which case the nominee status has to be indicated by law, but the identity of the investor has to be indicated only when acquiring that security

needs permission from the Hungarian Financial Supervisory Authority. The nominee can act on behalf of more than one person. The nominee has to disclose that he act in the capacity of nominee, but the identity of the investor has to be disclosed only in the cases specified in the Capital Market Act.

6.16. Malta

Again this is an issue of contractual arrangements. The recent impact of the prevention of money laundering rules is in the direction of requiring disclosure of names but in the case of authorised intermediaries it is not necessary to show that the holding is for clients or who they are. The ISA (control of assets) regulations and the recently enacted laws on trusts and fiduciary duties do impose a positive duty to segregate and to record the interest of beneficiaries and principals and so in practice assets are held in named accounts or, when not possible or practicable, in clients' accounts which are indicated to be such.

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes, but some systems do not allow named accounts when this will lead to an intermediary having too many accounts and insist on omnibus clients accounts. The CSD of the Malta stock exchange has taken such a view on occasion.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, it is possible.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

Yes, the ISA (control of assets) regulations treat a custodian or a portfolio manager as an intermediary holding assets on behalf of a customer, even when the assets are held in the name of the intermediary.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

It is not a legal obligation under the securities law to disclose that one is acting as an intermediary but this duty may arise under the prevention of money laundering laws and it may be legally more appropriate to disclose the nature of the holding under the securities and trust laws.

6.17. Netherlands

Securities may be credited to an account held in the name of person who is acting on behalf of the economic owner (nominee accounts) and in principle, a nominee account may be opened in the name of the person maintaining the account. Please note, however, that on 13 June 2003 the Netherlands Supreme Court has rendered a decision, which limits the possibility to achieve an in rem segregation by opening a nominee account (in Dutch: "kwaliteitsrekening") to a very large extent. Therefore, the economic owners run the risk that creditors of the account holder can take recourse on the assets in the account and that in the event of insolvency proceedings with respect to the account holder, the assets in the account form part of the insolvency estate.

6.18. Austria

6.18.1. Under general civil law securities may be credited to a securities account in the name of a person or entity who is acting on behalf of another (i) where the existence of the other is not indicated and (ii) where the existence but not the identity of the other is indicated as well as (iii) where the existence and the identity of the other is indicated.

Which one of these three possibilities will be chosen will depend, apart from the agreement between the account provider and the account holder, on the mandatory provisions of **anti-money laundering regulations**.

6.18.2. Securities may be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person.

6.18.3. Securities may be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person. In practice the account holder may open a (sub-)account for each person or entity for whom he is acting.

6.18.4. The person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) may be considered as an "intermediary". The answer will depend on the definition of "intermediary". In case that person or entity is authorised under the Austrian Banking Act to maintain securities accounts for others, it will be considered to be an "intermediary" in the meaning that it manages the safekeeping and administration of the security for its owner, i.e. an account provider.

6.18.5. Whether the person or entity in whose name the securities account is credited on behalf of others must disclose whether it is acting on behalf of investors or not and if so, must disclose their identities is manifold and cannot simply be answered by a yes or no. It will depend on the circumstances and in which capacity that person or entity is acting (anti-money laundering regulations must be observed). In case securities are issued there are circumstances in which such disclosure is not required (see answer to question (2) under a), last paragraph). In case the person or entity acts professionally and falls under the Austrian Banking Act, the obligations of banking secrecy pursuant to section 38 Banking Act must be observed. These rules will apply to any securities account provider irrespective on which level in the chain of holdings it is acting. These rules allow for identification in many cases (e.g. certain tax evasion proceedings, court proceedings, probate proceedings) and may be waived by the respective holder of a securities account.

6.19. Poland

In principle, securities accounts need to be managed in such a way as to allow securities owners to be identified correctly. There are two exceptions to this rule. Article 10 subpara. 3 of the Law on the Public Trading in Securities of August 21, 1997 gives entities - indicated to KDPW by an entity that is a KDPW participant and performing activities outside Polish jurisdiction in the scope of a central securities registration system, or settles transactions executed in securities trading -

the right to issue documents confirming the legal right of persons indicated in these documents, to receiving benefits from corporate actions by Polish issuers arising from the securities registered on the depository account managed by KDPW for the later entity (KDPW participant). It should be noted that at the level of depository accounts managed by KDPW, it is not possible to identify securities owners registered on this account. This means that issues relating to determining entities acting as intermediaries for securities registered on the depository account managed by KDPW for institutions which perform outside the jurisdiction of Poland the role of a central securities registration system, or settle transactions for these securities, Polish law leaves entirely to the appropriate foreign law. It should though be stated that this legal rule has not as yet been applied in practice and the aforementioned opinion is merely an interpretation. Arguments against such an interpretation, on the other hand, show that the Law on the Public Trading in Securities of August 21, 1997 (Article 30, subpara. 2a) recognises the management of securities accounts, on which securities admitted to public trading in Poland are registered as an activity which may only be performed with the authorisation of a supervisory body, or on the basis of a single passport and according to Polish regulations on the management of accounts, irrespective of whether they are managed via a branch created in Polish jurisdiction, or without such a branch being opened.

The second exception was defined in Article 35 of the Law on the Public Trading in Securities of August 21, 1997. According to the provisions of this article, following authorisation from a supervisory body, a foreign entity which keeps securities in custody, or is an intermediary in securities trading in OECD countries, acting on the account of other foreign entities and on the basis of their consent, may open securities accounts in entities which are authorised to manage such accounts in Polish jurisdiction. In such instances, an entity managing securities accounts is not required to reveal the identity of persons on whose behalf it has opened these accounts. The foreign entity with authorisation to open securities accounts without revealing the identity of the persons on whose behalf it is acting may issue them with documents confirming their legal right to exercise rights relating to securities registered on accounts opened on their behalf. This solution allows the management of securities accounts on behalf of persons whose existence is indicated, but without their identities being revealed.

These are the only exceptions to the generally held principle that rights to securities registered on a securities account belong to the owner of that account.

6.20. Portugal

Portuguese law does not recognise omnibus or nominee accounts as such. From a Portuguese law perspective, the owner of the securities is the registered holder of the Individual Ownership Account, regardless of the fact that such securities account is in the name of a person or entity who is acting on behalf of another person. As mentioned before, any records kept by the nominee - including any sub-accounts - will not be considered to be In The System and will have no *in rem* effects.

Securities can, from a practical point of view, be credited to a nominee or omnibus account but for all effects - with the sole exception detailed below - the nominee or registered holder will be considered the owner of the securities.

Under some circumstances detailed in article 74. CVM - such as to avoid compliance with information duties (for instance, qualifying holdings disclosures), advertising duties or to avoid having to launch public acquisition offers - the

presumption of ownership arising from registration in Individual Ownership Accounts may be rebutted, for the before mentioned limited purposes only, before the CMVM. In these circumstances, the registered holder will have to prove before the CMVM that it is acting on behalf of another person or persons and, under some conditions, it may have to disclose the identity of such person or persons before the CMVM.

May the securities account be opened in the name of the person or entity who is maintaining the account?

Yes, but, as mentioned before, such person will be considered to be the registered holder of the securities.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, but such person who is acting on behalf of others, will be considered to be the registered holder of the securities. As mentioned before, any records kept by the nominee - including any sub-accounts - will not be considered to be In The System and will have no *in rem* effects.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

No. The person or entity in whose name the securities account is registered is considered to be the owner of the securities.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

As mentioned before, if the registered holder wishes to avoid compliance with information duties (for instance, qualifying holdings disclosures), advertising duties or to avoid having to launch public acquisition offers - the presumption of ownership arising from registration in Individual Ownership Accounts may be rebutted, for the before mentioned limited purposes only, before the CMVM, in which case the registered holder will have to disclose the identity of the beneficial owner of the securities. *Per se*, qualifying holding disclosure requirements may demand that the investor's identity be disclosed (articles 16. and 20. CVM), under certain circumstances.

6.21. Slovenia

The holder of dematerialised securities account is considered to be legal (and beneficial) holder of dematerialised securities, registered (entered) on this account (Art. 16 of ZNVP), which is maintained directly in the central registry. In the legal framework of dematerialised securities intermediaries in the meaning of a legal person holding dematerialised securities on behalf of another person (as another person's fiduciary, depository or custodian) do not occur (see answer to Q1).

Investment firms (KDD registry members) may open and maintain their *house accounts*, which are a type of holder's account (see answer to Q3). On a house account of the investment firm only securities held on own behalf (account) of the

investment firm (holder of that account) may be entered (registered). Pursuant Par. 2 of Art 155 of ZTVP-1 a stockbroking company (investment firm, KDD registry member) may not transfer to the house account those securities held by its clients.

Pursuant Par. 1 of Art 156 of ZTVP-1 investment firm (that performs services of dematerialised securities accounts maintenance) shall keep dematerialised securities held by an individual client in the account of that client (i. e. client's account).

6.22. Slovakia

Securities may be credited to another type of securities account called „member's client account" that has the function of an omnibus account. In the member's client account the central securities depository registers data on securities whose owners are registered by member. That means owner of this account is not considered to be owner of securities registered in this account and identity of beneficial owner is not indicated in this account. Member's client account can be only opened in the name of entity (CSD member) that maintains corresponding securities *owner's accounts in its registration. It cannot be opened in the name of the central securities depository that maintains omnibus accounts or in the name of other member. First, securities are credited to the beneficial owner's account in the name of the owner and only then they are credited to omnibus account. Participants do not need to place a separate instruction in order to credit omnibus account – this instruction is generated by the registration system itself after the beneficial owner's account has been credited.*

6.23. Finland

*Regarding book-entry system, an account may be opened in the name of the entity who is maintaining the account. In the book-entry system, securities may be credited to a securities account in the name of a person where the existence but not the identity of the other person is indicated (*option *ii). A securities account may be opened both in the name of APK maintaining the whole book-entry system as well as in the name of an account operator (participant of APK) maintaining the account.*

Securities may be credited to a special account (custodial nominee account) to hold a collective securities position. Book-entries owned by foreign individuals, corporations or foundations may be credited to such custodial nominee account administered by a custodian on behalf of the beneficial owners. Thus, a custodial nominee account can be established as an omnibus account. The *custodial nominee account shall contain information on the custodian instead of the beneficial owner and include an express note that the account is a custodial nominee account. This statement creates a legal presumption for the benefit of the owners further down in the custody chain. Neither the custodian nor its successors or creditors have a title to securities in a custodial nominee account. It is not allowed for the custodian to hold its own securities in the same account as its customers. Thus, the entity in whose name the account is credited and maintaining the securities account is considered as an intermediary. Pursuant to law, the existence of a custodial nominee account presupposes that the holder of the accounts is a nominee and not the owner of the securities.*

Outside of the book-entry system, there are no specific provisions governing the treatment of a holding maintained by the intermediary. *There is no legal reference to maintenance of accounts and the custodians refer to 'custody' or 'portfolio holdings' rather than accounts.*

In accordance with the Investment *Services Directive, an intermediary is obliged to segregate his own holdings from the customers' holdings. Chapter 4, Section 5 a of the SMA provides that a securities intermediary shall arrange the custody, handling and clearing of the monetary assets and other property of its client (client funds) entrusted to it so that there is no danger of their confusion with the own funds and assets of the intermediary. Client funds shall be kept in custody in a reliable manner and the monetary funds of the client shall be deposited in an account in a deposit bank or in a branch of a foreign credit institution unless other investment has been agreed upon in writing. With the exception of a deposit bank and a branch of a foreign credit institution entitled to receive deposits, a securities intermediary shall in its bookkeeping keep the monetary funds of the client separate from the own funds and assets of the intermediary.*

Traditionally, the Finnish regulatory practice has adopted a rather restrictive approach towards allowing physical securities to be held in fungible pools. Before the book-entry system was introduced in the beginning of 1990s, the intermediaries were expected to keep the securities holding of each client physically separate from the holdings of other clients. Also in practice holdings in share certificates were segregated to customer-specific portfolios, whereas bonds held by Finnish investors were pooled. Nevertheless, pooling of physical securities has not been regulated explicitly in Finland. Before the introduction of the book-entry system, the banks faced *a practical problem when settling customer trades made at a stock exchange when a single share certificate included more shares than what was sold at the exchange. Before the trade could be settled, the share certificate had to be sent to the company to be split. There are still no written rules on pooling of physical securities, nor on nominee/omnibus accounts pertaining to securities outside the book-entry system.*

Like in many other jurisdictions, the Finnish law on insolvency poses a risk that unless duly segregated, customer assets may be considered commingled and thus property of the bankruptcy estate leaving the customers as unsecured creditors of the estate.

6.24. Sweden

In the book-entry system the effects of a credit of securities to an account is regulated by Chapter 6 (Legal Effect of Registration) in the Financial Instruments Accounts Act. These rules focus on the account holder's rights to dispose the instruments on the account and the effect against third parties of a credit to an account. The general rules (section 2 and 3 in Chapter 6) are the following. *A person, who is registered as the owner on a book-entry account shall, subject to the limitations set forth in the account, be deemed to have the right to dispose of the financial instrument. Where a notice of transfer of a financial instrument is registered, the instrument may not thereafter be attached by the transferor's creditors in respect of rights other than such as were registered at the time the notice was registered. The provisions of these sections shall also apply to pledges of collateral.*

To characterize the rights is not a simple task, in my opinion the rights regarding a book-entry account can be characterized *as property right to the securities in the account or to the account*.

6.25. United Kingdom

Yes. This arrangement is common in the asset management industry, where the manager often contracts with the custodian as agent for managed funds as disclosed but unnamed principals. However, the arrangement poses certain regulatory and credit risk management problems for the custodian.

Also, it is common for intermediaries to open omnibus client accounts with upper tier intermediaries.

May the securities account be opened in the name of the person or entity who is maintaining the account?

In relation to an intermediary opening an account in its own books in its own name, there is no express prohibition, but the arrangement would be unusual.

In relation to an intermediary requesting that an upper tier intermediary open an account in its name, this is not uncommon, and permitted provided the account bears a client designation.

In relation to an intermediary requesting that an upper tier intermediary open an account in its name, this is not uncommon, and permitted provided the account bears a client designation.

May securities be credited to a securities account in the name of a person or entity who is acting on behalf of more than one other, i.e. such that those others hold a collective securities position, rather than segregated individual positions per person?

Yes, if those were the terms agreed by the parties. It is understood that this would be unusual.

Is the person or entity in whose name the securities account is credited (if different from the person or entity maintaining the account) considered to be an intermediary?

Only if it is not itself the beneficial owner of the assets credited to the account.

Does that person or entity have to disclose whether it is acting on behalf of investors and, if so, their identities?

There is no such requirement at general law. However, if that person is a regulated firm, the registration and recording requirements in CASS 2.2.10 may in practice be likely to involve such disclosure.

7. QUESTION NO. 7

WHAT RIGHTS ARISE WHEN SECURITIES ARE CREDITED TO SECURITIES ACCOUNTS? IS THERE A SPECIFIC REGIME FOR ESTABLISHING THESE RIGHTS? ARE THESE RIGHTS CHARACTERISED AS A CLAIM, AN INTANGIBLE, A CHATTEL, OR A NEW AND SEPARATE LEGAL ASSET, DISTINCT FROM THE UNDERLYING SECURITIES, WHICH CAN BE THE OBJECT OF PROPRIETARY RIGHTS (E.G. OWNERSHIP, SECURITY INTEREST, USUFRUCT) AND PROPRIETARY DISPOSITIONS (E.G. SALE, PLEDGE, LOAN)? WHAT OBLIGATIONS OF THE INVESTOR MAY ALSO ARISE?

7.1. Belgium

There is a specific statutory regime for the holding of securities on a book-entry basis. This regime allows the holding of financial instruments with settlement institutions (as well as with their participants or affiliates: see above the introductory remarks; the answers made hereafter in the whole questionnaire are therefore also valid for the holding regime between affiliates and their own clients unless otherwise indicated) pursuant to the provisions of the Belgian Royal Decree 62.

With respect to the Royal Decree regime, accountholders at designated settlement institutions have by law a co-ownership right of an intangible nature on a pool of book-entry securities of the same category held by the settlement institution on behalf of all accountholders having deposited securities of the same category (Article 2 of Royal Decree 62; see also articles 12 and 13). This co-ownership right implies for the accountholders specific rights with respect to the securities deposited by them with the settlement institution, which rights do not accrue under Belgian law to holders of pure contractual rights to return of securities, namely (1) the right of "revendication" (in other words the right to the return in kind of the relevant quantity of securities in the event of an insolvency or bankruptcy of the settlement institution so that each accountholder has enforceable proprietary rights for the return of the relevant quantity of securities rather than the mere contractual rights of an unsecured creditor) and (2) the right to vote.

Without the specific regime organised by Royal Decree 62, account holders would have a mere contractual claim against its intermediary. This would still be the legal analysis for securities held on a fungible basis but not pursuant to Royal Decree 62.

7.2. Czech Republic

Under the provision of section 94 of Capital Market Undertaking Act, the person in whose name the owner account is opened is the owner of the securities. No distinction is made between the owner account in CSD or other intermediary. The right is characterized as a legal ownership to the underlying securities.

7.3. Denmark

What rights arise when securities are credited to securities accounts? Is there a specific regime for establishing these rights? Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)? What obligations of the investor may also arise?

The effects of a credit of electronic securities to a CSD-account is regulated by the Securities Trading Act Art. 66 and 69. These rules contain no general characterisation of the nature of the right but instead focus on the effect against third parties of a credit to an account. The general rule (Art. 66) is that a right over a security must be reflected by a credit to a CSD-account in order for the account holder´s right to have effect against third parties (including creditors). Consequently, if a credit is made to a CSD-account, the account holder enjoys protection against third parties. Further, according to Art. 69 when a transfer has resulted in credit to an account, the account holder (transferee) cannot be met with any objections as to the validity of the transfer except that the objection that the transfer is void because of forgery or duress under threat of violence (and even the possibility of these latter objections are in practice rather limited because of the fungible nature of the securities which makes tracing of individual securities almost impossible).

The rights resulting from a credit to a CSD-account are considered rights in the actual electronic securities credited to the account (and is thus not distinct from the underlying assets).

Securities Trading Act. Art. 66 and 69 do not apply to securities accounts that are not CSD-accounts. In a situation where a credit is made to a securities account in e.g. a bank (which holds a corresponding omnibus account with the CSD), the effects of the credit to the securities account (in the bank) is that the account holders rights are protected in case of insolvency of the bank, cf. Financial Business Act Art. 72. If a wrongful transfer is made by the bank (e.g. a sale of the securities to a third party), the account holder cannot trace his interest against a third party acting in good faith. However, of course the account holder can hold the bank liable for the wrongful transfer and is probably entitled to have the wrongful debit of the account corrected (the resulting credit to the account holders account may in case of bank insolvency create a shortfall of securities, see answer to Question no. 29).

7.4. Germany

In case of securities purchased and held in safe custody in Germany, the credit to the securities account normally evidences the acquisition of ownership of the securities. With the exception of a transfer of co-ownership of securities held in collective safe custody with the CSD (Girosammelverwahrung) pursuant to Section 24 para 2 Securities Deposit Act, it is not the credit as such which constitutes the transfer and acquisition of (co-) ownership of securities but rather pursuant to Section 929 Civil Code the agreement between seller (former owner) and purchaser (new owner) that the ownership or co-ownership shall pass from the seller to the purchaser and furthermore the transfer of possession – single or joint – of the securities. Physical direct possession may be substituted, of course, by indirect possession based on a custody agreement with the custodian bank. The reason for this structure is that German law distinguishes between concluding a contract to sell or to buy securities (Verpflichtungsgeschäft) on the one hand and concurrent act of transferring the ownership or co-ownership of the securities sold/purchased (Verfügungsgeschäft) on the other hand.

Transfer of co-ownership pursuant to Section 24 para 2 Securities Deposit Act occurs only if the transfer did not occur pursuant to provisions of civil law at an earlier moment in time which is usually the case.

In case of securities purchased and held abroad which are not eligible for cross-border collective safe custody (Section 5 para 4 Securities Deposit Act), the

securities account of the customer is credited in 'Gutschrift in Wertpapierrechnung' (WR-Credit). The system of WR-Credit has been developed by the German private banks in the years 1959 /1960. Since 1973 it is applied by all German banks on the basis of uniform special terms and conditions, originally called 'Special Conditions for Securities Dealings Abroad' (Sonderbedingungen für Auslandsgeschäfte in Wertpapieren). Today's basis are Sections 12, 14 (2), 19 (2) and 20 of the Special Conditions for Securities Dealings (Sonderbedingungen für Wertpapiergeschäfte, hereinafter SCSD). Cornerstones of the concept are:

- Unless otherwise agreed, foreign securities purchased abroad for a customer are held in safe custody abroad (Section 12 para 1 and 2 SCSD).

- The bank shall entrust another foreign or domestic custodian (e.g. Clearstream Banking AG) or its own foreign branch with the safe custody of the securities (Section 12 para 2 SCSD).

- The safe custody of the securities is subject to and governed by the rules and regulations and usage of the place of safe custody and by the terms and conditions of the foreign custodian (Section 12 para 2 SCSD).

- The bank executing the purchase order and acting thereafter as first tier custodian for its customer undertakes (i) to acquire ownership or co-ownership or such other entitlement to the securities which is equivalent to ownership or co-ownership and customary in the country where the securities are actually kept in safe custody and (ii) to hold such entitlement as fiduciary trustee for its customer. The securities account of the customer is credited 'WR' stating the foreign country where the securities are located (Section 12 para 3 SCSD).

- The rights of the customer resulting from a WR-Credit are subject to all economic and legal risks which may adversely affect the relevant securities of the same description held in safe custody abroad as cover of the WR-Credits as a consequence of force majeur, rioting, war, natural disaster or other acts by third parties abroad for which the (German) custodian bank may not be held liable, or in connection with mandatory dispositions of State, whether domestically or abroad (Section 12 para 4 SCSD).

This concept of WR-Credits is permitted by Section 22 Securities Deposit Act which exempts securities transactions executed abroad from the strict obligation to transfer ownership or co-ownership to the customer for whom a purchase order has been executed (Sections 18, 24 Securities Deposit Act). It may result in a split between legal and beneficial ownership under the law of the foreign country where the securities were purchased and are held in custody, which law would be applicable pursuant to the rules of the conflict of laws.

The German CSD Clearstream Banking AG is performing services also in connection with WR-Credits. It acts as intermediary between the domestic custodian bank and the foreign custodian which it selects and mandates with the safe custody and it credits the securities account of the domestic custodian bank 'WR (Section 64 General Terms and Business Conditions of Clearstream Banking AG). Such services of CBF are widely used by German custodian banks. Otherwise each custodian bank would have to establish individual custody relationships with foreign custodians wherever securities are traded which have been purchased by its customers.

Obligations of the investor: The investor has to pay custody fees which cover safe keeping and administration of the securities, e.g. collection of interest, dividends

and nominal amounts when due. Such services are rendered by the custodian bank pursuant to the custody agreement which is governed by the SCSD. Regarding dispositions of the securities, e.g. sale, transfer to another securities account, accepting a tender offer, exercise of subscription rights for new shares, the customer has to instruct the custodian bank accordingly.

7.5. Estonia

Pursuant to (7) of § 6 of the ECRSA the owner of the nominee account is required to maintain records on the securities and persons with whom the owner of the nominee account has entered into an agreement pursuant to which the owner of the nominee account has acquired the securities.

A credit entry in the records of the owner of the nominee account evidencing the fact that the securities are held on behalf of and for the benefit of a particular person (investor) gives rise to a bundle of rights, which under the provisions of the ECRSA include inter alia:

a. the right to be deemed the owner of the securities in the nominee account vis-à-vis (i) the owner of the nominee account and (ii) the creditors thereof in relation to securities that correspond to the entry in the records of the owner of the nominee account;

b. the right of immunity in respect to bankruptcy or other measures directed against the assets of the owner of the nominee account;

c. the right to instruct the owner of the nominee in exercising voting and other rights attached to securities that correspond to the entry in the records of the owner of the nominee account.

As to the characterization of these rights, the language in the provisions of the ECRSA enables the conclusions that this bundle of rights:

a. distinct from underlying securities (i.e. securities credited to the nominee account at the level of the Central Register) – see section 7^1 of § 6 of the ECRSA – wording of this provision implies that the transfer and provision as a collateral of the rights may be effected by way of entries made within the internal records by the nominee account owner without influencing the overall balance in the nominee account at the level of Central Register;

b. an be the object of proprietary rights (e.g. ownership, security interest) and proprietary dispositions.

If the owner of the nominee account maintains the internal records in a state other than the Republic of Estonia, then pursuant to § 23 (1) of the Private International Law Act the following aspects shall be governed by the law of the state, in which the internal records are held:

a. the nature of the rights arising out of the credit made to the account within the internal records;

b. content of the proprietary rights in relation to securities, including their perfection and termination;

c. in the case of disposition of securities - consequences to the rights attached to securities;

d. reconditions applicable in exercising the rights attached to securities;

e. providing securities as a collateral;

f. priority of the rights encumbering securities;

g. rights and obligations of the intermediary in respect of securities held with that intermediary.

7.6. Greece

7.6.1. DSS

In respect of rights arising out of securities held with the DSS securities accounts, please refer to 2.2. above: all rights and obligations concerning securities registered in the DSS in the investor's account flow to this investor, irrespective of possible contractual rights (as opposed to in rem) of third parties in relation to such securities as against the investor. Reciprocally, possible rights of third parties, other than the account holder, on the securities are enforceable only against the account holder and not erga omnes, e.g. against the Issuer, ACSD or other third parties.

In particular:

As **ex lege** presumed shareholder, the DSS account holder holds the right to participate and vote at general meetings of the issuer pertaining to the securities registered in the investor's account. Third parties (e.g. beneficial owners or end investors) could exercise such rights only by delegation, acting as representatives of the account holder.

Solely the account holder is entitled to dividends.

7.6.2. BoGS - Investors' rights / Protection of investors for securities held within the BoGS

In respect of investors' securities held in the Participant's customer account within the BoGS, investors may raise a claim in respect of the securities only against the Participant with whom they hold an account (article 8 para 2 of Law 2198/1994) and not against the BoGS or the BoG, which is the administrator / operator of the BoGS. The obligations of the BoG are discharged by paying the interest and capital due under the securities to the Participants.

In the event that the Greek state or other Greek public entities, issuing securities held within the BoGS, fail to fulfil their obligations (namely they do not timely pay interest or capital due under the securities to the BoG for remittance to the Participants in the System), investors are entitled to raise a claim, in respect of their rights attached to the securities, only against the issuer (Greek State or Greek public entities) and not against the Participant or the BoG.

Investors are granted a privilege over all accounts of the Participant held in the BoGS, in order to satisfy their claims on the relevant securities against the Participant. For shortfalls see below under (29).

Furthermore, Law 2198/1994 provides that all accounts held within the BoGS are not subject to seizure or attachment. Securities held through a Participant within the BoGS cannot be challenged at the BoGS level.

7.7. Spain

The inscription of securities in a securities account included in the registry system has material (substantive) effects: it confers to the account holder property rights.

Both terms “propiedad” and “titularidad” of a property right, are used by the regulations in force to refer to rights arising out of the credit of securities in a securities account.

The particular regime is the general one on securities held by means of book-entry outlined above.

Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)?

Inscriptions in securities accounts confer property rights in the securities credited therein. Therefore, the object of such property right is the security itself.

What obligations of the investor may also arise?

Notwithstanding the contractual obligations towards the entity in charge of the book-entry registry (the account provider), according to the terms of the Deposit, Administration and Securities account agreement, the credit of securities in the securities account does not create any other obligation on the account holder side.

7.8. France

7.8.1. What rights arise when securities are credited to securities accounts? Is there a specific regime for establishing these rights? Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)?

Dematerialisation has not changed the nature of the rights of the accountholder vis-à-vis the issuer[56]. The investors hold a claim against the issuer in respect of debt securities and a right as shareholder (droit d’associé) in respect of equity securities.

Such rights are rooted in company law. A direct right against the issuer is held by the investor whether or not the securities are held directly with the issuer or through an authorised intermediary (custodian).

Only a minority view among French scholars considers that the nature of the rights of the accountholder vis-à-vis the custodian is to be characterised as a personal claim.

Statutory law does indeed clearly provide that securities are recorded in the name of their owner which reflects a proprietary in rem right ("droit reel") (see also below, para. 8)

Furthermore, pursuant to Article L. 533-7 MFC, the custodian is required to protect the ownership rights of investors.

It should also be noted that a minority view among French scholars considers that French securities are tangible ("droit corporel"), despite the dematerialisation legislation.

---

[56] See Conseil National du Crédit et du Titre, *Problèmes juridiques liés à la dématérialisation des moyens de paiement et des titres* (May 1997).

The book entry in a securities account has four consequences for the account holder :

- the acquisition of property of the security,

- it records delivery of the security (the transfer of the property coincides with the delivery of the security, i.e. credit of the security to the securities account),

- the enforceability and effectiveness of the rights attached to securities against the issuer,

- the book entry is a presumption of the account holder's property right on the security.

7.8.2. What obligations of the investor may also arise?

No obligation arises for the investor, other than certain disclosure requirements (such as threshold disclosures) which may arise under Company law.

Furthermore, the customer is bound to perform its obligations under the custody agreement (payment of fees etc.)

7.9. Ireland

This depends on the terms and conditions of the relevant securities, those governing the establishment of the relevant securities account, the level of segregation of assets t;hat is effected and the approach that may be taken by an Irish court to the requirement for establishing a trust (see our response to (2) above). Rights may, for example, be expressed to be contractual (against the intermediary) or proprietary (in the underlying securities) in nature. They will invariably be intangible rather than tangible. To the extent that the investor has proprietary rights they will be equitable in nature.

Is there a specific regime for establishing these rights? Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)?

There is no specific regime that applies in all circumstances; it depends on an application of a general body of law including, potentially, English authorities that are of persuasive authority, only, in Ireland. How the rights are characterised will depend on the nature of the agreement establishing the securities account and the terms of the relevant securities. It may, for example, create a contractual claim against the account holder or some form of indirect proprietary interest in the underlying asset credited to the securities account. The latter – a form of "interest in securities" – would appear to come within the last category mentioned above. See our response to question (1) above in relation to the rights established under the CREST regime.

What obligations of the investor may also arise?

This will depend on the contractual terms of the agreement between the investor and the intermediary. An investor is likely, for example, to be required to make good any shortfalls and to indemnify the intermediary for costs and expenses.

7.10. Italy

When securities are credited to a securities account the same rights arise as if the underlying physical securities were credited (please refer to the answer to question 12 below). The regime for establishing these rights is the one provided under the law.

Since the underlying security is characterised as a chattel under Italian law, these rights are also characterised as a right to a chattel which can be the object of proprietary rights and dispositions. It should be noted that, due to the fact that the dematerialised and immobilised securities are held and transferred through a book-entry system, the acquisition always takes place bona fide and therefore no recuperatory actions by the previous owner can be brought.

Sources of Law:

Article 22 of the FLCA.

7.11. Cyprus

It should be reiterated that there exists under the Securities and Stock Exchange regime a first tier registration in the central depository and central registry and then there is a second tier of accounts: the depository account and the trading account. The last two accounts are electronically linked to the first tier registration and are simultaneously updated with the information contained in the central depository and central registry. Such registration acts as prima facie evidence of any matters to do with the securities. I would not, therefore, describe registration as a separate legal asset distinct from the underlying securities. Registration is a 'picture' of the rights and obligations accounted for therein and even this 'picture' is not conclusive or unqualified. Registration is evidence of a proprietary relationship vis a vis the company. This proprietary relationship covers a bundle of rights and obligations in relation to the company. It should be noted that the above holds true for entities incorporated in Cyprus. The position could be different concerning entities registered abroad where registration has a different legal effect since the relevant Cyprus provision provides that the central register has the same role and effect as the registers required by the law of incorporation of the issuer. The obligations of the investors are the obligations held by an owner of securities i.e. to enjoy ownership within the bounds of the law.

7.12. Latvia

Securities shall belong to their acquirer as of the moment the book entries in respect of those securities are made in the securities account of the acquirer. When securities are registered in the securities account the owner has all rights that are established in these securities (Article 125, Law). Investment brokerage firm and a credit institution shall be responsible for a prompt registration of the transactions in respect of securities and for prompt making of book entries of the financial instruments resulting from those transactions in the financial instruments accounts of customers. Dematerialized securities can be classified as an intangible property.

There are no distinctions between securities and the rights that are established in these securities if the securities are issued in dematerialized form, i.e. that book entry in security account doesn't establish a new separate asset. The person who owns these securities has the claim right on the rights that are established in these securities.

The intermediary is prohibited to use the securities belonging to an investor for settlement of the intermediary's creditor's claims. This requirement shall also apply to cases when an intermediary is recognized insolvent in due course of law. Also in the case when an investor has submitted an instruction to dispose of financial instruments to an intermediary and that intermediary has started to execute a transaction, those securities shall not be used to meet creditor claims on the person disposing of the financial instruments.

7.13. Lithuania

(7) What rights arise when securities are credited to securities accounts? Is there a specific regime for establishing these rights? Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)? What obligations of the investor may also arise?

Following Lithuanian law, securities are traced (recorded) by the credits in personal securities accounts. Under Lithuanian law securities are characterized as assets eligible to be hold in ownership right. However, all assets, including mare contractual claims, are eligible to be hold in ownership right under Lithuanian law (Art. 4.38 of the Civil Code). Nevertheless legal regime for transfer, protection and holding of various types of assets differs. Therefore in order to characterize legal nature of investors' rights to securities special legal norms applicable to investors' rights to such assets has to be evaluated. First of all, investors' rights to securities cannot be characterized as contractual ones. In case of bankruptcy of an intermediary investors will no be treated as creditors of the intermediary in respect of the securities. The management of securities accounts will be transferred to another intermediary in such case and the creditors of the bankrupted intermediary will not be entitled to attach investors' securities. Such feature indicates absolute nature of investors' rights. What is the object of investors rights, i.e. the securities themselves or proprietary rights to the underlying securities, it is very hard to evaluate. If investor should be deemed having only proprietary rights to the under laying securities, there would rise a question who is a legal owner of the securities themselves then. The concept of common-law trust is not applicable to holding of securities in Lithuania. The legal wording of Company law and Law on Securities Market as well as by-laws suggest the investor to be a legal owner of securities under Lithuanian law. Overall securities should be deemed as legal fiction, as an instrument simplifying holding of the rights derived from security in respect of the issuer (e.g. shareholders rights, bondholders' rights, etc.). Such financial instrument is owned by the investor; however, the way of execution of the rights derived from security depends on the type of security.

The obligations of investors, as owners of securities, are of general purpose, i.e. to enjoy their ownership in a manner that does not infringe the law and third parties' rights Also particular obligations of the investors may be related to particular requirements applicable to the transfer of securities, e.g. mandatory tender offer requirements.

7.14. Luxembourg

With the recording of a security to a securities account in a collective safe-custody system, the security looses its individuality. The depositor (investor) however retains the same rights as if the security had remained with it.

The entitlement of the depositor is qualified as a right in rem of an intangible nature, up to the number of securities booked to its account, on the entirety of the securities of the same kind deposited with or held in an account by its depository (Art. 6 of the Securities Act).

It is to be noted that, unless the depository is declare bankrupt, such right in rem can only be enforced by the investor (depositor) against its direct depository (Art. 6 of the Securities Act).

7.15. Hungary

The accountholder has proprietary rights on the securities credited to his account.

7.16. Malta

This depends (a) on the entity providing the securities account and (b) on the relationship between the holder and the client.

In the case of the CSD which operates securities accounts for the Malta stock exchange, there is no relationship of "holding" as the CSD is not an intermediary for the holding of clients' assets but it is a pure administrator of accounts for the MSE.

When the intermediary is a service provider which holds clients assets by crediting them to a securities account in its books, it could be a holding under a mandate/contract of service which could be a fiduciary mandate or it could be a holding under trust. The crediting of an asset to a securities account in that case would give rise to legally enforceable rights to request the return of the assets credited to the account and to full account of all dealings.

Is there a specific regime for establishing these rights?

Yes, there is the ISA **(control of assets) regulations** and the **trusts and trustees act**. A copy of the regulations is attached as the regulations are specifically relevant to many questions in this questionnaire.

Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)?

The ISA **(control of assets) Regulations** characterises the right of the customer as one of ownership in the same assets or a pro-rata right of ownership in a pool, when assets are pooled with other assets of other clients (subject to consent of customer).

The ownership of the assets (full or an undivided part) is a right of direct ownership of the assets themselves and the customer is free to deal with such assets as they are his, however due to the fact that they are registered in the name of the intermediary, the customer loses the power to make delivery of the assets in the normal way. In such cases it will be necessary to rely on the laws of assignment of rights – combined with the laws on sale of assets – to have assets delivered from an owner to a buyer.

Notification of the intermediary of the transfer of assets would be necessary for an effective transfer of rights. This is not a very clear area of law.

Trusts law refers to a legally enforceable right "in or to" the assets held under trust. Whichever the right – whether "to" or "in" assets, the rights of a beneficiary are at

law a new right which can be dealt in as a new asset which can be sold, pledged and so on.

Both laws ensure that there is a clear right of recovery of specific assets held by the intermediary.

What obligations of the investor may also arise?

There is an obligation to pay the fees of the intermediary and the assets would be subject to liens or privileges to protect such rights of the service provider who holds assets. This right is one "in rem" which means that they attach.

Regulation 3(3) of the ISA **(control of assets) regulations** state that the intermediary has no rights over customer assets unless expressly agreed, even when the assets are fungible. Usually fungible assets become owned by the intermediary in terms of the civil code. Here is it the opposite.

7.17. Netherlands

Reference is made to the answers to Question (1) and Question (4).

7.18. Austria

7.18.1. No (additional) rights arise when securities are credited to securities accounts (see answer to question (3)). The securities account is a bookkeeping tool and a means of proof. Rights between the account holder and the account provider arise when the account agreement is made. The main contents of the account agreement is the obligation by the account provider to take securities in custody on behalf of the account holder (the safekeeping of securities) and the obligation of the account holder to pay for the services of the account provider. When securities are credited to the securities account, the credit reflects the fact that these securities have been taken into custody by the account provider on behalf of the account holder. Without the credit to the securities account the fact that the securities have been taken into custody would not change and the rights following from that fact would be the same: Namely the obligation by the securities account provider to keep these securities in safe custody and to hold them in accordance with the instructions received in respect of these securities. The instructions received by third parties delivering securities to the account provider and the rights and obligations of the parties to the account agreement are in general under the general civil law, the Commercial Code and in respect of purchases to be made on behalf of the account holder under the respective regulations of the Deposit Act (commission to buy: sections 13 to 20 Deposit Act (see answer to question (2) under b), second paragraph).

7.18.2. b) The rights of the account holder against the account provider stemming from the account agreement may be attached by a creditor of the account holder in the same way as securities which are held by the account provider on behalf of the account holder. These rights may also be pledged by the account holder (obligatory rights in case of the account agreement, ownership rights in respect of the securities).

7.19. Poland

A securities entry on securities accounts results in the acquisition by the owner of that account all rights to those securities – which means full ownership of these

securities, enforceable against the issuer, intermediary and third parties. Of course, this is only the case for entries performed according to legal regulations.

Entries on securities accounts may be performed following the registration of the securities in KDPW (a new issue), or following the settlement of a transaction transferring rights in securities within KDPW, which also performs the role of clearing house for transactions executed in the public securities market. In principle then, entries on securities accounts managed by intermediaries are performed on the basis of documents sent to them by KDPW. Where the acquisition of securities has taken place on the basis of an event resulting, by virtue of law, in a transfer of those securities (e.g. inheritance), an entry in the acquirer's securities account shall be made at his request.

Rights resulting from credits on securities accounts are full proprietary rights.

Any potential obligations of an investor may only result from the type of securities registered on that investor's securities account, or they could also relate to full payment for these securities, if these were transferred to the investor prior to full payment for them. Of course, additional obligations of the investor may arise from the securities account management agreement, concluded by the investor with the intermediary, however, these will be obligations of a relative nature, arising from services rendered on the investor's behalf by the intermediary.

7.20. Portugal

According to articles 80. and 105. CVM, the credit of securities to Individual Ownership Account evidences the acquisition of ownership of the securities. The securities are in themselves the object of the proprietary rights (e.g. ownership, security interest, usufruct) and of the proprietary dispositions (e.g. sale, pledge, loan).

Regarding the obligations of the investor, please note that such obligations are mainly those that are provided for in the registration and/or deposit agreement made between the investor and the Financial Intermediary, which usually includes paying any fees due for the services rendered.

7.21. Slovenia

When dematerialised securities are credited to a dematerialised securities account holder of that account becomes a legal (and beneficial) holder of those securities. By transferring dematerialised securities form the (former) holder's account to the new holder's account the rights arising from dematerialised securities are transferred to the new holder (i. e. a person, who is the holder of the new holder's account).

The provision of Art. 6 of ZNVP states:

»(1) The rights of a holder relating to dematerialised securities shall arise with the crediting of dematerialised securities to the holder's account in the central register and shall be transferred by means of transfer of dematerialised securities to the new holder's account in the central register.

(2) The rights arising from a dematerialised security, which are entered in the central register, shall be acquired, restricted or terminated on their appropriate entry in the central register, if not otherwise stipulated by this Act.«

Rights of a holder of dematerialised securities (i. e. rights of a holder of a dematerialised securities account on which the securities are registered) constitute:

− the rights arising out of the securities against the issuer and

− the right(s) to dispose with dematerialised securities (i. e. to transfer dematerialised securities to another person or to enable a third person to acquire a third party right on dematerialised securities).

Rights of a holder of dematerialised securities may be object of following types of third party rights (Par. 1 Art 28 of ZNVP):

1. lien;

2. the usufruct;

3. redemptive right (call option, option to purchase securities);

4. pre-emptive right.

Third party rights are acquired by registration (entry) in the central registry on appropriate sub account maintained within the holder's account (see also answer to Q3). The holder of a sub account on which a third party right is registered is the beneficiary to that right i. e. the person to whose benefit third party right has been established and entered in the central registry.

Third party rights that are based on a holder's legal transaction (disposition) are entered (registered) in central registry upon an order for registration given (issued) by a holder (Art. 40 of ZNVP). Third party rights shall be recorded in the central registry in accordance with their contents defined by in the order for registration. Registration of the third party rights to securities shall also include their beneficiaries (Art. 41 of ZNVP). Third party rights to securities shall come into effect in respect of third parties on their entry in the central registry (Art. 42 of ZNVP). Apart from pre-emptive right, all other types of third party rights are acquired (against the holder) on their entry in the central registry, i. e. at the same moment as they come into effect against third parties.

7.22. Slovakia

When securities are credited to securities owner's account, second condition for becoming an owner of book-entry securities is fulfilled. A legal or natural person that acquired the security on the basis of agreement or on the basis of other legal fact stipulated by law and is entered as an owner of book-entry security in registration defined by the Act is deemed to be the owner of book-entry security. Owner of securities account becomes owner of securities the moment securities are credited to this account. Securities are considered to be financial assets. When handling pledged security, securities are transferred to buyer with effective lien. Also benefits from pledged securities are subject to lien. Generally, pledged securities cannot be sold in anonymous trades.

7.23. Finland

Regarding an investor-specific book-entry account maintained in the book-entry system, an investor is considered to have a direct and traceable ownership right of an individual book-entry security registered in his account. The right of the investor is neither regarded as a proportional co-ownership right to a pool of securities nor as a special interest in such. The rights of the account holder and other holders of rights are specified in accordance with the Act on Book-Entry Accounts. The rights pertaining to a book-entry account can be characterized as property rights either pertaining to the securities credited to the account or to the account as a whole and applicable to the securities credited to the account from time to time (e.g. pledge).

Credit on a book-entry account does not itself create any specific rights, since the rights exist without recognition on the account. However, in order to be protected against third party claims, a right has to be registered to the respective book-entry account.

There is no numerus clausus –principle as to what kind of rights can be registered to the book-entry account. However, the most common registrations of rights have been standardized in the system, such as pledge, restriction of transfer and usufruct. A sale is registered by debiting the securities from the seller's account to the recipient's account.

In terms of book-entry securities credited to an omnibus account ('custodial nominee account') and of securities held with an intermediary outside of the book-entry system the situation is less clear. Under the traditional Finnish property law, a person can hold property on behalf of another person. The property is not considered to be owned by the person holding the property and the owner has an enforceable right against a third party (e.g. successor and creditor), if the property is sufficiently segregated from the assets of the person holding the property. See further discussion under question 12.

7.24. Sweden

The legal position of a CSD or an account operator could be described as a depository relationship. The liability as operator and depository in the book-entry system is regulated in Chapter 7 of the Financial Instruments Accounts Act.

7.25. United Kingdom

It is assumed that the assets held by the intermediary are segregated from its house assets and commingled with like assets of other clients, and that there is no shortfall. The general view is that the client acquires a bundle of contractual and property rights. Its contractual rights are determined primarily by the custody contract. Its property rights are generally considered to be equitable (i.e. beneficial) co-ownership rights in common with other clients to whose accounts like assets are credited by the intermediary, in proportion to their entitlements.

Non-CREST

The position under English law is uncertain. The balance of academic view favours the following analysis:

the investor has no direct relationship with the issuer, but a relationship with the intermediary determined by the agreement between investor and intermediary

the investor has a co-ownership interest in whatever it is that the intermediary holds, alongside other investors holding entitlements to the same "securities"

the book entry represents (or the thing which the investors co-own is) a package of rights exercisable against the intermediary akin to the rights arising under UCC revised Art 8.

Unfortunately statutory or judicial authority is not available as to the appropriate analysis of the position. Other analyses, for example based on the law of trusts, are possible.

CREST

Legal title to the securities is conferred on the holding CREST member by virtue of the Uncertificated Securities Regulations (see below).

Is there a specific regime for establishing these rights?

No. The above is based on a body of case law, as analysed by practitioners and academics.

CREST

The Uncertificated Securities Regulations 2001 provide that:

in relation to title to UK shares, the CREST register is prima facie evidence of title (as is the company's own shareholder register), and that the CREST register prevails over the company's records in the event of inconsistency

in relation to UK government securities, entries on the CREST register are prima facie evidence of holdings of such securities

in relation to non-UK-equity corporate (including debt) securities, entries on the CREST register are prima facie evidence of holdings of such securities

in relation to "eligible debt securities" (essentially dematerialised certificates of deposit, Treasury bills), entries on the CREST register are prima facie evidence of holdings of such securities

in relation to other securities (such as CDIs), entries on the CREST register are prima facie evidence of holdings of such securities (but not in any underlying security such as a foreign share represented by a CDI).

(CREST Depository Interests (CDIs) are, like global depository receipts, new securities which are created within the CREST system, and resemble the underlying securities they represent. This allows CDIs to be subject to the Uncertificated Securities Regulations 2001 rather than have the legal status of entitlements in the books of any other intermediary.)

Are these rights characterised as a claim, an intangible, a chattel, or a new and separate legal asset, distinct from the underlying securities, which can be the object of proprietary rights (e.g. ownership, security interest, usufruct) and proprietary dispositions (e.g. sale, pledge, loan)?

The last. It has been referred to by commentators as an "interest in securities", and is akin to the US "securities entitlement."

CREST

Although the rights constituted by an entry on the CREST register generally confer title to the asset, such rights are in practice available only to members of CREST. Thus it is impossible to analyse the rights attributable to such title in isolation from the incidents of CREST membership. These other incidents arise out of the contract of membership, and in some specific circumstances provide that a credit to a member's account does not amount to an official entry on the Register conferring title under the Uncertificated Securities Regulations 2001

What obligations of the investor may also arise?

In general, none, except as provided under the agreement with the intermediary. Standard drafting includes obligations promptly to make good any shortfalls, and to indemnify the intermediary for its costs and expenses. There are also

representations and warranties concerning inter alia beneficial ownership of the custody assets and/or authority from the beneficial owner to deal with them.

CREST

By contract CREST members indemnify CRESTCo for all liabilities suffered by CRESTCo arising from the actions or omissions of the Member. There are numerous other obligations arising out of CREST membership by virtue of the CREST Terms and Conditions.

8. QUESTION NO 8.
WHAT IS THE LEGAL POSITION OF THE INTERMEDIARY IN RESPECT OF THE SECURITIES CREDITED TO AN INVESTOR'S SECURITIES ACCOUNT?

8.1. Belgium

The intermediary is merely acting as a depositary/agent on behalf of the investor who is the sole owner of the securities.

8.2. Czech Republic

CSD is obliged to make records in accounts only on the basis of instruction of the intermediary who is the participant in CSD. Intermediaries eligible to become participant in CSD and thus send transfer instructions are investment firms, banks, management companies, operator of regulated market, foreign CSD, central bank etc. Participants of CSD may send only instruction to which they are entitled by the instruction of the securities owner. Intermediaries who hold customers securities in customer account in CSD are liable for the loss, destruction, damage and devaluation of the securities

8.3. Denmark

The legal position of a CSD as intermediary is best described as a depository relationship. Its liability as depository is regulated by Securities Trading Act Art. 80:

"A central securities depository shall be liable in damages for any loss resulting from errors in connection with the registration, alteration or cancellation of rights on accounts with the central securities depository concerned or for payments made by the central securities depository, even if such errors are fortuitous. However, if the error can be ascribed to an account manager, the liability in damages shall rest with this manager, cf. Art. 81 of this Act."

If there is a discrepancy in the amount recorded at the CSD account the CSD is not liable unless the discrepancy is due to an error performed the CSD when performing the function of registration, alteration or cancellation of rights on the accounts.

Only when the holder of rights pursuant to section 69, 2nd clause in the Security Trading Act (i.e. due to forgery or duress under threat of violence) fails to acquire or loses any rights over electronic securities shall he be entitled to claim damages from the central securities depository concerned for the losses incurred, cf. Securities Trading Act. Art. 80(2).

The legal position of an intermediary other than a CSD is regulated by general principles of law, see answer to Question no. 12.

8.4. Germany

With respect to securities held in jacket or collective safe custody (Sonder- oder Girosammelverwahrung) in Germany the intermediary, i.e. the custodian bank or CSD, holds possession of the security certificates but not ownership/title. The investor and not the intermediary is entitled to exercise and, if necessary, to enforce before the courts the rights arising out of the securities. However, it is the business and duty of the custodian bank/intermediary to collect interest and dividend payments as well as repayment of bonds. In doing so the intermediary exercises

rights of the investor in the capacity of an attorney on the basis of an authorization contained in Section 14 of the SCSD. With respect to Federal Bonds entered into the Federal Debt Register, the CSD is authorized by Section 8 para 7 Law on the Federal Debt Register to request payment of interest and capital when due.

With respect to securities held in safe custody abroad and credited to the securities account in WR-Credit the intermediary holds title to the securities in his capacity as fiduciary trustee. Such trustee position enables the intermediary to exercise and enforce all rights arising out of the securities against the issuer and any third party in his own right. However, without instruction of the ultimate investor the intermediary will only render such administration services and exercise rights as in the case of securities held in domestic safe custody.

8.5. Estonia

The intermediary (the owner of the nominee account) holds securities in its name but on behalf and for the benefit of the client (investor).

8.6. Greece

The intermediary (Operator or Participant) acts as custodian, i.e. account keeper and administrator, as explained above, regarding customers accounts, within the DSS and within the BoGS, respectively.

8.7. Spain

The intermediary (participant in the registry system of securities held by means of book-entry) that holds the securities account in the name of its clients, is in a legal position characterised by its two-fold dimension:

On the one hand, in the position of participant in a securities holding system. It is the participation in a legal-substantive registry with material or substantive effects over investors' rights in securities. This implies the development of a function of public interest, with similar legal effects that those arising from the Real Estate registry or other registries of goods. For the purposes of carrying out such activity, the intermediary must fully and strictly comply with the regulations applicable to the registry system. Such regulations are of a mandatory nature and cannot be replaced, altered or otherwise modified by contract.

In addition, opening and maintaining the securities account is made according to the contractual framework agreed by parties, for the development of ancillary investment activities (custody of securities or keeping the book entry registry)

The Spanish jurisprudence (case-law) has highlighted the combination of the typical features of the deposit agreement (i.e. obligations of guarding and returning the object deposited) together with other features pertaining to the agency/mandate agreement (i.e. administration for the preservation of the rights in securities)

As a result, it is considered as a mixed type of agreement, from which the following obligations arise on the intermediary side: custody, conservation and administration.

Considering the dematerialised nature of the securities held by means of book-entry, the obligations of its custody, in particular, guarding and returning the object deposited (enforceable in the case of physical securities), are logically replaced by the obligation of holding the securities account and keeping the book-entry registry in the terms foreseen in the relevant applicable regulations.

As a conclusion, the intermediary is in a legal position created ad-hoc by the legal regime of securities held by means of book-entry, known as “entity in charge of the book-entry registry”.

8.8. France

French legislation has vested with the AMF the authority to set the conditions governing the exercise of the activity of custody of securities.

The intermediary is not the owner of the securities credited to the customer's account.

The Règlement Général of AMF contains rules governing the duties of a custodian (teneur de compte conservateur) of securities.

Among the duties of a custodian vis-à-vis its clients, the custodian is under the duty :

to maintain and preserve the securities;

not to use securities recorded in its books in the name of its customer without the consent of such customer;

not to transfer ownership over such securities without accountholder’s consent;

to redeliver those securities, if need be.

The above rule characterises the duties of a depositary under the French Civil Code.

The French Civil Code does indeed provide that:

"As a rule, a deposit is a transaction by which one receives the thing of another, on condition of keeping it and returning it in kind." (Article 1915)

"A depositary must take, in the keeping of the thing deposited, the same care as he does in the keeping of the things which belong to him." (Article 1927).

"He may not make use of the thing deposited, without the express or implied permission of the depositor." (Article 1930)

"A depositary must return identically the same thing which he has received." (Article 1932)

Those above rules also lead to the conclusion that such deposit is to be characterised as a regular deposit (i.e. title to the securities remains with the investor-depositor).

This characterisation is also supported by case-law57 which has characterised such deposit as a regular deposit.

Such analysis is not put into question by the fungible nature of financial instruments.

Indeed, as long as securities or deposits are identified and segregated as a result of the book entry, there may be no transfer of property for the benefit of the depositary or custodian in the absence of commingling of such securities with securities held by the custodian for own account[58].

---

[57] Cass. Crim. May 30, 1996. Bull. Criminel 1996 n° 224 p. 625

[58] T. Bonneau / F. Drummond, *Droit des Marchés Financiers*, deuxième édition, Economica, 2005, n° 232, p. 223; Cass. 1ère Civ. November 29, 1983; Bull. I, n° 280

8.9. Ireland

This will depend on the nature of the agreement establishing the securities account and the terms of the relevant securities. For example, it may have only contractual obligations to the investor or it may act as trustee in respect of the securities on behalf of the investor, as beneficiary.

CREST Ireland is not an intermediary in the sense that an intermediary holds securities for investors.

8.10. Italy

The intermediary has the legal position of a custodian of the securities credited to the investor's securities account. The investors' asset are segregated for all intents and purposes from those of the intermediary and the intermediary has no rights over such securities (except when these have been given as collateral). The investor may authorise the intermediary to make use of the financial instruments deposited to the account in the intermediary's or third parties' interest. Furthermore, in accordance with the general rules on deposit, a statutory lien and a right of retention over the deposited assets are provided for in favour of the depositary in case of failure by the investor to pay the fees and expenses due to the depositary. Please also refer to the answer to question 25 below.

The intermediary shall perform various duties in its capacity of custodian consisting of: a) exercising in the name and on behalf of the investor the financial rights attaching to the financial instruments and, to the extent the intermediary has been so authorised, the administrative rights attaching thereto; b) issuing, upon the investor's request, a non transferable certification necessary for the exercise of rights attaching to the financial instruments; c) informing the issuers, upon the investors request, and in any event when so provided by the law, of the names of any person who is entitled to exercise any rights attaching to the financial instruments, with a view to enabling the issuer to comply with any requirements provided for by the law.

Sources of Law:

Articles 1838, 2756 and 2761 of the Civil Code.

8.11. Cyprus

The legal position of the intermediary is the position held by every registered owner of securities. If the intermediary reveals his capacity as a custodian or trustee then the contents of the accounts are treated as property of the ultimate account holder.

8.12. Latvia

According to the Civil Law the intermediary is the holder of the securities, i.e. the person who has actual control over the property, but who acknowledges another person as the owner thereof. The holders of property have no right to act with the property without consent of investor.

8.13. Lithuania

Following Art. 1.101(10) of the Civil Code, an intermediary is deemed to be holding securities under the rules of custody. The rules of custody provided in the Civil Code are tailored for keeping of the chattels, but not intangible assets. Therefore, the regulation shall be applicable under the principal of analogy. The

main feature of such regulation is that the investor upon transferring his assets in custody of an intermediary does not loose his ownership right to the assets. This is a very important aspect in bankruptcy of an intermediary, since the creditors of the latter shall not be entitled to attach investors' assets.

8.14. Luxembourg

The intermediary is acting as a depository on behalf of the investor who is the sole owner of the securities.

8.15. Hungary

The intermediary is consignee in respect of these securities if it takes part in the transaction, or it is a proxy if it only acts in the position of account holder.

8.16. Malta

From an administrative angle the intermediary is treated as the person who has full rights to deal with the assets in the securities account (as mandatory or as a trustee) but he will not be treated to be the owner if he is a mandatory. If he is a trustee then he is the owner of the assets subject to fiduciary obligations.

8.17. Netherlands

As may follow from the answer to Questions (1) and (4) already, the legal position of the intermediary in respect of the securities credited differs depending on the securities concerned. Under Netherlands Law, special measures are taken to avoid that securities of customers of a bank fall within its bankruptcy estate. Although the likelihood of a bank which is supervised by De Nederlandsche Bank N.V. (the Nederlands Central Bank, "DNB") becoming insolvent is negligible, different protection mechanisms have been developed to avoid, to the largest extent possible, that the customers of a bank would incur risks, should any such situation occur.

Securities subject to the Securities Giro Administration and Transfer Act

Securities which fall under the Securities Giro Administration and Transfer Act and which have been given in custody to an Admitted Institution within the meaning of said Act are placed on behalf and in the name of the customer in a collective deposit. The Act provides that the customer becomes a co-owner of the relevant collective deposit. Consequently, under Netherlands Law, in the event of the insolvency of an intermediary that is an Admitted Institution, the securities are not available to the bank's trustee in bankruptcy and are therefore protected from such bankruptcy.

Bearer securities held in the Netherlands and not subject to the Securities Giro Administration and Transfer Act

Bearer securities held in the Netherlands which are not subject to the Securities Giro Administration and Transfer Act are placed by the intermediary on behalf and in the name of the customer in the custody of a Securities Depository Company, designated for this purpose. This company has been established as a special purpose company which holds the rights (and where applicable: legal title) to such securities, with the exception of securities that can be identified by serial number or in another manner, as belonging to a customer who has sole ownership.

The customer has a direct right against the Securities Depository Company with respect to securities held in custody on his behalf by the Securities Depository Company. The obligations of the Securities Depository Company with respect to the securities are solely towards the customer. The Securities Depository Company

does not engage in any activity other than the safekeeping of securities for the benefit of the Bank's customers or the Bank itself. It is explicitly forbidden for the Securities Depository Company to engage in any activity that could result in commercial risks. The Bank guarantees the customer the proper performance by the Securities Depository Company of its obligations towards the customer. The result of this arrangement is that the customer's rights with respect to these securities are separated from the Bank's liabilities (while at the same time the risk of the Securities Depository Company becoming insolvent is only theoretical).

The Securities Depository Company is managed by the Bank and the Bank shall remain charged with the duties with respect to the administration of securities. The Securities Depository Company's function could be described as that of a "vault" or a bare nominee facilitating the custody operations of the Bank. The Bank is charged with and liable for the duties entailed by the administration of the securities, such as settlement, collection of dividend and interest payments, corporate action notification and management, reporting, tax reclaims, proxy voting and processing of the customer's instructions.

Bearer securities held outside the Netherlands; registered securities

Rights with respect to bearer securities located outside the Netherlands and not subject to the Act and rights with respect to registered securities are also held by a Securities Depository Company. The structure of such Securities Depository Company is comparable to that of the Securities Depository Company referred to above. The Securities Depository Company will acquire the legal title to the rights concerned, with the exception of rights that can be identified as belonging to a customer who has sole ownership. The customer has a direct right vis-à-vis the Securities Depository Company. The obligations of the Securities Depository Company with respect to the securities and rights relating thereto are solely towards the customer. It will, insofar as possible, hold the rights against the (sub)custodians, rather than the Bank. The Bank will guarantee the customer that the obligations of the Securities Depository Company towards the customer will be properly fulfilled. The securities held by the Securities Depository Company will therefore be completely separated from the Bank's liabilities (while at the same time the risk of the Securities Depository Company becoming insolvent is only theoretical). In the same manner as is described above the Securities Depository Company is managed by the Bank and the Bank shall remain charged with the duties with respect to the administration of the securities. In this legal construction, the Securities Depository Company holds the rights for the customers of the Bank and the Bank remains charged with all obligations and liabilities resulting therefrom.

8.18. Austria

The legal position of the account provider in respect of the securities evidenced by the credit to an investor's securities account is that of a custodian of assets owned by the account holder in respect of which the account provider is entrusted with some management functions (the extent of which depends on the account agreement).

8.19. Poland

The legal position of an intermediary may be compared to that of a custodian keeping assets on behalf of other persons, obliged to protect them from loss or any other harm to allow the investor to realise rights arising from securities and transferring to the investor all benefits the issuer confers via the intermediary, as

well as to realise instructions sent by the investor relating to securities entered on the investor's securities account.

8.20. Portugal

The financial intermediary renders, to the account holder, the services of book-entry registration and deposit of securities. Its legal position is, therefore, that of a service provider. The financial intermediary has no ownership rights over the securities accounts.

8.21. Slovenia

Investor is legal (and beneficial) holder ("owner") of dematerialised securities credited (entered) to his (holder's) dematerialised securities account (Par. 2 of Art. 16 of ZNVP). Pursuant Par. 1 of Art 16 of ZNVP the rights arising from dematerialised securities may be exercised only by their legal holders.

Intermediary in the meaning of an investment firm (and KDD registry member) is only authorised (under the contract of dematerialised securities account maintenance services) to enter (into central registry) holder's (Par. 1 of Art. 75 of KDD Rules):

1. orders for transfer of dematerialised securities, debiting the holder's account it maintains and crediting another account,

2. orders for entry of third party rights in dematerialised securities entered in the holders' account it maintains; and

3. holder's or entitled person's (beneficiary's) orders to modify or cancel a third party's right in dematerialised securities entered in the sub account of the holder's account it maintains, except for orders to modify or cancel a pledge.

8.22. Slovakia

Instruction for transfer of securities bears the information on member of the CSD that maintains securities account to which securities should be credited. In this respect intermediary – the CSD member – only facilitates transfer of securities to beneficial owner account. Intermediary has no legal position with regards to transferred securities.

8.23. Finland

Regarding the book-entry system, the account operators of APK don't run their own sub-accounting systems. Instead, they operate client accounts in one book-entry system on the basis of the powers given to them by the investors. Neither APK nor the other account operators are considered to be the owners of the securities in a book-entry account unless it is an account opened separately in the account operator's own name for its own positions. If applying the Hague Convention, APK shall be regarded as the relevant intermediary in respect of the book-entry accounts. The role of the account operators can be characterised with the words of the Hague Convention as recording "in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as a manager or agent …".

As to the holdings maintained outside the book-entry system the intermediary can be characterised as a property deposit (deposit related to property law) under the Finnish Commercial Code. Provided that the assets of the customer are sufficiently segregated from the assets of the intermediary, the intermediary does not have a right to the customer assets, nor its successors or creditors. It shall be noted that

the banks offer also services whereby they only offer a safe deposit box without recognising the content of the deposit.

8.24. Sweden

Such distinction is not made in the Financial Instruments Accounts Act.

8.25. United Kingdom

An intermediary is (subject to agreement to the contrary, which would not be expected) likely to be a trustee. However, some aspects of the law of trusts are unsatisfactory when applied to securities held in accounts, and in particular it does not follow from the characterisation of an intermediary as a trustee that the intermediary holds particular securities on a bare trust for the investor.

CREST

CREST is not generally an intermediary (in the sense that an intermediary "holds" assets for its customers). In relation to CDIs the CREST Depositary is an intermediary in this sense in respect of the securities underlying the CDIs; as such it is in the position of non-CREST intermediaries discussed above. CRESTCo Limited is an Operator under the Uncertificated Securities Regulations 2001, which is a unique status with its own special statutory rights and responsibilities.

9. QUESTION NO. 9

IS THERE ANY DISTINCTION BETWEEN (I) THE RIGHTS ARISING OUT OF THE SECURITIES AGAINST THE ISSUER AND (II) THE RIGHTS IN RESPECT OF HOLDING THE SECURITY?

9.1. Belgium

The right of co-ownership in an intangible pool of book-entry securities, as organised by Royal Decree 62, includes both (i) and (ii) (cf. Royal Decree 62 , Articles 12 and 13).

9.2. Czech Republic

Securities owner recorded in the owner account is entitled to exercise rights arising from securities against the issuer. Exercise of rights arising from securities against the issuer by CSD or holder of customer account is possible only in capacity of proxy by particular securities owner. CSD and holder of customer account are on the other hand in any respect liable for the proper exercise of issuer's duties to securities owner. Intermediary who holds customer account in CSD in respect of securities credited to this customer account acts in capacity of securities safekeeper. Securities safekeeper is bound by provision of section 34 of Securities Act which governs the terms of securities contract to protect securities against the loss, destruction, damage and devaluation.

9.3. Denmark

Generally, no distinction is made. A separate question is to what extent the issuer has knowledge of the identity of the account holder which may have relevance in relation to corporate actions. But the general concept is that a right over securities derived from a holding also creates a right against the issuer.

9.4. Germany

Under German law there is a clear distinction as described under Question 1. The clearing and settlement system by book entry via CSD is based on the transfer of co-ownership of certificates or deemed certificates, i.e. title to the certificate. The rights arising out of the security follow by operation of law as they are embodied in the certificate by virtue of the terms and conditions of the certificate (transport function).

If a security certificate does not have such transport function, it may not be subject to transfer by book entry. In such case, the function would be more or less limited to evidence certain rights which would have to be transferred by individual assignment. The assignee would acquire title to the certificate by operation of law (Section 952 Civil Code).

9.5. Estonia

Vis-à-vis the issuer or other third parties the intermediary (i.e. the owner of the nominee account) is entitled to exercise the rights arising from the securities. When doing so it has the obligation to follow the instructions of the investor. Moreover, at the request of the investor it has the obligation to grant authorization in the required format to the investor in order for the investor to represent the owner of the nominee account.

9.6. Greece

Regarding securities held within the DSS, there is no distinction between such rights, due to the fact that the account holder is registered in the DSS as the sole entity entitled to exercise, against the issuer of the securities, the rights attached

thereto. This rule does not impede a foreign intermediary from holding securities in its own name and account for its customers' account. Nevertheless, rights attached to the securities may only be exercised against the issuer by the intermediary, the latter being the account holder within the DSS. However, the intermediary may authorize more representatives – corresponding to its customers – in order to exercise its voting rights.

In respect of securities held within the BoGS, please refer to our answers under 2.3. and 7.b.

9.7. Spain

These are connected rights:

i. The rights arising out of the securities against the issuer are generated in the existing direct (contractual) relationship between both parties. These rights are enforceable exclusively against the issuer.

ii. The rights in respect of holding the security is a property right. It confers to its owner full domain in the security against the issuer and third parties, as well as powers of disposal and encumber, and the exercise and enforceability of the rights arising out of such property position (e.g.: right to assist and vote in a AGM, to receive interests, etc)

9.8. France

There is a distinction between the rights arising out of the securities against the issuer and the rights in respect of holding the securities.

The investor has a property right over the securities recorded in his securities account.

The securities confer on the owner different rights against the issuer. The nature of these rights, rooted in company law, depends on the type of securities:

shares give the right to receive dividends, to receive information from the issuer and to vote at shareholders general meetings

debt securities give right to interest payments and repayment of principal and to the extent applicable to participate and vote in bondholders meetings.

Vis-à-vis the custodian, the relationship between the custodian and investor is the one related to a depositary contract ("contrat de dépôt") (see above question 8).

9.9. Ireland

Yes. These distinctions can arise in a number of respects. For example, rights under the securities against an issuer will be personal rights; rights against an intermediary that acts as trustee will, as against that trustee, be property rights. Rights arising in respect of a holding of securities must comprise an intangible asset; certain rights in certain securities may comprise a tangible asset (e.g. rights to a bearer security). Rights in respect of a holding, being an indirect proprietary interest, held through an intermediary, must generally be exercised through the intermediary; a right under a direct holding of a security may be exercised directly against the issuer. Rights in respect of a holding, being contractual rights against an intermediary, will not afford any right of recourse, direct or indirect, to the issuer.

9.10. Italy

As indicated in the answer to question 12 below, holding of a security through a book-entry system is tantamount to holding the security is physical form. Nonetheless, as a matter of Italian corporate law, there are cases where there is a distinction between rights arising out of the securities against the issuer and rights in respect of holding the security. For example, such distinction exists where the "participation rights" do not coincide with the "economic rights" attaching to shares. In case of a listed banca popolare, whose shares must be immobilised in the CSD system, the holder of the shares can always exercise the economic rights relating thereto, but can only exercise the relevant participation rights (e.g., voting rights, right or withdrawal, etc.) only after having being admitted as a shareholder by the board of directors.

9.11. Cyprus

No distinction is made. Rights against the issuer and rights in respect of being the registered holder of the securities are identical the only exception existing in the case where a person is able to rebut the initial presumption of registration and to show that he, for example, is entitled to be registered as the owner. In such a case, of course, an action may lie for rectification of the register.

9.12. Latvia

Generally, no distinction is made. A separate question is to what extent the issuer has knowledge of the identity of the account holder which may have relevance in relation to corporate actions. But the general concept is that a right over securities derived from a holding also creates a right against the issuer.

9.13. Lithuania

The securities are legal fiction incorporating rights against the issuer which may not always be executed directly towards the issuer (e.g. in cases of Government debt securities). The rights from the securities are also deemed as separate objects of ownership right (as specific assets). Such conclusions follows from the jurisprudence of Constitutional Court of Lithuania which ruled that upon acquisition of shares of the company the disintegration of the ownership right of the shareholder occurs – on the bases of ownership right to the capital, previously owned by the shareholder and transferred to the company for the shares, originates property and non-property shareholders rights which are the object of ownership right. Also the rights arising from the securities may be also transferred by not transferring the securities wherefrom such rights have arisen (e.g. the shareholders are entitled to transfer voting rights for a period not exceeding 10 years). The aforementioned examples suggest that rights from the securities are deemed to be separate assets than the rights in securities, though the former directly depend on the latter. For the purpose of circulation through the SSS only securities may be transferred.

9.14. Luxembourg

The Securities Act clearly distinguishes between the rights arising out of the securities against the issuer and the rights in respect of the holding of the securities.

(i) As overall principle, the Securities Act provides in Article 6 that "the depositor has the same rights as if the securities and other financial instruments had remained with it."

The rights arising out of the securities may be exercised following the procedures established by the Securities Act:

Article 8: "The rights attached to securities and other financial instruments may be exercised by means of the production of a certificate, set up for the purposes set out therein, by the depository certifying the number of securities or other financial instruments booked to the account.

For the purposes of participating in a general meeting of a company, the numerical list of securities or other financial instruments booked to an account with a depository may validly be replaced by a certificate delivered by such depository to the depositor which confirms the unavailability of the securities or other financial instruments booked to the account up to the date of the general meeting".

(ii) As to the rights in respect of the holding of the securities, the depositor has a right in rem of an intangible nature, a right of co-ownership in an intangible pool of book-entry securities. The depositor can only exercise this right in rem against the depository (Art. 6 of the Securities Act)

9.15. Hungary

Since holding securities on an account means proprietary rights, there is no distinction.

9.16. Malta

There is no legal distinction between the rights against the issuer and the rights to the asset as customer remains the owner of the rights and assets in both cases, but the intermediary is at law treated as the person who can exercise right vis a vis third parties, so there is a practical distinction. It is only the intermediary who can practically exercise rights against the issuer. Should the customer wish to re-unite his rights vis a vis third parties to his rights in the assets then he must ask the intermediary to place the assets in his own name.

9.17. Netherlands

With respect to securities subject to the Securities Giro Administration and Transfer Act and with respect to individualised bearer securities, a right over the securities should also create a right against the issuer. However, it may be impossible for the investor to exercise the rights against the issuer whereas the issuer has no knowledge of the identity of the investor, in which case the investor would have to effectuate its rights through the intermediary. With respect to fungible securities the investor merely has a contractual right against the custodian, and it is the custodian as owner of the securities that has a right against the issuer.

9.18. Austria

Yes. The rights arising out of the securities against the issuer may only be exercised by the owner of the securities (the account holder) or by a person who derives authority to exercise some or all of these rights from the owner. The rights in respect of holding the security are those which have been agreed between the owner of the security and the actual holder. In general they relate to the safekeeping and administration of the security. See above answers to questions (7) and (8).

9.19. Poland

Any distinction between rights arising out of the securities enforceable against the issuer and rights in respect of holding the security do not exist. A securities entry on a securities account results in the transfer of rights in these securities being

passed on to the owner of the account. These rights are therefore conferred with the effect of "erga omnes" including effective against an issuer and these rights may be freely used (e.g. the securities may be sold or pledged). In the case of registered securities, there may be restrictions on their sale and any breach of such restrictions may lead to lack of an effective purchase of these securities.

A separate issue relates to the legal right to exercise securities rights from securities registered on securities accounts. Generally speaking, such legal rights will arise from the entry of securities on the securities account of the investor. In order to confirm this account balance, at the request of investors, intermediaries issue so-called depository certificates, which give the legal right to exercise all rights inherent in these securities enforceable against the issuer. However, in respect to registered shares, registered on securities accounts, such a legal right is conferred by an entry of a shareholder in the share register managed by the issuer of these shares. Entries in this register are carried out at the request of a purchaser of registered shares.

9.20. Portugal

No.

9.21. Slovenia

With dematerialised securities there is no distinction between (i) the rights arising out of the securities against the issuer and (ii) the rights in respect of holding the security

9.22. Slovakia

Regarding dematerialised securities, a person who holds securities in its securities owner's account is deemed to be the owner of those particular securities. In this case, there is no distinction between the rights arising out of the securities and rights in respect of holding the security. If securities are held in an omnibus account, holder of this account according to Slovak legislation is not an owner of securities registered in omnibus account and has no rights to those securities and consequently no rights in respect of holding the security.

9.23. Finland

In general, the rights arising out of securities against the issuer are determined in accordance with either the terms and conditions of the security (bond) or with the corporate documents such as the articles of association of a company.

In the book-entry system, the rights arising out of a security can be divided into two categories. First, in respect of shares and other equity rated securities, the shareholder list or other respective list of holders. The list is created on the basis of information of holders of securities accounts. In certain cases, however, the right against the issuer is determined based on information registered in the account, such as pledge of dividend right. The list of holders is being updated on the basis of the account information, but if there were discrepancies between the list of holders and the account information, the latter would prevail. Regarding fixed income and other non-equity rated book-entry securities, the rights arising out of the securities both against the issuer and in respect of holding of the security are determined solely in accordance with the registrations to the book-entry account.

Outside the book-entry system, the rights against the issuer are determined in accordance with a registration to the shareholder list (equities) or with the actual holding of the security certificate (bond and other fixed income). Regarding

companies not incorporated in the book-entry system, there is no possibility to nominee register a holding. Equities can be described as registered securities in Finland. In order for a transfer to be valid against the issuer, it shall be recorded to the shareholder list. A transfer is rendered valid if there is a continuous series of transfers extending to the transferee in the share certificate. Bonds are predominantly bearer securities in Finland and thus eligible to be held with a nominee.

9.24. Sweden

A CSD Nominee Account could be characterized as an account in which securities could be held in pooled form. The investor has no right to particular securities in the nominee account since the securities are fungible. However the securities should be separated in the records of the nominee (intermediary) and thereby should the investor be protected in case of insolvency of the intermediary.

9.25. United Kingdom

Yes. On the basis that (i) relates to the obligations of the issuer under the terms of issue of the securities, such obligations are generally and in the normal course enforceable only by the direct holder of the securities and not by the client. However, on the basis that (ii) includes rights in respect of an indirect holding, the client enjoys these rights, which are in the normal course enforceable only against the intermediary.

In practice the intermediary will limit its responsibility in respect of many of the incidents of securities ownership: especially in respect of voting and corporate actions. The right to income may also be altered (eg as to timing or currency). However, if a sale is carried out by the investor, the price is not usually affected by the manner in which the security is held.

CREST

In relation to UK equities, by virtue of the Uncertificated Securities Regulations 2001, the CREST register constitutes the person recorded as holder on CREST's register the person entitled as against the issuer in respect of those rights enjoyable by a shareholder under English law. While the CREST register is one means by which title can be established, the rights of the holder do not differ if the holder's entitlement is recorded on the issuer's shareholder register instead of the CREST register.

In relation to other securities, in practice there is no better way to establish ownership than a record on CREST's register, so in practice the answer is as for UK equities.

10. QUESTION NO. 10

WHERE SECURITIES ARE HELD IN POOLED FORM (E.G. A COLLECTIVE SECURITIES POSITION, RATHER THAN SEGREGATED INDIVIDUAL POSITIONS PER PERSON), DOES THE INVESTOR HAVE RIGHTS ATTACHING TO PARTICULAR SECURITIES IN THE POOL?

10.1. Belgium

No, cf. in particular Articles 6 and 15 of Royal Decree 62. The Royal Decree sets out the legal regime applicable to the deposit of securities with settlement institutions, without identifying such securities by their serial numbers in favour of each depositor - in other words on a fungible basis. When securities have been so deposited on a fungible basis under Royal Decree 62 it is legally and practically impossible to identify any specific securities as belonging to any specific accountholder.

10.2. Czech Republic

The investors do not have rights attaching to particular securities held in the pooled form. Dematerialized securities are held in pooled form, when credited to customer account pursuant to section 94(1)b of Capital Market Undertaking Act. Securities may be credited to customers account only if there is a safekeeping contract between an intermediary and its customer. Section 34 (3) of Securities Act stipulates that securities kept together with fungible securities of other depositors are common property of all clients.

10.3. Denmark

Generally, the investor have a right in the particular securities in the pool as the investor´s right is protected in case of insolvency of the intermediary (See answer to Questions no. 6-7 and 15). However, the investor´s right is not protected against bona-fide purchasers, cf. answer to Question no. 6-7.

10.4. Germany

No. Pursuant to Section 6 para 1 Securities Deposit Act the sole ownership of the investor (customer of the custodian bank) of his securities is converted by operation of law into fractional co-ownership of the respective holding at the CSD at the moment when the CSD receives such securities for collective safe custody. According to Section 7 Securities Deposit Act, the investor may request delivery of securities corresponding number wise or amount wise to the securities (of the same description, of course) which he has deposited. He is not entitled to request delivery of exactly the same security certificates.

10.5. Estonia

When registered with the Central Register all of the relevant issuer's securities of the same type and representing equal rights shall have the same Securities Identification Code (ISIN code) allocated by the Estonian CSD (Estonian CSD acts as National Numbering Agent). It follows from this that a particular security has no unique identification and all securities within the same issue are fungible.

Therefore it is only possible that investor's rights attach to a corresponding number of securities instead of a particular security.

10.6. Greece

No such right arises for the investor, except otherwise agreed in case of non regulated holding of foreign securities or securities not registered within the DSS or the BoGS with another custodian.

10.7. Spain

The Spanish regulations only foresee the case of co-ownership (jointly acquired by two or more). In such a case, it is required that the account be opened and maintained in the name of all of the co-owners.

10.8. France

The investor does not have rights attaching to particular securities in the pool where such securities are held in a collective securities position at the upper tier level.

10.9. Ireland

There is no Irish authority on this but in our view identification of specific securities is a required pre-condition to attachment of rights. Such attachment may not be relevant to the establishment of property rights if it can be established that all investors in the pooled securities are beneficiaries of a single trust over the securities and have co-ownership rights (see above).

Regulation 18 of the CREST Regulations which provides for the acquisition by a transferee of securities of an equitable interest in such securities following an operator instruction, and prior to an entry on the register, provides further (in subsection 5 thereof) that that regulation has effect notwithstanding that the units to which the operator instruction relates, or in which an interest arises, may be unascertained. Therefore, although the securities may be unascertained, this would not prevent an equitable interest accruing in such securities.

10.10. Italy

Where securities are held in pooled form the investor does not have any rights attaching to particular securities in the pool. In particular, when securities are immobilised in a CSD system, the right of the investor may be qualified as a joint ownership or joint possession on pooled securities, so that each investor have pro-quota rights thereon.

10.11. Cyprus

In theory in Cyprus securities may be held in a pooled form. In such case the investor may have rights on the contents of the account. The relevant provisions have not been activated yet nor is the framework clear pending promulgation of secondary legislation.

10.12. Latvia

According with the Law the intermediary should open a security account for each individual investor. In Law there are no strict restrictions that prohibited holding the securities in pool form. However the intermediary in its registers should reflect the account balance of the individual investor. In pooled form securities may be held only with the consent of investor and according to the provisions of the agreement concluded by parties. Generally the pool of securities is made under trust agreement. In most cases the investor then has a claim right of the corresponding amount of cash.

10.13. Lithuania

Securities are held in a two-tier system in Lithuania. Following Art. 1.101(10) of the Civil Code, an account manager is deemed holding securities in custody. Firs-tier intermediary also holds securities of the second-tier intermediary in custody. Since the general accounts opened with the CSDL record only the total amount of the securities of the same issue hold by the intermediary for its clients, it could be stated that investors' securities of the same issue are commingled in the omnibus account and are held in custody by the CSDL. The legal result is that commingling of securities terminates direct property rights of investors of individual securities. I.e. if in case of second-tier personal accounts it was possible to identify the owner of particular security pursuant to client identification in the securities account, it is not possible to identify what securities are owned by the particular client in the omnibus account. Following Art. 6.836 of the Civil Code, in case the things are mixed with other things of the same type and quality (which would be in case of securities of the same issue), the person that transferred the things to custody is entitled to the same quantity of things of the same type and quality. However, it is not explicitly clear, whether securities of the same issue should be deemed jointly owned by the investors. This is because securities are transfer in custody of the CSDL by the second-tier intermediaries which do not have any ownership rights therein. Under Lithuanian law the only person having ownership rights in securities are the persons in whose personal account securities are credited, except for nominee accounts (please, refer to answer to the question 6). On the other hand if an intermediary, that hold securities with the CSDL in omnibus accounts, transferred securities without consent of an investor and later went to bankruptcy, an amount of investors' assets would be less than it should be. Notably, general accounts of intermediary opened with the CSDL indicate only total amount of securities credited in personal securities accounts managed by the intermediary. However, they do not contain records regarding particular amount of securities owned by particular investor. Therefore in such shortfall of securities it can be hardly possible to identify whose securities were transferred without authorization. Currently it is not clear whether investors should bear the pro rata risk in case of loss of securities of the same issue. Further, if securities of the same issue would be deemed as jointly owned by the investors, Art. 4.79 of the Civil Code provides co-owners' priority right of acquisition and the part of the jointly owned assets may not be transferred without the consent of the other co-owners. Clearly, this is not the case in practice of securities market. However, the abovementioned uncertainties have negative impact on legal certainty in securities market.

10.14. Luxembourg

No, cf. in particular Articles 5 and 7 of the Securities Act. The Securities Act provides that the depository is discharged of its obligation of restitution in redelivering securities of the same kind without matching numbers or other individual identification elements. Thus, when securities are deposited on a fungible basis it is legally and, most of the time, also practically impossible to identify any specific securities as belonging to any specific depositor.

10.15. Hungary

Since dematerialised securities are not identified one by one, the investor has rights attaching to a certain quantity of a given security.

10.16. Malta

No, when assets are pooled then the right in individual assets changes to an undivided right of ownership in the pool of assets.

10.17. Netherlands

No

10.18. Austria

No. Holding in pooled form relates to each category of securities. All securities of the same category (kind, fungible securities) are collectively held (pooled). Ownership of individual securities added to the existing pool changes from ownership of the individual securities to co-ownership in the securities held in the pool. The share of co-ownership by each of the investors (co-owners, account holders) corresponds to the number of securities added by each co-owner to the pool. Except for the right to ask for an individual security to be withdrawn (in case of printed securities), the rights of co-owners are the same as described above in respect of questions (7), (8) and (9).

10.19. Poland

(10) Rights in securities are always conferred on the owner of a securities account (exceptions to this rule are described in (6)). Therefore, the opening of one securities account for several investors would lead to the joint ownership of all the securities registered on this account, as well as at the same time creating severally joint rights in each of these securities.

10.20. Portugal

In what concerns nominee or omnibus accounts the answer is no, as mentioned above, because the owner of the securities is, from a Portuguese law perspective, the registered holder of such securities.

10.21. Slovenia

Non applicable for "final client level" type of dematerialisation (see also answer to Q6).

10.22. Slovakia

In Slovakia, securities are segregated in an individual position per person.

10.23. Finland

The custodial nominee account can be characterised as a pool in the book-entry system. The investor *does not have rights attaching to a particular security in the custodial nominee account, since book-entry securities are fungible.*

Outside the book-entry system, Finnish physical securities are not regarded totally fungible, since they are numbered. An investor should be regarded to have rights attaching to a particular, numbered security in a pool. Furthermore*, commingling Finnish securities in a pool has not been regarded permissible practice. Regarding indirect holdings in pooled foreign securities, the Finnish law is silent on the rights of the investor.*

In certain circumstances a holding of securities held in a fungible pool might be regarded as joint ownership under the Law on Certain Relationships Based on Co-ownership (180/1958). The law shall be applied when a right to a security belongs jointly to two or more persons. Under the law, the co-owners shall each own a share

of the object. The co-owner shall have the right to transfer his share without the consent of other co-owners. Otherwise, the co-owners shall all agree to a measure concerning the jointly owned object. Furthermore, the law provides the rules for joint administration, for segregating a share from the object, and for selling the object.

If the securities are held in a pooled form outside Finland and the record pertaining to the securities holding is kept in Finland for the investor, one should assume that the Finnish law would not assign rights attaching to particular securities in the pool but rather to the whole pool in a manner that is envisaged in the Law on Certain Relationships Based on Co-ownership.

10.24. Sweden

The tranferee´s right is derived from the transferor and is thus in principle dependent on the transferor´s entitlement to dispose. Another question is if it is possible to trace wrongfully transferred securities due to the fungible nature of the securities. Furthermore even if such proof can be established, the provisions in the Financial Instruments Accounts Act limit his chances. Where a notice of transfer of a financial instrument is registered, the instrument may not thereafter be attached by the transferor's creditors in respect of rights other than such as were registered at the time the notice was registered provided that the transferee was acting in good faith.

10.25. United Kingdom

Some commentators have suggested that the client does have attached rights, on the basis of certain judgments.[59] However, the better view is that, because attachment is a legal consequence of identification, there can be no attachment in the absence of the individual segregation that is the operationally precondition of identification. Further, no attachment is necessary in order to confer property rights, on the basis of the co-ownership analysis discussed above.

CREST

In relation to UK shares, government securities, corporate debt securities and eligible debt securities, CREST accounts do not record any interest in securities held in pooled form, as there is no higher-tier intermediary.

[59] *Hunter v Moss, CA Pacific Finance Ltd, Re* [2000] 1 BCLC 494.

11. QUESTION NO. 11

IN WHAT MANNER DOES THE INVESTOR ACQUIRE RIGHTS IN RESPECT OF SECURITIES CREDITED TO HIS SECURITIES ACCOUNT (I.E. IS THE TRANSFEREE'S RIGHT IN THE SECURITIES DERIVED FROM THE RIGHT OF THE TRANSFEROR OR IS IT ORIGINALLY CREATED IN THE MOMENT OF CREDITING IN HIS FAVOUR)?

11.1. Belgium

Inter parties, between the transferor and the transferee, rights are derived from their contractual arrangement. Vis-à-vis third parties, rights to book-entry securities held pursuant to Royal Decree 62 are transferred by reference to the debit and credits in the books of the intermediary where the settlement takes place. If the investor does not have an account directly with the intermediary where the settlement takes place, his right to the securities received will depend on his contractual arrangements with his immediate intermediary.

11.2. Czech Republic

The right of transferee is derived from the right of transferor. Principle of derivative acquisition of rights to transferred securities follows from the general principle of civil law that no one can transfer more rights than one have. Recognition of this general principle is expressed in section 96(3) of Capital Market Undertaking Act in which this rule is in case of securities altered and the protection of bona fide acquirer is introduced. Section 96 of Capital Market Undertaking Act results in a rule that acquirer of securities does not become an owner in case the acquirer is aware that the transferor does not have a right to transfer ownership of securities.

11.3. Denmark

The tranferee´s right is derived from the transferor and is thus in principle dependent on the transferor´s entitlement to dispose. However, this general principle is subject to two important exceptions. First, a person (A) whose securities were wrongfully transferred to the transferor often cannot trace his interest to the transferee due to the fungible nature of the securities, which makes it hard to prove that the securities transferred from A to the transferor are the same of the ones transferred from the transferor to the transferee. Second, even if such proof can be established, A´s right to trace his interest against the transferee is further limited by law in case of CSD-accounts: In case of credits to a CSD-account, the transferee obtains ownership of the securities at the moment where the credit was made to the transferee´s account, provided a) that the agreement between the transferor and the transferee was valid under contract law, b) that the transferee was acting in good faith and c) that the transferors lack of entitlement was not due to forgery or duress under threat of violence, cf. Securities Trading Act Art. 69. It should be noted that even though this rule does not apply to an account that is not a CSD-account, a disposition by an intermediary (nominee) over the customers securities is considered a disposition over the CSD-omnibus account (and not over the accounts at the intermediary) and is thus subject to Securities Trading Act Art. 69, cf. answer to Question no. 7.

11.4. Germany

In case of securities held in safe custody in Germany the investor acquires rights in respect of securities credited to his securities account derived from the rights of the transferor, i.e. each acquisition of the rights corresponds to a loss of such rights on the side of the transferor, usually the seller. This principle applies irrespective of

whether the securities are held in separate safe custody at the custodian bank or in collective safe custody at the CSD. In case of purchases and sales via stock exchange, title to the securities is transferred directly from the seller to the purchaser without any intermediary acquiring (ownership/co-ownership) title to the securities.

In case of securities purchased and held in safe custody abroad which are credited in WR-Credit, the rights of the investor are originally created at the moment when the credit on his securities account becomes effective.

11.5. Estonia

It is rather similar to the "transfer of a bundle of rights" (rights arising from the credit entry), when it comes to the transaction that is settled through debits and credits made within internal records of the owner of the nominee account (i.e. debiting the first client's account and crediting the second client's account).

If the structure of the transaction involves a corresponding credit in the nominee account (i.e. the owner of the nominee account first made an acquisition of securities upon instruction of the client on whose behalf it acted) then it is rather similar to original creation of this "bundle of rights".

11.6. Greece

As explained above under 2.2., according to Article 47 of Law 2396/1996, the registration within an account of the DSS is proof of the rights emanating from the relevant securities. Therefore, it could best be interpreted that this registration is a constitutive one and that the account holder's rights are originally created at the moment when his account is credited with the securities in question. Nonetheless this interpretation has not been judicially confirmed.

Concerning the BoGS, the opposite seems to apply, i.e. the transferee's right in the securities derives from the right of the transferor (see also article 6 para 4 of Law 2198/1994). Therefore, article 7 para 1, first sentence, prohibits BoGS Participants to transfer securities without the consent of the beneficial owner. However, the second sentence of the said provision protects third parties acquiring securities, if they act in good faith.

11.7. Spain

The transferee's right in relation to the securities transferred derives from the right of the transferor. In addition, such right is acquired according to what it is inscribed in the registry, this means, in the same terms and conditions as those that were inscribed in the transferor's securities account.

For a better understanding of this transmission regime, the following rules should be taken into account:

According to article 10 of the Securities markets law, "The creation of limited rights in rem or liens of any other kind on securities represented by book-entry shall be recorded on the corresponding account. (…). The creation of the lien is valid vis-à-vis third parties from the time the corresponding entry is recorded.

And article 9 of the same Law foresees: "A third party purchasing for consideration securities represented by book entry from a person who was legitimately entitled to transfer such securities according to the book entry records shall not be subject to any claim (reivindicatio) unless said third party acted in bad faith or with gross negligence at the time of purchase".

Therefore, in the case that a limited right in rem or lien which does not prevent from transferring is recorded in the transferor's securities account, the transferee will receive the security in the same condition, i.e., with the limited right in rem or lien, and will be the owner of the security in the same term and limitation as it was the ownership right of the transferor. On the contrary, any limitations in securities that have not been inscribed in the transferor's securities account will not be enforceable against the bona fide transferee.

11.8. France

Under the current state of affairs, in the absence of a specific legal provision to the contrary, the right of the transferee derives from the right of the transferor.

However, when securities are transferred through a DvP system with continuous irrevocable settlement it may be argued that is impossible to identify the transferor of these securities. Under such circumstances, any defences related to such transferor's rights are swept and as a result the transferee acquires a direct and independent right provided that the purchase price has been paid. Such argument is based on the provisions of Article L. 431-2 of the MFC, as modified by Ordinance n° 2005-303 of 31 March 2005, which contemplates that:

"where the securities settlement system provides for a continuous irrevocable settlement, the transfer of ownership occurs under the conditions of the Règlement Général of the AMF. Such transfer occurs for the benefit of the purchaser provided that the purchase price has been paid to the financial intermediary. Such financial intermediary remains the owner as long as the purchaser has not paid the price."

In order to remove any uncertainty in this respect, consideration is currently being given to introduce a rule acknowledging that the transferee acquires a direct and independent right against the issuer when securities are credited to the securities account held by the accountholder with the relevant intermediary.

11.9. Ireland

There is no certainty on this under current Irish law. It will depend on the nature of the right that each account holder has against the intermediary and the terms of the purported transfer/creation of rights. For example, if the transferor has a proprietary interest in underlying securities and the "transfer" is a transfer of that interest, the transferee's right will derive from the transferor's interest. If the transferor has a contractual right to delivery of securities, but no proprietary interest, the effect of the "transfer" may either derive from that right (be a transfer of it) or be a new and equivalent right created in the moment of crediting (the distinction between assignment and novation).

11.10. Italy

Following the book-entry in its favour, the investor has full and exclusive title to the exercise of any rights attaching to the financial instruments credited to the account, in accordance with the legal regime applicable to any such financial instruments and is entitled to transfer such rights in accordance with applicable laws.

The person in whose name the book-entry is made cannot be subject to any claims or actions by any of the previous owners of the financial instruments provided that the rights were acquired pursuant to a good title and in good faith.

Sources of Law:

Article 32 of the Euro Decree.

11.11. Cyprus

According to Art 14 of the Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996 the transfer of securities is valid from the moment of registration of the transfer in the central depository and the central securities register. Crediting and debiting in the second tier accounts take effect electronically and therefore they are tied to registration. It should be recalled once again that the central register has the same role and effect as the registers required by the law of incorporation of the issuer (Art 6 of the above law). According to Cyprus law, provided it is the law of incorporation, under certain conditions, a transfer of shares may be subject to any equitable interest in the shares.

11.12. Latvia

Taking into account *the provisions of the FIML and the LCD rules the rights in respect of securities are transferred from transferor to transferee.*

11.13. Lithuania

There is no explicit answer under Lithuanian law. One might assume that in case of transfer of securities one object is annulated and another created. However, the issue of securities as objects of circulation is subject to special rules. Therefore it is rather doubtful if the latter opinion is reliable. A concept of novation supported by some professionals could hardly be applicable under Lithuanian law as well, since the legal owner of securities is an investor and securities are not held in trust. It is most likely the transferee's right in the securities should be deemed derived from the ownership right of the transferor. On the other hand such construction creates particular problems related to the bona fide purchasers' protection (please, also refer to answer to question 24).

11.14. Luxembourg

Inter partes, the transfer of rights is subject to the contractual arrangements between the transferor and the transferee. Most of the time, the transfer is achieved by the debit and credit of the relevant securities accounts with the intermediary where the settlement takes place. If the investor does not have an account directly with such intermediary, the transfer of the rights will depend on his contractual arrangements with his immediate intermediary.

11.15. Hungary

The rights of the investor are originally created in the moment the securities are credited on his account.

The securities intermediary shall transfer all securities to a subsidiary account, which are under attachment by virtue of law, court order, administrative measure or contract, underlying some right of a third person, or if so instructed by the accountholder. If the account holder is permitted to alienate any securities under attachment, the securities intermediary shall transfer such securities, with an indication of the attachment, to the subsidiary account of the new owner of the securities opened under his securities account.

11.16. Malta

The crediting of the securities to the account of a customer implies that the intermediary, as his representative, has acquired the assets on customer's behalf, but the crediting is only consequential to the acquisition and is not per se an

acquisition. The acquisition has effects at law as a transaction. The crediting of the account creates the legal relationship of fiduciary mandate or trust between the intermediary and the customer which can be enforced by specific performance.

11.17. Netherlands

Again a distinction must be made between the various types of securities involved. If the securities concerned are individualised bearer securities, the transferee's right is derived from the transferor and is thus in principle dependent on the transferor's entitlement to dispose. However, this principle is subject to the exception that the transferee may have the benefit of rules aimed at the protection of third party transferees acting in good faith. In the event of fungible securities and securities subject to the Securities Giro Administration and Transfer Act, delivery takes place by book-entry systems, whereby the investor waives its claim against the depository, which, in turn, assumes an obligation towards the transferee. This is more likely to be characterised as novation than as a transfer in the strict sense. With regard to fungible securities, the general prevailing view is therefore that the transferee's right is originally created at the moment of crediting in his favour. With regard to securities subject to the Securities Giro Administration and Transfer Act the same could be argued. Please note however that although under the Securities Giro Administration and Transfer Act a transfer of securities also takes place by way of book-entry, such book-entry constitutes by law a transfer in the proprietary sense of the word and is therefore distinct from delivery by book-entry entirely based on contract. In legal literature this has been used as an argument to take the stands that the transferee's right is indeed derived from the right of the transferor, which position is supported by the fact that the Securities Giro Administration and Transfer Act contains provisions aimed at the protection of third parties acting in good faith. On the other hand, it is generally acknowledged that a person whose securities were wrongfully transferred to the transferor cannot trace his interest to the transferee due to the fungible nature of the securities, which makes it hard to prove that the securities transferred from this person to the transferor are the same ones transferred from the transferor to the transferee.

11.18. Austria

The manner in which the investor (account holder) acquires rights in respect of securities depends on the nature of the contract with which the investor acquires **the security**. In case the underlying contract is a purchase (the "titulus") it must be completed by a way of transfer recognised under the general Austrian civil law or under the particular rules of the Deposit Act in case of purchase through a commissionary (the account provider) – see answer to question (2) under b) and to question (3) last paragraph (the "modus"). The acquisition of the security may be perfected independently of crediting it to the securities account, but the crediting to the account of the transferee may serve as the sign of transfer perfecting the purchase. In case of pledges only the rules of the Austrian General Civil Code apply. These correspond to a large extent to the rules for acquisition of ownership (the "modus").

There may be other rights in respect of securities which the investor acquires as for instance rights to interest payments, dividends, new shares etc. which are to be considered. In case of interest or dividend payments the issuer will make respective payments to the principal paying agent or to a central securities depositary who will distribute the respective payments to its account holders who in turn will distribute

the respective amounts to their account holders until payments have reached the final investors who are entitled to receive the payments. The final investor has a direct claim against the issuer which is satisfied by the issuer in the way described above. In case of warrants and corporate actions the issuer must inform the final investor of the respective action in order to enable the final investor to exercise its rights. These rights will be acquired in the manner provided in each case (forms to be completed).

None of the two possibilities given as an example in brackets will apply, neither the rights are derived from the right of the transferor nor is the right originally created in the moment of crediting the right in his favour on his securities account.

11.19. Poland

The purchase of securities by one investor from another investor is always a derived right, i.e. the first investor acquires exactly the same rights as the second investor. At the initial purchase (i.e. with the creation of rights that hitherto were non-existent), the instant securities are entered on the securities account, this is only the acquisition of securities of a new issue from the issuer. This ignores issues relating to derivative transactions, whose rights are treated as securities for the purposes of the Law on the Public Trading in Securities of August 21, 1997.

11.20. Portugal

The transferee's right in the securities is derived from the right of the transferor (articles 71. and 80. CVM).

11.21. Slovenia

As a general rule, the transferee's right in the securities is derived from the right of the transferor.

Exception to general rule is the acquisition of dematerialised securities by bona fide transferor (se answer to Q24)

11.22. Slovakia

An owner of book-entry security is the legal or natural person that acquired the security on the basis of agreement or on the basis of other legal fact stipulated by law and is entered as an owner of book-entry security in registration defined by the Act. Provided that there is an underlying agreement, transferee acquires the rights in respect of securities at the moment of crediting securities to its securities account.

11.23. Finland

In the book-entry system, the investor acquires the rights in respect of the securities in the moment of crediting the securities to the book-entry account in his favour.

Outside the book-entry system, the investor acquires the right to a security either through transfer of holding of the security certificate (bearer bonds) or through transfer of holding and through a written assignment of the security by the transferor to the transferee (registered shares). If the securities are kept safe by a third party, such as a custodian, the transfer can be executed through notification to the custodian. In all cases, the right is derived from the right of the transferor.

11.24. Sweden

As mentioned above the owner registration gives the holder of the account a legitimate capacity as owner, but is not constitutive, in the sense that the account holder is materially the right owner of the securities on the account.

11.25. United Kingdom

On a trust analysis, the former. The account is evidence of the rights of the client under the custody trust. However, if the intermediary receives securities on behalf of the client; fails to credit them to the account; and became insolvent, the client would still have property rights in the securities. Any problems in asserting such rights would be evidential and not substantive.

On a "new type of property right" analysis, the transferee's right (viz, an entitlement to a share of the intermediary's own entitlement) is newly created by the intermediary at the time the intermediary intends to credit the transferee's account; except that if there is a bad delivery (eg want of finality or fraud) to the intermediary, the transferee risks reversal of the credit entry in his favour, so to this extent his rights are derived from the right of the transferor. (This conclusion follows from the legal analysis set out at Question 7 above; the law is unsettled and other interpretations are possible. It is probably at variance with market perception, which is that the transferee "owns" the "same" securities that the transferor had.)

CREST

The transferee's right (his prima facie title - see answer to Question 7 above) is created by the entry on the CREST register, not beforehand. Reversal of entries as for non-CREST situations is also possible.

12. QUESTION NO. 12

WHAT LEGAL EFFECTS ARISE FROM A CREDIT ENTRY ON A SECURITIES ACCOUNT (E.G. BOOK-ENTRY AS CONFERRING OR EVIDENCING THE ROOT OF TITLE, BOOK-ENTRY AS A REPLACEMENT FOR THE POSSESSION OF THE DOCUMENT OF TITLE, BOOK-ENTRY AS AN ESSENTIAL ELEMENT FOR EXERCISING THE RIGHTS ATTACHING TO SECURITIES, OTHER RIGHTS OR OBLIGATIONS)? PLEASE DISTINGUISH THE LEGAL EFFECTS AGAINST (I) THE ISSUER, (II) THE INTERMEDIARY, (III) AN UPPER-TIER INTERMEDIARY (OR INTERMEDIARIES) OR (IV) THIRD PARTIES?

12.1. Belgium

Credit entry under Royal Decree 62 is temporarily replacing the underlying certificate deposited and is constitutive of co-ownership rights of the investor in the pool of fungible book-entry securities held with the intermediary, replacing his exclusive ownership right on the underlying securities as long as the underlying securities are maintained in the fungible regime organised by Royal Decree 62. Such entitlement is attached to any book-entry securities held with settlement institutions, their clients (affiliates") and between the systems' clients and their own clients if they selected Royal Decree 62. This is directly enforceable under Belgian law only against the intermediary maintaining the securities account , but is opposable to any third party including in case of insolvency. Articles 12 and 13 of Royal Decree 62 provide however that the investor can directly assert the rights attached to the securities (economical and non-economical rights) against the issuer including in case of insolvency of the latter (e.g. to vote in its winding-up).

12.2. Czech Republic

Credit of securities to the owner account in CSD or other intermediary result in presumption of ownership. Proof of the opposite is allowed, pursuant to section 94(3) of Capital Market Undertaking Act by means of law or judicial decision. Application of proof of the opposite is therefore possible only in judicial proceedings or in case the law expressly states that the owner of securities is a person different from an account holder.

Transient legislation governing the operation of register of dematerialized securities by Securities Centre (see question 3) works in similar way. However, proof that the holder of the securities account is not an owner of securities is not restricted.

Specific effects against issuer:

Once a dematerialized security is credited to owner account, account holder acquires direct entitlement to execute rights against issuer. Record of securities on the owner account represents the only evidence of this entitlement. Proof of credit of securities on securities account in case of exercise of the rights against issuer depends on the legal provisions regulating respective sorts of securities. In general, there are available two options. First option is an account statement of owner account. The second option is the account statement of register of issues, which statement may require form CSD any issuer of dematerialized securities. In case of discrepancy, the account statement of register of issues would prevail. In case of shares, Commercial Code requires a company to supply account statement of register of issues for general meeting. In case of bonds, the way the ownership is to be proven is not determined. Decision is to be taken by the issuer in bond issue particulars.

Effect against intermediary, upper-tier intermediary and third parties:

Presumption of ownership effects against anyone. In case of dematerialized securities the credit of securities is necessary requirement for transfer of ownership on contractual basis. Transfer of ownership is therefore completed only by credit of securities on the owner account in CSD or customer account of the intermediary in CSD. Credit of the securities on the owner account in books of intermediary who is a participant in CSD only reflexes the transfer of ownership which has been already completed. In case the transfer of ownership does not take place on accounts in CSD, ownership is acquired by credit on the owner account in the books of respective participant in CSD.

12.3. Denmark

(i) Effects against the issuer. To the extent a right is created or validly derived by a credit to an account, cf. answer to Question no. 9, such right is also effective against the issuer.

(ii) Effects against the intermediary. If the intermediary is not a CSD, the account credit does not in itself create rights against the intermediary. The contract between the account holder and the intermediary decides which rights the account holder has against the intermediary. The account often reflects these rights but does not create the rights. If the intermediary is a CSD, see answer to Question no. 8.

(iii) Effects against an upper-tier intermediary (assuming there is an upper tier-intermediary which is most often not the case with respect to CSD-accounts). Generally an account holder does not have rights directly against the upper-tier intermediary. In other words, the account holder must instruct his own intermediary (which can then exercise its rights against the upper-tier intermediary). If the account holder´s intermediary refuses to do so, the account holder must obtain a court order against that intermediary (ordering the intermediary to follow the instructions of the account holder) or a judgement against the intermediary establishing which part of the omnibus account at the upper-tier intermediary that belongs to the account holder. Such a judgement against the intermediary may be "enforced" directly against the upper-tier intermediary in the sense that the court order can be registered on the intermediaries´ account at the upper-tier-intermediary, if the latter is a CSD. If the intermediary becomes subject to insolvency proceedings, the account holder is similarly entitled to withdraw its securities directly from the upper-tier-intermediary, cf. Financial Business Act Art 72(7) (see answer to Question no. 15).

(iv) Effects against third parties. See answer to question no. 11

12.4. Germany

According to Section 24 para 2 Securities Deposit Act co-ownership of securities held in collective safe custody at a CSD in Germany passes to the purchaser upon effecting the credit to his securities account maintained with his custodian bank (being a participant/account holder of the CSD) who executed the purchase order, provided that (i) the custodian bank is entitled to such disposition (credit) and (ii) the transfer of co-ownership was not effected pursuant to the provisions of the Civil Code at an earlier moment in time. It is the common opinion among legal experts in Germany that in case of settlement of a stock exchange transaction co-ownership of the securities sold and purchased passes from the seller to the purchaser pursuant to Sections 929 et seq. Civil Code based on a structure of legal declarations starting from the seller mandating his custodian bank to sell, and transfer co-ownership of, his securities via the CSD holding physical possession of the securities (in certain cases involving a Central Counterparty) and the bank executing the corresponding

purchase order of the purchaser. As a rule, the ultimate investor as purchaser acquires co-ownership of the securities directly from the seller without any intermediary in the chain acquiring temporarily such co-ownership. The credit entry on the securities account is evidence for transferring the (indirect joint) possession to the purchaser and for the agreement that co-ownership shall pass to the purchaser.

If the securities are purchased and held in safe custody abroad, the securities account is credited WR. As outlined above under Question 7 such credit entry is not intended to evidence transfer of ownership to the investor. It rather establishes a fiduciary trust relationship between the custodian bank as trustee and the ultimate investor as beneficiary.

(i) Legal effects against the issuer: The seller as former shareholder or bondholder (creditor) is replaced by the purchaser. There is no acquisition of title without loss of title in case of securities held in separate or collective safe custody. In case of WR-Credit, the legal owner (trustee) may remain unchanged if Clearstream Banking AG is involved.

(ii) Legal effects against intermediary: Except in case of a WR-Credit, the intermediary is not acquiring co-ownership (title) of the securities.

(iii) Legal effects against an upper-tier intermediary: Same as (ii).

(iv) Legal effects against third parties: By acquiring co-ownership the investor is protected against any third party. The same is true in case of a WR-Credit.

12.5. Estonia

Please see response to questions (7) - (9).

12.6. Greece

In respect of legal effects concerning registrations within an account held within the DSS or within the BoGS, by a Participant, see above under 2.3.

In respect of legal effects concerning registrations within an account for foreign securities or for Greek securities not listed in ATHEX held by a Greek financial intermediary, which, in his turn, keeps an omnibus account held with an intermediary, please refer to 2.4. above.

12.7. Spain

The inscription in the securities registry has full material effects and as such, will be enforceable erga omnes: against the issuer, the intermediary and third parties.

Please distinguish the legal effects against (i) the issuer, (ii) the intermediary, (iii) an upper-tier intermediary (or intermediaries) or (iv) third parties?

As described above, such a distinction is not relevant. The effects are the same and enforceable erga-omnes.

The Spanish legislation does not foresee the feature of the upper-tier intermediary, which usually appears on indirect holdings scenarios. Therefore, credits, debits and attachments take place in the registry either in the central tier (kept by IBERCLEAR) or in the detailed tier (maintained by its participants) of the registry. As an exception, blockings or attachments of debt securities listed in the Public Debt Market or in AIAF Market, both of which are maintained and settled in the CADE Platform, do produce a simultaneous attachment on either tiers or levels (i.e. in the account maintained by the participant for its client, and in the “third parties”

segregated account maintained in IBERCLEAR representing the total amount of securities owned by the clients of the participant).

12.8. France

Former legislation

In the context of the introduction of the dematerialisation in France, the legislator's intention was not to overhaul entirely the regime of securities.

For the legislator and legal scholars, the dematerialisation reform was purely technical and did not purport to modify rights of holders of securities.

The Courts have, at the initial stage, made decisions accordingly and have continued to take the view that transfer of title occurred sole consensu on the trading date according to Article 1583 of the French Civil Code.

The Commercial Chamber of the French Supreme Court took the view that the book entry only constitutes a perfection measure (Cass. Comm. 25 nov. 1993 Bull civ.n°431 p.313 – Com. 22 mars 1998 Bull. N°322 p.216). According to those early decisions, the book entry resulting from the dematerialisation legislation had no effect on transfer of title. It took the view on the basis of the Civil Code provisions governing the sale (Article 1583) according to which transfer of title occurs as soon as the parties agree on the subject matter and the price.

This approach created difficulties in particular in the context of trades on regulated markets and more particularly on forward markets.

New legislation

Therefore, legislation has been enacted through a number of statutory measures including the law of December 31, 1993, codification of such provisions under Article L. 431-2 of the Monetary and Financial Code and more recently Ordinance n°2004-604 of June 24, 2004 (ratified by law n°2004-1343 of December 9, 2004) and Ordinance n° 2005-303 of 31 March, 2005 (ratified by law n° 2005-811 of July 20, 2005).

Article L. 228-1 of the Commercial Code:

- refers, for purposes of transfer of title, to Article L. 431-2 of the Monetary and Financial Code in respect of securities traded on a regulated market and in respect of securities settled in a DVP system;
- in respect of any other case (i.e. over-the-counter transactions), transfer of title results from the book entry of securities in the name of the purchaser under conditions set by decree (expected to be issued shortly).

Article L. 228-1 of the Commercial Code provides that :

"The transfer of ownership in respect of securities traded on regulated markets or issued in book entry form with an authorised intermediary participating in a securities settlement system referred to in Article 330-1 of the MFC occurs under the conditions defined by Article L. 431-2 of the MFC.

In any other cases, the transfer of ownership results from the book entry in the account of the buyer under the conditions defined by a Decree."

Article L. 431-2 of the M&FC, as modified by Ordinance n° 2005-303 of 31 March 2005 and law n° 2005-811 of July 20, 2005, contemplates that:

"*The transfer of ownership in respect of financial instruments referred to in paragraph 1, 2 and 3 of Article L. 211-1-I of the M&FC and any similar financial instrument issued under foreign law, when admitted to the operations of a central depositary or settled through a securities settlement system referred to in Article 330-1 of the M&FC results* ***from book entry in the account of the buyer on the date and under the conditions defined by the Règlement Général of the AMF***[60].

In the event the account of the financial intermediary of the buyer has not been credited with purchased securities on the date and under the conditions defined by the Règlement Général of the AMF, the trade will be rescinded, notwithstanding any legislative provision to the contrary, and without prejudice to the rights of the buyer to claim remedies or to take any legal action.

When several buyers are affected by such termination, such termination is applied pro rata to the respective rights of the affected buyers.

As an exception to the above paragraphs, where the securities settlement system provides for a continuous irrevocable settlement, the transfer of ownership occurs under the conditions of the Règlement Général of the AMF. Such transfer occurs for the benefit of the purchaser provided that the purchase price has been paid to the financial intermediary. Such financial intermediary remains the owner as long as the purchaser has not paid the price."

Articles L. 431-2 as amended by the Ordinance of March 31, 2005 will come into effect on the date of publication in the official gazette ("Journal Officiel") of the provisions of the AMF General Rules to which article L. 431-2 refers.

As a result of the above changes, transfer of title over dematerialised securities results from the book entry of securities in an account maintained either with the issuer or an authorised intermediary. Transfer of title occurs now solo traditione instead of solo consensu.

The view may now be taken that the book entry now represents the securities. The book entry is not merely purely evidentiary nor is it only a perfection or publicity measure. It constitutes the security itself.

Legal effects

The credit of securities to a securities account renders a transfer effective against the issuer, the intermediary or third party (including upper tier intermediaries whose book entry only mirrors low-tier intermediaries recordings).

Legal effects against the issuer

The credit of securities to a securities account confers on the account holder the rights attached to such securities (e.g. voting rights, dividends…).

In the event the securities are held in an account maintained with the issuer, such issuer becomes the depositary of such securities.

Legal effects against the intermediary

In the event the securities are held in an account maintained with an authorised financial intermediary, such intermediary becomes the depositary-custodian of such securities.

---

[60] Modifications of the *Règlement Général* of the AMF are expected to implement this new rule. The March 31, 2005 Ordinance will only become effective upon promulgation of those rules.

Legal effects against an upper-tier intermediary

There is no legal effect. There is only an accounting effect. The securities are credited in the account of the intermediary held with the upper-tier intermediary.

Legal effects against third parties

The credit entry of securities in a securities account is a presumption of the investor's property right over such securities.

In view of the *in rem* proprietary right characterisation of dematerialised securities, the holder of the securities account should be protected by the provisions of Article 2279 of the French civil Code which protects the good faith acquirer against third parties claims. However, proposed changes are under consideration to clarify this matter. See also in this respect (24) below.

12.9. Ireland

A meaningful response can only be given in the context of specific circumstances. However, on the assumption (which, given the nature of the query, seems appropriate) that the account holder holds a proprietary interest in the securities credited to the account, rather than contractual rights, only against the intermediary, then (i) generally, absent unusual circumstances such as specific terms of the securities, none (ii) the contractual or proprietary rights of the customer against the intermediary referred to in our response to question (11) above (iii) generally, absent specific circumstances, none (iv) generally, absent specific circumstances, none (other than to the extent that the investor has a proprietary interest in the assets credited, so that a third party loses rights that it would otherwise have had, had the assets formed part of the intermediary's property), although, in the case of (i), (iii) and (iv) notice of the account and the property rights created by it may, depending on whether any such party takes action that affects the assets credited to the account, affect issues such as priorities, tracing rights, the establishment of constructive trusts etc.

12.10. Italy

The draftsman of the legislation on immobilised and dematerialised securities aimed at keeping the new system as little intrusive as possible into the general theory on title and transfer to "titoli di credito". This concept is described as "neutrality" of the new system. The neutrality implies that, to the extent possible, the legal position of the owner of the immobilised or dematerialised instruments should remain the same as if their rights continued to be incorporated in a document. In this context it is fair to say that credit entry replaces possession of the document of title.

The transfer of immobilised securities by way of book-entry shall have the same effects as a transfer made pursuant to the rules governing the circulation of the relevant financial instruments.

As to dematerialised securities, the following legal effects arise from a credit book-entry on a securities account:

a) the person in whose name the account is kept has full and exclusive title to exercise any rights attaching to the financial instruments credited to the account, in accordance with the legal regime applicable to any such financial instruments, and has the right to transfer such rights in accordance with applicable laws; i.e. book-entry is an essential element for exercising the rights attaching to securities. This is the principal legal effect of the credit entry against the issuer;

b) the person in whose name the book-entry is made cannot be subject to any claims or actions by any of the previous owners of the financial instruments provided that the rights were acquired pursuant to a good title and in good faith.

This is the principal legal effect of the credit entry against third parties and reproduces the general principle governing transfer of "titoli di credito" in the Italian legal system.

Sources of law:

Article 86 of the FLCA;

Article 32 of the Euro Decree.

12.11. Cyprus

An entry of a transfer of securities effected on the register takes effect as a prima facie evidence of title (explained above) of the new holder of the securities against any intermediary, upper tier intermediary or third party. The evidence of title covers both rights in a security as well as rights derived from the ownership of a security (e.g. right to dividend).

12.12. Latvia

The first credit entry to the individual investor's account means the completeness of creation of securities and evidencing the root of title against the issuer, any intermediary and third parties.

12.13. Lithuania

A first credit entry on the personal securities account means completion of creation of securities and evidencing the root of title against the issuer, any intermediary and third parties. Also book entry in securities account should not only be deemed as a perfection mean of rights to securities, but also as a mean for conferral of entitlement to the rights from the securities.

12.14. Luxembourg

The rights of the investors against the issuer are evidenced by the account records which, at least temporarily, replace the underlying physical certificate. They are constitutive of co-ownership rights of the investor in the pool of fungible book-entry securities held with the intermediary, replacing the investors' exclusive ownership right on the underlying securities as long as the underlying securities are maintained in a fungible regime, be it with a bank acting as depository or an institution operating a securities settlement system. The investor's co-ownership rights are directly enforceable only against the intermediary maintaining the securities account. Pursuant to Article 8 of the Securities Act, the investor can directly assert the rights attached to the securities (economical and non-economical rights) against the issuer including in case of insolvency of the latter (e.g. to vote in its winding-up) by means of the production of a certificate issued by the depository certifying the number of securities booked to the securities account.

12.15. Hungary

Whenever title to dematerialized securities is conveyed it must take place through securities accounts. Unless evidenced to the contrary, the holder of a security shall be the person on whose account it is registered. Against the issuer this means that the investor who has a certificate stating that he owns a given number of securities, can demand to get listed in the shareholders register.

12.16. Malta

The book entry is evidence against the party which entered it but it is no more than that. It does not give the person in the entry any right other than against the administrator of the book system to deliver to him what the entry states he is entitled to. This does not impinge on the issue as to whether he is the owner or not.

In case of insolvency of the intermediary the assets are "ring-fenced" protected and must be delivered to another intermediary by the liquidator or court officer appointed for the bankrupt intermediary.

Please distinguish the legal effects against

(i) the issuer,

The issuer is only bound to recognise the person entered in the share or bond register held by him unless the article otherwise specify in which case one must see the terms.

(ii) the intermediary,

The intermediary has a contractual obligation under the mandate/contract of service to deliver what he has acquired for the client, the book entry being evidence of the acquisition and holding on behalf of the customer.

Reference is made to regulation 4(2) of the ISA (control of assets) regulations which state that the records of the "subject person" establish rebuttable evidence of ownership.

However the absence of a book entry for a client does not mean the client has no rights as right exist as a matter of fact and law and the book entry is only one of the elements evidencing the facts.

(iii) an upper-tier intermediary (or intermediaries) or

An intermediary like the CSD which is used by an issuer to distribute shares and bonds and who holds security accounts for other lower tier intermediaries as part of their service, is only bound to recognise the person entered in the system as entitled to the securities in question.

It should be noted that the CSD never has delivery obligations as it does not "hold" assets in its book entry system. Consequently the CSD cannot ever be asked to deliver securities to a customer.

(iv) third parties?

Third parties can act on the assumption that the book entry correctly refers to the person entitled to the asset for the purposes of a pledge or a sale of the asset.

Should it later on prove not to be correct, the law is not clear as to what happens and whether the transfer of a security by an intermediary who was not the owner is a valid transfer when for value and in favour of a person in good faith. The civil code applies this basic principle to movables by nature but not to movables by operation of the law – as would be securities – or to immovables.

This creates a serious area of ambiguity in our law as a buyer would depend completely on evidence he may not have access to of an express mandate from the customer selling the securities to the intermediary. Alternative he can claim that there is an implies mandate but that may be difficult to prove.

The books of account of the intermediary are evidence prima facie that the seller is the owner but this is rebuttable. The books of account say nothing about whether the intermediary has authority to sell or only to hold, has discretions or not and so on. The books of account may show a pledge and that would indicate that there is an inability to transfer.

When the intermediary is a trustee, then transfers from him will be valid if to a purchaser for value and in good faith. (see Article 40 of the Trusts and Trustees Act).

12.17. Netherlands

i. Effects against the issuer. To the extent a right is created or validly derived by a credit to an account, cf. answer to Question no. 9, such right is, in principle, also effective against the issuer.

ii. Effects against the intermediary. The contract between the account holder and the intermediary determines which rights the account holder has against the intermediary. The account often reflects these rights but does not create the rights.

iii. Effects against an upper-tier intermediary (assuming there is an upper tier-intermediary which is most often not the case with respect to CSD-accounts). Generally an account holder does not have rights directly against the upper-tier intermediary. In other words, the account holder must instruct his own intermediary (which can then exercise its rights against the upper-tier intermediary). If the account holder´s intermediary refuses to do so, the account holder must obtain a court order against that intermediary (ordering the intermediary to follow the instructions of the account holder).

iv. Effects against third parties. See answer to Question no. 11.

12.18. Austria

No legal effects arise from a credit entry on a securities account. As described in the answer to question (7) the credit entry evidences that this security is held by the account provider on behalf of the account holder. It does not even evidence "the root of title". The credit entry **evidences** – and prove to the contrary is allowed – that the account holder is holding the security and entitled to exercise the rights represented by the security against the issuer.

In that meaning the following legal effects may be distinguished against

i. the issuer: The issuer is authorised to treat the account holder as the owner of the security (unless specifically informed to the contrary) and the account holder is entitled to exercise any and all rights of a owner of the security against the issuer;

ii. the intermediary/account provider: The credit entry effected by the account provider is made in fulfilling its obligation to correctly identify the owner of the security according to the instructions received and the account agreement made with the account holder; when action is required in respect of a category of securities (interest or dividend payment, exercise of warrants etc.), the account provider must consider the respective credit entry on the securities account;

iii. an upper-tier intermediary/account provider (or intermediaries/account providers): The upper-tier account provider(s) will not be aware of any credit entry on securities accounts maintained by the lower-tier account holder. For it, the account holder is only the lower-tier account provider, holding on its account with the upper-tier (second) account provider various categories of securities (not distinguishing whether held in the account holder's own name or for third parties, namely its customers=account holders, perhaps final investors);

iv. third parties: Third parties may assume that the credit entry made without any additional notations is made to evidence the ownership of the account holder of the security credited to its account. In case the third party is a creditor of the account holder, it may attach the securities to enforce its claim. Third parties may also take the securities credited to the account as collateral for any loans to the account holder. They would be well advised to make sure that the evidence of ownership by the account holder created by the credit to his securities account is verified by documents of title and their valid perfection.

12.19. Poland

A securities entry on securities accounts has constitutive effect, i.e. the agreement obliging the transfer of securities transfers these securities the instant that an entry is made on the securities account. Such an entry is essential to transfer securities as well as to exercise all rights from these securities. Legal effects arising from a securities entry on securities accounts are binding for all, i.e. the issuer (here there is also the issue of legal rights discussed in (9) above) the intermediary, an upper-tier intermediary, and third parties.

12.20. Portugal

A credit entry of Securities In The System on an Individual Ownership Account has erga omnes effects and creates proprietary rights over the securities. The registered holder of the account is considered the owner of the registered or deposited securities and therefore such legal effect is produced (i) against the Issuer; (ii) against the financial intermediary in whose books the account is held; (iii) against any "upper-tier intermediary" (which can only be considered a nominee) and (iv) against third parties.

According to article 56. CVM, the issuer that, in good faith, fulfils any obligation in favour of the registered holder or confers to the same any right is released and exempt from liability.

According to article 58. CVM, the rights of the purchaser of security acting in good faith would not be affected by the unlawfulness of the seller provided the acquisition has been carried out according to the applicable rules of conveyance.

As mentioned before, under some circumstances detailed in article 74. of the CVM - such as to avoid compliance with information duties (for instance, qualifying holdings disclosures), advertising duties or to avoid having to launch public acquisition offers - the presumption of ownership arising from registration in Individual Ownership Accounts may be rebutted, for the before mentioned limited purposes only, before the CMVM. In these circumstances, the registered holder will have to prove before the CMVM that it is acting on behalf of another person or persons and, under some conditions, it may have to disclose the identity of such person or persons before the CMVM.

12.21. Slovenia

Investor is legal (and beneficial) holder ("owner") of dematerialised securities credited (entered) to his (holder's) dematerialised securities account (Par. 2 of Art. 16 of ZNVP).

Therefore legal effect that arises from a credit entry on a dematerialised securities account is that the holder of dematerialised securities account becomes a legal holder of those securities (Par. 1 of Art. 16 of ZNVP) and becomes entitled to exercise legal holder's rights. There is no distinction in described legal effect against

(i) the issuer (in the case of registered dematerialised securities see also answers to Q1 and Q5): by crediting dematerialised securities on holder's dematerialised securities' account the holder acquires rights arising out of those securities against the issuer;

(ii) the intermediary (i. e. KDD registry member that maintains holder's dematerialised securities account);

(iii) an upper-tier intermediary (i. e. KDD that maintains the central registry) or

(iv) third parties.

12.22. Slovakia

Credit entry in a securities account is an essential element for exercising the rights attached to securities in relation to the issuer. The same applies to relation with the intermediary and upper-tier intermediary. Against third parties credit entry may be used as a replacement for the possession of the document of title

12.23. Finland

The legal effects of the accounts incorporated in the book entry system and of entries made in these accounts are governed by the Act on Book Entry Accounts. The actual registration decision is made by entering the decision in the book entry account in question. In the registration procedure it is presumed that the account operator examines the legal grounds and the validity of the registration in question. Competence to apply for registration lies with the account holder. In addition to the account holder, also a pledge holder may apply for registration, in accordance with a written consent of the account holder.

The general public has the right to rely on the validity of the registrations. Thus, persons acting in bona fide are protected. An acquisition registered in a book entry account as well as a right pertaining to a book entry and registered in the account have priority over an acquisition and right not registered in the account. If mutually conflicting interests pertain to the same book entry, the right first registered in the book entry account has priority over a right registered later.

The information that has been entered in the system may, according to law, be relied upon by third parties. In other words the rights which are registered do exist (positive reliability) and rights which are not registered don't exist (negative reliability) from the point of view of third parties.

The legal effects of the registrations extend also to the issuers. An issuer's performance based on a book entry, e.g. payment of dividend to an account holder, is considered valid. Correspondingly only an account holder may take part in a shareholders' meeting.

Regarding custody holdings recorded outside of the book-entry system, the legal effects of such recordings are more ambiguous and depend, at least to a limited extent, on the agreement between the intermediary and the investor. It is evident that such records are binding between (ii) the investor and the intermediary, while they lack binding effect against (iii) an upper-tier intermediary. Such records on Finnish shares are not binding against (i) the issuer, either unless the holding has been registered duly in the shareholder list, where relevant. However, the records kept by an intermediary may have validity against an issuer of a fixed income security issued in bearer form. With regard to third parties (iv), the records are valid if the investors assets are duly segregated from the assets of the intermediary.

The Finnish law is mostly silent in respect of proprietary aspects concerning treatment holdings in a fungible pool. The Act on Book-Entry Accounts is not applicable when determining the rights of an investor holding securities with an intermediary bank if the securities are not credited on an individual account in the book-entry system. There is ambiguity as to the manner in which the Finnish law shall be applied to holding, transfer and pledging of securities or security interests held with an intermediary.61 Finnish proprietary law governing fungibles and movables held with a third party is largely based on principles rather than express law and these principles have not been developed to address the needs of active cross-border securities trading. The principles generally recognize transfer of indirect holding by notification (denuntiatio). In particular, if the person holding the securities is a third party, the transfer by notification between a transferor and a recipient is valid (tradition longa manu). The case is not so certain in respect of transactions between the direct holder and the indirect holder (constitutum possessorium). Section 22, subsection 2 of the Act on Promissory Notes (622/1947) provides that a sale of a negotiable promissory note shall be binding upon a creditor of a bank or another financial institution selling the promissory note even if the note remains in custody with the bank or another financial institution. Analogous application of this provision seems to endorse transfers by the intermediary to the investor without transferring the possession of the security certificates.

12.24. Sweden

Generally no, but the parties could agree to a right to set-off or net. In case of insolvency the Swedish law provides extensive right to set-off.

12.25. United Kingdom

As indicated above, the book entry evidences the title of the client.

(i) The account entry alone has no legal effect against the issuer. An legal additional element would be required in order to confer rights on the client as against the issuer, such as unusual terms of issue of the securities; a court order; or dishonest assistance by the issuer in a breach of duty towards the client, giving rise to a claim for constructive trust.

---

61 A Ministry of Finance Working group stated in 2002 that "…Finland lacks legislation that could be applied to securities holdings or records kept in Finland outside the book-entry system... The absence of substantive law causes ambiguity as to what kind of rights the owner has in respect of foreign securities which are held in custody in Finland and for which records are maintained in Finland. Consequently, it is also unclear, how such shares can be pledged or transferred validly…" (See report VM 14/2002, Multi-tiered holding of securities")

CREST

In relation to UK shares, the CREST register constitutes the holder a member of the company and is thus the root of title. However, English law gives an investor a choice as to the root of his title. An entry on the CREST register is not essential in order to exercise the rights attaching to the securities, as an investor can take the securities out of CREST and rely exclusively on the issuer's own shareholder register as the root of title. In relation to other securities, see the answer to Question 9.

(ii) The credit entry confers a "step-in right", ie the right to take over the proportionate share of whatever the intermediary holds. It is almost always an essential element for the investor to exercise any rights relating to the securities; even if the investor can show that the intermediary was in error in failing to credit the account the investor's action lies against the intermediary. (There may be some circumstances where the investor can establish it has proprietary rights against an asset notwithstanding the absence of a credit entry in his favour on the intermediary's books.)

The investor's right is robust against the intermediary's insolvency.

CREST

In effect, the CREST Register constitutes the recorded holder the legal owner of the asset – it is impossible to get a better title. See Question 9. (See Question 7 as to the special status of CDIs.)

(iii) Usually the upper-tier intermediary would be on notice that the assets placed with it are client assets, although it would generally not know the identities of the clients in question. It might incur liability as constructive trustee if for example it dishonestly assisted in a breach of duty towards clients. The credit entry would therefore create or increase the potential claims of a client in the event of constructive trusteeship.

Any further effect on an upper-tier intermediary generally depends on (unusual) terms in the agreement between the relevant intermediary and that upper-tier intermediary.

(iv) Third parties who are creditors of the intermediary would be affected, in that the client's property rights recorded in the account would remove the assets from the pool available to creditors in insolvency and judgment creditors. The intermediary's account is not a public document. However, a third party having notice of a credit entry would be on notice of the property rights it evidences. This might involve liability under a tracing action or an action for constructive trusts where the assets are dealt with in breach of duty to the client. Notice may also affect the priorities of the third party in the event of successive dealings in the assets.

In summary, the investor's right would be robust against third-party claimants, subject to the following:

if the investor had notice of a third party's claim when the interests in securities were acquired, that claim would usually be binding (insofar as it could be established)

if the third party obtains a charging order, in execution of a judgment debt owed by the investor, that would be binding if duly notified to the intermediary

certain liens and charges may arise by operation of law; although untested, it is likely that such liens/charges would bind the investor and intermediary

if the intermediary has made an operational error, the intermediary's terms of business will typically allow the intermediary to reverse the credit entry in the investor's favour.

CREST

No legal rights will arise vis a vis third parties from a credit entry on a securities account at CREST.

CREST has developed special mechanisms for holding securities over which third parties may want to enforce third-party rights, ie securities subject to equitable mortgages and charges. The CREST escrow function allows the CREST member (chargor) to move the charged securities to an escrow balance under the control of the chargee. Settlement of a Transfer To Escrow ("TTE") in this way achieved the same practical effect of passing control of securities to a third party without transferring title. After settlement of the TTE the chargee can input a Transfer From Escrow instruction ("TFE") either to return the securities back in to the control of the chargor upon repayment of the loan, or to transfer them to himself as a means of enforcing the security.

13. QUESTION NO. 13

IS THE INVESTOR ENTITLED TO SET-OFF OR NET RIGHTS AGAINST THE INTERMEDIARY IN RESPECT OF SECURITIES WITH OBLIGATIONS THAT INVESTOR MIGHT HAVE TO THE INTERMEDIARY?

13.1. Belgium

The issue of set-off or netting by an account holder of rights to securities held by it with an intermediary is a matter for the contractual arrangements between the intermediary and its account holders.

13.2. Czech Republic

There is no provision of law which entitles the investor to set-off or net rights against intermediary with the obligations to the intermediary. However, the right of the investor could be established on contractual basis.

13.3. Denmark

Generally no. However, if the intermediary has a security interest in the securities and has exercised a right of use, the investor´s rights and obligations may be subject to a close-out-netting agreement.

13.4. Germany

With respect to investors as customers of a a custodian bank or CSD the answer is no. All delivery obligations have to be fulfilled "gross".

13.5. Estonia

General legal framework (mainly the provisions of the LOA) as a general rule permits offsetting of mutual obligations. There are no special provisions prohibiting offsetting of mutual obligations in the situation described in question (13) if respective contractual arrangements are in place between the investor and intermediary permit doing so.

13.6. Greece

In principle yes, according to the GCC rules, except otherwise agreed between the parties.

13.7. Spain

No. Article 1.200 of the Spanish Civil Code expressly foresees that "netting will not take place when some of the debts arise from deposit or the obligations of a depositary (…)".

13.8. France

We do not believe that an investor would be in a position to exercise a right of set-off against the intermediary in respect of securities with obligations that investor might have against the intermediary.

As indicated above (question (8)), the investor is a depositor and the depositary is required to preserve and maintain property rights in respect of securities recorded in its book in the name of the investor and to redeliver those securities. He may not use such securities without the consent of the investor. The investor is the owner of the securities and has the right to request the redelivery of such securities. In the absence of mutual fungible claims, no set-off is possible.

13.9. Ireland

This will depend on the terms of contract between the parties. There is no general non-insolvency right of set-off or netting that would have this effect under Irish law and for set-off rights to accrue, they would have to be contractually reflected in the documentation. Set-off rights may also be subject to contractual restrictions.

Insolvency set-off rights may be available on the winding-up of a party in respect of which the rules for the time being in force under the law of bankruptcy apply in relation to the respective rights of secured and unsecured creditors, debts provable and the valuation of future and contingent liabilities. The bankruptcy rules in relation to set-off are contained in paragraph 17 of the First Schedule to the Bankruptcy Act 1988 which rules are incorporated into section 284 of the 1963 Act. Under statutory insolvency set-off rules, set-off of "mutual credits and debts", only, is permitted. Irish law does not provide for the set-off of securities against cash and so, in order to achieve the economic equivalent of this, the contract must provide for the monetisation of the investor's entitlement to securities before any purported set-off.

Pursuant to the European Communities (Reorganisation and Winding-up of Credit Institutions) Regulations 2004, which implement Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions, if reorganisation measures are imposed on, or winding-up proceedings are commenced in respect of, an Irish credit institution, set-off will be available in accordance with Irish domestic law but, in addition , pursuant to Regulation 28, which implements Article 23 of the Winding-up Directive, if set-off is:

(a) not enforceable as a matter of domestic Irish law; and

(b) enforceable pursuant to the law "applicable to the institution's claim", for the purposes of the Regulation,

set-off will be enforceable pursuant to Regulation 28, subject to any proceedings that might be taken under general Irish insolvency laws to avoid, or otherwise render voidable or unenforceable, legal acts detrimental to creditors. There is no Irish authority as to what law is "the law applicable" to the institution's claim for this purpose is (e.g. governing law/law of lex situs).

13.10. Italy

In principle not. It is disputable whether the investors and the intermediary may agree that a netting of the respective credit and debt position may take place.

13.11. Cyprus

The relevant stock exchange legislation does not make any reference to setting-off by the investor. However applicable Cyprus law jurisprudence forbids the setting-off of mutual obligations unless specifically provided by contract.

13.12. Latvia

However, if the intermediary has a security interest in the securities and has exercised a right of use, the investor's rights and obligations may be subject to a close-out-netting agreement.

13.13. Lithuania

It is not forbidden. On the other hand no specific regulation regarding such set-off or net in such cases is provided as well. Therefore general rules of set-off should be applicable, i.e. the rights have to be personal rights (claims); these have to be mutual and of the same kind; a time limit of a mutual claim to be set-off has to be expired, or the time-limit of its performance is not fixed, or it is defined by the moment of a demand to perform the obligation. In case set-off is not processed in the SSS, it shall be forbidden to set-off any claims if either of the parties is facing bankruptcy procedures. Also set-off is forbidden in respect of:

(1) claims disputed within the judicial proceedings;

(2) claims arising from a contract for the constitution of a life annuity;

(3) claims the performance of which is connected with the person of a concrete creditor;

(4) claims for damage suffered by reason of bodily injury or death;

(5) claims against the state; though, the state may effect a set-off;

(6) where the subject-matter of an obligation is property which is exempt from seizure;

(7) other claims, in the cases established by laws. A debtor shall not be entitled with the right of a set-off if he is bound to compensate for damages resulting from his actions performed with the intention to cause damages.

13.14. Luxembourg

Luxembourg law does not provide for automatic set-off. Thus, netting by an account holder of rights to securities held by it with an intermediary is a matter for contractual arrangements to that effect.

13.15. Hungary

Yes.

13.16. Malta

The fact situation of this question needs explaining but it can be confirmed that if there is an agreement which expressly caters for set-off or netting between an investor and an intermediary, then set-off and netting can take place, however, absent agreement set off can only take place between money claims which are certain, liquidated and due.

As the law treats assets held for customers as not owned by the intermediary, it will not be possible to set off personal liabilities of the intermediary by using customer assets as customer assets are ring-fenced and protected from the creditor of the intermediary by regulation 5 of the ISA (control of assets) regulations. These regulations also give immunity from garnishee to customer assets.

13.17. Netherlands

In principle, the investor is entitled to set-off, if the requirements for set-off are met:

a. Mutuality: the mutual debts must be between the same parties, acting in the same capacity.

b. Corresponding claims: both claims must relate to the same subject matter. Corresponding claims are, for example, two monetary obligations payable in the same currency or two obligations for the delivery of securities of the same kind. Cross claims payable in different currencies may not be set off against each other. The effect of this rule may be somewhat mitigated by the general rule under Netherlands Law that if a claim is denominated in a currency other than the currency of the country where the payment must be made, the debtor may also pay in the currency of such country, unless the parties have agreed otherwise or unless this conflicts with legislation or customs.

c. Authorisation to discharge debt: the debtor must be authorized to discharge his debt. A debtor shall for instance not be authorised to discharge his debt if the debt has not yet become due and payable and prepayment is not possible.

d. Due and payable: the claim of the creditor must be due and payable.

Given that the investor is likely to have financial obligations to the intermediary and that the intermediary has obligations to deliver securities to the investor, the corresponding claims requirement is probably not met

13.18. Austria (to be completed)

13.19. Poland

(13) An investor is not entitled to set-off or net rights against the intermediary with respect of securities with obligations that an investor might have against the intermediary.

13.20. Portugal

Not in what securities accounts are concerned, because the investor has proprietary rights over the securities, not credit rights against the Financial Intermediaries.

13.21. Slovenia

General rules of set-off apply. Pursuant Art. 311 of Obligation Code (OZ) a debtor may set-off his obligation with his claim (right) against a creditor, if following conditions are fulfilled:

1. the object of both obligation and right (claim) is either cash (monetary obligation and claim) or commodity of the same kind (i. e. same securities),

2. both obligation and right (claim) are due.

13.22. Slovakia

Generally, investor is not entitled to set-off or net its obligations it might have to the intermediary, but it is up to intermediary and investor if such possibility they establish by bilateral contract.

13.23. Finland

In the book-entry system, the investor is not generally entitled to set-off or net rights against the intermediary in respect of securities with obligations that the investor might *have to the intermediary.* However*, the Act on Financial Collateral (11/2004, implementing the Collateral Directive in Finland), provides that the parties can agree that once the debt has matured, all the secured counter-obligations of the parties shall be immediately netted or that they can be netted.*

Outside the book-entry system, the right to set-off depends on the contractual relationship between the investor and the intermediary. *The Finnish law provides*

*generally extensive rights of set-off in bankr*uptcy. Furthermore, the Act on Financial Collateral may be applicable to the relationship.

13.24. Sweden

Generally no, but the parties could agree to a right to set-off or net. In case of insolvency the Swedish law provides extensive right to set-off.

13.25. United Kingdom

Set-off rights are primarily a matter of the agreement between the investor and the intermediary. In such circumstances, the availability of set-off in the insolvency of the intermediary must be considered on a case by case basis. The account agreement between the intermediary and the investor might restrict rights of set-off. Although such provision is not customary, it would generally be effective as a contractual matter. In the insolvency of either party governed by English law, statutory insolvency set-off will apply, but in the absence of a specific contractual provision requiring the conversion of the investor's entitlement to securities into a monetary claim, there would be no set-off of the "securities" against any cash sums owed to the intermediary. Under English law it is not possible to set off things 'owned' (the securities) against sums owed.

The intermediary may by contract be entitled to 'net' delivery and receipt instructions so that sales and purchases of the same security on the same day are reflected by a single change to the investor's account.

CREST

CREST's Terms and Conditions do not contain any rules dealing with set-off.

There is no 'netting' of delivery and receipt instructions except in relation to securities underlying a CDI.

14. QUESTION NO. 14

IS THE INTERMEDIARY ENTITLED TO SET-OFF OR NET OBLIGATIONS TO THE INVESTOR IN RESPECT OF SECURITIES WITH RIGHTS THE INTERMEDIARY MIGHT HAVE AGAINST THE INVESTOR? CAN ANY SUCH ENTITLEMENT BE ALTERED BY CONTRACT?

14.1. Belgium

Apart from a statutory lien operating under Belgian law in favour of an intermediary (see question 26), the issue of set-off or netting by an intermediary of rights to securities held with it is a matter for the contractual arrangements between the intermediary and its account holders.

14.2. Czech Republic

Except the statutory lien on securities in safekeeping, the intermediary does not have a right to set of or net rights against the investor with the obligations to the investor. However, right to set off or net obligation could be established by contract.

14.3. Denmark

Generally no. However, if the intermediary has a security interest in the securities and has exercised a right of use, the investor´s rights and obligations may be subject to a close-out-netting agreement.

14.4. Germany

With respect to a CSD or a custodian bank in relation to their customers the answer is no.

14.5. Estonia

General legal framework (mainly the provisions of the LOA) as a general rule permits offsetting a mutual obligations. There are no special provisions prohibiting offsetting of mutual obligations in the situation described in question (14) if respective contractual arrangements are in place between the investor and intermediary permit doing so.

14.6. Greece

Same answer as under 13.

14.7. Spain

As explained before, netting does not take place when some of the debts arise from deposit or the depositary obligations.

On the other hand, a similar legal institution relevant to this effect is the retention right (ius retentionis) given to the depositary. Although it is provided for in the Civil Code, for any kind of deposit agreement, it may be applied in this context, and therefore the depositary may retain the securities as collateral until the full payment of what it is owed for the opening and maintaining the securities account.

14.8. France

We do not believe that an intermediary would be in a position to exercise a right of set-off or net obligations in respect of securities between rights of the investor against the intermediary and rights the intermediary might have against the investor.

As indicated above, the investor has a direct right against the issuer which is a claim in respect of debt securities or a shareholder right in respect of equity securities. The custodian is required to preserve and maintain securities recorded in its book in the name of the owner and to redeliver those securities, if need be. He may not use such securities without the consent of the owner.

We do not believe that these fundamental rights could be altered by contract.

However, the AMF General Rules provides that intermediaries are required to require margin calls from clients to cover commitments arising from an order specified as being for deferred settlement and delivery ("ordres avec service de règlement et de livraison différé")62 or arising from a position taken on a regulated forward financial instruments market (i.e. the "MONEP" or the "MATIF")63. In case of insufficiency of cover, the intermediary must require the client to reduce its positions or to increase the amount of the cover in the account opened in the books of the intermediary. Failing posting of such additional cover such intermediary must liquidate, totally or partially, the positions of the client64.

Article L. 442-6 of the MFC provides that:

"Whatever their nature, the deposits made by the clients to the benefit of investment services providers […]for purposes of hedging or guaranteeing the positions taken on a financial instruments market, are transferred by way of outright transfer of title to the provider,[…]for the payment of, on the one hand, the debit balance resulting from the automatic liquidation of the positions and, on the other hand, any other sum due to the provider,[…].

14.9. Ireland

Again, this will depend on the terms of contract between the parties. There is no general non-insolvency right of set-off or netting that would have this effect under Irish law. As outlined in the response to (13) above, insolvency set-off may be relevant and to the extent that an intermediary sought to rely on statutory insolvency set-off, this would permit only the set-off of "mutual credits and debts" and would not, therefore, facilitate the set-off of rights to securities against sums owed.

14.10. Italy

See above.

14.11. Cyprus

See Q. 13

14.12. Latvia

Generally no. However, if the intermediary has a security interest in the securities and has exercised a right of use, the investor's rights and obligations may be subject to a close-out-netting agreement.

---

62 Article 517-4 of the AMF General Rules.

63 Article 518-3 of the AMF General Rules.

64 Article 517-7 and Article 518-3 of the AMF General Rules.

14.13. Lithuania

Set-off is not forbidden. Also, please, refer to the answer to question 13. Any set-off may be executed upon unilateral notice. The Civil Code does not provide for prohibition of the right to set-off by the parties. However, it is very doubtful whether the parties can agree on absolute revocation of eligibility to the set-off right, i.e. revocation not related to specified claims. That is because the eligibility to obtain a right to set-off constitutes part of person's legal capacity which restriction is very arguable. However, if the parties identified the claims in respect of which the set-off is revoked or restricted, such provision likely would not be inconsistent with the law.

14.14. Luxembourg

Luxembourg law does not provide for automatic set-off. Thus, netting by the intermediary of rights to securities held by an investor with it is a matter for contractual arrangements between the intermediary and its account holders.

Operators of a securities settlement system, however, have pursuant to Article 17 of the Securities Act the benefit of a lien on all securities, claims, monies and other rights booked to accounts held with them, in connection with the system they operate, as own assets of a participant, to the extent that such assets are free of any collateral security notified to or accepted by the depository. The lien secures only claims which have arisen in connection with the clearing and settlement of transactions on securities.

14.15. Hungary

Yes, and it can be altered by contract.

14.16. Malta

If assets are not money and the debt is not certain liquidated and due then no set off can take place unless there is a contract. If there is a contract for set off and netting then it will work, subject to ensuring that the conditions for applicability exist.

It is not clear what the situation will be if an intermediary, not authorised to enter into a set-off and netting agreement, does this anyway in relation to customer's assets. The same rules as stated above may apply and it is possible that because of lack of title and power to transfer securities, then the netting agreement may not operate in accordance with its terms

There are exceptions to this and reference is made to two laws which may have an impact on customer rights in that they seek to secure the finality of the set-off and netting between parties, except in case of fraud.

The set-off and netting on insolvency act, 2003 and the collateral regulations implementing the eu coillaterla directive were intended to create security when specific arrangements are made between contracting parties which contemplate set-off and netting as a form of security.

Another exception may arise in a similar context even under civil law where there is the context of a pledge and the pledgee is authorised to re-pledge the assets. That situation may lead to the transfer of securities being valid in favour of the peledgee as a result of the enforcement on the basis of the fact that the intermediary pledgee/pledgor has authority to pledge the securities in the first place.

14.17. Netherlands

As regards the entitlement to set-off, reference is made to the answer to Question 14. The intermediary is entitled to set-off as well if the requirements for set-off are met.

The statutory right of set-off described above may be modified by agreement between the investor and the intermediary. Parties to a contract may agree to widen the right of set-off beyond its statutory limits by contractually eliminating one or more of the requirements set out above, as, for instance, is seen in the general terms and conditions applied by most banks in the Netherlands. In addition, parties may also contractually restrict or exclude the statutory right of set-off. Outside of bankruptcy, a contractual modification of the statutory right of set-off will have effect against third parties, such as attachors or pledgees.

Crucially, there is the question as to whether the rules of insolvency set-off, as set out above, can be varied by contract. The Netherlands Bankruptcy Act does not contain a provision as to this point. There is also no published case law available on the question as to whether a contractual set-off can be validly invoked against a bankruptcy trustee in insolvency proceedings. Nevertheless, it is generally accepted that contractual set-off provisions will be effective if, and to the extent that, the effect will remain within the parameters established by the set-off provisions of the Netherlands Bankruptcy Act. A more extensive application of the right of set-off may not be enforceable.

14.18. Austria

Answer to both (13) and (14):

In order to set-off or net rights, the rights must be of the same kind and fulfil other requirements listed in sections 1438 to 1443 General Civil Code. In case the investor would owe the account provider securities of the same kind (e.g. 10 Royal Dutch shares) that the account provider holds for the investor (e.g. 90 Royal Dutch shares), the account provider would not be entitled by law to set-off or net his claim for 10 Royal Dutch shares against the 90 Royal Dutch shares held on behalf of the account holder. Section 1440 General Civil Code expressly forbids to set-off or net ("kompensieren") tangibles held in custody. This statutory regulation may be altered by contract.

14.19. Poland

(14) The intermediary is not entitled to set-off or net obligations to the investor with respect of securities with rights the intermediary might have against the investor.

14.20. Portugal

No. Again the Financial intermediary cannot set off credit rights against proprietary rights.

14.21. Slovenia

General rules of set-off apply (se answer to Q13).

14.22. Slovakia

No, intermediary has no rights with respect to securities of investor, unless such rights are allowed by a contract.

14.23. Finland

In the book-entry system, the intermediary is not entitled to set-off or net obligations in respect of securities, since the investor is considered to have direct proprietary rights and the intermediary is merely operating the account. However, the same reference as in 13 above, should be made the Act on Financial Collateral. Furthermore, pursuant to Chapter 4a, Section 11 of the SMA, a clearing party has a statutory collateral right to a book entry security of a customer for the fulfillment of the obligations arising from an order relating to the book entry in question if the clearing party has made a payment relating to the book entry securities and if the securities are held on a special commission account opened in the name of the intermediary. While this is not directly a set-off provision, it is worth noticing in this respect.

Outside the book-entry system, the right to set-off depends on the contractual relationship between the investor and the intermediary. The Finnish law provides generally extensive rights of set-off in bankruptcy. Furthermore, the Act on Financial Collateral may be applicable to the relationship.

14.24. Sweden

For CSD Accounts the investor is protected against the insolvency of the intermediary and also the CSD. The investor has a direct and traceable right to the securities credited to the account. The intermediary – account operator – only operates and administers the account. The investor does not have to rely on the intervention of the court or a liquidator. In case of an insolvency of the intermediary the securities on the nominee account and owned by third parties are not regarded as assets of the intermediary.

Regarding other securities account the protection of the investor depends on sufficient separation of the investor’s assets from the assets of the insolvent intermediary. If the intermediary has separated the assets the investor is protected but if the intermediary has commingled the assets the investor may risk losing the proprietary right and becoming an unsecured creditor. The liquidator should, if necessary, sort out and distribute the assets to investors.

14.25. United Kingdom

As indicated in the response to question 13 above, insolvency set-off is confined to obligations, and does not extend to property rights. To the extent that the investor's rights in respect of securities are proprietary, they must be met in full, and are not subject to set-off. Contractual provision purporting to modify the mandatory provisions of insolvency law, including the scope insolvency set-off, are not effective. In the absence of insolvency, however, contractual provision providing for set-off may be effective. Such provision is not customary, and an equivalent result is generally sought by granting to the intermediary a security interest over the investor's assets in respect of sums due from the client to the intermediary. In contrast, contractual rights of set-off are customary in respect of cash balances.

15. QUESTION NO. 15

IS THE INVESTOR PROTECTED AGAINST THE INSOLVENCY OF AN INTERMEDIARY AND, IF SO, HOW? DOES THE INVESTOR HAVE TO RELY ON THE INTERVENTION OF A COURT OR LIQUIDATOR? IN WHAT WAY IS THE ANSWER DIFFERENT IF THE INSOLVENCY IS OF AN UPPER-TIER INTERMEDIARY?

15.1. Belgium

Under the Royal Decree, investors are protected against the insolvency of a settlement institution. Article 12 provides that the owners of fungible securities are allowed to seek the enforcement of their co-ownership rights only against the settlement institution with which such securities are entered into an account. If the settlement institution is subject to bankruptcy or another similar procedure, the recovery in property of the amount of securities which the settlement institution is liable to return shall be exercised against the pool of fungible book-entry securities of the same category, deposited with the settlement institution or with any subcustodian on behalf of the settlement institution. The enforcement of proprietary rights shall, as far as Belgian law is concerned, in no way be affected by the deposit of such securities, by book-entry of otherwise, by the settlement institution with other depositaries in Belgium or abroad (see Article 4 of Royal Decree 62). The action in recovery shall be exercised against the receiver of the insolvent intermediary (settlement institution or affiliates) who will allocate (through physical delivery for bearer certificates, re-registration in the issuer books for registered securities or transfer to another account keeper in the issuer CSD for dematerialised securities) the securities among their respective owners.

By exception to the limitation of the right of revendication of the investor/account holder which can only be exercised against the intermediary maintaining the securities account with such account holder under Royal Decree 62, when an intermediary has recorded securities in its name but on behalf of others with a settlement institution or with another affiliate of the latter, the ultimate owner, on behalf of whom such book-entry securities have been recorded with the above-mentioned upper tier intermediary, can in case of insolvency of its intermediary exercise its right of recovery directly against the settlement institution or the affiliate (article 13 end of Royal decree 62) on the securities so held in the name of the insolvent intermediary but on behalf of clients.

15.2. Czech Republic

The investor is a legal owner of the securities held on his behalf by intermediary. Under general provisions of insolvency law, insolvency effect, with some exceptions, only assets of the insolvent debtor. Securities owners are entitled to claim their securities to be excluded from insolvency proceedings. Pursuant to section 34 of Securities Act are securities held in safekeeping with fungible securities of other owners are not effected by insolvency proceedings and the liquidator is obliged to hand them to the owners.

15.3. Denmark

The Danish CSD is very unlikely to become insolvent, so the rules on investor protection are in practice only relevant in cases where the account holder holds through another type of intermediary (e.g. a bank). It should be noted that insolvency of the account manager which manages a CSD-account does not affect

the account holder´s rights as the account does not form part of the assets of the manager (which is not even considered an intermediary).

If an intermediary becomes insolvent, the investors are protected by Financial Business Act Art 72, which states:

72.-(1) Where a financial undertaking is licensed to operate as a securities dealer, the undertaking shall

(i) take adequate steps to ensure its customers' right of ownership of their securities and contracts on currency spot transactions for *investment purposes with a view to achieving a profit on changes in the rate of exchange, and*

(ii) organise and build its activities in such a way that the risk of conflicts of interest mutually between the customers of the securities dealer, and between the customers and the securities dealer is limited as much as possible.

(2) A financial undertaking licensed to operate as a securities dealer may not have the disposal of its customers' securities without the explicit consent of said customer.

(3) A financial undertaking licensed to operate as a securities dealer may keep customers' securities in an omnibus account or safekeep if the financial undertaking has informed the individual customer about the legal consequences hereof and said customer has consented to this. The Danish FSA may, in exceptional cases, authorise that securities owned by a financial undertaking and its customers are kept in the same safekeep account. A financial undertaking shall keep a register designating clearly the individual ownership of the registered securities.

(4) The Danish FSA may deprive a financial undertaking licensed to operate as a securities dealer of the right to keep an omnibus account or safekeep under subsection (3).

(5) The provisions of subsections (1) and (2) shall apply correspondingly to Danmarks Nationalbank (Denmark's central bank) and the Danish Financial Administration Agency with the derogations naturally following the nature of the matter.

(6) The Danish FSA may lay down more detailed provisions on the conditions mentioned in subsections (1)-(3).

(7) In the event of the bankruptcy, cf. section 248, suspension of payments and similar of a financial undertaking, the individual customer may, on the basis of the register, cf. subsection (3), 3rd clause, withdraw its securities from an omnibus account or safekeep, if there is no dispute about the right of ownership of said customer beforehand.

> As it appears Art 72(7) protects the investors against intermediary insolvency on the bases of the register (the account keeping) of the intermediary. In practice, it may happen that the register maintained by the intermediary does not correspond entirely with the total number of securities held by the now insolvent intermediary. In other words, situations may arise where there is either a surplus or a shortfall of securities. Art 72(7) does not explicitly deal with these situations. Probably, in case of a surplus the investors are entitled to withdraw their securities (even though they are commingled with the surplus-securities belonging to the insolvent intermediary). With respect to shortfalls, see answer to Question no. 29.

In principle, Art 72(7) also apply to upper-tier intermediary insolvency (which is only likely to occur in a multi-tier holding pattern, as the Danish CSD as mentioned is unlikely to become insolvent). The way in which Art 72(7) would work in such a situation would be, that the intermediary would be entitled to withdraw the securities from the insolvent upper-tier intermediary (and consequently hold through another upper-tier intermediary). In an international holding pattern, it might occur that the upper-tier intermediary is foreign and its local insolency rules does not protect the intermediary (and thus not the investors holding through the intermediary). In such a cases, the question may be raised if intermediary is liable to the investors for the "lost" securities", see answer to Question no. 16.

15.4. Germany

Insolvency protection under German law is provided in the following manner:

Securities held in collective safe custody:

Under the concept of regular custody ("depositum regulare") applicable to securities in safe custody under German law, the investor retains ownership. He is the co-owner of a pool of fungible securities (represented by a – definitive or technical – global certificate) held at the level of the CSD. The investor is the civil law (co-)owner, the CSD and any other custodian bank (stepping in between the investor and the CSD) are only (direct or constructive) "possessors" of the global certificate.

Therefore, in case of a hypothetical insolvency of the CSD and/or a custodial bank there is nothing that could fall into their insolvency estate, since as a rule neither intermediary nor the CSD hold own "in rem" entitlements in the securities.

Both the CSD and the custodian bank are subject to the investors` vindication right (Section 985 Civil Code, 7, 8 Securities Deposit Act) deriving from his ownership position entitling him to a pro rata "delivery" of securities out of the pool (delivery in case of a global certificate meaning: transfer of the global certificate into the vaults of a new solvent CSD or transfer of co-ownership shares by way of book-entry from the insolvent custodian to a solvent custodian).

Under general law, vindication rights are fully enforceable in case of (the CSD's/custodian's) insolvency; Section 47 Insolvency Code states that the owner of an asset does not take part in the insolvency proceedings but rather is entitled to vindicate his asset from the insolvent estate under the normal rules applicable outside insolvency proceedings ("…bestimmt sich nach den Gesetzen, die außerhalb des Insolvenzverfahrens gelten."), i.e. Section 985 Civil Code, 7, 8 Securities Deposit Act

Federal and State (and ECB) bonds (which are civil law claims created by entry into the state debt register) are made subject to the rules of the Safe Custody Act by way of legal fiction (Section 8 para 2 Federal Debt Securities Administration Act) and are hence identically eligible for collective safe custody under "in rem" rules. Hence, in case of insolvency of the CSD and/or a custodian bank the investor is entitled to vindication (Section 985 Civil Code, 7, 8 Securities Deposit Act Custody Act), fully enforceable as against the insolvent estate (Section 47 Insolvency Code).

As regards securities held on a fiduciary basis in WR-Credit, occurring in practice where securities are not eligible for collective safe custody under German "in rem"

rules) the insolvency protection would basically be the same. Under "WR", the investor does not become civil law (co-) owner but ownership rests with its custodian bank which exercises its ownership-right on a fiduciary basis (formal legal owner or Treuhänder) – with the investor being the fiduciant (i.e. the beneficial owner or Treugeber) thereof. It is leading legal opinion that , in case of insolvency, the economic approach would prevail over the formal legal one: the fiduciant's (investor's) position would prevail over the formal ownership of the custodian bank and would avail the investor of a vindication right as against the custodian bank's insolvent estate; securities formally owned by the custodian bank on a fiduciary basis would not form part of the custodian bank's insolvent estate and the investor would be protected by Section 47 Insolvency Code as described above.

15.5. Estonia

Yes, this is provided expressis verbis in (3) of § 6 of the ECRSA, but this extends only to the nominee account opened with the Central Register and the clients of the owner of the account.

The latter means that Estonian law does not provide protection to the levels below (e.g. where the direct client of the owner of the nominee account in the Central Register acts on behalf of third persons).

15.6. Greece

a. Regarding securities held within the DSS, given that these securities are held in separate accounts under the name of the end-customer (beneficial owner), if the Operator, acting as administrator of the customer accounts, becomes insolvent, then investors rights are fully protected.

b. In respect of Government securities held within Participants' omnibus accounts in the BoGS, investors' interests are protected by virtue of article 8 of Law 2198/1994 (see above under 7.b.) in conjunction with article 6 para 3 of Law 2396/1996 (above under 1.2.). Furthermore, article 8 para 3 of Law 2198/1994 strengthens investors' rights in case the Participant does not hold enough securities in its customers' account, in order to satisfy the relevant customers' claims. More particularly, relevant investors' claims are privileged and satisfied by the Participant's «own portfolio account», also including any securities of the Participant held in the «investor/customer portfolio account» of another Participant. Even if such accounts are not sufficient to cover the respective claims, investors will be satisfied pro rata. Outstanding claims of the investors are satisfied by using the remaining assets of the Participant in respect of which they are granted a special privilege which ranks ahead of other privileged creditors such as employees, the state and social security entities (article 8 para 5 of Law 2198/1994).

From the above, as well as from article 7 para 2 of law 2198/1994, providing that seizure of Participant's securities held within the BoGS is prohibited, one concludes that a) no seizure of own Participant's securities held within the BoGS is possible and b) no seizure of customers' securities held by a Participant, segregated from his own assets, is possible. Customers' securities seizure is however possible by the Participant only if such seizure is effected by a customer's creditor.

c. Furthermore, Article 6 para 3 of Law 2396/1996 clearly protects the investors' rights in the event that the intermediary, being either a Greek credit institution or an investment firm, becomes insolvent, as explained above under 1.2.

d. Finally, please note that article 4a of Law 1806/1988 provides for a) a "special liquidator" for investment firms, who is appointed by the court among a list of experts set up by the HCMC, and b) a "liquidation supervisor", appointed by the HCMC. The special liquidator and the liquidation supervisor have, inter alia, the obligation to look after the investors' interests.

Similarly, article 8 of Law 1665/1951 provides for the appointment of a "Commissioner" by the BoG in several cases, such as, for example, insolvency of a credit institution.

15.7. Spain

In the case of securities credited in the securities accounts, the insolvency of the intermediary will not affect the investor's rights, since they are not credit rights against the issuer, but property rights recorded in the securities account held by the intermediary. Therefore, these rights inscribed in the accounts are never commingled or otherwise mixed with the intermediary's assets.

In the case of securities listed for quotation in official secondary markets, according to article 44 bis 9 of the Securities Markets Law, should an insolvency proceeding be opened against a participant in IBERCLEAR, the CNMV may, immediately and at no cost to the investor, transfer the securities credited in his securities account to another firm authorised to perform this activity. In the same way, the owners of such securities may request for them to be transferred to another firm –this is a case of separatio ex iure dominii–. If no firm is in a position to take on the responsibility for the aforementioned records, this activity shall provisionally be undertaken by IBERCLEAR until the owners request that the registration of their securities be transferred.

Does the investor have to rely on the intervention of a court or liquidator?

No. Without prejudice to general insolvency provisions that grant the insolvency administrator and the judicial authority, if required, the capacity "to establish cautionary measures as it may deem necessary to protect the assets of the bankrupt", it is foreseeable that the transfer of the clients' securities to another participant in IBERCLEAR would happen fast.

The transfer procedure that may be initiated by the CNMV referred to above does not require the involvement of the insolvency administrator. On the contrary, it is a mechanism to protect investors' interest that seeks the speeding up of the exercise of rights by its legitimate owners.

In what way is the answer different if the insolvency is of an upper-tier intermediary?

The Spanish registry system does not foresee the feature of the upper-tier intermediary, that usually appears on indirect holdings scenarios, as described in the Introduction. In this case, the investors' rights should be determined according to general Private International Law rules.

15.8. France

15.8.1. *Is the investor protected against the insolvency of an intermediary and, if so, how? Does the investor have to rely on the intervention of a court or liquidator?*

The intermediary does not hold title to the securities which are recorded in the name of their owner (i.e. the customer) (see question (5) above).

Article L. 211-6 of the M&FC provides that in case of bankruptcy of the financial intermediary maintaining the securities account, securities held through such intermediary may be transferred to another financial intermediary.

As any owner, the investor has a right to require redelivery of securities ("droit de restitution").

A derogatory regime under applicable insolvency rules is created as a result of such provisions. Such regime is derogatory under the insolvency code to the extent that such right is subject to its own regime.

The regime contemplated under Article L. 211-6 of the M&FC contemplates verification of securities held with the CSD and financial intermediaries in order to determine whether they are sufficient to enable the insolvent intermediary to meet its delivery obligations *vis-à-vis* securities account-holders. This verification is performed financial instrument by financial instrument under the control of the judicial administrator or liquidator together if need be with the administrator or liquidator designated by the *Commission Bancaire*. In case of an insufficiency, a *prorata* allocation is made among account-holders and such account-holders may then require transfer of those securities so allocated to another intermediary. No proof of claim needs to be filed in respect of the claim corresponding to financial instruments which may not be made available to accountholders as a result of an insufficiency of assets with the central depositary.

15.8.2. ***In what way is the answer different if the insolvency is of an upper-tier intermediary?***

In view of the above, it appears that the recording of securities with the central depositary in sufficient number is the key-consideration. This is irrespective of the sufficiency or insufficiency of assets with the upper-tier intermediaries which are mere pass-throughs. In fact, the upper-tier intermediary is acting as agent of the lower-tier intermediary (reference is made to question 16 in this respect).

15.9. Ireland

Yes, to the extent that the investor's property is held by the intermediary subject to a valid trust, Irish law recognises that, on any insolvency of a trustee holding property under a valid trust, the trust property belongs to the beneficiaries of the relevant trust and is not available for distribution among creditors of the insolvent trustee. To the extent that securities held by the intermediary for the investor could be considered to be held on trust, they would not be available to the creditors of the trustee either on its insolvency or otherwise and the liquidator would be required to return the securities to the investor. In this regard, the Supreme Court in the case of Robert Dempsey v Bank of Ireland[65] held that the liquidator only acquires such title to the assets as the company had which means that he takes the assets subject to any pre-existing enforceable right of a third party in or over them which would apply to any such trust property.

---

[65] Supreme Court, unreported, 6 December 1985

To the extent that cash sums are held by the intermediary in the name of the investor, such amounts would typically not be held on trust and would simply represent debts owed by the intermediary to the investor. In such circumstances, the investor would have to prove in the insolvency of an intermediary as an unsecured creditor. It may be that insolvency set-off would operate to ensure that cash amounts owed to the investor by the intermediary, could be set-off against cash amounts owed by the intermediary to the investor. See further the Dempsey case cited above in this regard.

In addition, there are certain statutory priorities in insolvency, in the case of certain regulated intermediaries and pursuant to pursuant to section 52(7) of the IIA and section 52(5) of the Stock Exchange Act 1995, as amended, for certain "client monies" or "client investment instruments" - essentially client money or investment instruments or documents of title relating to such investment instruments which are "received, held, controlled or paid on behalf of a client".

The Settlement Finality Regulations provide for the automatic designation of bodies which are "payment systems" within the meaning of section 5 of the Central Bank Act 1997. The Irish Minister for Finance on behalf of Ireland has designated and notified to the Commission that CREST Ireland is a "payment system" for the purposes of the Settlement Finality Directive and, as such CREST Ireland is a "designated system" pursuant to the Settlement Finality Regulations. Transfers of securities by means of the CREST Ireland system therefore have the benefit of the protection afforded by the Settlement Finality Regulations (see further the responses to question (20) below).

Does the investor have to rely on the intervention of a court or liquidator?

Typically, no court order would have to be relied upon by the investor to establish his rights although, in practice, it may be that on the insolvency of an intermediary, a liquidator would be involved and the investor may seek the intervention of the court if a dispute arises. The books of the intermediary should record such rights and the appropriate court or the insolvency officer would generally seek to establish the reliability of such accounts and satisfy himself that the investor's claim was legitimate and resolve any issues in respect of shortfalls or discrepancies.

In what way is the answer different if the insolvency is of an upper-tier intermediary?

As outlined in the responses to question (9) above, the investor would have no direct rights against an upper-tier intermediary. As a matter of general Irish law, it is considered that the upper-tier intermediary holds the securities on trust for the intermediary, which in turn holds its interest on trust for the investor. An investor could not pursue the upper-tier intermediary directly but would have to pursue its rights against the intermediary which, in turn could pursue its rights against the upper-tier intermediary. Typically the investors' rights would not be recorded in the books of the upper-tier intermediary and it is rare that the upper-tier intermediary would hold securities on trust directly for the investor.

Therefore if an upper-tier intermediary was subject to Irish insolvency law the liquidator would not recognise the investor's rights but only the rights of the intermediary, to the extent that the upper-tier intermediary held the securities on trust for the intermediary. The intermediary would not require a court order to establish its rights against the upper-tier intermediary.

15.10. Italy

The rules on segregation are designed to protect the investor against the insolvency of the intermediary. These may prove of limited effectiveness only where records have not been orderly kept and in case of fraud.

In case of insolvency the investor must rely on the intervention of a court or liquidator.

The answer is not different in case of an upper tier intermediary. The intermediary that sub-deposited the securities will be responsible for any failure by the upper-tier intermediary to perform its duties.

15.11. Cyprus

The investor is protected against the insolvency of an intermediary since the securities are registered in his name and he is considered the proprietor of the securities. Consequently there is no need for an intervention by a court or liquidator. In case the securities were registered in the name of any third party, which subsequently became insolvent then it is entirely up to the investor to seek redress in court pursuant to the principles established by Cyprus law. There is no question of bankruptcy by an upper-tier intermediary as the CSD in Cyprus is controlled by the CSE which is a public body.

15.12. Latvia

The LCD is very unlikely to become insolvent, so the rules on investor protection are in practice only relevant in cases where the investor's custodian is an intermediary. Securities belonging to a customer of an intermediary shall not be used by the intermediary to settle the claims of its creditors. As the investors' securities are segregated from intermediary's assets, in the case of insolvency the investors' securities will be transferred to another intermediary with the prior approval by Financial and Capital Market Commission. This requirement shall also apply to cases when an intermediary is recognized insolvent in due course of law. Securities belonging to the investor shall be recovered in due course of the Law on Civil Process where there is an order by a bailiff or pursuant to the Law on Taxes and Duties where there is a decision by tax administration bodies on recovering delayed tax payments.

15.13. Lithuania

Following Art. 101(10) of the Civil Code intermediaries are deemed holding investors' securities in custody. Upper-tier intermediary holds securities credited in general securities accounts in custody as well. Assets kept in custody do not become owned by the custodian and do not fall into the asset mass of the custodian. In case of bankruptcy of intermediary such assets could not be subject to intermediary's creditors claims. However, in order these provisions could be enforceable separation of investors' assets from the intermediaries has to be performed. Art. 24(1)(3) of the Law on Securities Market provide for requirement of client's assets segregation from the intermediary's assets. The CSDL in conducting general accounting of securities also runs separate accounting of securities managed by each account manager as well as securities holdings of these account managers and holdings for their clients (investors).

15.14. Luxembourg

Under the Securities Act, investors are protected against the insolvency of a depository. Under normal circumstances, investors may only enforce their

proprietary claim against the depository. However, Article 7 of the Securities Act provides that in the case of bankruptcy, liquidation or other insolvency measure or reorganisation procedure of the depository the investors are allowed to exercise their rights in rem on the pool of securities the depository had (sub)-deposited, either by book entry or otherwise in its name, with other depositories in Luxembourg or abroad. Such claim is to be exercised in accordance with Article 567 of the Commercial Code against the direct (sub)-depository of the depository, only.

If the securities available are insufficient to cover all claims and if the insolvent depository holds in its own portfolio securities of the same kind, then such securities will be added to the pool of securities upon which the investors may exercise their claims.

15.15. Hungary

The investment service provider must keep the money and financial assets of the investors separate from it's own assets. The assets of the investors cannot be used to pay off the creditors of the investment service provider. The liquidation process is ordered by court and a liquidator is appointed. An investor-protection fund is set up from the contributions of the investment service providers, every investment service provider is obliged to be a member. If in case of liquidation the assets are not sufficient to pay off all investor demands, the fund indemnifies the investor for the max.amount of 24.000 EUR.

15.16. Malta

Yes, both the ISA **(control of assets) regulations** and the **trustee and trustees act** protect customer assets from the insolvency of the intermediary by, in the first case, treating the assets as a distinct patrimony which remains owned by the customer and in the second case by treating the assets as a distinct fund not available to trustee creditors.

The whole system is based on proper records and segregation by the intermediary for if there is no evidence of the nature of the holding of assets as customer assets, the system will be difficult to implement for lack of evidence. Book entry systems of "subject persons" acting as intermediaries are prima facie evidence of rights of ownership of the account holder.

The legal status above noted arises from the law and the liquidators are bound to immediately deliver customer assets to other intermediaries or the customer in case of insolvency without the need of court orders, as long as they have the appropriate records.

15.17. Netherlands

Reference is made to the answer to Question 8.

15.18. Austria

The investor is protected against the insolvency of an account provider because the securities held by the account provider are the property of the investor. They do not fall under the estate of the insolvent account provider. Securities account providers are banks against which only bankruptcy proceedings may be opened (no composition proceedings). In bankruptcy proceedings the intervention of a liquidator is required. All acts of the bankrupt account provider must be performed by the liquidator. In case the liquidator would not follow the instructions by the account holder to transfer his securities, the liquidator would be personally liable

and be personally sued for performance. Bankruptcy proceedings in the past have shown that liquidators, in most cases solicitors, are aware of the legal situation and execute promptly the instructions by the account holders.

There is one particularity in respect of foreign securities. As a rule Austrian account providers will not transfer ownership rights on the account holders in case foreign securities are acquired. Austrian account providers are authorized by their General Business Conditions to keep foreign securities abroad, to hold them in their own name or under the name of a "nominee". In most cases this means that the account provider will acquire (co-) ownership in these securities (if this is possible under the foreign law) and the account holder receives "Wertpapierrechnung" – securities billing or accounting) which means the right to ask the account provider to transfer the securities into ownership of the account holder. The general view is that these rights, based on a trustee relationship between the account holder and the account provider, are sufficient grounds to give the account holder the same rights against third parties to enforce their rights against the account provider or in case of bankruptcy of the account provider as an owner of securities would have (see answers to question (7), (40) and (41)).

The answer is **not different** in case of an insolvency of an upper-tier account provider.

15.19. Poland

(15) As already shown above in (4), securities registered on securities accounts managed for investors do not constitute proprietary assets belonging to the intermediary managing such accounts and do not form part of the bankruptcy estate of such an intermediary. Therefore, any use of these securities in the event of the bankruptcy by a trustee of a bankrupt's estate to satisfy the creditors of that intermediary would be against the law and would make the trustee liable for the resulting harm. Moreover, in order potentially to compensate investors for the securities they have lost that were registered on accounts managed by a bankrupt intermediary, a compensation scheme was established meeting the requirements of Directive 97/9/EC of the European Parliament and of the Council on the investor compensation scheme. The bankruptcy of an upper-tier intermediary does not in any way affect the rights of investors arising from entries on their securities accounts, since legal consequences are related only to entries on securities accounts.

15.20. Portugal

In case of insolvency of the depository, securities will not form part of the insolvent financial intermediary estate. The right of the holders will prevail to demand that any securities unduly attached be separated and given back.

15.21. Slovenia

The investor is protected against the insolvency of an intermediary (both KDD registry member, which maintains his dematerialised securities account and KDD) as he is the legal holder ("owner") of the securities, credited to his dematerialised securities account (Par. 2 of Art. 16 of ZNVP). Therefore dematerialised securities credited to dematerialised securities accounts of clients of insolvent investment firm (i. e. KDD registry member, which maintained those accounts) do not form a part of the investment firm's (intermediary's) bankruptcy estate. The same applies in the case of insolvency of KDD.

The investor does not have to rely on the intervention of a court or liquidator.

15.22. Slovakia

Investor's assets include cash and investment instruments of the investor that were taken over by the stock broker also in its capacity as intermediary in order to perform an investment service and they constitute the obligation of the stock broker against the investor including interest or any other benefits connected with these assets. An Investment Guarantee Fund („the Fund") set up by the Act provides reimbursement for unavailable investor's assets taken over by the stock broker. In case of insolvency of the stock broker the Fund makes reimbursement in the amount of 90% from unavailable investor's assets. Reimbursement is paid within three months from issue of Fund's statement on details of reimbursement.

15.23. Finland

In the book-entry system, the investor is protected against the insolvency of both the intermediary and APK. The investor is considered to have a direct and traceable ownership right to the securities credited to the account of the investor. The intermediary (account operator) merely operates and administers the account. While the insolvency of the intermediary may affect the service provided to the investor, it has no effect on the proprietary rights of the investor. Thus, the investor does not have to rely on intervention of a court or liquidator. In case the securities are held in a custodial nominee account (omnibus account), the insolvency of the intermediary shall not affect the rights of the investor either. In case of insolvency of the intermediary, the book-entry securities owned by third parties and entered in a custodial nominee account are not regarded as assets of the intermediary. If Finnish insolvency rules are applied to the process, the book-entry securities do not, pursuant to Chapter 5, Section 6 of the Finnish Bankruptcy Act (120/2004) belong to the bankruptcy estate of the intermediary and the beneficial owners need not participate in the insolvency proceedings as creditors. The owners are entitled to claim that the securities be separated from the assets of intermediary. Accordingly, pursuant to Chapter 4 Section 9 and Chapter 7 Section 5 of the Code of Execution the book-entry securities in a custodial nominee account may not be subject to execution procedure or attachment in favour of the creditors of intermediary.

Outside the book-entry system, the protection of the investor depends on sufficient segregation of the investor's assets from the assets of the insolvent intermediary. If the intermediary has duly segregated the assets, the investor has full protection whereas if the intermediary has commingled the assets, the investor may risk losing the proprietary rights and becoming an unsecured creditor. Intervention by the liquidator is necessary at least to sort out and distribute the assets to the investor. Chapter 5, Section 6 of the Bankruptcy Act referred to above is applied also to the securities holdings outside the book-entry system. It provides that assets held by the bankrupt debtor belonging to a third party that can be separated from the assets of the debtor, shall not belong to the bankruptcy estate. Such property shall be submitted to the owner or to a person designated by the owner in accordance with such terms and conditions that the bankruptcy estate is entitled to call for.

15.24. Sweden

The liability of an intermediary for upper-tier intermediaries is mainly a contractual matter. The intermediaries' liability for third parties is determined by general principles of contract and tort law. It is important to note that the CSD and the account-operator have strict liabilities in relation to the account-holders, se chapter 7 of the Financial Instruments Accounts Act.

15.25. United Kingdom

Securities held by the intermediary for the investor are generally held on trust, and therefore not available to the creditors of the intermediary in its insolvency or otherwise. Because it enjoys property rights in the securities as beneficiary under a trust, the investor is generally entitled to require the liquidator to deliver the securities to it or to its order. Cash sums held by the intermediary in the name of the client are generally not held on trust, and constitute debts owed by the intermediary to the client. These are not protected in the insolvency of the intermediary, and the investor has to prove for them as an unsecured creditor.

CREST

CRESTCo Limited is merely the Operator of the system, and its records of entitlement would be unaffected by the insolvency of the CRESTCo Limited (the corporate vehicle maintaining such records). CRESTCo Limited does not "hold" securities for investors.

Certain CREST corporate entities do hold certain types of security for investors, whose rights are recorded on the registers maintained by CRESTCo Limited. For example, CREST International Nominees Limited holds entitlements to non-UK securities which are represented by CDIs. The insolvency of one of these entities would have the same consequences as the insolvency of a non-CREST intermediary.

Mention should be made of the status of CREST as a "designated settlement system" under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999. The effect of designation is to protect "transfer orders" against the consequences of insolvency of a participant in the system. CRESTCo Limited is a participant for these purposes.

Does the investor have to rely on the intervention of a court or liquidator?

No court order will be required for the investor to establish its rights. In practice, the intermediary's books will be the definitive record of such rights, and the liquidator, administrator or other insolvency officer will need to satisfy him/herself that the investor's claim is legitimate, and to resolve any shortfalls or discrepancies.

CREST

See previous answer.

In what way is the answer different if the insolvency is of an upper-tier intermediary?

The investor has no direct rights in relation to an upper-tier intermediary. On a traditional English law analysis, the upper-tier intermediary holds securities on trust for the intermediary, which in turn holds its interest under a sub-trust for the investor. In the normal course the investor is not entitled to recover the securities in its own name, and must rely on the intermediary. The investor is entitled to require the intermediary to assert its property interest against the liquidator of the upper tier intermediary, and recover the securities on its behalf. Please see the discussion in the answer to question 26.

In a small minority of cases, the upper-tier intermediary holds the securities on trust directly for the investor, with the intermediary acting as agent. In such a case, under English law, the investor would be entitled to recover the securities in its own name

If the upper-tier intermediary is subject to English insolvency law the consequences of its insolvency would be as set out above. The liquidator or administrator would not recognise the investor's rights as they would not be recorded in the upper-tier intermediary's books. They would be exercisable only through the proximate intermediary. However, the proximate intermediary would not require a court order to establish such rights.

CREST

Not applicable.

16. QUESTION NO. 16

WHAT LIABILITY DOES THE INTERMEDIARY HAVE (I) FOR UPPER-TIER INTERMEDIARIES OR (II) OTHER THIRD PARTIES THAT IT MAY RELY ON FOR THE PERFORMANCE OF ITS FUNCTIONS? MAY ANY SUCH LIABILITY BE ALTERED BY CONTRACT?

16.1. Belgium

Under Belgian law, there is a general principle of contractual liability of the counterpart who is using a sub-agent ("agents d'exécution") for the performance of his contract. The counterpart will be contractually liable for the wrongdoings of the sub-agent (case law: see P. Van Ommeslague, Cours de droit des obligations, vol. 3 (ULB Ed 1997-1998/9), p. 552 and following). This rule is applicable to a depositary using a sub-custodian for holding securities on behalf of a client.

Liability of intermediaries is subject to the terms of the contracts between the relevant intermediaries and their accountholders, including any potential liability for upper-tier intermediaries and other third parties. The contractual allocation of liability is subject to general restrictions on limitation of liability under Belgian law. For example, an intermediary's exclusion of liability for wilful misconduct would be unenforceable.

16.2. Czech Republic

Safekeeper of securities is pursuant to section 34 (6) of Securities Act responsible for damage caused by loss, destruction or damage to securities. Safekeeping of securities by the upper-tier intermediary does not free the safekeeper of its liability. The liability may be altered by contract.

16.3. Denmark

The intermediaries´ liability for third parties are determined according to general principles of contract and tort law. Generally, the intermediary is liable for not performing its duties to the account holder, whether or not the reason for non-performance is an error committed by the intermediary itself or by a third party engaged by the intermediary to perform its duties towards the account holder. However, if an upper-tier intermediary disposes over the securities by a fraudulent act or becomes insolvent (and the intermediary is not entitled to withdraw the securities under the insolvency proceedings), it can hardly by characterised as a non-performance of the intermediary. Instead it is likely to considered as a question of liability for deposits. The liability of depositories depends on whether the deposit can be characterised as depositum regulare (only liability for negligent acts) or depositum irregulare (strict liability). If the intermediary maintains the securities on a omnibus account (with the upper-tier intermediary) it is possible that the agreement will be seen as depositum irregulare as the part of the pooled securities belonging to a specific investor is not segregated at the upper-tier level (similar to a money deposit in bank where it is not possible to determine which part of the banks accounts in other banks that belong to which customer). However, it also possible that the agreement will be seen as a depositum regulare. The chances of the agreement been classified as a depositum regulare are increased, if the intermediary has split the securities on different accounts (one for each investor) at the upper-tier level, and if the account holder has been informed of the identity of the upper-tier intermediary. Of course this does not rule out liability as the intermediaries´ choice of upper-tier intermediary can be considered a negligent act, e.g. if the intermediary ought to have known that the upper-tier intermediary was having financial

difficulties. As it appears, it is not quite clear whether the intermediaries´ liability for upper-tier intermediaries is strict or limited to cases of negligence.

Generally, parties can alter the liability by contract clauses. However, such a clause by which the intermediary seeks to limit its liability will only be upheld by court if it is clear from the agreement and if it is reasonable. An agreement that the intermediary has no liability whatsoever for losses caused by third parties including upper-tier intermediaries is not likely to be upheld by courts.

16.4. Germany

Pursuant to Section 3 para 2 Securities Deposit Act any custodian bank entrusting another custodian with the safe custody of securities belonging to customers shall be liable for fault (negligence, wilful misconduct) of such other custodian. Such liability may be waived by agreement with the customer. Also in such case, however, the first tier custodian shall remain liable for careful selection of the other custodian, unless the customer expressly requests to select such custodian.

The liability of German banks for faults of upper tier custodians is governed by Section 19 of the Special Conditions for Securities Dealings (SCSD) which form part of any custody agreement with a German bank. Section 19 para 1 SCSD explicitly states that in case of domestic safe custody the bank shall be liable for any fault of its own employees and of any third party entrusted with the fulfilment of its custody duties and that the bank shall be liable for the fulfilment of duties by Clearstream Banking AG as CSD in case of collective safe custody.

Section 19 para 2 SCDS refers to safe custody abroad. Here the liability of the first tier (German) custodian bank is limited to careful selection and instruction of the foreign custodian bank. If Clearstream Banking AG or another domestic intermediary or a foreign office of the bank is involved in the custody chain, the first tier custodian bank shall be liable for their fault.

The basic rule of Section 3 para 2 Securities Deposit Act is also applicable to Clearstream Banking AG as CSD as explicitly stated in Section 5 para 3 Securities Deposit Act. As all other domestic custodian banks Clearstream Banking AG has not excluded or limited its liability for faults of own employees or of any third party entrusted with the fulfilment of its custody duties as far as collective safe custody in Germany is concerned (Section 7 para 1 General Terms and Business Conditions of Clearstream Banking AG).

With respect to safe custody of securities abroad, Clearstream Banking AG is fully liable for faults of a foreign CSD as for own faults, if the securities are part of a cross border holding of German or foreign securities which have been credited in book entry form to the securities accounts of its account holders based on Section 5 para 4 Securities Deposit Act (Girosammel-Credit). Section 5 para 4 sentence 2 Securities Deposit Act expressly forbids any waiver of liability for fault of the foreign CSD in such cases.

If Clearstream Banking AG acts as intermediary for the safe custody of securities abroad by crediting the securities account in 'WR-Credit', the same limitation of liability, however, is applicable pursuant to Section 7 para 2 General Terms and Business Conditions as described above for any other German custodian bank.

16.5. Estonia

Question remains unclear.

16.6. Greece

The Code of Business Conduct for Investment Services Firms and Credit Institutions providing investment services stipulates obligations of these financial intermediaries to uphold the interests of their clients and to safeguard market integrity during the performance of their business activities. More particularly, Section 4.1(f) provides that, in order to fulfill these obligations, the said financial intermediaries must only cooperate with third parties fulfilling the legal and substantial conditions for provision of services requested. It is also provided in Section 7.2 (c) that the financial intermediaries must enter into a detailed contract with their clients clearly determining their mutual undertakings in respect of the services provided. These contracts must, inter alia, determine whether the financial intermediary may possibly use third parties in rendering services. If third parties are used, then the said contracts shall provide for limitation of the financial intermediary's liability regarding provision of services by these third parties, apart from particular cases.

Most of the current master agreements between the said financial intermediaries and their clients provide for the exclusion of the intermediary's liability in the event of insolvency of an upper-tier intermediary, except in the event that the financial intermediary was acting mala fide.

In this respect, please note also article 334 para. 1 GCC, which provides for the following: "*A debtor shall be responsible as for his own fault in respect of the fault of the persons whom he employs in order to perform his obligations".* By virtue of Art. 334 para. 2 GCC the liability of the debtor for damages caused by acts or omissions of a third party can be entirely excluded (that means even in case of wilful misconduct and gross negligence) by way of contractual clause. Nevertheless, the general principles of the GCC (see Art. 178 and 179 on *bona mores*, 288 on good faith and 281 on abusive exercise of rights) apply to the exoneration clauses for the liability arising from the assisting person as well. In concreto, any potential exoneration clause for the damage caused by a third party, whose services are indispensable for the operation of the payment system, such as an upper-tier intermediary, could be considered valid, unless a fault could be attributed to the intermediary for its choice of the third party (*culpa in eligendo*) as well as for any instruction given to it (*culpa in instruendo*).

16.7. Spain

The concept of "upper-tier" intermediary is not recognised as such under Spanish Law. Each participant in IBERCLEAR, and IBERCLEAR itself, is subject to a specific liability regime. The responsibility of IBERCLEAR and its participant entities regarding the account holder or third parties is basically identical and consists of:

> The relevant entity will be held liable for any damage caused to a third party due to (i) the lack of practice or of accurateness of the relevant recording operations; or (ii) the delay in their practice; and (iii) in general, the breach of the rules concerning the maintenance of book-entry registries. The only exceptions are the cases were the fault is only imputable to the person suffering the damage.
>
> Notwithstanding the responsibilities which may occur due to lack of diligence concerning its control and monitoring functions, IBERCLEAR will also be held responsible for any damages for which it is directly charged.

When the damage consists of the deprivation of certain securities and wherever reasonably possible, the entity held responsible must purchase securities of the same characteristics for their delivery to the damaged party. In accordance with this principle, should a shortfall happen, the intermediary would be obliged to acquire the outstanding securities.

All of the aforementioned statements must be understood independently from all the rest of responsibilities, criminal, administrative or of any other kind that could arise.

In addition to the obligation to record the instructions that IBERCLEAR were to receive from the issuer (from the first recording of the securities, the modification of the conditions of the securities and its final amortisation), the maintenance of an exact correspondence between the amount of securities registered in the accounts of its participant entities and the total number of securities issued at each moment constitutes its main responsibility.

In principle, the responsibility regime against third parties cannot be altered by contractual agreements between the holder and his intermediary. However, the account holder could waive his rights within the general rules (when his refusal does not prejudice third parties and does not goes against "public order"). The possibility of a holder of securities waiving the responsibility of his securities depositary by means of a contractual agreement is very remote.

16.8. France

Pursuant to Articles 332-39 and following of the Règlement Général of AMF, a custodian may entrust to a third party acting as its agent (mandataire) all or part of its custody operations. Such agent must qualify as a custodian (teneur de compte conservateur).

A custody agreement is concluded which defines:

- the scope of the mandate;
- the responsibilities of the custodian (as principal) and its agent;

the procedure put into place in order to ensure control of the operations carried out by the agent.

Assets held by the agent in the books of the central depositary must be segregated so as to distinguish:

- assets held for the account of the clients of the principal including collective investment undertakings;
- assets held by the agent for own account.

A custodian is required to appraise the resources, procedures and risks incurred in respect of the agent and must make such appraisal available to the AMF.

The liability of the custodian is not affected by the fact that another intermediary is mandated as agent or that a third party makes available technical resources.

However, when a custodian is holding securities governed by foreign law for the account of a **qualified investor** within the meaning of applicable law and regulations, responsibilities may be contractually shared with such investor. By implication, it appears that, in other cases, the liability of the custodian may not be altered.

When financial instruments are held in custody abroad for the account of clients through a foreign agent, the protection of such financial instruments is governed by a contract between the custodian and such foreign agent which:

- defines the conditions under which accounts are maintained in the name of the custodian in the books of the agent;
- stipulates the obligation for the agent to report promptly any information regarding movements related to securities;
- sets forth the conditions under which the obligations of the custodian (i.e. by the agent) are to be implemented, i.e.:

  obligation to maintain and preserve securities;

  . obligation to redeliver securities;

  . prohibition to use securities without the consent of the owner.

16.9. Ireland

This will depend on the terms of the contract. It is not unusual, for example, for an intermediary to seek to limit its responsibility to the investor, and accordingly its potential liability, in this regard to exercising reasonable care in the selection and continued use of the upper-tier intermediaries and third parties. Whether it is possible to do so will depend on the nature of the investor and the extent, if any, to which it can be said that any loss suffered by the investor was attributable to the intermediary's own breach of duty to the investor. For example, regulatory limitations are imposed on the ability of a custodian of certain regulated collective investment undertakings to limit their liability. Unfair contract terms legislation would not apply in a business-to-business relationship.

16.10. Italy

The intermediary is liable to the investors for any failure by the upper-tier intermediary to properly discharge its duties. In this respect it is also worth noting that the intermediary is jointly liable with the CSD for any damages suffered by investors for wilful or negligent misconduct of the CSD. Such liability may not be altered by contract. The same rule applies to functions outsourced by the intermediary.

According to the same principle, the intermediary is to be held responsible for other third parties that it may rely on for the performance of its functions. In this case however it would appear that the intermediary and the investor may agree that the intermediary is not to be held responsible for third parties' failure to properly discharge their functions, provided that the investor shall in any event be entitled to bring an action for damages against such third parties. Please also note contractual limitations of liability for gross negligence and wilful misconduct are not allowed. Please also refer to § 32 below.

Sources of law:

Regulations on deposit and sub-deposit of financial instruments and cash pertaining to clients issued by the Bank of Italy on 1 July 1998;

Article 1228 of the Civil Code.

16.11. Cyprus

Starting from the fact that the upper-tier intermediary is a public body the intermediary is not liable for any acts or omissions of any such person. Any person aggrieved by such acts or omissions having a legally recognised interest in the issue (locus standi) may seek redress against the upper-tier intermediary. In relation to acts or omissions by third parties this is subject to the rules of contract and tort. According to Art 10 of the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001 the investor is bound against a bona fide third party by any actions of an intermediary in the context of a trading account which the investor opens for use by the intermediary but this does not affect the investor's right of recourse against the intermediary. It is not clear whether this situation may be altered contractually though in all probability this is likely.

16.12. Latvia

According with the FIML when providing investment services (including custody service) to customers, an intermediary shall have the obligation to perform as a decent and careful manager and ensure that the services are provided in a professional and careful manner in a customer's interests. Intermediary shall come into contract with the customer before started to provide the services. Where a customer incurs loss because an intermediary has provided incorrect information or failed to fulfill before mentioned requirements, that customer shall be entitled to request that the loss be covered in general course of law. Intermediary's liability are establish in accordance with the Civil Law – intermediary shall be liable for losses, shortcoming damage of securities, except for force majeur cases.

Intermediary, which is also a participant of LCD, shall act in accordance to the FIML and also LCD rules and regulations. For becoming a participant of LCD intermediary shall come into agreement with LCD. According with the provisions of agreement intermediary shall act in accordance with the requirements of FIML and LCD rules and regulations and shall be liable in the case of failed to fulfil these requirements.

16.13. Lithuania

As a professional custodian of securities the intermediary shall be liable in all cases for loss, shortcoming or damage of securities, except for force majeur cases (Art. 6.845 of the Civil Code). Under Lithuanian law the parties may not exclude or limit civil liability for damages sustained by intentional fault or gross negligence. Also the parties cannot modify the mandatory legal norms establishing civil liability, as well as the form or amount thereof. Since professional custodian liability rule is rather of mandatory nature, no exclusions or limitations of civil liability could be made to this rule. The intermediary, as a custodian, shall bear responsibility for any third persons relied. In can be concluded that a professional investor is subject to strict liability rules.

On the other hand, some obligations of the CSDL, as an upper-tier intermediary, are established in the Law on Securities Market and by-laws. In case an investor incurred some damage because of violation of law by the CSDL, the CSDL would be liable in tort before an investor. If such occurred, an investor could chose whether to bring an action only against an intermediary (which is liable under strict liability rules), to suit only the CSDL or to claim damages from both an intermediary and the CSDL.

In case intermediary provides not only custody services, but also other investment services (e.g. agency services in respect of securities trade) his liability in respect of such services would depend on the type of service performed. However in all cases the stricter standard of professional liability shall be applicable to all professional investment services provided by the intermediary.

16.14. Luxembourg

Under Luxembourg law, there is a general principle of contractual liability of the counterpart who makes use of sub-agents ("agents d'exécution") for the performance of its contractual obligation. The counterpart will be contractually liable for the wrongdoings of the sub-agent. This rule is applicable to a depository using a sub-custodian for holding securities on behalf of a client.

Liability of intermediaries is subject to the terms of the contracts between the relevant intermediaries and their accountholders, including any potential liability for upper-tier intermediaries and other third parties. The contractual allocation of liability is subject to general restrictions on limitation of liability under Luxembourg law. For example, an intermediary's exclusion of liability for wilful misconduct would be unenforceable.

16.15. Hungary

It depends on the legal system relevant in their relationship.

16.16. Malta

i) For upper-tier intermediaries

The intermediary who does not control or select the upper tier intermediary is not liable for its acts unless he expressly assumes such liability. If the intermediary controls the upper tier intermediary then he will be liable for acts and insolvency and if he only selects the other intermediary then he will only be liable for negligence in selection and supervision.

or

ii) other third parties that it may rely on for the performance of its functions?

The general principles of law apply and if the actions of the third parties are such as to be beyond the control of the intermediary then the intermediary will be able to claim "force majeure". In other cases the intermediary will be liable for breach of contract and that includes damages arising from the breach of delegates of the intermediary. If the customer expressly selects the third party then the intermediary will not be liable for such third party's acts.

May any such liability be altered by contract?

YES

16.17. Netherlands

The intermediaries´ liability for third parties are determined according to general principles of contract law. In principle, the intermediary is liable for not performing its duties to the account holder, whether or not the reason for non-performance is an error committed by the intermediary itself or by a third party engaged by the intermediary to perform its duties towards the account holder.

In practice, intermediaries will contractually exclude or limit their liability for sub-custodian to a very large extent. However, such a clause by which the intermediary

seeks to limit its liability will only be upheld by court if it is clear from the agreement and if it is reasonable. An agreement that the intermediary has no liability whatsoever for losses caused by third parties including upper-tier intermediaries is not likely to be upheld by courts.

16.18. Austria

The account provider is liable for the upper-tier (second) account provider in the same way as he is liable for own faults (section 3 para 3 Deposit Act which quotes section 1313a General Civil Code). This liability may be altered by contract. In case the liability has been altered, the account provider will nevertheless be liable for negligence in selecting the upper-tier account provider, unless the securities have been deposited with the upper-tier account provider on express instruction by the account holder (section 3 para 3 Deposit Act at the end). General Business Conditions of Credit Institutions (e.g. no 69 (3) of Austria's largest bank) provide that the account provider is responsible, in case of customers who are enterprises, only for the careful selection of an upper-tier account provider. Towards private customers the responsibility is the same as for own faults.

The Austrian CSD accepted responsibility for other account providers (e.g. foreign CSDs and International CSDs) as for its own acts. For some account providers the responsibility is reduced to their careful selection. The respective account providers and degree of responsibility for them are listed in Annex B to the GBC of the Austrian CSD, last column.

The account provider is liable for other third parties on which it relies on the performance of its functions in the same way, as it is liable for its own negligence (section 1313a General Civil Code). This liability may be altered by contract.

In any of the two cases listed in the question, alterations of liability cannot exclude liability for wilful misconduct and gross negligence.

See also answer to question (32).

16.19. Poland

(16) An intermediary is liable for any harm caused by upper-tier intermediaries or other third parties, which it uses when carrying out its functions (e.g. in relation with the settlement of transactions executed on the basis of orders sent by investors relating to the purchase or sale of securities). An intermediary is liable as if for its own actions or omissions, for the actions or omissions of persons through which it performs its activities, as well as persons with whom it entrusts the performance of obligations. The liability of an intermediary in this scope is based on the principle of risk (i.e. the intermediary may not avoid this responsibility claiming lack of fault, in particular lack of fault in its choice of action or supervision). It is however possible contractually to limit the investor’s liability.

16.20. Portugal

As mentioned before, the concept of "upper-tier intermediary" is not recognised as such under Portuguese law.

Generally speaking, under article 314. CVM, Financial Intermediaries must indemnify those damages caused to any individual in consequence of the violation of duties, relating to the performance of its activity, which were imposed by law or regulations of a public authority.

The fault of the financial intermediary is presumed when the damage caused is within the scope of contractual or pre-contractual relations and, in any event, when originated by the violation of information duties.

16.21. Slovenia

Non applicable for the legal framework of dematerialised securities.

16.22. Slovakia

The Act covers only responsibility of an intermediary towards investor.

16.23. Finland

Under the Finnish liability regime, liability for financial losses may be negotiated between the parties, while there is a general rule on liability of the main contractor for the performance of the subcontractors. Thus the liability of an intermediary for upper-tier intermediaries is largely a contractual matter. It is common that the intermediary restricts its liability for the operation of foreign central securities depositories in which the securities are held.

Regarding the book-entry system, strict liability of the account operator in relation to registrations strengthens the reliability of the book entry system. The account operator is liable to compensate damage caused by an incorrect registration irrespective of whether it is due to e.g. his negligence, fraudulent act by the account holder or a third party or even a technical fault in the system. Strict liability of the account operator may not be altered by contract.

16.24. Sweden

A distinction has to be made between CSD-accounts and other securities accounts.

For a CSD-account an account-operator must be specified. The account-operator must have a participation agreement with the CSD in order to act as account-operator . If the account holder wishes to transfer (or sell) securities from the account, the account holder must instruct the account-operator to do so. The account-operator then registers the transfer in the book-entry system. The account holder cannot himself directly instruct the CSD or report a transfer to the CSD.

A transfer is in principle effective between the parties to the transfer from the time of the agreement. The transfer becomes effective against third parties from the time of registration of the transfer in the CSD-account (the credit to the transferee´s CSD-account). The account-operator is obliged to register transfers immediately.

For other securities account the decisive moment is when the intermediary has taken notice of the transfer notification.

16.25. United Kingdom

Where the default of an upper-tier intermediary or other third party (third party) on whom the intermediary relies causes loss to the investor, the position is generally as follows. It is assumed that the sub delegation is disclosed to the investor, and that the investor consents to it. In general the intermediary is not strictly liable for such losses. If the third party is a nominee or close associate of the intermediary, it may be unrealistic for the intermediary to expect to escape liability. In relation to independent third parties, the position at general law is that the intermediary is only liable where the loss it attributable to its own breach of duty to the investor. Provided the intermediary has exercised reasonable care in the appointment and supervision of its sub-delegates, it should escape liability for their defaults.

The FSA's Client Assets Sourcebook (CASS) requires a regulated firm subject to its terms to accept responsibility to its client for any nominee company it controls. The standard of care is the same as if the firm itself held the securities under the FSA's custody rules. Apart from this, liability is a matter for contract, subject to the provisions of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, which may impair the effectiveness of exclusion clauses.

CREST

Not applicable

What liability does the intermediary have for other third parties that it may rely on for the performance of its functions? May any such liability be altered by contract?

An intermediary will typically exclude liability for losses which are not occasioned by negligence on the part of the intermediary, and such an exclusion would still be operable where the intermediary relies on a third party to carry out the intermediary's functions.

CREST

CRESTCo excludes liability in its terms and conditions for the default of other third parties in various circumstances that it may rely on for the performance of its functions.

CRESTCo accepts liability to its members for negligence, wilful default and fraud.

17. QUESTION NO. 17

WHAT STEPS ARE NECESSARY FOR SECURITIES TO BE TRANSFERRED? PLEASE ELABORATE BOTH OPERATIONAL AND LEGAL STEPS. DO THESE STEPS DIFFER AS REGARDS THE EFFECTIVENESS BETWEEN THE PARTIES TO THE TRANSFER AND VIS-À-VIS THIRD PARTIES (E.G. PERFECTION REQUIREMENTS)?

17.1. Belgium

Unless a transfer takes place between two accounts of the same account holder (in which case it is a realignment and not a transfer in the legal sense of the word), a transfer will, as between the underlying investors, require a transfer agreement. Vis-à-vis the intermediary with whom the securities are held, instructions pursuant to the account agreement/rules will be required.

In simplified terms, the processing of a transfer of securities will involve the following steps:

Validation and matching of instructions

Resource checks (to ensure that the necessary securities are available in the account holders' accounts)

At the same time as the resource check has been successfully completed (or immediately thereafter), a simultaneous debit and credit of the transferor's and the transferee's respective securities accounts will happen.

17.2. Czech Republic

Dematerialized securities are transferred on a basis of valid contract. Contract may be concluded on or outside a regulated market, and no formal arrangements are required. Transfer is completed by book entry record in the books of CSD or intermediary who has the customer account in CSD. Record is made upon an instruction, which must contain all data recorded in the books. Transfer instruction may be given by the entitled person, which is in most cases an account holder. Investment firm which entered in transfer agreement on behalf of its customer is entitled to give a transfer instruction (section 96 /4/ of Capital Market Undertaking Act). Contracts concluded on a regulated market are settled on the instruction given to CSD by the operator of the regulated market (section 96 /5/ of Capital Market Undertaking Act).

17.3. Denmark

A general distinction has to be made between CSD-accounts and other securities accounts:

CSD-accounts: For each CSD-account an account manager must be specified. The account manager is most often a bank (only certain legal entities can act as account manager, cf. Securities Trading Act Art 62. An entity must have a participation agreement with the CSD in order to act as account manager, cf. Securities Trading Act Art 64). If the account holder wishes to transfer (or sell) securities from the account, the account holder must instruct the account manager to do so. The account manager then reports the transfer to the CSD, which registers the transfer. The account holder cannot himself directly instruct the CSD or report a transfer to the CSD. Before reporting a transfer to the CSD, the account manager is obliged to make sure that the reported information meets certain formal requirements (e.g. that the securities are properly specified) and that the transferor was entitled to dispose

over the securities (e.g. that the person instructing the account manager is in fact the account holder). If the account manager is in doubt as to the actual or legal facts of consequence to the registration, or if anybody informs the account manager that the intended registration will violate the rights of the person concerned, the account manager shall effect a preliminary registration. Subsequently, the CSD shall reach a decision as to how the final registration can be effected.

A transfer is in principle effective between the parties to the transfer from the time of the agreement. The transfer becomes effective against third parties from the time of registration of the transfer in the CSD (the credit to the transferee´s CSD-account). The account manager is obliged to report transfers to the CSD without undue delay. It should be noted that even though the effectiveness against third parties does not occur until the time of registration of the credit to the transferee´s CSD-account, the rules of finality (see answers to Question no. 20-21) limit third parties ability to challenge a transfer already from the time when the transfer instruction order was made (even though the transfer has not yet been settled through registration on a CSD-account).

Other securities accounts: The rules in the Securities Trading Act does not regulate transfers of securities which are not credited to a CSD-account (e.g. where the investor holds through a bank (intermediary) who then in turn holds for its customers on an omnibus account at the CSD). A transfer of securities is made by instructing the intermediary (the bank) to make the transfer (or sale). The bank then performs the transfer. If the transfer is to an account in the same bank, the completion of the transfer merely involves a credit to that account and a corresponding debit of the transferor´s account (this is sometimes also true if the transfer consists of a sale to the bank). Such a transfer probably becomes effective between the parties from the time of their agreement and against third parties from the time, when the bank was notified of the transfer (even if the credit and debit is made later). If the transfer is to an account with another intermediary, the transfer involves not only a debit of the transferors account in the bank, but often also a transfer at the upper-tier level (a transfer from the bank´s omnibus account to the transferees intermediary). Such a transfer is also effective between the transferor and the transferee from the time of their agreement, but is probably not effective against all third parties until the upper-tier intermediary has been notified (or in case of a CSD has registered) the transfer from the omnibus account (it may be effective against some third parties, e.g. parties dealing with the transferor, from the time of the notification of the bank).

17.4. Germany

As outlined above (Questions 7 and 12) ownership or co-ownership passes from the seller to the purchaser by agreement (Einigung) between seller and purchaser that ownership or co-ownership shall pass from one to the other and furthermore by transferring (direct or indirect) possession of the securities to the purchaser (Section 929 et seq. Civil Code).

In legal terms, by placing a sale order with the custodian bank the seller authorizes implicitly pursuant to Section 185 Civil Code his custodian bank to declare the offer for the agreement to transfer co-ownership of the securities sold ‘to whom it may concern’. The CSD accepts such offer as attorney of the bank and its customer who has purchased the securities. By debiting the securities account of the seller’s bank and crediting the securities account of the purchaser’s bank, i.e. precisely at the moment when such debit and credit becomes effective, the co-ownership of the securities sold and purchased passes from the seller to the purchaser without any

intermediary acquiring temporarily co-ownership of such securities. This rather legal procedure follows necessarily from the German legal doctrine in respect of transfer of ownership of securities pursuant to Sections 929 et seq. Civil Code, Section 8 para 1 General Terms and Business Conditions of Clearstream Banking AG and, in case of Eurex Clearing AG acting as Central Counterparty, Chapter V Section 2.1.1 Clearing Conditions of Eurex Clearing AG. The debit and credit of the securities account, i.e. the book entry, as such evidence but do not constitute the legal acts described above which are necessary to transfer (co-)ownership. When speaking of 'declaration', 'offer' and 'agreement' (Einigung) it has to be noted that this is legal doctrine and that such acts occur implicitly by causing and conducting the clearing and settlement of such transactions.

17.5. Estonia

Steps and phases are as follows:

(1) Entry into an agreement (e.g. sale agreement) obliging the transferor to transfer securities to the transferee against the purchase price.

(2) Delivering instructions (i.e. delivery instruction) ordering the intermediary for relevant entries to be made - requirements as to the form and other aspects of the delivery instruction depend on service conditions and level provided by the intermediary in question.

(3) Conducting entries by the intermediary (i.e. debiting transferor's account and crediting transferee's account) – way of making entries (e.g. free of payment versus delivery versus payment) depends of the service conditions and level provided by the intermediary in question.

17.6. Greece

17.6.1. Regarding the transfer of securities held within the DSS, please refer above, under 2.1. and 2.2.

Furthermore, concerning the operational steps, please note the following:

Settlement of transactions in the ATHEX Spot Markets is effected three business days after the trade date ("T+3"). DSS C&S Regulation – whose effect is contractual and not regulatory – contains detailed operational steps for clearing and settlement. In accordance with article 10 of DSS C&S Regulation, clearing and settlement involve the following four stages:

Notification of transactions to be settled from ATHEX to the ACSD (article 11 of DSS C&S Regulation).

Finalisation of transactions (articles 12-13 of DSS C&S Regulation).

Notification of the Operator's account to the DSS (articles 14-18 of DSS C&S Regulation)

Settlement of transactions (articles 19-26 of DSS C&S Regulation)

At this stage ACSD removes sold securities from sellers accounts held by its Operator, registers them in the purchasers account, held by the latter's Operator and proceeds to the respective debits and credits of the Operator's deposit account held for settlement purposes within the Settlement bank, appointed by the ACSD. The latter is co-beneficiary to these accounts and, following an automated computerised processing of

the transactions of each session of the ATHEX, gives orders to the settlement bank to debit or credit such accounts with the amount resulting from multilateral cash settlement for each Accounts Operator participating in the settlement procedure. The settlement operates on the principle of delivery versus payment.

17.6.2. Regarding the transfer of securities held within the BoGS, please refer above, under 2.3. Further, concerning the operational steps, which are mostly governed by BoGS Operating Regulation, enacted through an Act of the Governor of the BoG, please note the following: BoGS is a net settlement system, settling the transactions with same - day value in principal at the end of the day, but also during the day particularly for the settlement of transactions related to monetary policy operations, intra-day credit operations within TARGET and cross-border transactions. The System also ensures that the sale of and payment for securities are effected simultaneously (DvP). Transactions are settled on the basis of the principle of double notifications sent by contracting parties.

Regarding transactions executed in ESSM, which is operated by the BoG (Article 26 of Law 2515/1997, as amended by Law 2733/1999), their clearing and settlement is effected through the BoGS between Participants.

In the course of the day, three interim clearings of transactions take place on the basis of matched transfer orders which either have been received from Participants and have same day value or are generated automatically by the System (e.g. repurchases under repos). Final clearing and settlement takes place after the cut-off time for receiving transfer orders and consists of three stages, namely: the final settlement stage, the closure of final settlement stage and eventually the day's closure (see in detail Section 9A of BoGS Operating Regulation). Transactions directly connected to Eurosystem's monetary policy and TARGET's intraday liquidity operations are processed on a continuous basis (RTGS), i.e. Delivery versus Payment model 1 according to BIS definition. RTGS settlement is available between 07:00 and 18:00 CET (Central European Time).

17.7. Spain

Securities are consider the object of property rights and, as with any other in rem right, a valid transfer with full effects erga omnes requires a valid agreement to transfer property and the delivery to the buyer. According to article 9 of the Securities Market Act, the transfer in the book-entry register in favour of the acquirer is equivalent to the delivery of the physical securities to the buyer.

The operational steps and procedures for the transfer of securities are varied and depend on the register, clearing and settlement system of IBERCLEAR in which the transferred securities are included (these systems are: (i) the Stock Exchange system; (ii) the Public Debt system and (iii) the AIAF Fixed rate Market system).

17.8. France

General rule

Transfer of title is governed by Article L. 228 of the Commercial Code and Article L. 431-2 of MFC (see in this respect question 12).

The following principles apply:

financial instruments referred to in paragraphs 1 through 3 of Article L.211-1-I of the M&FC and any similar financial instrument issued under foreign law, when admitted to the operation of the central depositary or settled through a DVP system – transfer of ownership results from book entry in the account of the buyer on the date and under the conditions defined by the AMF General Rules[66];

- in all other cases, transfer of ownership results from the book entry in the account of the buyer under the conditions set forth by decree.

Registered securities

- Pursuant to Article L. 431-1 of the MFC, in case of transfer ("ordre de négociation, cession ou mutation") of registered securities admitted to the operations of a central depositary (or in case of any modification affecting the book entry of such securities), the authorised financial intermediary maintaining a securities account shall issue a "registered share message" ("Bordereau de références nominatives" or "**BRN**") setting out the identity of the purchaser or seller, the legal nature of its rights and the restrictions which may affect the financial instrument (if any). Furthermore, the BRN must also contain a Code identifying the transaction.

  Such BRN circulates among the authorised financial intermediary, the central depositary and the issuing company, in accordance with the provisions of the Règlement Général of the AMF.

Listed bearer securities

- Article P 2.1.1 of the operating rules of Euronext (Specific rules applicable to the French regulated markets) provides that:

  "Transactions executed on the Eurolist market are cash-settled.

  The buyer is accountable for the funds, and the seller for the securities, as soon as the order is executed. Credits and debits on a financial instrument account are made on the date of order execution[67]."

- Article 1.3.5.7 of the operating rules of LCH Clearnet provides that:

  "LCH Clearnet SA sends the requisite delivery and payment instructions calculated as set out in article 1.3.5.6, and per Financial Instruments, to the relevant central Securities depositary *or Securities settlement system. An Instruction will give details of the timeframe in which such delivery and payment instructions are sent to each central Securities depositary or Securities settlement system. LCH Clearnet SA is discharged of its obligations towards Clearing Members once the payment and the settlement have occurred.*

The payment of funds and delivery of Securities are linked so as to occur on a simultaneous basis."

---

66 This rule will become effective upon promulgation of the relevant rules by the AMF (see question 12 below).

67 Those rules are expected to be changed in light of the modifications contemplated by the Ordinance of March 31, 2005 which will become effective upon promulgation of the relevant AMF rule.

Perfection of the transfer

Title of the buyer of securities is perfected and binding upon third parties on the book entry date in the account of the buyer and where Article L. 431-2 MFC applies, this occurs on the date and under the conditions defined by the Règlement Général AMF (subject to such rule becoming effective).

17.9. Ireland

See our response to question (1) above. However, the mechanism for transfer will depend on the interest purported to be transferred and the nature of the security. In the case of indirectly-held securities, the transfer of the indirect interest may be effected by account entries.

Irish law distinguishes between "legal title" (where, in respect of registered securities, an entry has been included on a register) and "beneficial" ownership where one person (the beneficiary) owns the asset but the legal title is in another's (the trustee's) hands. Complex issues arise in respect of the determination of whether a beneficial interest has arisen in the absence of an express trust.

Bearer securities are transferred by delivery of the physical instrument representing the security and registered securities are transferred by registration.

In the case of transfers of registered securities, beneficial interest may transfer in circumstances where there is an incomplete transfer so that beneficial ownership may have moved to the transferee, notwithstanding that the transferor is still registered as owner, once a valid contract to transfer has been entered into and the price has been paid.

The legal (or legal and beneficial) ownership of Irish equities (all of which are registered securities) may be transferred by way of the registration in the Register of Members of the company of a "proper instrument of transfer[68]". A proper instrument of transfer is a share (stock) transfer form duly executed (in the case of most companies) on behalf of the transferor only, which complies with the terms of the Stock Transfer Act 1963 (the "**Stock Transfer Act**") and in respect of which appropriate stamp duty has been paid. If the transferor is a company and it has a corporate seal, the share transfer form should be executed under that seal. The register of members of an Irish company is prima facie evidence of any matters authorised or directed by the 1963 Act to be included in it[69]. It does not amount, therefore, to conclusive evidence (as details may have been incorrectly entered into the register and, pursuant to section 123 of the 1963 Act, no notice of any trust, express, implied or constructive, shall be entered on the register of members or be receivable by the registrar). Following the completion of a stock transfer form duly stamped, a share certificate shall be issued by the company. Such certificate shall be prima facie evidence of the title of the member to the shares[70].

The CREST Regulations disapply the provisions of Irish law which would otherwise prohibit or inhibit paperless transfers of securities through CREST Ireland. Specifically, Regulation 4 provides that title to securities may, provided it

---

68 Section 81 of the Companies Act 1963

69 Section 124 of the Companies Act 1963

70 Section 87 of the Companies Act 1963

is evidenced and transferred in accordance with the CREST Regulations, be evidenced and transferred without the necessity for a stock transfer form. In addition, Regulation 5 disapplies the provisions of the Statute of Frauds Act (Ireland) 1695 and section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 or any other rule of law requiring the execution under hand of a document in writing to transfer title to such property.

As outlined in our response to question (2) above, in the case of transfers of registered securities through CREST Ireland, the register is updated by the issuer or its registrar upon the receipt of an RUR by the registrar following a match being made in the CREST Ireland system between a selling instruction and a buying instruction in respect of a security. The CREST rules require the registrar to register a transfer within two hours of the receipt of an RUR and only in the following limited circumstances may the issuer or the registrar acting on its behalf, refuse to act on an RUR to register the transfer:

(i) where both CRESTCo and the relevant company have actual notice before the request is sent that the transfer is prohibited by an order of the High Court;

(ii) where the transfer is prohibited by or under any enactment;

(iii) where the company has actual notice that the transfer is avoided by or under an enactment or is to a deceased person; or

(iv) where the transfer is one of two or more transfers which have been notified to the company by CRESTCo as being "linked transfers". A linked transfer is a series of transfers which are in some way inter-dependent (i.e. so that for transaction B to be capable of settlement, transaction A would have to have been settled first). In such a case CRESTCo will notify the company that the two transfers are linked transfers in which case the company can either register the combined effect of the transfers or can register them simultaneously. If, notwithstanding that CREST may have described the two transfers as linked, combined or simultaneous registration would not in fact result in all linked transactions becoming capable of settlement, the issuer may refuse to register the transfers;

(v) an RUR may be ignored where the transfer is to a minor, to an entity which is not a natural or legal person; or to a number of joint holders greater than the maximum number permitted by the articles of association of the company.

he transfer of title must have actually been effected outright in order to be effective as against third parties. As between the parties to the transfer itself, however, a transfer of beneficial ownership in the asset which will typically occur following the execution of a contract to transfer and before the transfer of the legal title is effected, may give rise to a claim for damages or specific performance of the contract.

17.10. Italy

A transfer of securities initiates with an on-exchange or off-exchange contract between two investors, which creates the right of the transferee to receive title to such securities. Title to the securities is, however, acquired only through the following debit/credit procedure within the immobilised securities system managed by Monte Titoli S.p.A. (currently the sole CSD and registrar in Italy; **Italian CSD**):

(i) the Italian CSD debits the omnibus clients account held by the transferor's intermediary and credits the omnibus clients account held by the transferee's intermediary (**CSD Book Entries**);

(ii) the Italian CSD informs the transferor's and transferee's intermediaries about the CSD Book Entries;

(iii) the transferor's intermediary debits the transferor's proprietary account and the transferee's intermediary credits the transferee's proprietary account (**Intermediary Book Entries**).

If the transferee and/or the transferor are themselves intermediaries holding accounts with the Italian CSD, then the Italian CSD debits and/or credits the proprietary account(s) held by such transferor and/or transferee with the Italian CSD; as a result, (ii) and (iii) above (partially) do not apply.

If the transferee's and/or the transferor's intermediaries do not hold accounts with the Italian CSD, then one or more additional tiers are added to the above-described chain of book-entry registrations.

If the transferee and/or the transferor do not directly or indirectly participate in the Italian CSD system, but directly or indirectly hold accounts with another CSD, an agreement between the Italian CSD and the other CSD regulates the cross-border debit/credit registration through reciprocal omnibus accounts.

While the perfection requirements for the transfer of title to the securities do not differ between the contractual parties and vis-à-vis third parties, certain economic and corporate rights attached to the transferred securities do not automatically pass on to the transferee as a consequence of the transfer of title, since such rights are subject to additional "legitimating requirements" that are discussed in Question 34 ff.

Sources of Law:

Article 86 of the FLCA;

Articles 30 of the Euro Decree;

Articles 27, 38, 40 and 41 of Consob Regulation No. 11768 of 23 December 1998 (**Markets Regulation**);

Articles 17 and 23 of the Regulation on the Centralised Management Activities and Ancillary Services issued by Monte Titoli S.p.A. on 18 November 2004 (**Italian CSD Regulation**).

17.11. Cyprus

For securities to be transferred the investor needs to open a trading account. (The depository account is opened in the name of the investor once he owns listed securities). There are two kinds of trading accounts:

(i) a general trading account and

(ii) a specific account solely for purchases of securities.

In both cases the investor needs to specify a member i.e. a licensed investment firm which will be instructed to handle the transactions concerning these two accounts. The difference between the two kinds of trading accounts is that the general account permits the purchase and sale of securities while the specific account only allows the purchase of securities. The transaction is perfected once the change of

ownership is registered in the requisite register. This is the point in time where the transaction is perfected both vis a vis third parties as well as between the parties themselves. For the purpose of effecting a sale or purchase the intermediary must receive the instructions of the investor though the investor is bound vis a vis bona fide third parties. This means that the remedies which the investor has in case of transgression of his instructions are against the intermediary investment firm.

17.12. Latvia

Securities transfers made within LCD system are governed by LCD Rules and Regulations which are issued in accordance with the FIML and other legislative acts. Latvian settlement system have been operating by LCD and the Bank of Latvia.

Securities transfers are processed as debits and credits to respective securities account. Legally, these credits and debits shall be regarded as registrations/entries made in book-entry accounts in accordance with the Law and the rules of LCD. Operationally, transfers relate predominantly to the settlement process. Trade settles as soon as the preconditions for the settlement exist. A transaction is cleared and settled on the settlement date as soon as the seller has the book-entries subject to the transaction in his book-entry account available for settlement and when the payment needed in settlement has been deposited in the respective cash account by the buyer. Settlement occurs with finality by registering the transfer with a debit from the seller's book-entry securities account and a credit to the buyer's account and by entering a transfer between the respective cash memorandum accounts in an incessant and simultaneous process. Once the simultaneous debit and credit takes place, the transfer is effective both between the parties and vis-à-vis third parties.

17.13. Lithuania

In order for securities to be transferred the intermediaries have to be participants of the SSS. Membership in the SSS is established by concluding an agreement between the prospective participant and the CSDL. In order to become participants of the SSS, the prospective participants have also to be participants of payment system ‘LITAS’ operated by the BoL, since funds transfers are processed in the latter system which is also deemed to be a Clearing Bank. In order to become the participant of the payment system ‘LITAS’, the prospective participant has to meet various requirements established by the Board of BoL and to execute bank account agreement with the BoL. Both systems maintain close relations and exchange information on the conducted transfers through the same messaging system. Participants of both systems can enter securities settlement instructions and payment orders through the same access point. In case the transactions are concluded between the clients of the same participant or between the participant and his clients, the transfers of funds shall not be executed at the Clearing Bank.

The transfers of securities in the SSS are made basing on the transfer orders placed on the SSS by the participants or the messages of VSE about trading results. The SSS matches FOP and DVP settlement instructions of OTC trading between the CSDL participants on a continues (real-time) bases. The SSS does not match instructions of trades on VSE, since VSE submits the SSS netted trading session results. Securities transfers within the SSS are processed as debits and credits to the omnibus securities accounts of the participants. Depending on particular type of transactions, the transfers may be processed on real-time bases in gross settlement process or in separate batches in net settlement process.

Securities transfers in the personal securities account opened with the intermediaries must be executed immediately, after receiving confirmation of the executed settlement.

From the legal point of view transfer of securities involve transfer of ownership right to the securities. Regarding issues of perfection, please, refer to the answer to question No. 19).

17.14. Luxembourg

Any transfer of securities from one account to another (unless a transfer takes place between two accounts of the same account holder, in which case it is a realignment and not a transfer in the legal sense of the word), requires an agreement to the transfer by the underlying investors. Vis-à-vis the intermediary with whom the securities are held, the instructions have to be provided in the form as defined in the account agreement and rules of the intermediary.

In simplified terms, the processing of a transfer of securities will involve the following steps:

Validation and matching of instructions;

Provision checks (to ensure that the necessary securities are available in the account holders' accounts);

At the same time as the provision check has been successfully completed (or immediately thereafter), a simultaneous debit and credit of the transferor's and the transferee's respective securities accounts will occur.

17.15. Hungary

The transfer order of the investor can be executed if there are sufficient funds for the transaction. In cases when the account holder is not permitted to alienate the securities under attachment, the transfer order cannot be executed.

Transfer orders are revocable until they are settled according to the General Terms and Conditions of the CCP.

The rules apply for all parties.

17.16. Malta

Registered shares: these are transferred by means of a written share transfer instrument which is signed by both parties and submitted to the company to enter into the register of shareholders of the company (art. 118 of the companies act).

Registered bonds: these are transferred by an assignment in writing notified to the company for entering into the register of debenture holders of the company (art. 118 of the companies act).

Listed securities: when the securities are listed on the Malta stock exchange a written instrument is not required (art. 46 of the financial markets act).

A transfer of shares is effected through a licensed stockbroker making an offer and it being met by a bid. This is done electronically and when completed, it is entered in the register of the company by the CSD which acts as registrar of all securities listed on the exchange.

The register remains that of the company and binds the company accordingly. The entries in the register are either names of persons with accounts, names of

intermediaries (such as investment advisors) using their clients accounts or intermediaries (such as global custodians) using omnibus accounts.

At the present time transfer of ownership takes place immediately on trade, with payment and delivery taking place within two days. It is intended that the system be changed to transfer against delivery and payment all happening at the same time.

Unfortunately legal notice 287 of 2004, which states that transfer of ownership takes place when payment is made by the buyer to the seller's broker in full and final settlement through a payment system (whereupon the finality rules on payments will apply), has not yet been brought into force.

Effectiveness : in case of registered securities, the transfer of the security is effective once the parties agree on the price and the security, and if subject to written agreement, they sign the agreement. If the transfer is subject to other conditions, then transfer takes place when the conditions are fulfilled.

Notification to the company renders the transfer effective against third parties.

In case of listed securities, there is a degree of ambiguity because a number of laws, such as the civil code and others all determine different moments. The above-mentioned legal notice will clarify this point once and for all once it is brought into force as it will determine the date of payment in final settlement as the time when the transfer is complete.

At present the best opinion would be that it is the date & time of the trade which determines when the transfer has taken place. Currently the MSE operates on a t+3 settlement basis.

Intermediary held securities: when there is a transfer of securities held by an intermediary, the transfer process must be implemented by the intermediary as though it were the owner of the asset and the same rules apply as above. The owner of the asset does not need to be involved in the transaction other than to the extent of giving the intermediary the (internal) power of representation to transfer the securities or to acquire the securities as the case may be.

When the intermediary is a trustee no doubts arise because he is the owner and has full authority to transfer but when the intermediary is a mandatory, who may not have the power of representation, absence of authority could be a problem at law because the civil code at section 558 applies the principle of possession equals title only to securities to bearer and movables by nature – not to movables by operation of the law.

17.17. Netherlands

Transfer by means of novation

It should be noted that if the asset to be transferred merely constitutes contractual rights against the intermediary, the transfer will, in practice, take place by book-entries, whereby Party A waives its claim against the custodian which, in turn, assumes an obligation against Party C. This is more likely to be characterised as novation than as a transfer in the strict sense and can be accomplished without any formal requirements having to be fulfilled apart from making the book-entries concerned.

Please note that under Netherlands Law, the following interests in securities merely constitute contractual rights against the intermediary:

(i) rights of the investor with respect to bearer securities that are not subject to the Securities Giro Administration Transfer Act and that are physically held in the Netherlands by the depository on behalf of the investor on a fungible basis;

(ii) rights of the investor with respect to bearer securities that are physically held outside the Netherlands on behalf of a Netherlands depository;

(iii) rights of the investor with respect to registered securities registered in the name of a Netherlands depository.

It should be noted that a credit balance of a bank account also constitutes a contractual right, i.e. a contractual right of the account holder against the relevant bank for payment of the credit balance on the account. Therefore, cash may be transferred by book-entries as well.

Transfer in the proprietary sense

If the transfer constitutes a transfer in the proprietary sense, such transfer requires (i) delivery of the asset (in Dutch: "levering"), (ii) pursuant to a valid (written or non-written) agreement or other legal basis for transfer (in Dutch: "geldige titel"), (iii) by a person who has power to dispose of the assets (in Dutch: "beschikkingsbevoegdheid").

Delivery of registered debt securities

Under Netherlands Law, registered debt securities that are directly held by the investor - without the investor having an interest therein through a securities intermediary - constitute contractual rights against the issuer. Therefore, the rules applicable to the delivery of contractual rights apply to the delivery of such registered debt securities. Delivery of contractual rights is effected by assignment, which requires a written deed of assignment (in Dutch: "akte van cessie") and notification of the assignment to the debtor by the transferor or the transferee.

With respect to Netherlands government debt issued in the form of entries in the relevant debt register, the Dutch State Treasury Agency (in Dutch: "Agentschap van het Ministerie van Financiën") will make a corresponding entry of the transfer in the relevant debt register after receipt of the data required to make such an entry.

The transfer of registered debt securities which constitute contractual rights against the intermediary will in practice usually take place by way of novation (see above the heading 'transfer by means of novation').

Delivery of bearer securities

Bearer securities held on an individualised basis are delivered pursuant to the rules that apply to a delivery of bearer rights (in Dutch: "rechten aan toonder"). Delivery of bearer rights is effected by a transfer of possession of the documents representing the rights concerned. Transfer of possession can be achieved by physical delivery of the document to the transferee or a third party agreed upon by the transferor and the transferee or by some other means of transfer of possession..

The transfer of bearer securities which are not subject to the Securities Giro Administration and Transfer Act and which are deposited with a depository on a fungible basis (which would mean that no particular securities are identifiable as being owned by a specific investor) will in practice usually take place by way of novation (see above the heading 'transfer by means of novation').

Delivery of securities subject to the Securities Giro Administration and Transfer Act

In respect of securities subject to the Securities Giro Administration and Transfer Act, delivery of an interest in a collective deposit within the meaning of the Act is, pursuant to Section 17 of the Act, effected by means of an entry in the name of the transferee in the appropriate records of the Admitted Institution. Pursuant to Section 41(1) of the Act, delivery of an interest in a giro deposit by a member institution to another member institution is effected by means of an entry in the name of the acquiring institution in the appropriate records of Euroclear Netherlands.

Delivery of cash

As described above under the heading 'transfer by means of novation', the transfer of cash is more likely to be characterised as novation than as a transfer in the strict sense.

Legal basis for the transfer

The transfer of an asset requires a legal basis for the transfer, i.e. a legal reason justifying the transfer. This is normally an agreement between the parties obliging the transferor to transfer ownership. If a transfer lacks a legal basis, the transfer is void. The agreement underlying the transfer must sufficiently describe the assets that form the object of the transfer. With regard to contractual rights, it is sufficient if on the basis of objective data it is possible to determine, if not at the time of the pledge, in any event at the time of enforcement, which contractual right(s) has or have been pledged.

Power to dispose

Under Netherlands Law, in order to transfer an asset the transferor must have the power to dispose of the asset. Therefore, in the event of the delivery of future collateral, the transfer becomes effective at the time the transferor has the power to dispose of the property. A person may lack the power to dispose of collateral, such as where he is the subject of insolvency proceedings or where an attachment has been levied, even if he has full title to such collateral. The main rule is that no one may transfer greater rights than he has (the "nemo plus iuris ad alium transferre potest quam ipse haberet" rule). Under Netherlands Law, a party loses its right to dispose of an asset if an attachment is levied on such asset by a creditor of such party. A transfer of collateral subject to an attachment may be ignored by the attachor. Pursuant to Section 44 of the Securities Giro Administration and Transfer Act an attachment may not be levied against Euroclear Netherlands on a member institution's interest in a giro deposit. It is likely that the rules of Netherlands Law regarding attachments must be deemed to have a public policy ("ordre public") character.

A transfer is in principle effective between the parties and against third parties from the time that all requirements have been fulfilled (the credit to the transferee´s account in the event of a transfer by means of novation or, as the case may be, the formal requirements for an assignment in the event of a transfer in the proprietary sense).

As far as the operational steps are concerned, a transfer of securities is made by instructing the intermediary (the bank) to make the transfer). The bank then performs the transfer. If the transfer is to an account in the same bank, the completion of the transfer merely involves a credit to that account and a corresponding debit of the transferor´s account. Such a transfer becomes effective between the parties and against third parties from the time when the credit entry is

made, or, as the case may be, when the bank is notified of the transfer. If the transfer is to an account with another intermediary, the transfer involves not only a debit of the transferors account in the bank, but often also a transfer at the upper-tier level (a transfer from the bank´s omnibus account to the transferees intermediary). Such a transfer is also effective between the transferor and the transferee and against third parties from the time the upper-tier intermediary has registered the transfer in the omnibus account or, as the case may be, has been notified of the transfer.

17.18. Austria

The transfer of securities may have various reasons (e.g. purchase, donation, pledge, loan). A good example for describing the operation and legal steps is the transfer in case of purchase. Sales and purchases will most frequently occur over the counter, at the exchange or in rare cases directly between seller and purchaser who know each other. The fundamental legal rule is the same in all three cases: a sale and purchase contract must be made **and** perfected (see answers to questions (2), (7) and (12)). In OTC trades and trades at the exchange the securities will stay were they are, i.e. will be held by the same (probably upper-tier) account provider before and after perfection of the purchase, whereas in cases of direct sales and purchases the account provider may change, but must not. Sales and purchases OTC and at the exchange (with or without a central counterparty and according to different sets of rules – of the CSD and of the Clearing House – which do not make a difference in this context) are made on an anonymous basis (the instruction to the account provider means "sell to who ever wants to buy at these terms" and "buy from who ever wants to sell at these terms" – each an instruction to a commissioner). The sale takes place when the instructions match, be it within the holding system of the account provider where the seller and purchaser maintain securities accounts or at the level of an upper-tier account provider where both the account provider of the seller and the account provider of the purchaser maintain securities accounts. Once the instructions match delivery versus payment will take place (at regular intervals provided for the mass of transaction at the respective account holder). In case the securities will not be physically moved – which will be regularly the case – the securities account provider where the securities are effectively held receives instruction to no longer hold the securities in the name of the seller (his account provider) but from now on in the name of the purchaser (his account provider). In most cases this "Besitzanweisung" – "holding instruction" will be the means of perfection of the underlying (sales and purchase) contract. The corresponding bookings in the securities accounts of the seller and of the purchaser will be made without by itself disposing or creating rights of the parties. The booking on the securities account of the purchaser will be seen as a token of the change of the holding (possession) and will be – refutable – proof of it.

The effects of the steps described above does not differ in respect of the parties to the transfer and vis-à-vis third parties.

17.19. Poland

In principle, the transfer of securities takes place following the conclusion of an agreement, which executes the transfer, between the seller and purchaser. If the transaction was executed outside the regulated market and the parties to the transaction are not KDPW participants, then the party which according to the terms and conditions of the transaction is obliged to deliver the securities needs to send an order to the KDPW participant managing its securities account – on which these securities are registered – to transfer them to the other transaction party. The other

transaction party should inform the KDPW participant managing its securities account that it is awaiting the delivery of these securities. On the basis of these two messages, both participants (or only the participant managing the account for the selling party) send KDPW an order on the basis of which KDPW transfers securities between depository accounts managed for both these participants.

Operational steps necessary for perfection of a transfer resulting from a transaction concluded on a regulated market, when the client's securities account is managed by a broker:

a. a client places an order with a broker; it is accepted by the broker provided the order is compliant with the regulations of law (Decree of the Council of Ministers of 3 September 2002 on the procedures and conditions to proceed for brokerage houses, banks conducting brokerage activities and banks keeping securities accounts) and is placed in accordance with the broker's internal regulations;

b. if the broker's requirements regarding availability of assets (cash and securities) are satisfied then the broker issues a broker's order on the basis of the client's order;

c. after the transaction has been concluded the broker receives registration certificates from the market;

d. for transactions secured by the KDPW Settlement Guarantee Fund the broker makes entries in the operating register on the basis of the registration certificates;

e. the registration certificates are sent by the market to the settlement system managed by the KDPW;

f. on the basis of the registration certificates and provided that the required assets are available on the appropriate securities accounts managed by the KDPW, the transactions are settled in the KDPW system, e.g. the securities are debited from the account of the intermediary of the seller and are credited to the account of the intermediary of the buyer, and the cash settlement is effected at the same time on a DvP basis;

g. after receiving the account statement from the KDPW the broker debits the selling client's securities account and credits the buying client's securities account on its books.

Operational steps necessary for perfection of a transfer resulting from a transaction concluded outside the regulated market:

a. a client presents the broker with documents under which securities are to be transferred;

b. a broker sends a settlement instruction to the KDPW;

c. settlement instructions from the buying and the selling sides intermediaries are matched in the KDPW system;

d. after the matching is completed the transactions are settled in the KDPW system;

e. after receiving the account statement from the KDPW the broker debits the selling client's securities account and credits the buying client's securities account on its books.

If the transaction was executed on the regulated market, then the documents indicating the terms and conditions of the transactions executed, on the basis of which the securities transfer is performed between the depository accounts of participants are delivered to KDPW by the regulated market operator.

On the basis of documents confirming the performance of the transfer of securities between depository accounts managed for both participants in KDPW, the participant whose depository account was debited, following settlement performed in KDPW makes the appropriate debit on the securities account of the seller, while the participant whose account was credited in KDPW following settlement, performs the appropriate credit entry on the securities account of the purchaser. Entries on the securities accounts need to be performed following transaction settlement in KDPW and in accordance with the results of settlement. Intermediaries managing securities accounts are legally obliged to perform entries on these accounts on the basis of and in accordance with documents sent to them by KDPW.

The conclusion of an agreement obliging the transfer of securities only creates obligations between the parties. Only the transfer of securities between the securities account of the seller and the securities account of the buyer leads to the transfer of rights from securities to the purchaser, who becomes the owner of these securities and his proprietary right is enforceable against everyone.

For dematerialised securities not admitted to public trading, it should be stated that the parties to the transaction should send this agreement to the entity maintaining the registration system for these securities and give this entity the appropriate orders. The transfer of these securities to the purchaser takes place the instant an entry is made in this registration system, indicating the purchaser and the number of securities purchased. Therefore, in this case as well, such an entry such an entry will lead to consequences erga omnes.

17.20. Portugal

Transfer of Securities In The System between Individual Ownership Accounts belonging to the same or different holders, is performed through a debit entry in the account of origin and a credit entry in the destination account (articles 71. and 80. CVM).

All debit entries must be supported by a written order of the holder of the account or by a document whose form and content is proper and fit to prove the fact that is to be registered in the account (article 67.1 CVM).

17.21. Slovenia

In the following answers to Q17−22 (under the title “transfer of securities”) it is assumed that by “transfer of securities” it is meant the transfer of securities from (debiting) previous holder’s account to (crediting) new holder’s account caused by (previous) holder’s legal disposition of securities.

Following (three) steps are necessary for dematerialised securities to be transferred:

Step 1: Holder’s transfer order

Holder of dematerialised securities account (who is at the same time holder of dematerialised securities, entered on this account) disposes with dematerialised securities by issuing (giving) an order to transfer dematerialised securities that are the object of his disposition from (debiting) his account to (crediting) new holder’s dematerialised securities’ account (hereinafter: holder’s transfer order).

Holder issues his transfer order to his (KDD) registry member (hereinafter: holder's registry member). Holder's registry member is KDD registry member who maintains holder's (client) dematerialised securities' account on which dematerialised securities that are the object of holder's disposition are registered according to the contract of dematerialised securities' account maintenance executed with holder.

Holder's transfer order has a dual legal nature:

(i) It constitutes holder's legal transaction of disposal with dematerialised securities that are the object of transfer order. The precise definition of holder's transfer order, emphasizing its legal nature is given in point 4 of Art. 74 of KDD Rules:

"Holder's order is a written record of a holder's statement of business will that constitutes the holder's legal transaction of disposal, stating the following shall be performed by debiting his account:

− a transfer of dematerialised securities; or

− an entry or modification of the third party right in dematerialised securities."

(ii) It constitutes a mandate to holder's registry member to enter holder's transfer order into central registry by which in legal relationship between holder's registry member and holder holder's registry member receives authorisation (right) and assumes obligation to enter holder's transfer order in central registry.

Step 2: Entry of holder's transfer order in central registry

A registry member enters the transfer order in the central registry by transferring the order data to the information system of dematerialised securities accounts maintenance, and electronically through remote access in a form and manner determined by the technical regulations (Art. 22 of ZNVP and Art. 76 of KDD Rules).

Legal effect of entry of holder's transfer order is defined in Par. 1 of Art. 78 of KDD Rules: By entering a holder's transfer order the holder's registry member confirms the validity of a holder's legal disposal contemplated by such order.

Step 3: Execution of holder's transfer order in central registry

KDD is authorised for execution of transfer orders in central registry pursuant Art. 23 of ZNVP.

Pursuant Art. 79 of KDD Rules KDD executes an order or other entry in the central registry once the following prerequisites have been fulfilled:

1. all the data contained in an order or other entry was entered according to ZNVP, another act, KDD rules and regulations,

2. in the account or sub account debited in which the order or another entry is to be executed, there is a quantity of dematerialised securities at least equal to the quantity of dematerialised securities contemplated by such order or other entry,

3. the dematerialised securities contemplated by such order or other entry are not subject to any right of a third party or other impediment to their transfer ,or the entry, modification or deletion of the right of a third party thereto; and

4. the registry member who entered an order is authorised to do so.

Entry and execution of transfer order are processed in real time.

17.22. Slovakia

Securities are transferred on the basis of transfer instruction. Transfer instruction should be delivered by both parties to the trade to member of depository or to depository itself, depending on place where transferor and transferee keep their securities account. Central securities depository or member shall perform transfer of securities without any further delay after they receive matching instructions. If transfer instructions do not match, they are returned without any further delay back to instructing parties. If securities are transferred as a result of the stock exchange trade a different pattern for transfer is applicable. The stock exchange delivers matched transfer instruction to the central securities depository. Then follows the settlement process. Securities can be settled in two settlement modes – in net or gross mode, but this method only applies to cash leg of settlement. In net settlement mode on the day before settlement depository blocks securities for settlement. In case of payment of full net obligation depository transfers securities early in the morning on the settlement day. Transfer of securities is then followed by transfer of net cash obligations. In gross settlement mode depository on the settlement day transfers both gross cash obligations as well as securities using the RTGS payment system operated by the National bank of Slovakia for cash leg of settlement.

From the legal point of view, transfer of security means the change of owner of security effected on the basis of agreement closed according to the Act. Transferee becomes owner of security at the moment when security is credited to transferee's securities account and not at the moment when agreement was closed or trade was concluded.

17.23. Finland

In the book-entry system, securities transfers are processed as debits and credits to respective book-entry accounts. Legally, these credits and debits shall be regarded as registrations/entries made in book-entry accounts in accordance with the Act on Book-Entry Accounts. Operationally, transfers relate predominantly to the settlement process. In the Finnish settlement systems operated by the APK, a trade settles as soon as the preconditions for the settlement exist. A transaction is cleared and settled on the settlement date as soon as the seller has the book-entries subject to the transaction in his book-entry account available for settlement and when the payment needed in settlement has been deposited in the respective cash memorandum account by the buyer. Settlement occurs with finality by registering the transfer with a debit from the seller's book-entry securities account and a credit to the buyer's account and by entering a transfer between the respective cash memorandum accounts in an incessant and simultaneous process. Once the simultaneous debit and credit takes place, the transfer is effective both between the parties and vis-à-vis third parties.

Outside the book-entry system, a transfer of a securities position held with an intermediary takes place through a notification to the intermediary maintaining the custody holding and the intermediary taking notice of the notification. Please refer to answer in question 12 above.

17.24. Sweden

The object of the transfer is the securities.

17.25. United Kingdom

Legal title to UK shares is transferred by a duly executed stock transfer form, or properly authenticated dematerialised instruction for transfer through CREST, and payment of stamp duty/SDRT. Free delivery is possible.

Good title can be conferred on a bona fide purchaser of a legal estate for value without notice.

Under the Stock Transfer Act 1963 a transfer of securities can be effected by completing a statutory "stock transfer form". "Securities" for these purposes means shares, stock, debentures, debenture stock, loan stock, bonds, units in a collective investment scheme, and "other securities of any description".

Circumstances can arise where a person has legal title but is not recorded in either the CREST register or the Issuer's register (broadly where there is a transfer from certificated to uncertificated shares or vice versa).

Custodian's books are evidence of, but do not constitute, and are not definitive of, Investor's entitlement.

To become a shareholder of an English company it is necessary to have one's name entered on the register of members (including an entry on the CREST register of members). English law distinguishes between "legal" title (where such a formality as entry on the register has been followed) and "beneficial" ownership, where one person (the beneficiary) owns the asset but legal title is in another person's (the trustee's) hands. The law is extremely complex as to when beneficial entitlements arise in the absence of an express arrangement intended to create a trust.

English law also distinguishes between a **contract to transfer** an asset and the **transfer of title**. A contract is binding inter partes – and in relation to private company shares may give rise to the remedy of specific performance as opposed to mere damages - but only a title transfer is good against the rest of the world (subject to the risk of reversal discussed under Question 11).

Typically a transfer of title would occur if there is a valid contract to transfer, the price has been paid, and the transferor has taken the necessary steps (completion of a stock transfer form and delivery up of the share certificate, if one exists) to divest himself of ownership. The law would usually regard beneficial ownership as having moved in such a case to the transferee notwithstanding that the transferor's name is still on the register. This legal outcome is difficult to reconcile with practice where entitlement is evidenced by entries in accounts maintained by intermediaries. The accepted view is that a purchasing investor becomes entitled as beneficial owner against his intermediary as soon as the intermediary receives the shares (even if the intermediary delays in recording receipt in its accounts).

18. QUESTION NO. 18

WHAT IS THE OBJECT OF THE TRANSFER OF SECURITIES (E.G. A CLAIM AGAINST THE INTERMEDIARY, A *SUI GENERIS* RIGHT, THE SECURITY ITSELF)?

18.1. Belgium

The object of a transfer of financial instruments held pursuant to Royal Decree 62 is a sui generis co-ownership right *enforceable against the intermediary, as further described in our response to Question (7).As indicated in the Explanatory Memorandum of the Law of August 2, 2002 amending Royal Decree 62 (Parl. Doc. Chambre 2001-2002, n° 184/001, p.116), "in reality, only the co-ownership rights will be subject to transfer or pledge through book-entry movements" in the books of the settlement institution (or of the affiliate) under Royal Decree 62, and not the underlying securities, except of course when there is a transfer on the local market where such underlying securities are ultimately sub-deposited in which case those securities will be the direct subject matter of the transfers. Of course this is as long as the investor decides to keep the securities under the fungible regime of Royal Decree 62 . When the investors wants his securities back (or in case of insolvency of the intermediary), the underlying securities will be transferred back to him (either physically for paper form bearer certificates, or by re-registration in the name of the investor in the issuer records, or through a transfer of the dematerialised securities to the new account keeper of the investor).*

18.2. Czech Republic

The transfer of securities in books of CSD or other intermediaries result in the transfer of ownership to the securities. Since the securities held in safekeeping with fungible securities of other owners are common property of all owners, transfer of securities in books of intermediary result in the transfer of ownership to the portion of the pooled securities.

18.3. Denmark

The object of the transfer is the securities.

18.4. Germany

Ownership or co-ownership of (title to) the securities transferred in case of securities held in domestic safe custody.

Claims against the (first tier) intermediary within a fiduciary trust relationship in case of securities purchased and held in safe custody abroad (WR-Credit).

18.5. Estonia

The object of the transfer by way of entry made in the records of the owner of the nominee account is sui generis right, i.e. "transfer of bundle of rights arising from the credit entry. See also response to question (7).

18.6. Greece

The transfer of listed securities held within the DSS is considered as a transfer of the rights incorporated in the relevant security (i.e. shareholding rights regarding shares etc) (see above under 2.1. and 2.2.).

For the transfer of Government securities held within the BOGS please refer to 2.3.b. above.

18.7. Spain

The object of the transfer of securities is the right of property in securities.

Other rights in rem in securities (i.e. pledges) are also recorded (annotated) in the book-entry register of securities, and may also be transferred in favour of third parties (i.e. a new secured creditor) without dispossession of the securities. In this case, securities would remain in the debtor securities account, but the name of the new secured creditor would be annotated in the securities account.

18.8. France

The object of the transfer is the security itself insofar as the book entry represents the security (see in this respect (12) above).

18.9. Ireland

See our responses to question (17) above. This will depend on the nature of the asset sought to be transferred. To the extent that such asset is, in fact, the security, it will be the security. To the extent that, the right of the transferor as against its intermediary is other than a proprietary right to the security itself, the object may differ.

18.10. Italy

Only legal assets (beni giuridici) may be the object of a transfer (also by way of security) or the creation of a security interest. "Legal assets" are chattels, claims and intangibles. Negotiable instruments in certificated form are chattels. Under Italian law, securities "subject to book-entry holding and transfer" (page 1 of this Questionnaire) may be held in dematerialised or immobilised form.

Italian law does not characterise the nature of immobilised or dematerialised securities, but the Official Commentary to the Euro Decree requiring full dematerialisation of certain securities in 1998, including listed securities, states that dematerialised securities are to be treated as negotiable instruments in certificated form, and thus as chattels. Similarly, following the introduction of centralised securities in 1986 (that is, securities in certificated form that are deposited with the Italian CSD, but held and transferred in book-entry form within the Italian CSD system) legal scholars have constantly characterised immobilised securities as chattels.

Accordingly, if both the transferor and the transferee of securities deposited in the Italian CSD system hold such securities through one or more local custodians, the object of the transfer (also by way of security) are the securities themselves and not an interest in or a right over such securities.

A different analysis may apply in the presence of a non-Italian CSD or custodian in the chain of sub-custodianships. The most common situation in which a different analysis would apply is where securities deposited in the Italian CSD system are held by the transferee and/or the transferor through a non-Italian CSD located in a jurisdiction which applies the concept of interest in securities to securities transfers. In such a situation, in a transfer between two Italian nationals it is likely that the transfer contract would be governed by Italian law and that such contract would provide for the transfer of the securities held in the Italian CSD system. The Italian law imposed by the contract might contrast with the law of the transferee's non-Italian intermediary (which, under PRIMA is the law determining the object of the contract) in those cases were such law identifies the interest in securities rather than the underlying securities as the transferred object. This incongruity is one of the examples evidencing the advantages (and possibly the need) of uniformity of the characterisation of the object of the transfer among the various EU jurisdictions (securities vs. interest in securities).

Another example evidencing the advantages of uniformity of characterisation is a transfer of securities held in a non-Italian CSD system located in a jurisdiction which applies the concept of interest in securities where both the transferee and the transferor and their respective first-tier custodians are located in Italy. The Italian transferor and transferee would most likely enter into a transfer agreement governed by Italian law and such contract would simply provide for the transfer of the securities held in the non-Italian CSD system. This approach would be problematic where, under the law of such non-Italian CSD system, all such securities were registered in the name of a nominee and the object of the transfer would thus necessarily be a beneficial interest in such securities rather than the securities themselves. In such situation the transfer contract between the two Italian nationals would either need to have as an object an interest in securities (that is, the securities entitlement of the transferor against its own custodian) or state that the object of the contract are the securities themselves. The first solution is unlikely to occur, since Italian law does currently not contemplate the transfer of securities entitlements and it is hard to imagine that two Italian nationals (or an Italian law standard agreement) would specify that the object of the transfer is a legal asset that does not exist under Italian law. The second solution, on the other hand, would be exposed to the aberrant objection that transfers of securities are not permissible under the law of the non-Italian CSD, that the object of the Italian transfer contract is therefore inexistent and thus impossible and, as a result, that the Italian transfer contract is null and void.

The same type of incongruities do not arise when we move from a "dynamic" to a "static" situation involving a creation of a security interest rather than a transfer. In such situations the conflicts of law rules introduced by the Legislative Decree No. 210 of 12 April 2001 implementing Directive 98/26/EC on the finality of transfer orders (**Italian Finality Law**) and the Legislative Decree No. 170 of 21 May 2004 implementing Directive 2002/47/EC on financial collateral arrangements (**Italian Financial Collateral Law**) apply PRIMA without limitations and thus allow the recognition of (non-Italian) security interests perfected in (non-Italian) legal assets (such as the US "securities entitlement" provided by § 8-102(a)(17) of the US Uniform Commercial Code) that are unknown by the Italian legal system.

Sources of Law:

Official Commentary to Title V of the Euro Decree;

Article 9(1) of Legislative Decree No. 210 of 12 April 2001 implementing Directive 98/26/EC on the finality of transfer orders (**Italian Finality Law**);

Article 10 of Legislative Decree No. 170 of 21 May 2004 implementing Directive 2002/47/EC on financial collateral arrangements (**Italian Financial Collateral Law**).

Sources of Doctrine:

M. CIAN, Strumenti finanziari dematerializzati. Diritto cartolare e diritto societario, in Banca, borsa, tit. cred., I, 2005, p. 11ff.

18.11. Cyprus

The object of the transfer is the securities themselves and obviously the bundle of rights and obligations attaching thereto.

18.12. Latvia

The object of the transfer is the securities.

18.13. Lithuania

The security it self.

18.14. Luxembourg

The object of a transfer of financial instruments held in a securities account is a sui generis co-ownership right enforceable against the intermediary, as further described in our response to Question (7). As indicated in the explanatory memorandum of the Securities Act (Doc. parl. No, n° 4695, p.7), "At the moment where the securities are recorded in the books of the depository, the securities loose their individuality and become fungible. As of this very moment, securities circulate by way of transfer, consisting in a debit by the depository of one account with a certain amount of securities and a credit to another account of the same number of securities. Transfers can be carried out within a system, to another system, within Luxembourg or abroad which holds securities account in a similar way."

Underlying securities will not be transferred except of course when there is a transfer on the local market where such underlying securities are ultimately sub-deposited in which case those securities will also be the direct subject matter of the transfers.

If an investor claims his securities back (or in case of insolvency of the intermediary), the underlying securities will be transferred back to him (either physically for paper form bearer certificates, or by re-registration in the name of the investor in the issuer records, or through a transfer of the dematerialised securities to the new account keeper of the investor).

18.15. Hungary

The security itself.

18.16. Malta

When a customer of an intermediary wishes to transfer securities to another person he must ask the intermediary to execute the transaction documents as a mandatory with power of representation or as a trustee. The customer has not got "possession" of the security and so cannot deliver it upon a sale. The intermediary has such possession but must be authorised to sell as he has no title.

In case of an intermediary who is a trustee such issue does not arise as a trustee has ownership and possession combined, as would be the case of an intermediary who is authorised to sell.

It is clear that the customer has a right which is legally recognised and enforceable in both cases. When a customer is the owner, then he can demand accounting by the intermediary and immediate re-delivery of the securities to him by any means that are necessary to do so. If the customer is the beneficiary under a trust a broadly similar right exists under the trusts and trustees act.

Should a customer assign the right to demand delivery of the asset against the intermediary to another person it is not necessarily clear that at the same time ownership in the asset is also being transferred. This will depend on the agreements and the facts. Upon notification of the assignment of such right to delivery of the securities, the intermediary must act and recognise the new "creditor" of his obligation to deliver and account as the new customer.

18.17. Netherlands

In the event the securities concerned are securities subject to the Securities Giro Transfer and Administration Act, the object of the transfer are co-ownership rights in collective deposits of securities of the relevant kind within the meaning of said Act. If we are talking about individualised bearer securities, the object of the transfer is the security itself. Finally, if the securities concerned are fungible securities and the investor merely has a contractual right against the intermediary, the object of the transfer is this contractual right. Please note that all this derives from the old Roman law principle being one of the underlying principles of the Netherlands Law as well that no one can transfer more rights than he actually has (Nemo plus iuris ad alium transferre quam ipse haberet).

18.18. Austria

The object of the transfer is the security itself. In case of "Wertpapier-Rechnung" (see answers to question (15), second para) obligatory rights will be assigned. The operational procedure will be the same as if the security itself was transferred.

18.19. Poland

The object of transfers of securities are the securities themselves.

18.20. Portugal

The proprietary rights over the securities.

18.21. Slovenia

The object of the transfer of securities is the security itself. By transferring dematerialised securities the rights arising from securities are transferred (Art. 6 and Par. 1 of Art 35 of ZNVP).

18.22. Slovakia

Due to the fact that securities held in the central securities depository are dematerialised, transfer of securities means an entry into legally recognized registration of book-entry securities by way of debiting transferor's securities account and crediting transferee's account.

18.23. Finland

In the book-entry system, the object of transfer is the book-entry security.

Outside the book-entry system, the object of the transfer is a right to the security in accordance with the terms and conditions of the custody agreement. However, this right has not been defined explicitly in Finnish law.

18.24. Sweden

For CSD accounts the transferee becomes entitled to the securities at the moment of registration of the securities on his account. The transferor becomes disentitled at the moment the securities are moved from the account. The moment should be the same.

For other securities account the transferee becomes entitled and the transferor disentitled at the moment the intermediary has taken notice of the transfer notification.

18.25. United Kingdom

See answer to Question 7. In practice a shareholder holding via an intermediary will not execute a stock transfer form. The word “transferor” is not defined in the Stock Transfer Act 1963, and it is interpreted as meaning the legal owner of the securities.

19. QUESTION NO. 19

AT EXACTLY WHAT MOMENT OR MOMENTS IN TIME DOES A TRANSFEREE BECOME ENTITLED, AND TO WHAT? AT WHAT MOMENT OR MOMENTS IN TIME DOES THE TRANSFEROR BECOME DISENTITLED?

19.1. Belgium

Royal Decree 62 does not expressly provide for the moment when the sui generis entitlement is transferred from one account holder to another through the respective debit and credit of securities accounts. The specific mechanism will depend on the operational practices of each account holder/intermediary.

However, the legislative history of the Royal Decree confirms very clearly that, because of fungibility, securities held under the Royal Decree are handled and circulated on a book-entry basis:

"The deposit of securities results in the recording of an asset to the credit of the customer; their withdrawal results in a debit. The assets of one holder are transferred to another holder by a mere accounting record".

To take the Euroclear System example, since each Euroclear Participant is the owner, not of specified securities, but of a portion of a pool of book-entry securities of the same category held by Euroclear Bank (as operator) in the Euroclear System, and since ownership can be transferred by mere transfer on the books of Euroclear Bank, the entitlement to the securities deposited with Euroclear Bank is expressed by book-entry records in the accounts of Participants opened in the books of Euroclear Bank.

As stated by some of the most authoritative authors (Van Ryn and Heenen, Principes de droit commercial, 2nd ed., Vol. III, 1981, No. 162-translation):

"The title ... of the depositor is in fact the book-entry and no longer the certificate which such book-entry has temporarily replaced when the certificate entered the system of fungibility ... As we have seen, the holder is not solely creditor of a certain quantity of securities. The holder remains shareholder or bondholder, but his right for the time being ceases to be incorporated in a security instrument and is solely represented by a book-entry".

This position has been confirmed by the enactment of Article 133, §2 of the Act of 2 August 2002 which has inserted the new Article 1bis in the Royal Decree (which became, after coordination, Article 2) (see Explanatory Memorandum of the Government to the Parliament, Parl. Doc., Ch., 2001-2002, No. 1842/001, p.115).

19.2. Czech Republic

Transferee becomes entitled to the security at the time the security is credited to its owner account in CSD or credit to the customer account of the intermediary which acts on its behalf. In case the transfer takes place only in the books of intermediary different from CSD, transferee is entitled as soon as the security is credited to its owner account. Transferee becomes entitled to the ownership of securities (or co-ownership of securities held in customer account). As long as the transferred securities credited to the customer account of the intermediary in CSD are not credited to the owner account in the books of intermediary, securities owner does not profit from the presumption of ownership. Securities credited to customers account of the intermediary have to be credited to the owner accounts without

delay, no later than by the end of the accounting day (section 96 (2) of Capital Market Undertaking Act).

19.3. Denmark

With respect to the transferees entitlement, see answer to Question no. 17. Generally, the transferor becomes disentitled from the same moment in the time, when the transferee becomes entitled. However, under certain circumstances the transferees entitlement may not have the consequence that the transferor becomes disentitled. If the transferee became entitled due to an act of the intermediary acting without consent of the transferor (e.g. disposing over securities held on an omnibus account), the transferor may still be entitled to claim securities from the remaining pool of securities held on the omnibus account (in competition with other persons holding securities on that account), even though the transferee has become entitled to the transferred securities. Of course (unless the intermediary re-establishes the account balance on the omnibus account) this will result in a shortfall-situation. With respect to shortfalls, se answer to Question no. 29.

19.4. Germany

See answer to Question 17.

19.5. Estonia

The law does not provide the exact moment regarding the time when transferee becomes entitled to the object of the disposition and when transferor becomes disentitled. However, the law (the ECRSA) provides that the owner of the nominee account is responsible for maintaining records regarding persons on whose behalf the securities are held in the nominee account. This implies that both the moment of entitlement and disentitlement is directly connected to the moment of the corresponding entry made in the records of the owner of the nominee account (i.e. intermediary)

19.6. Greece

Please refer to 2.2., 11 and 17 above. The moment at which securities are debited to the transferee account within the DSS varies depending on the contract being the 'causa' of securities transfer (please refer to articles 20, 21, 46 and 47 of the DSS C&S Regulation and to Section 7B of the BoGS Operating Regulation).

19.7. Spain

The transferee becomes entitled with the credit of the securities to its securities account. The transferor becomes disentitled with the debit of the securities to its securities account.

19.8. France

(a) <u>At exactly what moment or moments in time does a transferee become entitled, and to what?</u>

The transfer of ownership of securities results from book entry in the account of the buyer maintained either with the issuer or the intermediary (see in this respect (12) and (17) above).

(b) <u>At what moment or moments in time does the transferor become disentitled?</u>

The transferor becomes disentitled at the moment of the debit of the security from his account.

19.9. Ireland

Our responses to question (17) above outline the manner in which a transfer will be effected. Again, this will depend on the nature of the asset and the method of transfer. See also our response to question (1), generally. Otherwise, the matter will depend on the contractual arrangements between the investor and the intermediary but we would expect that, in the case of book-entry transfers, the transfer is effected by the book-entry and that the transferor will become disentitled to whatever asset it possessed once his account with the intermediary has been debited.

CREST Ireland

The CREST Regulations provide that the transferee will become entitled to an equitable interest in the securities once settlement has been achieved (delivery versus payment) (see further our responses to question (20) below in this regard).

19.10. Italy

As a general principle of Italian law, the transferee becomes entitled to the securities (rather than to a right or claim thereto, as explained in Question 18) at the same moment at which the transferor becomes disentitled. If both parties are intermediaries holding proprietary accounts with the Italian CSD, transfer of title occurs when the Italian CSD debits and credits such accounts, as described in Question (17).

If one or both of the parties do not hold proprietary accounts with the Italian CSD, legal scholars and practitioners debate as to whether transfer of title occurs as a consequence of the CSD Book Entries (see (i) of Question 17) or the subsequent Intermediary Book Entries (see (iii) of Question 17). In other words, the question is whether transfer of title occurs at the "top" or at the "bottom" of the chain of debit/credit registrations. Although some scholars opine that it is the CSD Book Entries which are determinative, others, including ourselves, tend to believe that transfer of title occurs only when the Intermediary Book Entries (specifically, that of the transferee) are perfected because:

(i) Italian law conditions the transfer of title to fungible assets on the identification of such assets;

only upon the registration of the transferred securities in the transferee's proprietary account, the transferred securities are specifically identified, whereas at the (prior) time at which they are registered in the omnibus clients account held by the transferee's intermediary with the Italian CSD, the transferred securities are commingled with other securities of the same type.

Sources of law:

Article 1378 of the Civil Code;

Article 86(2) of the FLCA;

Article 32 of the Euro Decree.

Sources of Doctrine:

M. Cian, Titoli dematerializzati e circolazione cartolare, Milano, 2001, p. 324;

Martorano, Titoli di credito, Milano, 1997, p. 220;

Cardarelli, L'azione dematerializzata, Milano, 2001, p. 105.

19.11. Cyprus

The moment of entitlement and disentitlement to the securities is the moment of registration in the register of the new owner. At that particular moment the new owner becomes the proprietor of the securities. This does not exclude necessarily any existing equitable rights or rights to specific performance of contractual rights or rights the previously registered owner may have against a mala fide purchaser of the securities.

19.12. Latvia

According to the FIML securities shall belong to their acquirer as of the moment book entries in respect of those financial instruments are made in the securities account of the acquirer. The transferor becomes disentitled after he gives the instruction to his intermediary and intermediary starts execute this transaction. If the transfer has not been completed because of default of a party, the transferee or transferor can exercise the claim rights for money and/or securities.

19.13. Lithuania

In respect of exact moment of entitlement several aspects have to be mentioned.

First, it is hard to describe the exact moment of transfer of ownership right, i.e. whether the ownership right is deemed to be transferred from the credit of securities in general account of intermediary opened with the CSDL or from the moment of crediting securities in a personal securities account of an investor. Art. 45(1) of the Law on Securities Market provide for securities shall be registered by making entries in personal securities accounts. Such provision could be construed that as long as there are no records made in personal securities account no security is registered therein. In such case an investor could have mare contractual claims for demand of transfer of securities (i.e. of making book-entry into his personal securities account). Nevertheless, there is no explicit law provision that ownership right to securities is deemed to be passed to the acquirer at the moment of credit of his personal securities account.

Second, the above mentioned Art. 45(1) of the Law on Securities Market could be also construed as providing the rule that any credits to personal securities account only formalize transfer of ownership whereas the very moment of the transfer of ownership may not coincide with the moment of securities credit to personal securities account. The latter interpretation is also suggested by Art. 19.3 and 19.4 of the Rules on Securities Circulation and Account in respect of transactions executed on the exchange. It is established that *having received a notification from the exchange on the concluded transactions, the account managers must immediately open technical securities and technical cash accounts for the purpose of settling the transactions concluded on the exchange and record therein the number of securities and the amount of cash required for settlement of these transactions. Recording of these entries shall have no impact on the ownership right to the securities and cash. Having made entries in general securities accounts, the CSDL shall issue statements of these accounts and deliver them to the account* managers*, who must immediately make entries in personal securities and cash accounts, thereby* ***formalizing*** *the transfer of title to the securities and cash*. According to such provisions, credit of personal securities account could be deemed as perfection of legal standing of title to securities against the third parties.

Third, the Rules of Trade on VSE provide that transfer of ownership right to securities occurs on the day of settlement. However the latter rules do not provide

the exact moment on the day of settlement at which the transfer of title occurs. Art. 48 of the Rules of Securities Settlement System, approved by the board of the CSDL, stipulate that *settlement of securities transactions shall be considered as having taken place upon making entries in **general securities accounts** of the SSS participants and executing cash transfers between settlement accounts. A free-of-payment securities transfer shall be considered as having taken place, upon making respective entries in **general securities accounts** of the SSS participant delivering or receiving an order.* Notably, any security credits in personal securities accounts are made only after settlement. The above mentioned construction suggests that after the settlement the counterparties are deemed fulfilled their obligations of the securities transaction duly. Then there rises a question what rights an investor has in the time gap between the settlement and crediting his personal securities account. In such situation general agency rules could be applicable, i.e. that any assets acquired by the agent to its principal belong to the principal (an investor) and crediting personal securities accounts is for the purpose of perfection only. However in such case some problems might occur. If after settlement the intermediary failed to credit securities in personal securities account, the investor could use only personal action rights against the intermediary regarding crediting of securities to the personal account or transferring the securities to another intermediary. However the investor would not have adequate proof of ownership to securities credited in the omnibus account of intermediary opened with the CSDL and legal standing of proprietary title of investor could be hardly evoked against third parties.

In case of transfer of title to securities by the investors whose accounts are managed by the same intermediary and if transfer is not executed in the SSS, ownership of securities should be deemed transferred at the moment of crediting transferees personal securities account, since all clients must be separately identified in the intermediary's account.

19.14. Luxembourg

The Securities Act does not expressly provide for the moment when the sui generis entitlement is transferred from one account holder to another through the respective debit and credit of securities accounts.

Pursuant the principles of Code Civil, fungible securities actually constitute non-identifiable movables ("choses de genre") where transfer of property does not occur solo consenu but upon identification of the movable. This identification can happen in various ways, but in practice for securities the identification will generally coincide with the delivery of the securities by the seller to the buyer i.e. the booking of the securities into the account of the buyer.

However, the specific mechanism will depend on the operational practices of each intermediary and also on the market the securities are related to. Additionally, the law of 1 August 2001 relating to the transfer of ownership for guarantee purposes explicitly provides in Article 3 (3) that the transfer of ownership becomes effective at the latest at the recording of transfer in an account opened in the books of the transferee, a designated third party or a specific account *in the books of the transferor flagged as belonging to transferee.*

19.15. Hungary

At the moment when the securities are credited on the transferee's account he becomes entitled to the securities. The transferor becomes disentitled when his account is debited.

19.16. Malta

The situation is not very clear due to the fact that the above regulations (lN 287 of 2004) are not yet in force.

However the general principle is that the parties can determine when the transfer of ownership takes place by the terms of the contract between them.

Absent any conditions eg. Payment and delivery, the civil code (art. 1347) assumes ownership passes when the parties agree on the thing and the price. If there is some formality which needs to be complied with for the transfer, then it is on completion of that formality. If there are additional conditions, eg. Payment or delivery, then on the fulfilment of the conditions.

With listed securities it is the current position that transfer takes place on the trade. It is proposed that it be made when full and final settlement of the price takes place.

19.17. Netherlands

With respect to the transferee's entitlement, see answer to Question no. 17. Generally, the transferor becomes disentitled from the same moment in the time, when the transferee becomes entitled. However, under certain circumstances the transferees entitlement may not have the consequence that the transferor becomes disentitled. If the transferee became entitled due to an act of the intermediary acting without consent of the transferor (e.g. disposing over securities held on an omnibus account), the transferor may still be entitled to claim securities from the remaining pool of securities held on the omnibus account (in competition with other persons holding securities on that account), even though the transferee has become entitled to the transferred securities. Of course (unless the intermediary re-establishes the account balance on the omnibus account) this will result in a shortfall-situation. With respect to shortfalls, se answer to Question no. 29.

19.18. Austria

See answer to question (17). In case transferor and transferee maintain their securities accounts with the same account provider the exact moment of transfer of title (property or pledge) is, when the account provider no longer holds the securities in the name of the transferor but in the name of the transferee. This is also the moment when the transferor becomes disentitled. For all practical purposes this will be the moment when the securities are booked on the transferees securities account (cases where title (property or pledge) has been acquired at an earlier point of time according to applicable foreign law can not and must not be discussed here). When an upper-tier account provider is involved the same rule will apply.

19.19. Poland

It should be recognised that a purchaser of transferable securities rights acquires them at the instant that these securities are registered on the purchaser’s securities account, whereas the seller relinquishes rights from these securities at the instant they are deregistered from the seller’s securities account, not earlier however than the moment they are registered on the securities account of the purchaser. It should be noted as well that the Law on the Public Trading in Securities of August 21, 1997 does not set out this principle in detail, assuming instead that the securities entry on the purchaser’s account and their deregistration from the seller’s account take place simultaneously. According to Article 7 subpara. 3 of the Law on the Public Trading in Securities of August 21, 1997:

"3. A contract which obliges its party to transfer securities admitted to public trading shall transfer the securities when the appropriate entry is made in the securities account. Where the right to fruits attached to securities has been confirmed on the day on which a settlement of transaction should be performed in the KDPW S.A. or later and these securities are still recorded on the transferor's account, the fruits shall fall to the acquirer at the time the entry in his account is made."

19.20. Portugal

The transferee becomes the owner of the securities when his/her account is credited with the securities (article 80.1 CVM). The transferor becomes disentitled when his/her account is debited (article 80.1 CVM).

However, the acquisition in a regulated market of book-entry securities gives the buyer, independently of the credit of the securities acquired to its account and from the moment of the conclusion of the acquisition transaction, the right to sell those securities in such market (article 80.2 CVM).

19.21. Slovenia

By transferring dematerialised securities from (debiting) transferor's dematerialised securities' account to (crediting) transferee's dematerialised securities' account transferor becomes legal holder of dematerialised securities that were the object of transfer (Art. 6 and par. 2 of Art. 16 of ZNVP. Pursuant Par. 1 of Art. 16 of ZNVP the rights arising from dematerialised securities may be exercised only by their legal holders. Therefore by transferring dematerialised securities transferee becomes entitled (at the same moment) transferor becomes disentitled to exercise the rights arising from dematerialised securities.

Described legal effects of transfer occur at the moment of execution of transfer order in central registry (see also answer to Q17). The legal effects of transfer of securities are defined in Par. 1 of Art. 80 of KDD Rules: "Upon the execution of an order or other entry in the central registry:

1. to transfer dematerialised securities by debiting the holder's account and crediting the account of another holder:

   the holder whose account was credited acquires the rights to the dematerialised securities resulting from such transfer; and

   the rights to such securities of the holder whose account was debited ceases,

2. to enter or delete the right of a third party to dematerialised securities, the entitled person acquires this right, or this right of the entitled person ceases, as the case may be."

19.22. Slovakia

In free of payment transfer, transferee becomes entitled to securities at the moment when securities have been credited to its securities account held with member of depository and the transferor becomes disentitled to securities when they are debited from his securities account. If securities are transferred on delivery versus payment principle, their transfer is part of the settlement cycle. In net settlement mode securities are transferred on settlement day 2-6 a.m. whereas in gross settlement mode securities can be transferred on settlement day from 8:00 a.m. until 12:30.

19.23. Finland

In the book-entry system, the transferee *becomes entitled to the book-entry securities at the moment of entering the credit to his/her book-entry account. The transferor, in turn, becomes disentitled at the moment of entering the debit to his/her book-entry account. This moment is the same owing to the operation of the system.*

Outside the book-entry system, the transferee becomes entitled and transferor disentitled at the moment when the intermediary has taken notice *of the transfer notification. Regarding the object of transfer, please refer to the previous question.*

19.24. Sweden

Swedish legislation does not contain a generally applicable definition of finality. The rules of a settlement system decides the moment of irrevocability for the participants in a system. Those rules are supplemented the Settlement Systems Act. Article 13 in the Act states that even if a collective insolvency proceeding has been initiated against a participant in a Settlement System any transfer order is binding on third parties if the transfer order were entered into the system before the decision on insolvency proceedings was taken.

19.25. United Kingdom

The transferee is considered to become entitled as explained above under Question 17; but other interpretations, which may be valid, include:

the transferee becomes entitled at the moment at which the transferee's intermediary becomes entitled as against the higher tier intermediary

the transferee becomes entitled according to the moment agreed with his intermediary, possibly subject to the rule in Momm v Barclays Bank [1977] IQB 790, a case relating to transfers of cash credits in a banking context, which stated that the transferee of cash became entitled at the moment the bank decided internally to credit the transferee's account (which may be before the actual credit entry is made).

CREST

The transferee becomes entitled at the moment its account is credited.

20. QUESTION NO. 20

WHICH CONCEPTS OF FINALITY (E.G. UNCONDITIONALITY, IRREVOCABILITY, ENFORCEABILITY) APPLY TO TRANSFERS OF SECURITIES? IS ANY SUCH CONCEPT CHOSEN BY AN INTERMEDIARY OR IMPOSED BY LAW? DO THEY RELATE TO THE TRANSFER ORDERS, THE SETTLEMENT, THE PASSING OF TITLE OR OWNERSHIP, THE FULFILMENT OF THE UNDERLYING OBLIGATIONS, OR OTHER?

20.1. Belgium

We believe finality –which is not a traditional legal concept- is generally understood to mean the unconditional and irrevocable (including also enforceable) nature of settlement, allowing the securities to be available for subsequent transfers. Belgian law does not define such finality but legally underpins and protects finality of settlement orders against the effects of insolvency and similar situations (see in particular Article 157 of the Banking Law of March 22, 1993 on the neutralization of the zero-hour rule and the Belgian Act of 28 April 1999 implementing the Settlement Finality Directive (in particular articles 3 and 4); see also the new law of 15 December 2004 relating to financial collateral (implementing the Collateral Directive), especially articles 15 and 16.

In our view, finality of settlement is indeed an operational concept and the timing thereof should be defined by the rules/contractual arrangements of the relevant intermediary. Such rules would define the moment of entry of an instruction as well as the moment when the instruction becomes irrevocable. A transfer would happen in accordance with the rules of the intermediary, including whether or not all conditions for the transfer have been fulfilled. The object of the transfer is the sui generis rights established pursuant to Royal Decree 62.

20.2. Czech Republic

Securities transfer consists of underlying transfer contract and transfer of securities in the books of intermediary. Terms on which underlying transfer agreement can be subject to condition, can be terminated or revoked are not in focus of this questionnaire. Transfer in books of intermediary become irrevocable, enforceable at the moment it is carried out in the books of respective intermediary on the basis of proper instruction. Instruction to the intermediary can be cancelled by the investor on the terms specified in their contract governing the securities account. Instructiona are also automatically cancelled as an effect of insolvency proceedings. Irrevocability and enforceability of transfer instruction in securities settlement systems notified pursuant to settlement finality directive are under section 86(1) of Capital Market Undertaking Act set in the rules of securities settlement system. Enforceability of instruction in securities settlement system is guaranteed by section 86 (2) of Capital Market Undertakings Act.

20.3. Denmark

Danish *legislation does not contain a generally applicable legal definition of settlement finality but requires a CSD (Securities Trading Act Art. 57c) to include such provisions in its membership rules. This* includes *an obligation to define the exact point in time when a transfer order enters its settlement system, as well as the point in time when a transfer order can no longer be revoked by a participant or a third party.*

20.4. Germany

Under German law, the underlying relationship (etc. the securities purchase etc.) giving rise to a transfer instruction to the CSD is fully abstract from the legal acts undertaken in fulfilment thereof.

This means that a transfer of ownership would occur in the CSD regardless of the potential (in-)validity of the underlying *relationship. The same for the cash leg where a payment order would be validly executed regardless of any defects in the underlying* relationship.

*Securities transfers (i.e. transfers of co-ownership) follow the system of rights in rem (entailing both an alienation and a corresponding acquisition of rights directly from the selling to the acquiring investor, i.e. without any acquisition by an "*intermediary*") whereas cash transfers operate merely on a contractual basis (the credit by the intermediary alone would suffice to constitute the "monetary claim" in the hands of the beneficiary; cash would, in principle, be credited* to *the intermediary and from there to the beneficiary).*

Having said *this, "finality" (a term not defined in the Settlement Finality Directive 98/26/ EC* – hereafter SFD) would in broad terms designate the status of orders, instructions etc. (see*king to achieve the passing of the securities or of the cash, abstractly from the underlying relationship) as being insulated against their* voidance, rescission etc.

Finality *(i.e. the resilience of an order against posthum intervention) comprises two elements:*

*One is "*enforceability*" as contained in Art. 3 of the SFD meaning the validity and* enforceability of a transfer order in the event of (posthum) insolvency of the transferor (entailing the automatic posthum lapse of a contract, instruction etc. by *operation of insolvency law or action of the insolvency administrator)*

The other would be the concept of "irrevocability" as contained in Art. 5 of the SFD, which is in essence about the termination of a contract or an instruction by unilateral act of the instructing party ("revocation"). Revocation must not be *mixed up with "actio revocatoria" (i.e. the insolvency administrator's right to vindicate assets transferred in contravention of the insolvency freeze)*

[Under German law, "unconditionality" is familiar to "irrevocability" the main difference being that "revocation" would mean a (posthum) act of termination by a Party (as flowing from the nature of the mandate agreement being revocable by nature) whereas a "condition" would mean a pre-stipulated external event the (postum) occurrence of which would entail (automatic) termination.]

In the light of the above, irrevocability is a matter of contract; it deals with the possibility for the transferor to void a previously issued transfer order (by issuing a countermandate or a "cancelling order" etc.), whereas enforceability deals *with the interference of insolvency law. In other words: an enforceable (insolvency insulated) order can still be subject to a conditionality or to revocation; an irrevocable order can (theoretically, since the moment of enforceability will normally precede the moment of irrevocability) be subject to an insolvency freeze.*

As regards the concept of enforceability, this is enshrined in German law in Section 116, 3rd sent., of the Insolvency Code, according to which transfer orders remain valid even if insolvency proceedings have been opened vis-à-vis the transferor after the transfer. According to Section 81 para 3 Insolvency Code, insolvency proceedings opened vis-à-vis the transferor before the transfer, also remain valid if

the CSD was unaware (and did not need to be aware) of the opening *of insolvency proceedings.*

Such provision applies mutatis mutandis in preliminary judicial and administrative *proceedings (like supervisory moratoria etc., cf. Sections 21 (2) 2 Insolvency Code, 46 (1) 6 German Banking Act, 89a Insurance Supervision Act, 15 Building Societies Act)*

As regards the concept of irrevocability, the basic concept is contained in Section 676 of the German Civil Code. According to that provision, the termination of a transfer instruction is possible if the transferor's custodian bank receives notice of the termination before it credits the transferor's custody account. However, a system may designate an earlier point in time after which a termination is no longer possible. Clearstream Banking AG, Frankfurt, the only notified German securities settlement system, has made use of this possibility. According to its settlement rules a transfer order designated for one of the batch runs cannot be terminated after the published deadlines for the respective batch run have been reached . A transfer order for Real Time Settlement (RTS) cannot be terminated in the instant it is released and matched by the settlement system.

20.5. Estonia

Under the Estonian law, the concept of finality (i.e. within the meaning of the directive on Settlement Finality) is extended only to systems that qualify as settlement systems for the purposes of the relevant provisions of the SMA.

If the owner of the nominee account maintains the internal records in a foreign state then the law of a foreign state may determine more detailed regulation regarding the finality.

20.6. Greece

As provided in Article 21 of the DSS Operation's Regulation, securities transfers within the DSS from one account to another are mainly possible a) through a transaction taking place in the ATHEX, b) through a transaction taking place over the counter (article 46 of the DSS Operation's Regulation) or c) due to inheritance or full succession (article 47 of the DSS Operation's Regulation). Every securities' transfer, completed through registration (crediting) of securities to an investor's account is final and cannot be revoked. In particular, article 36 para 3 (b) of the DSS Operation's Regulation states that, upon registration, "ACSD may not cancel or alter registrations made" within the DSS. The exemptions thereof concern only cases of mistaken registration during the dematerialization process, i.e. in the listing phase, and not after a transaction. In any case, para 4 of article 36 states that no corrections may be made where incorrectly registered securities have already been transferred to a third person or any other transaction, including constitution of lien, has been made thereon.

The mentioned conclusion is confirmed also through article 19 para. 6 of DSS C&S Regulation. This provision, referring to the settlement of transactions effected in ATHEX, provides that the securities transfers in the investors accounts held by their Operators as a result of the transfer orders arising through the settlement procedure, are final in terms of article 3 of Law 2789/200071.

[71] This provision corresponds to article 3 of the SFD 98/26/EC.

In respect of BoGS, securities could be transferred from one Participant's account to another Participant's account as a result of a transaction effected in ESSM72 or over the counter, between two Participants.

The clearing and settlement of the transactions in ESSM is effected through the BoGS between Participants. All these transactions are notified to the BoGS by the transacting Participants, who transmit the relevant "transfer orders", as described in Section 6b and 7 of the BoGS Operating Regulation. Section 9A describes in detail the clearing and settlement procedure (see above under 17.2.).

Section 9 B iii provides for "final clearing and settlement". These provisions are not very clear cut. However, it could be inferred that registration of the securities in the Participants accounts is irrevocable.

20.7. Spain

Effectiveness of transfers:

According to the Law, the credit of securities in the acquirer's securities account has the effect of granting the acquirer full property in the securities. Such transfer is effective, non-conditional and enforceable erga omnes from the moment it takes place. Nevertheless, the credit in the account does not validate inter partes any possible nullity causes that may affect and invalidate the agreement (e.g. the fact that the agreement was entered into by a person not of legal age or without the proper and needed consent being given). Therefore, if such were to be the case, the transfer agreement could be declared as null by a Court and so forcing the buyer of the securities to hand them back if he still were to be owner. This would entail a new debit and credit, not an unwinding, and would not affect any bona fide subsequent acquirer, as they would be protected by bona fide protection rules (see question 24 below).

Finality of transfer orders:

Spanish Law has incorporated the provisions required by European Directive 98/22/CE (the SFD). In this context, the concept of finality implies that the obligations that arise from the transfer orders executed in settlement systems, once they are accepted by the system, are firm, binding and legally enforceable for the participant entity. Therefore, the entity will be obliged to fulfil them, being such obligations enforceable before third parties. The moment of acceptance depends on the applicable settlement system rules, as follows:

In the Stock Exchange register, clearing and settlement system (SCLV platform), transfer orders are accepted by the system, and therefore the obligations that arise from them are firm and non-revocable, at the time the trading is communicated – taking place in some cases this communication through the Stock Exchange's communication- to IBERCLEAR (as manager of the settlement system) by the participant entity and not taking into consideration the time of settlement of each transfer order.

In the Public Debt Market settlement and AIAF Fixed Rate Market systems the following rule is applied: "Orders communicated by participant entities will be considered accepted by the system, with the effects foreseen in Law 41/1999, of

[72] Dematerialised government securities held within the BoGS are being traded on a gross basis in the Electronic Secondary Securities Market, operated by the Bank of Greece (Article 26 of Law 2515/1997, as amended by Law 2733/1999), between primary dealers.

12 November, when cash and securities transfers are recorded, with prior assessment of the existence of sufficient amount of cash and securities being undertaken".

Is any such concept chosen by an intermediary or imposed by law?

It is imposed by law and by the rules of the relevant settlement system.

Do they relate to the transfer orders, the settlement, the passing of title or ownership, the fulfilment of the underlying obligations, or other?

As has been stated, finality in the meaning given to such term by the Finality Services Directive refers to: (i) Transfer orders that have been communicated to the system, but have not yet been settled, in the case of the SCLV platform; and to (ii) Transfer orders that have settled, in the case of the CADE platform.

20.8. France

20.8.1. Which concepts of finality (e.g. unconditionality, irrevocability, enforceability) apply to transfers of securities? Is any such concept chosen by an intermediary or imposed by law?

i. Reference is made to question 21:

in respect of settlement and delivery, finality is assimilated to execution, i.e. Banque de France consent in respect of cash transfer in RGV2;

Article L. 431-2 of the MFC, as modified by Ordinance n° 2005-303 of 31 March 2005, contemplates that:

"[…] **where the securities settlement system provides for a continuous irrevocable settlement**, the transfer of ownership occurs under the conditions of the Règlement Général of the AMF. Such transfer occurs to the benefit of the purchaser provided that the purchase price has been paid to the financial intermediary. Such financial intermediary remains the owner as long as the purchaser has not paid the price."

in respect of instructions, the concept is to be assimilated to irrevocability as defined in the rules of the designated system.

ii. Article L. 431-2 of the MFC,

Article L. 431-2 of the MFC, as modified by Ordinance n° 2005-303 of 31 March 2005, contemplates that:

"In the event the account of the financial intermediary of the buyer has not been credited with purchased securities on the date and under the conditions defined by the Règlement Général of the AMF[73], the trade will be rescinded, notwithstanding any legislative provision to the contrary, and without prejudice to the rights of the buyer to claim remedies or to take any legal action."

(See also response regarding question 22)

---

[73] Such rules are to be issued shortly.

This rule under the new regime resulting from the March 31, 2005 Ordinance purports to apply to the BRN which needs to circulate through to the issuer (see in this respect (17) above)).

20.8.2. Do they relate to the transfer orders, the settlement, the passing of title or ownership, the fulfilment of the underlying obligations, or other?

The above provisions refer to settlement.

20.9. Ireland

The concept of finality is not defined as a matter of general law.

The Settlement Finality Regulations provide that transfer orders which are entered into a payment system before the opening of insolvency proceedings against a member of the payment system, will be immune from attack under insolvency proceedings of such a member and shall be binding on third parties. (See further our responses to question (43) below in relation to the definition of "member"). The Settlement Finality Regulations further provide that where a transfer order is entered into a payment system after the moment of opening of insolvency proceedings against a member of a payment system and the order is executed on the day of opening of the insolvency proceedings against the member, the order shall be legally binding only if, after the order was executed, the settlement agent, the central counterparty or the clearing house can prove that they were not aware, and should not have been aware, of the opening of insolvency proceedings against the member. No definition of finality is provided in the Settlement Finality Regulations however, nor is there a mechanism provided in the Settlement Finality Regulations which deems settlements to be final. Instead, the Settlement Finality Regulations provide that the relevant payment system and its rules will determine the finality of payments issue, in that the Settlement Finality Regulations provide that the rules of a payment system will specify the moment at which a transfer order shall be considered to have been entered into in the payment system.

CREST Ireland

As a designated payment system, the Settlement Finality Regulations apply to transfers made by means of CREST Ireland, as a payment system. Generally, the CREST Regulations provide that the transferee acquires an equitable interest in the securities in respect of which the transferor had an equitable interest or in relation to which the transferor is recorded on the relevant register of securities as having title at the time that the RUR is sent. Following the entry on the register maintained by the issuer of the securities, the transferee will acquire a legal interest. The CREST Regulations also provide that to the extent that a transferee would be considered to have acquired a proprietary interest (of the form provided for by the Regulations or otherwise), in units of a security, no such interest shall be conferred if the conferring of such interest would be void by or under an enactment or rule of law.

20.10. Italy

(i) irrevocable from the immediate moment it is made, since only the order pertaining to such transfer may be revoked pursuant to the rules of the applicable Italian system ("system", whether Italian or not, has the same meaning given to such word in the Directive 98/26/EC);

(ii) legally binding among the participants in the system;

(iii) in the event of insolvency of a participant, enforceable against third parties, including the liquidator, and exempt from claw-back actions, when the order pertaining to such transfer was entered into the system prior to the opening of the insolvency proceeding or, under the same conditions as those set out in the Directive 98/26/EC, after such opening if the transfer occurs on the same day as the opening of the insolvency proceeding (Insolvency Day);

In addition, transfers (also by way of security) and security interests effected or created over securities by intermediaries not participating in the relevant system (including investors) in favour of participants are also exempt from claw-back actions.

All the finality concepts summarised above are imposed by law and not subject to the choice of the intermediary, whether or not participating in a system.

Together with the transfer of title to the securities, transfer orders and netting ("netting" has the same meaning given to such term in the Directive 98/26/EC) are also subject to the finality concepts set out in (ii) and (iii) above.

Based on the principle set out in (i) above, under the rules of the sole Italian settlement system, managed by Monte Titoli S.p.A. (Express II), transfer orders may no longer be revoked once the applicable pre-settlement daily reconciliation and matching system (RRG System) confirms that such transfer order is matched with the corresponding transfer order of the same trade by inputting a time stamp over such trade (Time Stamp). The placing of the Time Stamp follows (a) the acquisition of the pair of transfer orders by the RRG System from the on-exchange computerised trading systems or from the off-exchange trading parties and (b) the reconciliation of such transfer orders. See Question (21) on failure to reconcile transfer orders.

Sources of law:

Article 24 of the Italian CSD Regulation;

Article B.1.1.1 of the Regulation of the Italian Clearing and Settlement System of 5 August 2004 (CCG Regulation);

Articles 5.3-5.9 of the Daily Matching and Routing System Service Guide of October 2003 (RRG System Regulation).

20.11. Cyprus

The relevant law is the Law on Settlement Finality in Payment and Securities Settlement Systems 2003 which transposes the Finality directive (98/26/EC). In effect the finality provisions of the directive are introduced into this law and the ambit of the directive is co-extensive to the ambit of the law. The Cyprus Stock Exchange has been designated as a system for the purposes of this law. The law protects transfer orders, set-offs and the provision of collateral security arrangements. As with directive 98/26/EC it defines the time at which insolvency proceedings against a participant in the system are considered to take precedence over transfers and set-offs. The question now arises whether finality relates to transfer orders, settlement, passing of title etc. Given that registration signifies the transfer of title it is more likely than not that finality covers transfer of title. The law states that the action is irrevocable as against a third party. It is not quite clear if there can be a reversal between the parties themselves though in all probability an innocent party would be limited to a claim in damages.

20.12. Latvia

Concept of settlement finality is defined by the Law On finality in Financial Instruments and Payment Systems (adopted in November, 2003). According with this law when the SSS has started executing settlement movements formed according to the placed orders by LCD participants, order cannot be revoked. Settlement movements can fail only as a result of a shortage of cash and/or securities within SSS and/or on settlement accounts.

20.13. Lithuania

The framework for settlement finality is the Law on Settlement Finality in Payment and Securities Settlement Systems. The latter law was adopted in order to implement the Finality directive. Art. 4(3)(4) of the Law on Settlement Finality in Payment and Securities Settlement Systems provides for the rules of the system has to establish the moment when the placed orders may not be revoked. Art. 47 of the Rules of Securities Settlement System provide that once the SSS has started executing settlement movements formed according to the placed orders of the SSS participants, the said orders may not be revoked. The moment of entry of orders into the System shall be treated as the beginning of the execution of the formed settlement movements. Such settlement movements can fail only as a result of a shortage of cash and (or) securities within the SSS and (or) on settlement accounts. As mentioned in answer to question 19, settlement of securities transactions shall be considered as has taken place upon making entries in general securities accounts of the SSS participants and executing cash transfers between settlement accounts. FOP securities transfer shall be considered as has taken place, upon making respective entries in general securities accounts of the SSS participant delivering or receiving an order. As it was mentioned in answer 19, it is difficult to identify whether the settlement finality also signifies transfer of ownership right. It is clear that finality relates to the transfer of orders and settlement. Following Art. 7.2 of the Rules on Settlement for the Exchange Transactions, approved by the LSC, settlements mean movements of securities and cash transfers between accounts whereby obligations of the parties are fulfilled. Thus finality also could be related to fulfillment of the underlying obligations.

20.14. Luxembourg

Finality – which is not a traditional legal concept – is generally understood to mean the unconditional and irrevocable (including also enforceable) nature of settlement, allowing the securities to be available for subsequent transfers. Luxembourg law does not define finality but legally underpins and protects finality of settlement orders against the effects of insolvency and similar situations (cf Art. 61-24 of the amended Law of 5 April 1993 relating to the financial sector (the "Banking Act") implementing the Settlement Finality Directive; see also Articles 20 and 21 of draft law n° 5251 relating to financial collateral (implementing the Collateral Directive).

Thus, finality of settlement is rather an operational than a legal concept. The timing of irrevocability, according to the law, is to be defined by the rules/contractual arrangements of the securities settlement system. Such rules would define the moment of entry of an instruction into the system as well as the moment when the instruction becomes irrevocable. Once an instruction has become irrevocable it cannot be challenged anymore afterwards.

Please note that these rules apply only to securities held in a securities settlement system. For "ordinary" intermediaries there are no specific rules in respect of settlement finality.

20.15. Hungary

All of the above mentioned apply to the transfer of securities, and this concept of finality is imposed by law. The above mentioned concept of finality applies to all of the above listed elements.

20.16. Malta

Maltese law does not address this issue specifically in relation to securities though it has implemented the finality directive into its banking laws in so far as payments are concerned.

Using general principles of Maltese law however one would say the concept is not applicable in so far as transfer of securities is concerned as a transfer of securities can mostly be rebutted by subsequent evidence of title by a third party whose right of ownership has been upset by the action of an intermediary.

The courts in such case will have to determine who has the best title and will demand very strong evidence to upset the title of a person who has acquired in good faith and for value.

20.17. Netherlands

Netherlands Law does not contain a generally applicable legal definition of finality. In practice the concept is understood to refer to both the question whether and, if so, until which moment a transfer order can be revoked or reversed by the transferor and the question whether a transfer order is affected or voided by the transferor being declared bankrupt or subjected to other insolvency proceedings. The first concept of finality (irrevocability) is a matter of contract. In most cases the custody agreement will determine that a transfer order may not be unilateral by revoked or cancalled, or, if revocation or cancellation is possible, until which moment. The second concept of finality (enforceability in insolvency proceedings) is a matter of law.

A bankruptcy order under Netherlands Law takes effect retroactively from 0.00 hours on the day on which the order is rendered. With respect to the bankruptcy of a financial institution participating in a system for the execution, clearance or settlement of transfer orders designated as a system pursuant to Section 212a of the Bankruptcy Act, certain exceptions are made to the retroactive effect of the bankruptcy order in relation to instructions for the transfer of or granting of a security interest in cash or securities by means of book entries. Pursuant to Section 212b (1) of the Bankruptcy Act, a bankruptcy order does not take effect retroactively from 0.00 hours on the day of the order with respect to:

a. instructions entered into the system by the institution before the moment of the relevant judicial authority handing down the order commencing the insolvency proceedings, or

b. any payment, transfer, set-off or other legal act necessary to process such instructions within the system.

Further, pursuant to Section 212b (2) of the Bankruptcy Act, the bankruptcy of an institution cannot be invoked against third parties with respect to instructions entered into the system by that institution on the day of the bankruptcy order but after the moment at which it was rendered, if such order is executed on the same day and the institution executing the order can prove that it neither knew nor should have known of the order when it executed the instructions.

Pursuant to Section 71 (8) of the Act on the Supervision of the Credit System, an emergency regime - a suspension of payments with respect to a credit institution - is deemed to take effect retroactively from 0.00 hours on the day on which the court order imposing the emergency regime is rendered. There is no retroactive effect or, as the case may be, no adverse effect of the emergency regime in relation to instructions for the transfer of or granting of a security interest in money or securities by means of book entries in the same circumstances as are described above with respect to bankruptcy.

20.18. Austria

20.18.1. General

General Austrian law does not know "concepts of finality" (e.g. unconditionality, irrevocability, enforceability) which would apply to transfers of securities. Austrian civil law applies to transfers of securities the scheme of "titulus" (the agreement between the parties to the transfer) and the execution (perfection) of the agreement by the "modus" (way of transfer "in rem" according to the limited choice of action offered under the general civil law) (see answer to question 11). When the "titulus" has been lawfully agreed and the "modus" has been lawfully perfected, the transfer is "made". In other words one could say the agreement is "fulfilled" ("completed"). The use of the **word "final"** ("endgültig") is **not common** in this context.

Under civil law the transfer of a security could be challenged for several reasons like (i) error, compulsion, lack of capacity (lack of consent of tutor), insanity or that (ii) the "modus" was not lawfully made, i.e. transfer of possession was irregular. In case of bankruptcy of the transferor the transfer may be challenged (iii) for reasons laid down in the Bankruptcy Code, sections 27 to 32, in particular when the agreement was made or completed during the suspect period.

20.18.2. Finality Act

Since the adoption of the **Finality Directive** in Austria by the Finality Act, Federal Law Gazette I 1999/123 (see attachments) the notion of "finality" has been introduced into Austrian law in the meaning in which it is used in the Austrian "Finality Act". There is no definition of "finality" in the Finality Act whose long form title is (in our translation) "Federal Act on the **Effectiveness** of Settlements in Payment Systems as well as in Securities Delivery and Settlement Systems". The relevant section of the Finality Act (section 15) is headed "Effects of payment and transfer instructions". The section rules that instructions which have been entered into a "system", as defined in the act, prior to the declaration of insolvency of the respective participant, will not extinct, because of the declaration of insolvency. In other words, settlement of such instructions will not be affected by the insolvency proceedings. Moreover section 15 para 1 Finality Act rules that an instruction may not be recalled neither by a participant in the system nor by a third party **with effect for the system** after a certain point of time laid down by the rules of the system. Special rules exist in case instructions have been given after the moment of declaring insolvency proceedings and have been executed on the same day. They will be validly performed in case the

settlement system, the central counterparty or the clearing system can prove that it was not aware of the declaration of bankruptcy and should not have been aware of it (section 15 para 2 Finality Act).

It is important to note that section 15 para 3 Finality Act rules that **claims based on civil law** including **challenges** under the **Bankruptcy Code** based on legal acts made outside the settlement system will not be affected by the "finality" and **are allowed**. In other words the settlement within the system is protected and the result is "final" for the system, i.e. **the transfer is perfected**, but in case the result is illegal for **reasons of substantative law**, the prejudiced party is authorised to claim its rights (in and outside of court). Pursuant to section 17 Finality Act the same rules apply for collateral that has been provided in a system. It should be noted that the rules on collateral relate not only to participants in a system but also to central banks of member states of the European Economic Area or the European Central Bank.

It should be noted that Austria adopted the Finality Directive as it was, i.e. strictly and not "at large".

20.18.3. CSD

The only recognised Austrian securities settlement systems are the Austrian Central Securities Depositary (the "Wertpapiersammelbank") operated by Oesterreichische Kontrollbank Aktiengesellschaft, the "Arrangement" (which is replaced by a CCP-system), the CCP system and the option system. In the general business conditions (the "GBC") of the CSD the relevant "finality" regulations are contained in its section 8. Para 3 of this section 8 GBC rules that instructions to the CSD **are given** when received within its business hours listed in Annex A to the GBC. Para 4 alinea a) of section 8 GBC rules that instructions may be **recalled** until the "cut off" times listed in Annex B to the GBC (i) unilaterally in case the business partner has not placed a corresponding instruction and (ii) jointly by both business partners in case the "matching of instructions" took place according to Annex B to the GBC, but not yet the execution. Moreover para 4 alinea b) of section 8 GBC rules that instructions have been **entered** into the system according to the Finality Act at the beginning of the execution day. Instructions of the business partners may be recalled according to alinea a) of section 8 para 4 GBC, but they became irrevocable in the meaning of the Finality Act in respect of third parties. A receiver would have the same rights as the bankrupt party and therefore could unilaterally recall the instruction in case the business partner has not entered a corresponding instruction and (ii) recall the instruction jointly with its business partner until execution ("cut off") in case matching took place.

"Finality" as described above relates to the transfer of ownership (creation of collateral), subject to challenges not related to the system that are based on general principles of law (as described in A) of this answer). Special rules apply to the CCP system, namely section 17 of the Clearing Rules (see attachments), headed "Objections". Objections to a trade confirmation or a settlement notification must be made immediately to the Clearing House (the CCP.A), but at the latest 60

minutes before the start of trading in the respective instrument on the next exchange trading day. The party raising objections must file within three exchange trading days a complaint with the Court of Arbitration as otherwise the transaction shall be deemed accepted and may no longer be rescinded (Finality Act).

20.19. Poland

As regards relations between investors and intermediaries, securities transfers are carried out on the basis of purchase or sale orders sent by the investor. Sending such an order and its execution by an intermediary creates a legal relation between the investor and the intermediary, where the intermediary is obliged, accordingly, to purchase or sell securities in its own name, however on the account of the sender of the order, and for the investor to pay commission. In principle then, the order of an investor may be cancelled only in circumstances arising from the legal relations connecting him with the intermediary. Such orders are sent and executed by an intermediary as part of a broader relationship connecting both sides – agreements for the provision of brokerage services, where the intermediary is obliged to execute agreements for the sale or purchase of securities with the investor. As part of this same relationship, described in regulations issued by intermediaries, these regulations should define in detail principles for modifying and cancelling orders by investors. In other words, a transfer order sent by a client is binding and final, as long as it is not modified in any manner set out in the rules describing the provision of broker services by an intermediary. Irrespective, however of the provisions of these regulations, an order cannot be cancelled once it has been executed by an intermediary (i.e. once the intermediary has executed a securities sale or purchase agreement on the basis of the investor's order.

In relations between KDPW and its participants, finality of settlement performed in KDPW is based on irrevocability of settlement instructions sent by participants. Settlement orders relating to transactions executed in the regulated market sent to KDPW in principle become final and irrevocable the moment they are sent. Settlement instructions relating to other transactions become final and irrevocable the moment in which KDPW begins to execute them, on condition however that the activities started by KDPW will lead to their being executed.

20.20. Portugal

Portuguese Law has incorporated the provisions required by European Directive 98/22/CE (the Settlement Finality Directive - "**SFD**"). In this context, the concept of finality implies that the obligations that arise from the transfer orders executed in settlement systems, once they are accepted by the system, are firm, binding and legally enforceable for the participant entity (article 274. CVM).

Is any such concept chosen by an intermediary or imposed by law?

It is imposed by law and by the rules of the relevant settlement system.

Do they relate to the transfer orders, the settlement, the passing of title or ownership, the fulfilment of the underlying obligations, or other?

As has been stated, finality in the meaning given to such term by the SFD refers to transfer orders which are introduced into the system by the respective Participants.

20.21. Slovenia

Transfer order becomes irrevocable upon entry in central registry (see also answer to Q 17). The precise moment of entry of a transfer order in central registry is defined by KDD's (technical) regulations as the moment when the computer application "order engine" running on a server operated by KDD receives electronic file (in XML format) containing transfer order data.

Transfer of dematerialised securities from (debiting) transferor's dematerialised securities' account to (crediting) transferee's dematerialised securities' account becomes final upon execution of transfer in central registry.

20.22. Slovakia

Transfer of securities is irrevocable. Concept of irrevocability is enforced by the Act on Securities and Investment Services that is compliant with the EU legislation (Settlement Finality Directive has been transposed into the Act). Transfer orders become irrevocable at the moment of irrevocability set by depository in its Operational rules. Concept of finality also applies to settlement.

20.23. Finland

In the book-entry system, matched and subsequently confirmed instructions are binding on participants. Matched and confirmed settlement instructions can be removed from APK´s system only when both participants agree on it.

The transfer of book-entries and the finality of these transfers have been regulated specially in sections 26 – 29 of the Act on Book-Entry Accounts. In accordance with these provisions, a right or a transfer registered in a book-entry account shall have priority over a right that has not been registered. The information registered in the system may be relied upon legally. Derived from these principles, a transfer of book-entry securities is final when the security has been entered in the receiver's book-entry account. If the recipient acts in good faith (bona fide) the transfer shall not be revoked or challenged even if it turns out later that the transferor did not have a right to transfer the securities. Even if the recipient acts in bad faith, the finality of the transaction is not cancelled in the book-entry system. Rather, a new transaction shall be entered in the system based on a court order revoking the effect of the first transaction, but both transactions will remain valid in the system.

There is no zero-hour rule or any other similar provision in force creating retroactive effects in Finland. A bankruptcy takes effect in general from the moment of the court decision initiating the bankruptcy proceedings. For this part, the Finnish law corresponds to the Settlement Finality Directive and to the Collateral Directive.

APK´s both settlement systems, operate RTGS, continuous and real-time DVP systems. Both systems fulfil the Lamfalussy Recommendations using BIS – DVP model 1 (1992 CPSS DVP Report).

Outside the book-entry system, because of the ambiguities referred to in the response to question 12, finality rules are not clearly defined. Finality relates to the operation of the intermediary and whether the intermediary accepts revocation or not. Generally it can be assumed, that revocation is not possible after the intermediary has taken notice of the notification to transfer the securities.

20.24. Sweden

The answer to the question regarding a revocation of a transfer instruction could be divided in two parts. If the transaction is part of the settlement in the CSD the rules of the settlement system decides the moment of irrevocability for the participants in a System, see answer to question 20. In other situation both parties of a transfer order have to agree to the revocation.

A possibility to correct wrongful registration is included in chapter 5 section 4 of the Financial Instruments Accounts Act.

Section 4 A registration shall be rectified where it contains any obvious inaccuracy as a consequence of the fact that the person carrying out the registration measure or some other person has committed a typographical error, calculation error or similar oversight, or as a consequence of any technical error. Any person affected shall be given the opportunity to submit comments, provided that rectification is not to the advantage of such person or where comments are otherwise obviously unnecessary.

The time of the registration will be decisive in case of insolvency. In general, Swedish law does not protect a party in bad faith and an insolvency administrator may be able to recover securities that an insolvent debtor has disposed of in contradiction with the recovery rules.

20.25. United Kingdom

There are no finality concepts under or imposed by the general law.

The Financial Markets and Insolvency (Settlement Finality) Regulations 1999 implement the Settlement Finality Directive in the UK. These provide that the default arrangements of a designated system are, in relation to transfer orders, immunized from attacks under English and foreign insolvency law. Specific rules of insolvency law are also expressly disapplied in relation to transfer orders. But there are no provisions deeming settlements to be final – the structure of the law is to leave it to the designated system and its rules to determine the moment (and meaning) of finality.

CREST and LCH.Clearnet are designated systems through which securities transfers may be effected.

21. QUESTION NO. 21

WHAT WOULD BE THE EFFECT ON CONCEPTS OF FINALITY OF EACH OF (I) A REVOCATION OF TRANSFER INSTRUCTIONS, (II) THE DEBITING OF PROVISIONAL OR ERRONEOUS CREDITS; (III) INSOLVENCY CHALLENGES, (IV) FRAUD? ARE THERE SPECIFIC RULES RELATING TO ERRONEOUS ENTRIES ON ACCOUNTS?

21.1. Belgium

(i) Revocation of a transfer instruction would put into question the finality of the settlement. This is why the above-mentioned Belgian Law of 12 April 1999 implementing the Settlement Finality Directive has introduced protection for designated systems against the risk of revocation, including in case of insolvency events.

(ii) By definition, provisional credits are not yet final. Finality is therefore irrelevant for the reversal of the provisional credit itself. According to general principles of banking law and practices , a banker has the right to correct erroneous credits to accounts. The error would be corrected through the introduction of reverse movements (fr: "contrepassation"). One can argue that the right of reversal would not itself affect finality because because the erroneous transfer is not the settlement of an instructed transfer and therefore the question of finality does not arise.

In case of erroneous credit, the transferor has in principle the right to recover back the securities erroneously credited against the transferee who is under the duty to transfer them back to the transferor. This is the application of the legal regime of "répétition de l'indû" (quasi-contract that is a source of obligation under the Civil Code: article 1376 CC). Same in case of fraud or insolvency rule which would lead to invalidate the transfer made vis-à-vis the transferee based on the insolvency claw-back rule or in some cases on another quasi-contract that is "enrichissement sans cause" ("action de in rem verso": general principle of law). This transfer back may happen later outside the system but can not lead to any unwind or revocation of transfers orders already settled in a protected system under Settlement Finality regime (see recital 13 of the SFD; see article 4§1, last sentence of Belgian Act of 28 April 1999).

21.2. Czech Republic

Revocation of transfer instruction result in voidance of a transfer effected in the course of execution of such instruction. CSD and intermediary are entitled to correct erroneous credit of securities pursuant to section 98 of Capital Market Undertaking Act. However, what is an erroneous credit is not clearly defined in law. Proper transfer instructions and proxies are made invalid as insolvency proceeding are opened. Transfer instructions in securities settlement systems notified pursuant to settlement finality directive are protected from the effects of insolvency proceedings. However, this protection applies only in case of insolvency proceedings against participant of the securities settlement system. Insolvency of the investor in not covered by any legal provisions. Therefore the participants in securities settlement system acting on behalf of their customers raise a question of finality of transfer to transferee. It seems probable that legal provision protecting bona fide acquirer of securities does not apply to such transfer under all circumstances.

21.3. Denmark

The effects of finality and legal effect time of settlement are defined by each CSD, see answer to question 20. According to the membership rules of the Danish CSD, transfer orders that are settled via net settlement procedures, are considered final when settlement is completed (securities transfers are book entered on the securities account in question). A securities transfer that is settled via net settlement procedures gain legal effect time at a pre-defined point in time that is specified for each settlement block in the membership rules. Transfers orders that are settled via RTGS-procedures are considered final when the pertinent securities have been transferred to the buyer (book entered on the securities account in question). However, in both situations, the objection that a trade transaction is void because of forgery or duress under threat of violence will prevail, cf. Securities Trading Act Art. 69.

When both parties to a transfer order have instructed a transfer order for settlement, the transaction cannot be unilateral cancelled or revoked by either a participant or a third party. Furthermore the transfer order cannot be unilateral revoked after legal effect of a settlement batch.

When both parties have instructed a transfer order for settlement, the transaction cannot be affected by insolvency procedures against any of the parties. If there has been erroneous entries on accounts, a procedure is laid down in the Danish Securities Trading Act Art. 74 stating that an accountholder that is entitled according to the register shall have the opportunity to comment heron.

Finality with regard to transfer instructions by an intermediary other than a CSD is regulated by general principles of contract and insolvency law.

21.4. Germany

Are there specific rules relating to erroneous entries on accounts?

A revocation (in the sense that the transfer order is terminated and the transferred assets/funds have to be reversed) is impossible after the securities have been credited to the account of the transferee ***(or earlier, under the rules of a system). This does not mean that the transferor has other options to receive the assets back (e.g. if the underlying contract was void), but this would have to be settled outside the CSD/securities giro.***

As regards the possibility to cancel provisional or erroneous credits such entitlements of the account carrying ***custodian banks are fairly limited and do not touch on the concept of finality under German law (as explained above), as it would not be the transferor or the insolvency administrator that would challenge the transfer, but the transferee's custodian (correcting its own errors or enforcing its own reservation). The possibility to cancel such credits under general principles of German civil law is customarily acknowledged and part of the terms and conditions of all German credit institutions (e.g. Abschnitt IX Nr. 20 of the general terms and conditions of the Deutsche Bundesbank).***

As regards defraudation, and leaving aside the problem of a bona fide acquisition, our assessment would be that such a transaction (i.e. where the transferor was not entitled to dispose of securities and nevertheless did so knowingly) would not be covered by the legal provisions implementing the SFD mentioned ***above. The SFD grants two very specific protections (1) against the insolvency and (2) against a late termination of the contract. The defrauding transferor is, however, not*** under ***insolvency proceedings.***

Similarly, a disposition effected by a minor or mentally disabled would not benefit from the above mentioned protection.

These are "natural hazards***" inherent in any transaction and the SFD contains no specific protection against that.***

Finally, with respect to insolvency challenges, transactions entered into a system are unaffected by such insolvency challenges. Netting remains enforceable, Section 96 para. 2 Insolvency Code, "claw-back rules" are dis-applied, Section 147 Insolvency Code.

With regard to securities, the general principles apply mutatis mutandis.

21.5. Estionia

Relevant provisions of the LOA cover revocation of the transfer instruction under the Estonian law.

No specific rules on the debiting of provisional or erroneous credits. The same applies to insolvency challenges and fraud.

21.6. Greece

Insolvency of the transferor or of the Operator/Participant after completion of settlement has no effect on the finality of transfers of securities within both DSS and BoGS[74].

Regarding erroneous credits in accounts within DSS, please refer above under (20). In respect of fraud, whereas registration in DSS accounts has a constitutive effect, it could be argued that the consequences of a transaction's cancellation due to fraud could not be raised against third parties.

BoGS Operating Regulation does not contain any provision in this regard. It must be noted that BoGS Operating Regulation, while describing the final settlement stage, it refers to "cancellation of transactions" where transactions remain uncovered after application of the automatic securities lending facility (Section 9 part Biii of the Regulation). This cancellation does not affect proprietary rights, because it does not refer to completed securities' transfers. Regarding fraud, there is no provision explicitly governing this matter. It must be mentioned that article 7 para 1 of Law 2198/1994 protects third parties acquiring in good faith.

21.7. Spain

In general terms, transfer orders cannot be the object of revocation. Given the substantive terms in which the recording in securities accounts takes place, the management of such securities accounts does not permit corrections or provisional records to be made. The register's content is presumed valid and protected by the Courts.

---

[74] *With Law 2789/2000, Greek Legislation has been harmonized with the SFD 98/26/EC. Law 2789/2000 applies to the DSS as well as to the BOGS and its article 29 ensures that transfer orders and netting are valid and enforceable vis-à-vis third parties even in cases of insolvency proceedings against a participant in the above systems. Furthermore, it stipulates that the validity of netting shall not be prejudiced by any provision relating to the cancellation of contracts or transactions concluded before the moment of initiation of insolvency proceedings. It also provides that insolvency proceedings against a participant in the above systems shall not have retroactive effects on the rights and obligations arising from or in connection with its participation in the system, provided such rights and obligations arose prior to the formal notification of insolvency proceedings.*

No court decision ruling, taken within an insolvency proceeding, may produce any effect whatsoever on the finality of transfer orders.

Are there specific rules relating to erroneous entries on accounts?

Notwithstanding the above, the intermediary may amend erroneous entries on accounts without the assistance of the judicial authority, in the cases that the inaccurateness of the entry is caused by a factual or arithmetical errors that result from the registry content, or by the mere comparison with the document that originated the entry75.

21.8. France

(a) Revocation of orders executed on a regulated markets

With respect to orders executed on a regulated market, Article 4203/5 of the Euronext Operating Rules states that any order entered into the central order book (i.e. the Euronext trading platform's order book, in which all submitted orders and any modifications thereto are held until matched, expired or withdrawn) may be modified or cancelled prior to its execution.

(b) Revocation of transfer instructions

-Under the terms of Article L.330-1-II of the MFC transposing in France Directive 98/26 of 19 May 1998, settlements and deliveries made in a securities settlement system are deemed to be final when they have been executed. Article 6.32, §2 of RGV2 Operating Rules states that "As soon as the Banque de France has given Euroclear France its consent to booking the corresponding cash transfers, **the system considers delivery versus payment orders to have been finally settled**. Consequently, securities delivery transfers are booked in the participants' current accounts with Euroclear France and the cash transfers are made by Banque de France into their settlement accounts".

Furthermore, under the terms of Article L.330-1-III of the MFC, payment instructions and delivery instructions in progress can no longer be cancelled once they have become irrevocable. The purpose of this provision is to avoid the risk of cancellation of payment instructions which had not become irrevocable at the time the insolvency was declared. The moment and the conditions under which an instruction is deemed to be irrevocable within a system are defined by the rule of that system. Under Article 6.3 of the operating rules of the RGV2 system, shall be deemed as irrevocable within the meaning of Article L. 330-1-III of the MFC any instruction from a participant and recorded in the RGV2 system, and which may not be cancelled by such participant in accordance with the RGV2 Operating Rules.

(c) Erroneous credits

To the extent Article 1376 of the French Civil Code were to be applied, the intermediary should be entitled to reverse the book entry in the account of the client held with that intermediary when such credit was made erroneously. Article 1376

---

[75] *Article 23. Rectification of recordings:*

The entity in charge or participant (of IBERCLEAR) will only be able to rectify the inaccurate entries by virtue of a court resolution, save in the case of pure factual or arithmetical errors that result from the content of the registry or by the mere comparison with the document that originated the entry. The rectification entry will be recorded on its date in the book referred to in the next article.

of the French Civil Code provides that "a person who receives by error or knowingly something not owed to him must return such thing to such person from whom it was unduly received".

However, Article L.330-1 of the MFC which applies in respect of a designated DVP system introduces a principle of irrevocability which applies notwithstanding any legislation to the contrary.

Article 1376 of the French Civil Code should apply outside of a DVP system.

(d) Insolvency

As a principle, a bankruptcy judgment enters into effect on the date when such judgment is rendered in public hearing. This has the effect of implementing such judgement as of 00:00 a.m. of such date of entry. Paragraph II of Article L. 330-1 of the MFC prevents the application of this "zero-hour rule". Article L. 330-1 states that payments or deliveries of financial instruments made until the expiration of the day on which a judgment for judicial reorganization or judicial liquidation has been rendered against a participant of the system, are irrevocable and cannot be cancelled. Paragraph III of Article 330-1 provides that the rule contemplated under paragraph II of such Article applies equally to transfer orders or to delivery of financial instruments instructions to the extent they have become irrevocable under the applicable Rules of the relevant system.

Paragraph 2 of Article L. 431-2 of the MFC provides that in the event the account of the financial intermediary of the buyer has not been credited with the purchased securities on the date and under the conditions defined by the AMF General Rules, the trade will be rescinded, notwithstanding *any legislative provision to the contrary. Application of this rule prevents the application of the provisions of Article L. 621-28 of the French Commercial Code (relating to the proceedings of judicial reorganisation and judicial liquidation) which provides that notwithstanding any legal or contractual provision to the contrary, no indivisibility, termination or rescission of a contract may result solely from the introduction of a judicial reorganisation proceeding.*

Paragraph 2 of Article L. 431-3 of the French Monetary and Financial Code provides that when an intermediary maintaining a securities account or a custodian settles a transaction by delivery of the financial instruments against payment in cash and substitutes himself to his client in default, then such intermediary can avail himself of the provisions of such Article L. 431-3; in such a case, he acquires the full ownership of the financial instruments or the cash received as compensation notwithstanding the provisions of French insolvency laws as enshrined in Book VI of the French Commercial Code.

(e) Fraud

There is no effect on the irrevocable settlement in case of fraud.

Intermediaries have to comply with rules of conduct provided by the MFC, the AMF General Rules and market operating rules. In particular, an intermediary has to act with due care and diligence and to refrain form any act or course of conduct which is likely to harm the integrity of the market.

Traditional civil law principles should apply to fraud in respect of the relationship between the intermediary and its custodian.

(f) Rules relating to erroneous entries on accounts

There are no specific rules relating to erroneous entries on accounts. (See above question).

21.9. Ireland

(i) & (ii) There are no specific rules provided for in general law in relation to the effects on concepts of finality of any of the above. Revocation and reversal of errors are matters which will be determined by contract, by the rules of a relevant payment system or by the courts. In terms of the relief available in Irish law, the interests of third parties will be relevant to any determination made by the courts.

(iii) Insolvency challenges – The rules of a relevant payment system generally disapply insolvency law in relation to settlement in such system (see further the response to question (20) above), however to the extent that settlement takes place outside a payment system the following insolvency provisions may be of concern in the context of finality of settlement generally.

(i.) the rule that authority or agency is revoked automatically once insolvency proceedings have been opened;

(ii.) section 218 of the 1963 Act which provides that any disposition of the property of a company including things (choses) in action and transfers of shares made after the commencement of a winding up by the court shall, unless otherwise ordered by the court, be void;

(iii.) section 286 of the 1963 Act which provides that certain acts done by or against a company, which is unable to pay its debts as they become due, to any creditor, within six months of a winding up of the company with a view of giving such creditor (or any surety or guarantor of the debt due to such creditor) a preference over the other creditors, will be deemed to be a fraudulent preference of its creditors and invalid accordingly (the period of six months is extended to two years in the case of certain connected persons); and

(iv.) section 139 of the Companies Act 1990 which provides for the return to the liquidator of a company of property disposed of by the company where the effect of such a disposal was to perpetrate a fraud on the company, its creditors or members.

Other provisions of insolvency law may also be relevant but an analysis of such provisions is beyond the scope of this questionnaire.

(iv) A court could avoid the finality of any transfer if fraud was proved.

There are no specific rules of law relating to erroneous account entries. General principles of law such as those relating to fiduciary duties and negligence may be relevant. Such entries may also result in a "constructive" trust arising (i.e. where the court determines that the holder holds for some other person with a better entitlement).

21.10. Italy

(i) Prior to the Time Stamp, a transfer order could be revoked under different conditions depending on whether the related trade was entered into on- or off-exchange. In on-exchange trades (with or without a central counterparty), only the managing company of the relevant market could request the cancellation of the trade from the RRG System under the conditions set out in such market's rules. In off-exchange trades, the trading parties could jointly request the cancellation.

(ii), (iv) and (v) Irrevocability following Time Stamp also applies to erroneous or fraudulent transfer orders, without prejudice, however, to the liability in contract and tort of the negligent or fraudulent party. Prior to the introduction of the Time Stamp, the RRG System could cancel transfer orders which cannot be reconciled, unless the Italian CSD orders settlement of the related "erroneous" trades under its responsibility.

(iii) See Question (20). Specifically, the insolvency of a participant in the relevant system does not jeopardise the finality of transfer orders and related transfers of securities, unless such order has been entered into the system after the opening of the insolvency proceeding and (a) the order has been executed on the Insolvency Day and Monte Titoli S.p.A. (as manager of the settlement system) or Cassa di Compensazione e Garanzia S.p.A. (as central counterparty and clearing house) cannot prove that, at the moment of entry of the order in the system, it was not aware of the opening of the insolvency proceeding, or (b) the order has been executed on any day following the Insolvency Day. An order is deemed "entered into the system" when it becomes final, that is, when the RRG System marks the related trade with the Time Stamp.

Sources of Law:

Articles 2 and 4 of the Italian Finality Law;

Articles 5.4, 5.7, 5.8 of the RRG System Regulation;

Article B.3.1.8. of the CCG Regulation;

Article 4.9.3 of Italian Stock Exchange Regulation of 5 November 2004.

21.11. Cyprus

A revocation of transfer instructions may take place in the context of the closure of a trading account by the investor. As mentioned above, the opening of a trading account entails the appointment of an investment firm to act as an intermediary for the particular account. According to the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001 Art 10 an investor may close the account if there are no pending transactions in the system. Otherwise, the investor is bound as against a bona fide third party by a transaction effected by his intermediary (Art 10). This of course does not prejudice the right of recourse the investor may have against the intermediary if he has overstepped his instructions. It is noted that for the investor to be bound by the actions of the intermediary the action must be within the limits of the trading account. This wording has not been clarified judicially as yet and it cannot be known whether the construction will affect the principle of finality.

An erroneous debit in the system in the context of the CSE may be rectified by the director of the CSE (Art 22 Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001).

Insolvency challenges are regulated in the light of the Law on Settlement Finality in Payment and Securities Settlement Systems 2003 as elucidated above.

There are no explicit rules regarding fraud though the above mentioned provision concerning rectification by the director of the CSE may be applied also to fraudulent instructions in the system. It is again up to the director to receive representations and decide on the requested rectification. By the same article the director may suspend dealings on particular securities pending resolution of such an issue.

21.12. Latvia

(i) transfer instructions that are registered in SSS may not be revoked;

(ii) provisional credits are not allowed under the Latvian law, there are no special rules on erroneous credits, major rule of bona fide purchaser should be applied, ;

(iii) according with the Law On Finality in Financial Instruments and Payment Systems (Article 8) settlement orders that are placed in SSS before an initiation of insolvency or bankruptcy procedure shall be deemed valid, undisputable and enforceable;

(iv) there are no special rules on finality in the case of fraud; if the fraud is detected the losses or damages to injured person be covered in due course of the law.

21.13. Lithuania

(i) instructions may not be revoked;

(ii) provisional transfers are not allowed under Lithuanian law/ there are no explicit rules regarding erroneous credits; major rules of bona fide purchaser should be applied (please, refer to answer to question 24);

(iii) in any case the order cannot be revoked by the participant of the SSS or the third party. Art. 7 of the Law on Settlement Finality in Payment and Securities Settlement Systems provides for if settlement orders are placed in the SSS before an initiation of bankruptcy procedure the orders shall be deemed valid, undisputable and enforceable. In case the order was placed in the SSS after an initiation of bankruptcy procedure and was executed it might be disputable by the third parties, unless the CSDL proves unawareness of initiation of bankruptcy procedure;

(iv) there are no explicit rules regarding frauds of book entries; major rules of bona fide purchaser should be applied (please, refer to answer to question 24).

There are no specific rules relating to erroneous entries on accounts. Art. 9.2.3 of the Rules on Accounting and Circulation of Securities provide that entries in personal securities accounts without the owner's consent may be made only in cases prescribed by law, as well as in accordance with the procedure for the rectification of errors, which is established in these rules. However the latter rules do not elaborate further how particular erroneous credits should be handled.

21.14. Luxembourg

The answer to this question depends on whether the securities are deposited with an ordinary depository or within a securities settlement system.

(i) Revocation:

(a) Ordinary intermediaries: a transfer instruction is to be considered as a mandate which remains revocable until the account has been debited. The fact that the account of the beneficiary may not have been credited, yet at the moment of revocation, is irrelevant and does not allow the receiver in bankruptcy to revoke or challenge in any way the transfer order if the account of the bankrupt transferor has already been debited.

(b) Securities settlement systems: pursuant to Art. 61-24 of the Banking Act, once an instruction has become irrevocable in accordance with the rules of the system it cannot be challenged anymore, even in the event of insolvency of the transferor.

(ii) By definition, provisional credits are not yet final. Finality is therefore irrelevant for the reversal of the provisional credit itself. According to general principles of banking law and practices, a banker has the right to correct erroneous credits to accounts. The error would be corrected through booking of a reversal order (fr: "contrepassation"). One can argue that the right of reversal would not itself affect finality because the erroneous transfer is not the settlement of an instructed transfer and therefore the question of finality does not arise (Art. 10 of the Securities Act)

In case of erroneous credit, the transferor has in principle the right to recover back the securities erroneously credited against the transferee who is under the duty to transfer them back to the transferor. This is the application of the legal regime of "the recovery of payment in error" (Art. 1376 Civil Code). The same applies in the case of fraud or insolvency rule which would lead to invalidate the transfer made vis-à-vis the transferee based on the insolvency claw-back rule or in some cases of "undue enrichment" ("actio de in rem verso"). This transfer back may happen later outside the system but can not lead to any unwinding or revocation of transfers orders already settled in a protected system under Settlement Finality regime (Art. 61-24 of the Banking Act).

(iii) Insolvency challenges

(c) ordinary intermediaries: A transfer instruction is to be considered as a mandate which remains revocable unless the account has been debited. The fact that the account of the beneficiary may not have been credited, yet at the moment of revocation (insolvency automatically triggers revocation), is irrelevant and does not allow i.e. the receiver in bankruptcy to revoke or challenge in any way the transfer order.

(d) securities settlement systems: pursuant to Art. 61-24 of the Banking Act, once an instruction has become irrevocable in accordance with the rules of the system it cannot be challenged anymore, even in the event of insolvency of the transferor.

21.15. Hungary

These are not applicable (see above).

21.16. Malta

A revocation of transfer instructions,

Once a transaction is completed, transfer instructions cannot be revoked between the parties but an owner who has been misappropriated of his assets can claim back assets

The debiting of provisional or erroneous credits;

Under current law this would appear to be subject to evidence. If a credit has been made and no value received then it can be reversed. If third parties suffer as a

result, the person whose fault it is will be liable in damages under principles of delict.

Insolvency challenges,

As a general rule, on an insolvency of a party, the latter will freeze all payments and any creditor will need to prove in the debtor's winding-up proceedings.

Having said that, Maltese law now recognises insolvency close-out netting and any close-out netting provision will be enforced. Another issue which must be kept in mind is that there is a six-month hardening period and any transaction which is deemed to be a fraudulent preference may be annulled.

Under ordinary principles the valid transfer of securities for value will not be upset by insolvency rules. If a transfer was conditional upon payment and no payment was made, then naturally the ownership transfer does not take place due to the insolvency, however if only payment remains due, while the law may grant the unpaid seller a privilege over the unpaid for securities, the seller will have to rank in the insolvency for the price due.

Fraud?

A general principle of Maltese law is that fraus omnia corrumpit – i.e. anything tainted with fraud can be reversed. However problems may arise if third parties in good faith have acquired rights. Maltese law is not clear as to what happens to such third parties in good faith.

Are there specific rules relating to erroneous entries on accounts?

No.

21.17. Netherlands

As stated in the answer to Question 20, revocability issues are a matter of contract. If the relevant agreement does not contain any provision as regards revocability, an order must be considered to have become irrevocable as soon as the transferor's custodian has accepted the order and has started processing it. In the event of gross settled transfer orders this is considered to be the case when the transferor's account is debited. In the event of net settled transfer orders this is considered to be the case at the time the instruction is entered into the settlement system. Please note that these views are based on case law and legal literature with respect to the revocability of credit transfers.

As regards erroneous credits, finality is governed by general principles of contract law. In this connection the provisions contained in the Civil Code aimed at the protection of third parties acting in good faith are of considerable importance. As far as securities subject to the Securities Giro Administration and Transfer Act are concerned, please note that this Act contains specific provisions with regard to this issue.

As regards insolvency challenges, reference is made to the answer to Question 20.

If a transfer is voided on account of fraud, the securities will have to be returned to the transferor. If this is not possible, the obligation for redelivery will be substituted by an obligation to pay compensatory damages instead.

21.18. Austria

See the above answers to question (20). Credit institutions other than the CSD do not operate a securities settlement "system" in the meaning of the Finality Act.

They will almost certainly be participants in the "system" operated by the CSD. Insofar the rules of the Finality Act will apply to these credit institutions.

In respect of customers of the credit institutions (securities account providers) the general business conditions of these credit institutions will apply. As a general rule, entering of provisional credits on the accounts will be possible ("Eingang vorbehalten" – "subject to receipt" no 41 of these GBC). In case of an error by the securities account provider itself, pursuant to these GBC it is entitled to recall the credit any time. In other cases it will recall the provisional credit only if the invalidity of the transfer instruction has been unequivocally proven to the account provider (no 40 of these GBC).

21.19. Poland

The revocation of a transfer order will be effective if it is performed prior to the moment defined in the appropriate regulations (see (20)).

Entries on securities accounts are final by nature, not provisional. This means that only such entries on securities accounts will be considered to be securities, which were carried out according to legal regulations in force (i.e. they were performed following the settlement of a transaction in KDPW, on the basis of matching instructions confirming settlement, and if this settlement did not need to take place, then following verification of reasons allowing settlement performance. Only these types of entries will lead to the purchase of a security by the owner of the account on which this security was registered and at the same time will result in finality of transfer.

The bankruptcy of an investor leads to the expiry of the agreement for the provision of broker services linking the investor with an intermediary and the expiry of any securities sale or purchase orders on the day the bankruptcy has been declared. From Article 749 of the Polish civil code, it seems however that despite the expiry of the order, it is still deemed to be valid for the benefit of the entity receiving the order (in this case the intermediary), until the moment when the entity discovered the expiry of the order. In other words, orders executed by an intermediary up to the moment he was informed of the bankruptcy of the investor will remain valid.

In the event of the bankruptcy of an intermediary, settlement finality performed by KDPW on the basis of settlement instructions sent by the now bankrupt participant is guaranteed by legal regulations implementing Directive 98/26EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities systems. In particular, according to these regulations, should a participant be declared bankrupt, the law protects the settlement instructions introduced into the depository-settlement system managed by KDPW along with the netted amounts, which are irrevocable and binding for third parties, if the settlement instruction was introduced into the system prior to the bankruptcy being declared. If the settlement instructions were introduced into the system and executed on the day of the declaration of bankruptcy, the legal consequences of introduction of these instructions into the system, are by law only irrevocable and binding for third parties, if after the date of settlement, KDPW can prove that it had no knowledge of the declaration of the bankruptcy and it could not have had such knowledge.

In case of fraudulent transactions, it should be assumed that such a transaction results in the transfer of securities to the purchaser. However, where it is acknowledged that the purchaser obtained the securities by fraud, he will be

obliged to return these securities to the seller and potentially compensate the seller for any losses.

21.20. Portugal

A **revocation** (in the sense that the transfer order is terminated and the transferred assets/funds have to be reversed) cannot be made after the securities have been credited to the account of the transferee (or earlier, under the rules of a system - article 274. CVM).

As regards the **possibility to cancel provisional or erroneous credits** such possibility is limited and must be made according to the rules of the system.

As regards **fraud**, please note that the invalidity or inefficiency of legal acts underlying transfer orders and cleared obligations does not affect the irrevocability of the orders nor definitive character of the clearing (article 277. CVM).

Finally, with respect to **insolvency challenges** (article 283. CVM), pleased note that the opening of bankruptcy proceedings, composition with creditors or reparation of any participant does not have retroactive effects on the rights and obligations resulting from its participation in the system or related to it. The opening of the above mentioned proceedings does not affect the irrevocability of the transfer orders nor their validity against third parties nor the definitive character of clearing, provided that the orders had been introduced into the system:

a. Before the opening of such proceedings; or

b. Following the opening of the proceedings, if the orders have been executed the day that they were introduced and if the clearing house, the settlement agent or the central counterpart prove that they did not have, nor should have, knowledge of the opening of the proceedings.

The time of commencement of the proceedings to which the before mentioned rules make reference is that in which the competent authority pronounces the decision of the declaration of bankruptcy, pursuit of the action of recovery of the company or an equivalent decision.

21.21. Slovenia

Neither –

(i) a revocation of transfer instructions,

(ii) the debiting of provisional or erroneous credits;

(iii) insolvency challenges, or

(iv) fraud has (by itself) legal effect on finality of execution of transfer in central registry (see also answer to Q20). There are also no specific rules relating to erroneous entries on accounts.

In cases described above a holder whose dematerialised securities' account was debited upon execution of transfer in central registry may exercise right (claim) against a holder whose dematerialised securities' account was credited in appropriate judicial procedure.

KDD shall (enter and) execute a transfer order ("reversing" the disputed transfer order) only upon final judgment issued on previous holder's claim against new (e. g. "fraudulent") holder.

In cases described above a (strict) liability of holder's registry member or of KDD for damages may arise.

Liability of holder's (KDD) registry member is defined in Art. 33 of ZNVP:

(1) A member of the Clearing and Depository Corporation shall be objectively liable to pay to the holder of the rights which are the subject of entry into the central register any damages caused by his failure to record (enter) or by incorrectly recording (entry) an order.

(2) A member of the Clearing and Depository Corporation shall not be liable to pay damages from the preceding paragraph if he can prove that the cause of his failure to record (enter) or of his incorrect recording (entry) of an order represented an act which was beyond his scope of business and that its consequences could not be anticipated, avoided or averted.

(3) A member of the Clearing and Depository Corporation shall not be liable to pay damages from the first paragraph of this Article if he can prove that the cause of his failure to record (enter) or of his incorrect recording (entry) of an order was an act by the holder of securities or a third party that could not be anticipated nor could its consequences be avoided or reversed.

Liability of KDD is defined in Art. 33 of ZNVP:

(1) The Clearing and Depository Corporation shall be objectively liable to pay to the issuer or holder of the rights which are the subject of entry in the central register any damages caused by its failure to execute an order or by an incorrect execution of an order or by failure to meet any other liabilities stipulated by this Act.

(2) The Clearing and Depository Corporation shall not be liable to pay damages from the preceding paragraph if it is able to prove that the cause of its failure to execute an order or of an incorrect execution of an order or of its failure to meet any other liabilities represented an event which was beyond its scope of business and that its consequences could not be anticipated, avoided or averted.

(3) The Clearing and Depository Corporation shall not be liable to pay damages from the first paragraph of this Article if it is able to prove that the cause of its failure to execute an order or of an incorrect execution of an order or of its failure to meet any other liabilities represented an act by the issuer, holder, member of the Clearing and Depository Corporation or a third party that could not be anticipated nor could its consequences be avoided or reversed.

21.22. Slovakia

If revocation of transfer instruction occurs prior to the moment of irrevocability, it is still in line with the concept of irrevocability of transfer instruction. After the moment of irrevocability, it is technically not possible to revoke transfer instructions in order to finalize the settlement. Moment of irrevocability of transfer instruction does not apply to free of payment transfer, only to delivery versus payment settlement. Provisional transfers are not used when transferring securities. Erroneous transfers cannot be reversed – there must be a new settlement instruction that would initiate reverse transfer to the previously settled instruction. In case of insolvency of a CSD member, transfer instructions are protected in line with Settlement Finality Directive. In case of fraud, final transfers cannot be simply

reversed. The court of justice will issue a resolution on how to handle fraudulent transfers. There are no specific rules relating to erroneous entries on accounts – even erroneous entries cannot be reversed.

21.23. Finland

In the book-entry system, finality prevents (i) effective revocation of transfer instructions and (ii) insolvency *challenges. For (ii)* erroneous *entries on accounts the following provision in Section 21 of the Act on Book-Entry Accounts shall apply to correcting such entries:*

"An account operator may cancel a registration based on clearly incorrect or incomplete information or evidently erroneous application of the law and decide the matter again."

"The correction of a factual error shall require that all those whose rights are effected are heard and that those whose rights are weakened by the correction have consented thereto."

A generally provided exception to finality relates to the fact that fraudulent acts should not be protected by systemic *finality rules. Both Settlement Finality Directive and Collateral Directive provide that the domestic rules on restitution and recovery of bad faith transactions shall not be totally displaced with the directives. Consequently, Finnish law does not protect a party in bad faith and a bankruptcy estate is entitled, within the limits of the Settlement Finality Directive and the Collateral Directive to recover funds that a bankrupt debtor has disposed of in contradiction with the recovery rules. The recovery will, however, take place separately in a judicial process and it will not have an effect on settlement.*

Regarding holdings outside the book-entry system, reference is made *to the response provided above to the previous question.*

21.24. Sweden

There are no provisions in the Financial Instruments Accounts regarding conditional transfers. When the transfer is registered it will be registered as unconditional. Of course, the parties may in the underlying *agreement condition the transfer, but if the transfer is registered it will be registered as unconditional.*

21.25. United Kingdom

21.25.1. Revocation is a matter for the rules of the system (or, absent a system, contract).

21.25.2. Reversal of errors etc is a matter for the rules of the system (or contract).

21.25.3. Insolvency challenges are largely disapplied in relation to a system, but not in relation to a settlement which is not among participants in a designated system. The insolvency challenges which are typically of concern in relation to finality of settlement are:

the rule that authority or agency is automatically revoked upon the opening of insolvency proceedings;

section 127 of the Insolvency Act 1986, which provides that dispositions of property made after the commencement of winding-up are void; and

section 239 of the Insolvency Act 1986, which provides that an act which would put a creditor, surety or guarantor into a better position in the

event of insolvent winding-up can be challenged by a liquidator or administrator in some circumstances.

There are various other rules of insolvency law which may be perceived to threaten finality of settlement and finality of netting processes (which may be relevant to certain settlement methodology).76

21.25.4. Fraud is not subject to finality legislation.

There are no specific rules of law relating to erroneous account entries, though general principles deriving from fiduciary responsibilities, negligence, etc, will apply, and it is possible in some cases for "constructive" trusts to arise (ie for a holder to be found by the court to be holding for some other person who has a better entitlement).

[76] See further *Settlement Finality in the European Union*, (2003) Ed. Vereecken and Nijenhuis, Chapter on Implementation in England, Section 3.1

22. QUESTION NO. 22

ARE THERE SPECIFIC RULES RELATING TO CONDITIONAL TRANSFERS OF RIGHTS, I.E. RULES WHICH SPECIFY THAT TRANSFERS OF SECURITIES ARE CONSIDERED TO BE CONDITIONAL AND WHICH WOULD ALLOW (RE-)DEBITING OR REVERSAL AND, IF SO, UNDER WHAT CIRCUMSTANCES? WHAT POSITION DOES THE RECEIVING INVESTOR HAVE AS A RESULT OF SUCH CREDITS?

22.1. Belgium

Yes, under Belgian law there are specific rules for how to account for transfer for which all conditions have not yet been fulfilled and which are therefore not included in the available securities balance of the account. Article 11 of Royal Decree 62 establishes the principle of the "différé du compte" for current accounts reflecting deposits of financial instruments with securities settlement systems (and their clients/affiliates). Thanks to the différé du compte, conditional commitments which have been recorded in a separate section of the securities account pending fulfilment of the condition before inclusion in the available balance ("disponible du compte") are to be taken into account when establishing the amount of assets held by the account holder with the intermediary, including in case of insolvency of one of the parties. An expected receipt which is still subject to a condition would be recorded in the separate part of the buying participant's account. This greatly facilitates cross-system transfers where the buyer and the seller do not have an account with the same intermediary and settlement therefore needs to happen across depositary accounts of the intermediaries.

22.2. Czech Republic

There are no specific rules relating to conditional transfer of securities in Czech law. General provision of section 553 of Civil Code providing for transfer of any right as a means of warranty of the debt is considered to be applicable to securities. Despite the lack of express legal provision, the ownership to the securities transferred in these circumstances is considered to cease with the settlement of the debt without any act of the debtor being necessary.

22.3. Denmark

Generally, transfers cannot be made registered as conditional. Of course, the transformer and the transferee may in the underlying agreement condition the transfer, but if the transfer is registered it will be registered as unconditional. Consequently, to reverse the securities to the transferor, it will be necessary that the transferee instruct the intermediary to do (which the transferee may be obliged to do under the terms of the underlying contract with the transferor).

As an exception to the general rule, it is explicitly permitted by Securities Trading Act Art. 72(1) that an account manager can condition a sale of a security of the payment of purchase price. The reservation of title is only valid until 5.30 p.m. the day after the scheduled date of settlement of the sale. If the account manager has not before that time exercised its right of return of securities (due to non-payment), the reservation automatically ceases to exist.

22.4. Germany

Regarding the relationship of the ultimate investor with his custodian bank executing his purchase order the following market practice has to be taken into account. Although stock exchange transactions are settled T+2 it is common

practice for the bank executing the order to settle such trade vis-à-vis its customer on the trading day itself, provided that the trade has been executed, as follows: the purchaser's account is debited with the purchase price for value settlement date (T+2) and the securities are credited to his securities account under the implied condition that the bank has received a corresponding credit entry on its securities account from Clearstream Banking AG. Since such credit is effected only on the second trading day following the trading day, the effectiveness of the credit entry on the customer account is postponed. With respect to the seller the same procedure applies the other way around.

22.5. Estonia

No specific rules on the conditional transfer of rights with regard to internal entries made by the owner of the nominee account under the Estonia law.

If the owner of the nominee account maintains the internal records in a foreign state then the law of that state determines the existence and content of the rules regarding conditional transfer of rights.

Greece

Conditional transfers of rights are not possible within DSS and BoGS and, therefore,

there are no rules handling these matters.

22.6. Spain

There are no such rules.

22.7. France

22.7.1. Registered securities

Article L. 431-2 of the M&FC, as modified by Ordinance n° 2005-303 of 31 March 2005 and law n° 2005-811 of July 20, 2005, contemplates that:

Article L. 431-2 of the MFC, as modified by Ordinance n° 2005-303 of 31 March 2005, contemplates that:

"The transfer of ownership in respect of financial instruments referred to in paragraph 1, 2 and 3 of Article L. 211-1-I of the M&FC and any similar financial instrument issued under foreign law, when admitted to the operations of a central depositary or settled through a securities settlement system referred to in Article 330-1 of the M&FC results from book entry in the account of the buyer on the date and under the conditions defined by the Règlement Général of the AMF.

In the event the account of the financial intermediary of the buyer has not been credited with purchased securities on the date and under the conditions defined by the Règlement Général of the AMF, **the trade will be rescinded**, notwithstanding any legislative provision to the contrary, and without prejudice to the rights of the buyer to claim remedies.

When several buyers are affected by such termination, such termination is applied **pro rata** to the respective rights of the affected buyers.

22.7.2. Bearer securities

As the French securities settlement system (i.e. "RGV2") is a designated DvP system and provides for a continuous irrevocable settlement, a trade

cannot be rescinded once settled. The settlement occurs only if cash and securities are available and credit to a securities account with resulting transfer of ownership is expected to occur following settlement only.

Article L. 431-2 of the MFC, as modified by Ordinance n° 2005-303 of 31 March 2005, contemplates that:

"[…] where the securities settlement system provides for a continuous irrevocable settlement, the transfer of ownership occurs under the conditions of the Règlement Général of the AMF. Such transfer occurs to the benefit of the purchaser provided that the purchase price has been paid to the financial intermediary. Such financial intermediary remains the owner as long as the purchaser has not paid the price."

Article L. 431-3 of the MFC provides that :

"In case of delivery of financial instruments (referred to in paragraphs 1, 2 and 3 of Article L. 211-1-I of the MFC (see in this respect (1) above)) against payment (i.e. in a DVP system), the default of delivery or payment when established at the date and under the conditions resulting from the Règlement Général of the AMF or, in the absence thereof, resulting from an agreement entered into between the parties, automatically releases the party who is not in default from any obligation vis-à-vis the party in default, notwithstanding any legislative provision to the contrary.

Where a custodian or a depositary proceeds to the settlement of an operation, by delivery of financial instruments against payment, in taking the place of its failing client, it may benefit from the provisions of this article: it then acquires the full ownership of the financial instruments or cash received from the counterparty.

Please note that the above provisions of Article L. 431-2 will come into effect at the date of publication in the official gazette of the provisions of the AMF General Rules to which article L. 431-2 refer.

22.8. Ireland

There are no specific rules in Irish law relating to conditional transfers. As a matter of general law, a court will not require completion of a conditional bargain while the condition is outstanding.

22.9. Italy

There are no such rules. Transfers of securities may contractually be subject to a condition subsequent or an obligation to retransfer, but this circumstance is not taken into account by the settlement and finality rules. Execution of a retransfer will require the relevant parties to enter into the relevant order of retransfer in the system.

22.10. Cyprus

There are no rules regarding conditional transfer of securities.

22.11. Latvia

Specific rules are applied under the Financial Collateral Law. This law was adopted in order to implement the Financial Collateral Arrangements Directive. There are no any other special rules governing the conditional transfers of securities.

22.12. Lithuania

Specific rules are applied under the Law on Financial Collateral Arrangements which was adopted in order to implement the Financial Collateral Arrangements Directive. There are no other specific rules relating to conditional transfers of rights.

22.13. Luxembourg

Yes, under Luxembourg law there are specific rules for how to account for transfer for which all conditions have not yet been fulfilled and which are therefore not included in the available securities balance of the account. Article 10 of Securities Act establishes the principle of the "différé du compte" for accounts reflecting deposits *of financial instruments with depositories.*

Article 10 of the Securities Act provides: "In case of bankruptcy, liquidation or other collective measure or reorganisation procedure of a depositor of securities or other financial instruments, the creditors of such depositor have a claim on the available balance of securities or other financial instruments booked to the account held in the name and for account of their debtor, after deduction or addition of the securities or other financial instruments which, by virtue of conditional undertakings, undertakings the amount of which is undetermined or of undertakings which have not yet matured, have been entered, as the case may be, into a distinct part of the account on the day of the opening of one of the above procedures and the inclusion of which in the available balance of the account is being deferred until the fulfilment of the condition, the determination of the amount or their maturity."

22.14. Hungary

Conditional transfer as such does not exist. If the parties agree on a condition for the transaction, they instruct the account holder to transfer the securities to a subsidiary account, which are under attachment until the grounds for the attachment are terminated.

22.15. Malta

Maltese law does not regulate this matter specifically. The ability to promise to re-transfer securities upon the happening of an event exists at law and will be enforceable but that would be subject to third party rights acquired on the securities in the meantime.

22.16. Netherlands

22.17. Austria

The Austrian CSD may not engage in conditional transfers of securities. Its General Business Conditions provide only for unconditional transfers (with or without payment).

Other securities account providers may grant a provisional or "conditional" credit entry of securities. This would mean that it is likely that the transaction will be successfully completed, but problems could arise. The account holder has not acquired the right (ownership e.g.) and may only dispose of this security with the consent of the account provider.

See also answers to questions (21) and (20) above.

22.18. Poland

There are no special rules relating to conditional transfers of securities. All securities transfers are in principle final. In the event of a transfer of securities that has taken place in breach of legal regulations, such a transfer would need to be considered as ineffective and incapable of transferring securities rights to the owner of the account onto which these securities were registered following this transfer. Hence it would be possible to consider making a reverse order for these securities onto the account of the seller, as long as the securities transferred in breach of the law remain registered on the account of their "purchaser". A reverse transfer in such cases will not deprive the "purchaser" of ownership in these securities, since it needs to be acknowledged that the "purchaser" never acquired such a right in the first place following the first transfer. The execution of a reverse transfer will not be possible however where the owner of the account on which these securities were registered in breach of the law, performs a further sale to a third party acting in good faith.

22.19. Portugal

No.

22.20. Slovenia

There are no specific rules relating to conditional transfer of right. In other words: conditional transfers can't be entered and executed in central registry of dematerialised securities.

The only exception applies to so call delivery versus payment (DVP) transfer orders. By such order holder of dematerialised securities (e. g. seller) instructs KDD to transfer dematerialised securities that are object of such order to new holder's (e. g. buyer's) dematerialised securities' account upon receipt of payment of specified amount of cash. DVP transfer order is enter in central registry in the same manner as "ordinary" transfer order (see answer to Q17) and has to be confirmed (electronically) by new holder's (buyer's) registry member. Upon confirmation of DVP transfer order KDD "blocks" holder's (seller's) dematerialised securities. Upon receipt of amount of cash specified in DVP transfer order (and deposited on a KDD's fiduciary bank account) KDD:

− executes transfer of ("blocked") dematerialised securities from (debiting) seller's dematerialised securities' account to (crediting) buyer's dematerialised securities' account and

− transfers (deposited) cash to seller's bank account.

22.21. Slovakia

Conditional transfers are not recognized by legislation.

22.22. Finland

Regarding the book-entry system, section 9 of the Act on Book-Entry Accounts provides that:

"A book-entry account may *contain a registration indicating that the book entry has been conveyed, but that, due to a reservation of title or other such factor, the conveyance is not yet final."*

This registration does not *allow debiting or reversal until this registration is removed. The receiving investor's right to the security is restricted with the* conditionality *of the transfer.*

Regarding holdings outside the book-entry system, reference is made to the response provided above to question 20.

22.23. Sweden

For CSD-accounts a first on-time principle is used. A registered right in good faith on the account has priority over a non-registered right and also priority over a later registered right. The rule is setout in the Financial Instruments Accounts Act in Chapter 6 section 2 and 3

Section 2. Where a notice of transfer of a financial instrument is registered, the instrument may not thereafter be attached by the transferor's creditors in respect of rights other than such as were registered at the time the notice was registered.

Section 3. Where the same financial instrument has been transferred to each of several persons, the transfer having priority shall be that in respect of which notice of transfer was registered first.

Even for other securities accounts the decisive factor is time but the relevant factor is the notice to the nominee. It is stated in Chapter 3 section 10 in the Financial Instruments Accounts Act that the provisions of Chapter 6 shall apply to nominee-registered financial instruments.

In the event the nominee is notified that a financial instrument has been transferred or pledged, such shall have the same legal effect as if the transfer or pledge had been registered in a Swedish CSD register.

22.24. United Kingdom

There are no specific rules of law relating to conditional transfers of rights. English law will not force completion of a conditional bargain while the condition is outstanding.

CREST

CREST does not provide for conditional transfers.

23. QUESTION NO. 23

WHAT RULES APPLY WHEN (I) COMPETING CLAIMS ARE ASSERTED AGAINST THE INTERMEDIARY; (II) COMPETING CLAIMS ARE ASSERTED RESPECTIVELY AGAINST THE INTERMEDIARY AND AN UPPER-TIER INTERMEDIARY?

23.1. Belgium

In accordance with Article 11 of the Royal Decree 62, attachment of securities accounts opened with a settlement institution (this rule is not applicable to affiliates in their relation with their clients) is not permissible. In addition, as provided for in article 14 of the Royal Decree 62, the cash paid to the settlement institution as dividend, interest and principal amounts relating to fungible securities may not be attached by the creditors of the settlement institution. More generally, Article 9 of the Act of 28 April 1999 prohibits any attachment or blocking of cash settlement accounts and of payments to be credited on such accounts.

We remain available to elaborate further on this question if it would have to be understood in a cross-border context, outside application of Belgian law.

23.2. Czech Republic

Competing claims to securities credited to securities account can be understood at least in three different meanings.

Contractual claims

The intermediary is not entitled to transfer securities without instruction of account holder even though the claim of the third party to receive securities may be duly evidenced and undisputable. Disposition with securities without the instruction from the owner is possible only in the process of enforcement of judicial decision.

Liens, in rem rights of third person

Liens may be constituted on the basis of contract, law or decision of court or other authorities. Liens are effective against third persons. Liens on contractual basis are effective when recorded in the books of the intermediary or in case of physical securities in safekeeping, when notified to the safekeeper. At the same time only one lien is possible in respect of particular securities. This restriction does not apply to liens constituted directly by law or by judicial decision or by decision of other authority.

Ownership

The investor whose securities are credited to the owner account in CSD or in books of CSD participant is deemed to be the securities owner unless the opposite is proven by law or judicial decision. Since the record of transfer in books of CSD or/and intermediary who has customer account in CSD is required to acquire securities ownership, disputes over securities ownership can arise about invalid underlying contract, fraud or erroneous credit.

23.3. Denmark

It is assumed that by "asserting a claim against the intermediary" it is meant that persons who have a right against the account holder try to enforce their competing rights by "contacting" the intermediary.

23.3.1. In principle, when competing claims are asserted against the intermediary, a first in-time principle is used. However, if the right (pledge or lien) first-

in-time is not perfected by registration on the CSD-account (or with respect to an account that is not a CSD-account: by notification to the intermediary), it has not priority against a right (second-in-time) which was registered on the account (before the right first-in-time). If the right second-in-time was a pledge (security interest) it only gets priority before the unregistered right first-in-time, if the pledgee was acting in good faith (neither knew or ought to have known about the right first-in-time at the time of registration).

23.3.2. The answer to this part of the question is easiest to do by an example: An account holder (A) holds securities through intermediary (I) which holds its customers´ securities through an upper-tier intermediary (e.g. the CSD). A has pledged his account to a pledgee (P1). If I pledges its omnibus account at the CSD to a pledge (P2), the right of P2 (asserting its claim against the upper-tier intermediary) will have priority over the rights of P1 and A (asserting their claims against I), provided P2 was acting in good faith (neither knew or ought to have known that I was not authorised to dispose over the securities at the omnibus account). If I does not pledge the account, but instead becomes subject to insolvency proceedings or the omnibus account is being subject of an individual action (levy) from one of I´s creditors, A and consequently also P1 has priority over (is perfected against) the insolvency administrator/the individual creditor, cf. answer to Question no. 15.

23.4. Germany

In case of competing claims, the intermediary has to check and, if possible, to decide which claim is justified and which is not, including which has priority over the other, as the case may be. If, after review with due care and diligence, it remains uncertain for the intermediary who of the competing persons asserting claims is entitled to such claim, the intermediary is entitled to exercise the right under Section 372 Civil Code to deposit the securities with such public depository (Hinterlegungsstelle) as is designated by the Law governing Deposits (Hinterlegungsordnung) of 10 March 1937. Besides the Lower Courts (Amtsgerichte) the German Central Bank may act as such depository under certain circumstances.

23.5. Estonia

Regarding competing claims against an intermediary, (3) of § 6 of the ECRSA provides that securities credited to a nominee account with regard to the owner of the nominee account and the creditors thereof, are deemed to be the securities of the client and do not form part of the bankruptcy estate of the owner of the nominee account. Subsection (3) provides in addition that measures for securing an action filed against the owner of a nominee account, or other restrictions on the transfer of the assets of the owner of the nominee account, applied in order to secure proceedings conducted with regard to the owner of the nominee account by a state or local government agency, do not extend to securities of third parties held in the nominee account.

23.6. Greece

Due to the fact that, in principle, the investor does not have any right attaching to particular securities in the pool (see above under 10) we assume that the question could be of importance only in case of seizure. From this point of view, regarding BoGS, please refer to (7) b and to (15) b above and, note, that, in principle creditors will be satisfied pro rata. Further, if more than one creditors having an execution title try to

enforce their rights by seizure of investor's assets kept in the intermediary's (Participant's) accounts, Civil Procedure rules on compelling execution apply.

Regarding DSS, due to the fact that securities are registered within the DSS in the investors' name, in accounts kept by Operators, compelling execution is effected through the Operator, who administrates the customers accounts held within the DSS.

In respect of assets held by credit institutions and investment firms acting as customers' custodians, there is not yet a specific rule prohibiting the exercise of creditors' rights on customers' securities held by intermediaries in omnibus accounts. However, article 56 of the draft law, mentioned above under I 1.2, provides the following:

a. Creditors of a credit institution or investment firm (acting as intermediary) are not entitled to seize securities held by the latter in its own name for its customers' account. This rule applies even if the said securities are held with an upper tier intermediary in an omnibus account, in book entry form, in the name of the credit institution or investment firm, for its customers' account, which is evidenced by the books kept by the credit institution or the investment firm.

b. Regarding investment firms, the provision mentioned herein above, applies even in respect of cash accounts held with an upper tier intermediary (credit institution) in the name of the investment firm for the account of the latter's clients.

In case a customer's creditor claims his rights by attempting to enforce seizure on securities held with an intermediary for account of the former's debtor (the intermediary's customer), then Article 24 of Law 2915/2001 applies. This provision prescribes, that such a seizure is only allowed "up to the specific amount required for the creditor's satisfaction". However, this could generate problems due to constant shifts in the value of securities (especially shares) and due to the time that lapses between seizure and compulsory execution, in cases where Law 3301/2004 - implementing into Greek law the Financial Collateral Directive 2002/47/EC - does not apply.

23.7. Spain

There are no rules applicable to this type of conflicts of claims, since the Spanish system protects the registered owner, via the presumption of its legitimate ownership. Thus, these conflicts are not based in discrepancies on the respective priorities of claims, but on proprietary rights that, according to its nature, they are not subject to the priority rules applicable to third parties claims –separatio ex iure dominio–.

Any potential conflict on the validity and accurateness of the inscriptions recorded in the securities accounts have to be solved by parties before courts.

23.8. France

Under circumstances where an accountholder would dispose of the same securities in favour of two different purchasers, the person in whose favour the first transfer has been recorded by a credit to the securities account of such person would prevail. This rule avoids the conflict rule of Article 1138 of the Civil Code which, based on the solo consensu rule, would favour the person in whose favour the first agreement has been concluded.

The securities credited to a securities account maintained by an intermediary are not the property of the intermediary. Therefore, the securities cannot be subject to claims from creditors of the intermediary.

23.9. Ireland

For the purposes of our responses to this question, we have assumed that (a) Irish law is the only law relevant to the issues and (b) the competing claims and priorities referred to above are those claims which are asserted by different parties in respect of a single asset, for example, when one asset is subject to two competing security interests (double dealing) primarily in the context of an insolvency of the intermediary. Where such competing claims exist, the rules of priority will determine the order in which the different claims will be satisfied out of the relevant asset. If the asset is insufficient to meet the competing claims, the order will be of great importance.

Other competing claims which may also be relevant but which we have assumed do not come within the scope of this question, include the following claims which may arise in the context of the transfer of securities and are relevant in the context of our responses to question (24) below: (a) claims from the transferor's liquidator; (b) claims from the issuer of the security; and (c) claims from third parties. These adverse claims are relevant in determining whether, in fact, a valid transfer actually took place in the first instance whereas the competing claims considered for the purposes of this response assume that a valid transfer has been effected but a dispute arises in relation to the priority of interests as between different parties in respect of the securities.

The following is a brief summary of the basic rules governing priority which are complex and a detailed analysis of which is beyond the scope of this questionnaire:

(a) generally, competing interests rank in order of creation so the first in time prevails subject to the following:

(b) a legal interest (where title is transferred) has priority over an equitable interest provided that the legal interest was taken in good faith without notice of the equitable interest;

(c) as between competing equitable interests, the first in time prevails but, if the holder of the second interest, without notice of a first, obtains the legal interest, it obtains priority;

(d) the holder in due course[77] of a negotiable instrument (including the good faith collateral taker) takes it free from any defects in title of the transferor[78] (this should not be relevant to an intangible interest in securities);

(e) the priority of successive assignees of a debt or other chose in action (intangibles) is determined by the order in which notice of assignment is given to the debtor[79] (where security interests are given over interests in securities, this rule is interpreted in practice to require notice to be given to the intermediary in whose account the interest of the collateral giver is recorded, assuming the assets remain there after the security is interest created, but there is no authority on this); and

---

77 Section 29(1) of the Bills of Exchange Act 1882

78 Section 38 of the Bills of Exchange Act 1882

79 This is known as the rule in Dearle v Hall (1828) & Russ 1, [1824-34] A11 ER 28

(f) a fixed charge will take priority over a floating charge and generally, a floating charge will be overridden by a subsequent fixed charge, however, the floating charge will have priority if it prohibited the creation of a subsequent fixed charge and the fixed chargee had notice of that.

These basic rules of priorities are supplemented as follows:

(i) the holder of a legal interest will lose his priority where he is involved in fraud or gross negligence;

(ii) normal priority rules may be displaced by agreement between competing interests;

(iii) there are special rules governing the ability of a secured party, after a grant of a subsequent encumbrance, to take further advances ranking in priority to the later encumbrance; and

(iv) discharge of a security interest automatically promotes junior security interests.

(i) Competing claims asserted against the intermediary.

The appropriate rule to be applied will depend on the legal nature of the asset subject to the competing claim and the legal nature of this asset will, in turn, depend on the role of the intermediary. A determination of the applicable rules must be made on a case by case basis.

(ii) Competing claims against the intermediary and an upper-tier intermediary.

This will depend on the particular circumstances and, in particular, the nature of the interests held by each thereof. Any such analysis would require consideration on a case by case basis and it may be difficult to predict the outcome of litigation that may arise in connection with these matters.

23.10. Italy

23(i) and 24. As discussed in Questions 17 and 19, a transfer of securities only creates the right upon the transferee to receive title to such securities (vendita obbligatoria), whereas transfer of title to such securities occurs at the time when the securities are credited to the transferee's account with the intermediary (**Transferee Account**).

In the event of competing claims against the intermediary, if the dispute arises before the registration of the transferred securities in any Transferee Account or in the absence of such registration due to the intermediary's wrongdoing or breach of the segregation rules, the transferee who first transferred the securities prevails and is entitled to obtain the securities' registration in his Transferee Account pursuant to the principle prior in tempore potior in jure. The trade tickets relating to such securities are eligible to prove which transfer occurred earlier in time.

Conversely, after the securities' registration in one Transferee Account, irrespective of who first obtained transfer of the securities, the transferee obtaining the securities' registration in his Transferee Account obtains good title to the securities if the related transfer contract is valid and the transferee *did not know that the transferor already sold those securities to another investor (bona fide purchase).*

The rules above also apply in the event of the intermediary's insolvency. However, if the liquidator is not able to *attribute title to the relevant securities to a specific investor through an examination of the records of the insolvent intermediary, the investor loses the right to obtain restitution of those securities and participate pro-quota in the distribution of the bankruptcy estate.*

23(ii). Assuming that a competing claimant has the right to direct his claim against the upper-tier intermediary, the upper-tier intermediary would not be able to verify such claimant's position in securities as it holds an omnibus clients account in the name of the intermediary, which is not required to reflect the single positions of such intermediary's clients.

Sources of law:

Article 31 of the Euro Decree;

Articles 22 and 85(4) of the FLCA.

Sources of Doctrine:

Briolini, Articolo 22, in Commentario al Testo Unico della Finanza, directed by Campobasso, Torino, 2002, p. 191;

Briolini, ARTICOLO 89, in Commentario al Testo Unico della Finanza, directed by Campobasso, Torino, 2002, p. 738;

IAMICELI, Unità e separazione dei patrimoni, Padova, 2003, p. 451.

23.11. Cyprus

According to the Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996 Art 6 in the Central Registry of Securities are registered all pledges or court orders or other charges in relation to securities traded on the CSE. According to Art 15 of the same law a pledge *or charge is valid from the moment of registration. Though the law is silent on the priorities of such charges common law imposes a first in time principle. Of course it must also be mentioned that not all such charges are charges in rem and therefore would not influence a possible liquidation of the securities. What rights can now be asserted against an intermediary? According to the Investor's textbook regulation 275/2001 a trustee or custodian is obligated to maintain separately personal and customer accounts. Such person may or may not disclose the fact that he is acting in such a capacity and he may or may not disclose beneficial or ultimate ownership. Furthermore such a person may maintain customer omnibus accounts though in such a case there must be book entries setting out ultimate customer holdings. Pursuant to the same regulations, securities registered in trustee or custodian accounts may not be charged or pledged otherwise than by a court order or according to the terms of the trust. Based on the above elucidation of the law it would be very difficult for a claimant against an intermediary to assert a claim against securities held by that intermediary in a representative capacity. The only question mark remains for securities held in the name of such an intermediary for the account of a third party but not disclosed as such. In such a case a court order may be issued but at the end of the day ownership will have to be clarified prior to the exercise of any competing right.*

As to competing claims asserted against intermediary and upper-tier intermediary it is reiterated that in Cyprus the CSE is a public body which exercised administrative functions. Insolvency is therefore *impossible. In any case any claim*

against such upper-tier intermediary could not result in a claim against securities processed through the CSD as such securities are the ownership of third parties.

23.12. Latvia

(i) There are no special provisions in the FIML on competing claims against the intermediary. As the relations between investor and intermediary are contractual based all claims against him can *be asserted according with Civil Law.*

(ii) There are no special rules in the FIML. LCD as an upper-tier intermediary opens and keeping two accounts for *intermediary: one for intermediary securities and another for intermediary's customers' securities. LCD has no information about identities of investors. Therefore it should be assumed that the competing claim will be asserted against the intermediary.*

23.13. Lithuania

23.13.1. There are no special rules regarding competing claims against an intermediary. The solution of this problem depends whether securities of the same issue are to be deemed jointly or separately owned by investors. Despite the requirement to manage separate personal accounts for each investor at the second-tier, securities of the same issue kept in custody by an intermediary for his clients are credited in omnibus account opened with the CSDL. No identification of separate investors is recorded in omnibus accounts. It is most likely that competing claims could be asserted against the intermediary not in respect of some particular securities credited in some personal account managed by this intermediary, but in respect of some amount of securities of the same issue owned by several investors, however it appeared that there is no equivalent amount of securities credited in the intermediary's omnibus account opened with the CSDL. In case securities were deemed jointly owned by the investors, there are no explicit answer how this issue should be tackled, e.g. whether the investors would be entitled to pro rata part of the securities of the same issue credited in the omnibus account, or whether the priority should be allocated to the investor whose personal securities account had been credited preparatory to other investors' rights. In case securities of the same issue were deemed as separately owned by the investors, i.e. securities would be deemed as assets eligible to be individualized by segregating them from other assets of the same kind by making book entries in personal accounts of the investors, priority right might be allocated to the investor whose personal securities account had been credited preparatory to other investors' rights. Such rule might be applied following general provisions of Art. 6.60(1) of the Civil Code which stipulate that *where a debtor fails to perform the obligation to deliver an* ***individually*** *determined* ***thing*** *to the creditor's ownership or possession thereof by the right of trust or use, the creditor shall have the right to demand that thing to be delivered. This right shall become* ***extinct*** *upon the thing concerned being* ***handed over to another creditor*** *with the same kind of right.* ***Until*** *the thing is* ***not handed over****, the* ***priority*** *to receive it shall* ***belong*** *to the creditor* ***in whose favour the obligation arose first*** *of all, and in the event where it is impossible to be ascertained, to the creditor who was the first to bring the action. The creditor who cannot avail himself of the right to force the performance of the obligation in kind, shall be entitled only to compensation of damages.* Notably the latter provision of the Civil Code is applied in respect of things whereas

securities are deemed intangible assets, but not things (chattels) under Lithuanian law. Therefore application of such rule might be also complicated.

23.13.2. No special rules. Direct contractual relation ship is established between the second-tier intermediary and the investor. Restrictions of ownership rights (e.g. applicable attachments) are registered in special securities accounts opened with the second-tier intermediary. Whereas upper-tier intermediary has no information about identities of investors. Therefore it might be assumed that priority should be allocated to the claim in respect to second-tier intermediary rather than to the upper-tier one. However, it is just general legal interpretation and the solution of particular situations might defer depending on the case.

23.14. Luxembourg

In accordance with Article 15 of the Securities Act, neither an attachment of, nor an enforcement against, nor a conservatory measure with respect to accounts to which securities accounts in the securities settlement system are booked are permitted. In addition, as provided for in Article 16 of the Securities Act, payments of dividends, interest, principal and other amounts due on securities and other financial instruments in the system to the depository principally operating a securities settlement system with which they are held, discharge the issuer. Amounts so paid may not be attached by the creditors of the depository principally operating a securities settlement system.

Outside a securities settlement system, attachments are possible.

In respect of the perfection of collateral, it is to be noted that generally the first to notify the depository of the pledge will take precedence over any subsequent pledgee.

Competing claims against upper-tier intermediaries are not possible.

23.15. Hungary

This question is not regulated, it is solved by the negotiation of the counterparties.

23.16. Malta

This has not arisen to my knowledge however the control of assets regulations state that the law governing the book entry system in which rights are entered shall govern the rights of parties. If Maltese law had to determine these kind of issues it would be a matter of evidence as to who has rights of ownership when there are two entries in the records of an intermediary about the same security.

As the legal rights of an intermediary are a conduit to the rights of the principal of such intermediary, the same issues of evidence will arise for the determination of who has the strongest claim.

As assignments are sometimes used to vest and transfer rights, the rule of assignment that the first to notify the intermediary has the prior right would have some influence, however as here we are dealing with ownership and the assignment of rights is only relative to delivery from the intermediary, that rule may not be fully applicable.

23.17. Netherlands

It is assumed that by “asserting a claim against the intermediary” it is meant that persons who have a right against the account holder try to enforce their competing rights by “contacting” the intermediary.

(i) In principle, when competing claims are asserted against the intermediary, a first in-time principle implies. However, if the right (pledge or lien) first-in-time is not perfected by registration in the custody-account (or with respect to securities not subject to the Securities Giro Administration and Transfer Act: by notification to the intermediary), it has not priority against a right (second-in-time) which was registered in the account (before the right first-in-time). If the right second-in-time was a pledge (security interest) it only gets priority before the unregistered right first-in-time, if the pledgee was acting in good faith (neither knew or ought to have known about the right first-in-time at the time of registration).

(ii) The rights of a pledgee having a right of pledge over the assets of the intermediary with the upper-tier intermediary (securing its claim against the upper-tier intermediary) will have priority over the rights of the investor and a pledgee having a right of pledge on the investor's assets with the intermediary, provided the second pledgee was acting in good faith (neither knew or ought to have known that the intermediary was not authorised to dispose over the securities at the omnibus account).

23.18. Austria

For the purposes of answering this question it is assumed that by "competing claims" it is meant that at least two of the customers of a certain securities account provider claim that certain securities should have been credited to their account or it is claimed that certain securities have been pledged whereas the account holder contests any pledging.

Under Austrian law such issues would have to be settled between the two parties involved in this litigation.

If the other party is not known to the claimant, which will regularly be the case, the claimant would state that the account provider was wrongfully acting or not acting and therefore claimant was prejudiced in its rights.

The same rules would apply in case a securities account holder would have transferred or pledged its securities twice (two different transferees or pledgees). The agreements between the account holder and the transferees/pledgees would be the "titulus" and the question arises which of the agreements has been completed ("erfüllt"). The transaction which was lawfully completed has the better right. In which way it was completed will depend on the circumstances but as a likely example the transferor will have given instructions for one of the two deals. The account provider will have executed these instructions and thereby will have assisted in completion. A claim against the account provider could only be asserted in case he was wrongfully acting or not acting.

The same rules would apply in respect of upper-tier account providers.

23.19. Poland

Owing to the manner in which entries on securities accounts create rights, it should be assumed that in principle there should be no possibility for competing claims to the same securities existing. If entries on the account are correct, the securities remain the property of the owner of that account and the intermediary is not authorised to force him to meet his own obligations to transfer securities to other parties, even if the existence of these obligations raises no doubts. Only in the event of such an entry on the securities account, which would be performed by an intermediary without a firm legal right to do so (e.g. an entry that does not correspond with the document

confirming transaction settlement in KDPW), or following fraud carried out by an intermediary, or, e.g. the intermediary's staff, it should be assumed that the intermediary should take necessary action to rectify the balances on the accounts managed by that intermediary to ensure they correspond with the correct balances that would exist if the intermediary performed entries in accordance with the law. Failure to do this would make the intermediary liable for resulting losses. Of course, if in order to satisfy the demands of parties other than the account owner, the securities are possessed as part of a seizure order, or if a court deciding the validity of claims of other parties orders for instance for the securities to be blocked to secure these claims, the intermediary should conform to the resulting obligations.

In principle it would be impossible for claims directed at the same securities would be asserted respectively against the intermediary and an upper-tier intermediary (i.e. KDPW), because securities exist only as entries made by intermediaries managing securities accounts and having direct relations with investors, and not through entries made by KDPW, except that entries on securities accounts performed by intermediaries should correspond with entries on accounts managed for them in KDPW. KDPW may only be liable for losses borne by the investor following such actions by KDPW which may be considered torts.

23.20. Portugal

There are no rules applicable to this type of conflicts of claims, since the Portuguese system protects the registered owner, via the presumption of its legitimate ownership. Thus, these conflicts are not based in discrepancies on the respective priorities of claims, but on proprietary rights that, according to its nature, they are not subject to the priority rules applicable to third parties claims.

Any potential conflict on the validity and accurateness of the inscriptions recorded in the securities accounts has to be solved by parties before courts.

23.21. Slovenia

Non applicable for "final client level" type of dematerialisation.

23.22. Slovakia

Transfer instructions are processed in an order in which they are delivered to intermediary (first-in-time). If there is a lack of securities, in case of OTC trades, they are not settled; in case of the stock exchange trades, their settlement is postponed by one day (and this repeats until the trade is settled).

If securities are pledged, they cannot be traded on the stock exchange in anonymous trades, but they can be transferred with effective lien in direct or OTC trades.

If there are competing claims against intermediary in case of its bankruptcy, only own assets of intermediary can be used to satisfy claims in an order given by the bankruptcy law. It is strictly forbidden by the Act on Securities and Investment services for intermediary to use assets of intermediary's clients for own benefits.

The same principles also apply to upper-tier intermediary.

23.23. Finland

In the book-entry system, persons acting in bona fide are protected. An acquisition registered in a book entry account as well as a right pertaining to a book entry and registered in the account have priority over an acquisition and right not registered in the account. If mutually *conflicting interests pertain to the same book* entry*, the right first registered in the book entry account has priority over a right registered*

later. Regarding these rules, it is of no relevance whether the claim is asserted to an upper or lower tier intermediary as long as it is recognized in the book-entry system.

Outside the book-entry system, reference is made *to ambiguities explained in response to question 12.*

23.24. Sweden

As mentioned before a transferee which registers his right in good faith has priority over unregistered right and rights registered later. The principles for good faith is set out in the Financial Instruments Account Act. The decisive factor is the knowledge of the person or if the person should have known.

23.25. United Kingdom

23.25.1. The rules of priority

The English rules of priorities are complex and the following is a rough guide.

i. The general rule is that competing interests rank in the order of creation, so that the first in time prevails. This is subject as follows.

ii. Any equitable interest is overridden by a subsequent legal interest acquired in good faith without notice of that prior equitable interest.[80]

iii. The holder in due course[81] of a negotiable instrument (including the good faith collateral taker) takes it free from any defects in title of the transferor.[82] However, the law relating to negotiable instruments predicates a physical instrument, and the general view is that an intangible interest in securities cannot be negotiable instruments.

iv. A floating charge is in general[83] overridden by a subsequent fixed charge. However, a floating charge has priority if it prohibited the creation of subsequent fixed charges and the fixed chargee had actual notice of this.

v. Where the collateral consists of intangible assets, the above general rules are modified by the rule in Dearle v Hall.[84] This provides that where there are successive assignments (or, by extension, other dealings in) a debt (or, by extension, other chose in action) priority is determined by the order in which notice is given to the debtor (or, by extension, other obligor). Where

---

[80] *Macmillan v Bishopsgate (No 3)* [1995] 3 All ER 747, per Millett J at 768.

[81] Bills of Exchange Act 1882, s. 29(1).

[82] See Bills of Exchange Act 1882, s. 38.

[83] The application of this rule can be uncertain in practice. The subsequent fixed chargee will not take priority if it had notice of a negative pledge in the prior floating charge at the time the fixed charge was created.

[84] (1828) 3 Russ 1, [1824 – 34] All ER Rep 28.

security interests are given over interests in securities, the rule in Dearle v Hall is interpreted in practice to require notice to be given to the intermediary in whose account the interest of the collateral giver is recorded.[85]

23.25.2. competing claims asserted against the intermediary

The applicable rule depends of the respective legal natures of the disputed asset and the claims asserted in relation to it. The legal nature of the asset is affected by the role of the intermediary.

(a) If the intermediary maintains positions by way of book entry for investors having a direct legal relationship with the issuer, the investor's interest will generally be legal and not merely equitable. If the dispute is between the client (claiming a legal interest) and a predecessor in title (also claiming a legal interest), rule (i) above will generally apply, so that the predecessor in title would prevail. However, if the disputed asset is a negotiable interest (for example in an immobilisation system, where physical instruments are held by a depositary on a non-fungible basis), rule (iii) above would apply, and the client would prevail.

(b) If securities are held indirectly on a commingled basis, the rights of the client are as discussed in the answer to question 7 above, and equitable rather than legal. In accordance with rule (ii) above, a prior equitable interest can only be overridden by a subsequent legal interest; this might be achieved by transferring the asset out of the indirect holding system into a directly holding system.

(c) If securities are held indirectly on a commingled basis, and if the dispute concerns successive dealings by the client in favour of third parties, and if the assets remain in the account with the intermediary, priorities between them will be determined by the order of notice written to the intermediary, in accordance with rule (v) above, subject as follows.

(d) If securities are held indirectly on a commingled basis, and if the dispute concerns successive dealings by the client in favour of third parties, and if the assets remain in the account with the intermediary, and further if the first interest is a floating charge and the second a fixed charge, the fixed chargee will prevail unless it had actual or constructive notice of the prior interest.

23.25.3. competing claims against the intermediary and an upper tier intermediary

It is assumed that all aspects of the question are governed by English law. For simplicity it is assumed that the upper tier intermediary stands in a direct relationship with the issuer, and therefore holds legal title. Because the relevant intermediary holds on an indirect basis, the interest it holds for clients is taken to be equitable and not legal.

---

[85] This is assuming that the collateral assets remains in an account maintained by such intermediary. If the assets are delivered out of the hands of the intermediary, to the collateral taker or its custodian, no such notice would be required.

The outcome of complex litigation like that considered here is difficult to predict. Applicable principles are considered to be as follows. The asset held for clients by the intermediary is an interest in a custody trust, of which the upper tier intermediary is the trustee and the intermediary the beneficiary. A successful claim against the upper tier intermediary will deplete the assets of this trust, and therefore take automatic priority over any claim asserted against the intermediary.

24. QUESTION NO. 24
WHAT RULES PROTECT A TRANSFEREE ACTING IN GOOD FAITH (THE 'BONA FIDE PURCHASER')? WHAT ARE THE LIMITS OF THE BONA FIDE PROTECTION?

24.1. Belgium

Pursuant to Article 10 of the Royal Decree 62, any bona fide person holding a financial instrument which is or has been submitted to the fungibility system, are not bound to return the financial instrument to the person who claims to have been involuntarily dispossessed thereof before the date on which the said financial instrument was remitted to the settlement institution and who had not, before such date, caused an opposition in respect thereof to be published. There is however no specific rule for the protection of the good faith purchaser receiving book-entry securities (since article 2279 of Civil Code relating to the protection of the bona fide possession is only applicable to moveable tangible assets). It is unclear whether a similar rule would be applicable similarly to the bona fide purchaser of book-entry securities.

24.2. Czech Republic

A transferee who is acting in good faith acquires ownership of securities although the transferor does not have a right to transfer respective securities. In case of doubts, good faith of transferee is presumed (section 96 /3/ of Capital Market Undertaking Act – for dematerialized securities, section 20 of Securities Act – for physical securities).

24.3. Denmark

As mentioned in answer to Question no. 23, a transferee which registers his right in good faith has priority over (takes free of) unregistered rights.

However, if the unregistered right is not a pledge granted by the account holder or a lien against the account holder, but instead a claim (objection) from a previous owner of the securities (e.g. a claim that the transfer to the person, who has now transferred the securities to the transferee, was invalid due to fraud) an exception applies: As mentioned in answer to Question no. 11, the original owner can claim even against a transferee acting in good faith, that the transferor lacked entitlement due to forgery or duress under threat of violence (provided the original owner can prove that it is the same securities that he transferred that have now been transferred to the transferee). If in such (a rare) case, the transferee acting in good faith does not take free of the previous owners claim, the transferee is entitled to full compensation from the CSD (regardless of whether the CSD has acted negligent), cf. Securities Trading Act Art. 80(2).

24.4. Germany

Bona fide protection is governed by Sections 932 to 936 Civil Code. The basic rules are:

Ownership or co-ownership of movables (e.g. securities) which do not belong to the transferor (seller) may be acquired by the transferee unless he is not 'in good faith' (in gutem Glauben) at the moment in time when he would acquire ownership or co-ownership pursuant to Section 929 Civil Code (Section 932 para 1 Civil Code).

The transferee is not acting in good faith if he knows or, as a result of gross negligence, does not know that the movable does not belong to the transferor (seller) Section 932 para 2 Civil Code).

A bona fide acquisition does not occur if the owner has lost the movables due to theft or any other action or event (Section 935 para 1 Civil Code), unless the movable is money or a bearer certificate (Section 935 para 2 Civil Code).

Since ownership/ co-ownership of securities is transferred pursuant to Sections 929 et seq. Civil Code a transferee acting in good faith is protected by Sections 932 to 936 Civil Code. This is still the leading opinion among legal experts in Germany although objections have been raised in recent years with respect to securities held via intermediaries based on the argument that indirect joint possession of securities held in collective safe custody may not be regarded as sufficient basis for a bona fide acquisition. We do not consider such objections to be justified.

24.5. Estonia

No bona fide protection is extended to the object of disposition with regard to internal entries made by the owner of the nominee account under the Estonia law.

Bona fide purchaser is protected only if it has made the acquisition when relying on the Central Register's data (i.e. a purchase at the level of the Central Register).

If the owner of the nominee account maintains the internal records in a foreign state then the law of a foreign state determines the existence and extent of the rules regarding bona fide protection.

24.6. Greece

Regarding securities held within BoGS, Article 7 paragraph 1 of Law 2198/1994, provides that Participants are not entitled to dispose of securities belonging to investors without the latter's consent. However, such lack of consent cannot be invoked as against «bona fide» third parties according to the same provision.

Regarding DSS, there is no provision regarding protection of bona fide purchasers of dematerialized securities. Nevertheless, it could be argued that the constitutive character of securities' registration within the DSS provides satisfactory investors' protection. This argument can further be reinforced from the GCC provision on protection of bona fide acquirers of movables *a non domino* (article 1036 GCC) as well as of bearer securities acquired in a market (article 1039 GCC).

24.7. Spain

According to article 9 of the Securities Markets Law, "a third party purchasing for consideration securities represented by book entry from a person who was legitimately entitled to transfer such securities according to the book entry records shall not be liable for any claim for their recovery unless said third party acted in bad faith or with gross negligence at the time of purchase".

What are the limits of the bona fide protection?

As stated above, the limits of the bona fide protection are: (i) purchase for consideration and (ii) the good faith of the acquirer.

24.8. France

To date, there are no specific rules under French law which protect the bona fide acquirer of securities.

However, in view of the proprietary in rem characterisation of securities (see in this respect (7) and (8) above), it is believed that the book entry in a securities account plays a role similar to the one of Article 2279 of the Civil Code in respect of a bona fide acquirer of a thing.

However, a proposal is under consideration to create a specific rule in the MFC providing that the credit of securities in a securities account protects the bona fide acquirer of securities against adverse claims.

See also in this respect (23) above.

24.9. Ireland

The general rule at common law (Nemo dat quod non habet: the transferor of an asset cannot pass a better title than he himself possesses) strongly favours the preservation of proprietary rights and provides that only in exceptional circumstances should the owner of an asset be deprived of his title to it other than by way of a voluntary act. Under this rule, the predecessor in title generally prevails over the good faith purchaser. This common law rule will apply unless either the rule of the law merchant (see (a) below) or the rule of equity (see (b) below) displaces it.

(a) The law merchant rule favours security of transfer over the security of title approach of the common law nemo dat quod non habet rule. It applies where the disputed asset is a negotiable instrument and in such circumstances will displace the common law rule. As indicated in the response to question (23) above, the good faith purchaser of a negotiable instrument (known as holder in due course) takes the asset free from any prior defects in title, and can (unknowingly) acquire good title from a thief.[86] While a holder in due course (defined in the Bills of Exchange Act 1882 and includes a pledgee and a purchaser) is under no general duty to investigate title,[87] such a holder has a duty to investigate any suspicious circumstances.[88] The holder in due course must have given value, but value is presumed.[89]

It is arguable that, in the context of interests in securities, the law merchant may be of little assistance to a purchaser. Negotiation and the law relating to negotiable instruments requires a form of physical document and, on the basis that interests in securities cannot be a negotiable instrument, the rule in favour of holders in due course cannot apply to purchasers of such interests.

(b) The rule of equity (also known as "equity's darling") applies to enable a bona fide purchaser for value of the legal estate, without notice (actual, constructive or imputed) of an equitable interest in the relevant asset to take free of that equitable interest.

---

[86] Section 38 of the Bills of Exchange Act 1882. However, even the holder in due course may be affected by a forgery. Where the signature on a bill of exchange has been forged or is otherwise of no legal effect, he has no rights against those who were parties to the bill prior to the ineffective signature.

[87] London Joint Stock Bank Ltd v Simmons [1892] AC 201

[88] Jones v Gordon (1877) 2 App Cas 616

[89] Section 27(2) of the Bills of Exchange Act 1882

Importantly, in relation to the potential application of this rule to interests in securities (held through an intermediary, so that the interest is equitable and not legal), an exception to the requirement that the purchaser must obtain the legal interest is where the purchaser obtains an interest giving him a superior claim on the legal interest to that of the holder of the equitable interest. An example of this given in Wylie on Irish Land Law in the context of real property is where, instead of taking a conveyance of legal title, it is conveyed to a trustee to hold it on its behalf. Although there is no modern judicial authority on the application of this to an indirect holding of Irish securities, this may be approach may be taken by the courts to provide additional protection for an acquiring investor whose intermediary holds as trustee. The decision in **Re Ffrench's Estate** (1887) 21 L.R.Ir.283 is an unhelpful precedent, addressing an issue of priorities where a trustee allowed trust funds to get into the hands of an equitable tenant for life, who mixed them with his own funds, purchased a property with the joint funds and created an equitable mortgage on it favour of a bank. The bank's equitable interest was held to have priority over the right of tracing of the beneficiary, which was held to be a "mere equity". The soundness of this decision is questionable. A beneficiary's interest under a trust should be considered to remain an equitable interest and the nature of the remedy used to protect that equitable interest should not be considered to affect the nature of the interest being protected.

24.10. Italy

See 23 above

24.11. Cyprus

As mentioned in Q17, according to Art 10 of the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001 the investor is bound against a bona fide purchaser by the actions of an intermediary within the limits of a trading account which the investor opens for use by the intermediary but this does not affect the investor's right of recourse against the intermediary. The limits of the bona fide protection lie in the unchartered territory of how the limits of a trading account are to be construed and what happens in case of fraud from the outset a the moment when the trading account is opened. Taking account that the rectification provisions set out in Q21 above cover cases of fraud it is foreseeable that fraud affecting the agreement between investor and intermediary may lead to a reversal of a transaction.

24.12. Latvia

There are no special rules in the FIML for protecting the transferee acting in good faith. Generally Civil Law shall be applied to securities transactions. According with the Civil Law if the purchaser did not know that the seller had no right to transfer the property, the purchaser may claim compensation for losses.

24.13. Lithuania

This is a very problematic issue. There are no special rules regarding protection of bona fide purchaser of securities in Lithuanian law. In such cases general rules should be applied. The Civil Code provides general rules regarding protection of bona fide purchaser only in respect of movable and immovable things. Art. 4.95 of the Civil Code provide that the owner shall have the right to vindicate his **thing** from another's illegal possession. Following Art. 4.96(1) of the Civil Code, if

movable thing was acquired for a consideration from a person who had no right to transfer this property, and the acquirer did not and could not know this (acquirer in good faith), the owner shall have the right to vindicate the thing from the acquirer only if the thing belongs to the owner or to a person to whom the owner had given it in possession, if the thing was lost or stolen from one of these, or if it stopped being in their possession against their volition. The owner may vindicate the thing within three years from the moment of the loss of the thing. On the other hand Art. 4.48(1) of the Civil code provide for a mandatory provision that the right of ownership may be transferred to another person only by the owner of a thing or by a person given such powers by the owner. If ownership to securities was transferred in violation of this requirement, the transaction would be null and void and restitution rules would be applicable in respect of the parties of the transaction. However, Art. 1.80(40 of the Civil Code provide that **assets** – object of the transaction that is annulled – may not be claimed from the third person in good faith, except in cases provided for in paragraphs 1, 2 and 3 of Article 4.96 of the Civil Code. Notably, Art. 4.96 of the Civil Code provide for vindication of **things**, but not other types of asset. If the wording interpretation method of the Civil Code was used, the conclusion could be made that securities, as intangible assets, could not be vindicated from the third party – bona fide purchaser. However, there is no special and explicit rule regarding bona fide purchaser of securities in Lithuanian law and that has negative impact on legal certainty.

24.14. Luxembourg

Pursuant to Article 4 of the Law of 3 September 1996 on the involuntary dispossession of bearer securities provides that once a security has been booked to a fungible account, the depository may request the release of a stop order which has been put in place subsequently. Thus, a bona fide owner is protected against a claim of the person who has been involuntarily dispossessed.

Furthermore, Article 9, paragraph 2 recognises and protects the good faith of the pledgee:

"The pledgor is deemed to be the owner of the pledged securities or other financial instruments. The validity of the pledge remains unaffected by the absence of ownership rights of the pledgor on the securities or other financial instruments designated as being pledged, except if the beneficiary of the pledge had been advised, in advance and in writing, of the absence of ownership rights of the pledgor, in each case without prejudice to the liability of the pledgor."

The protection of good faith pledgees has been recognised by national and foreign jurisdictions.

24.15. Hungary

There are no special rules, the general protection outlined in the Civil Code applies.

24.16. Malta

It does not appear that there are any rules which protect a transferee (from an intermediary who is a mandatory) in good faith other than the need for very strong evidence to upset a formally correct acquisition of title from a person who appears to be the owner.

When the intermediary is a trustee, however then there is full protection to a buyer in good faith for value.

24.17. Netherlands

A transferee which registers his right in good faith has priority over (takes free of) unregistered rights. Reference is made to the answer to Question 23.

24.18. Austria

The question implies that the transferee is expecting to receive securities or has good reasons to believe that the securities should become his property (e.g. as a donation or an inheritance). Rules for bona fide acquisition are set up in the General Civil Code, in particular in its sections 367 and 371 and in the Commercial Code in its sections 366 and 367 (see attachments).

Section 367 Civil Code protects the holder ("Besitzer") in good faith ("redlich") of movables in case he acquired in a public auction, from a merchant authorised for this trade or against consideration from somebody to whom the claimant had entrusted them, be it for use, for custody or for any other reason. Special rules are contained in section 371 Civil Code which relate to cash or bearer instruments which may only be claimed in case such circumstances occurred which enable the claimant to prove his property and by which the defendant must have known that he is not authorised to appropriate these things to himself. The securities account provider is holding the securities on behalf of the transferor either directly or through other account providers and the transferor has entrusted the securities to the account provider to be held in custody. Therefore the conditions of section 367 Civil Code will have been partly met (as far as "entrusted" goes, but unlikely as far as good faith goes) whereas proof according to section 371 Civil Code will not be possible in respect of property, but likely in respect of "must have known … not authorised to appropriate".

The rules of section 366 Commercial Code which apply in case a merchant sells or pledges in its business movables, property or a pledge will be acquired even if the seller or pledgor was not owning them except in case the acquirer was not in good faith, i.e. he knew or did not know for gross negligence that the movables did not belong to the seller or pledgor or that he was not authorised by the owner to dispose of these movables. Section 367 Commercial Code excludes good faith of a banker in case the loss of the bearer security has been published in the respective medium (nowadays practically not occurring).

In practice a securities account holder will be grossly negligent in assuming that he is entitled to securities credited to his account without prior actions on his side. In any case, the person responsible for the wrongful action, probably the securities account provider, will become responsible for any damage.

As a final remark one should say that the rules of bona fide acquisition do not seem to have practical importance in case of physical securities which are held by a securities account provider, are represented by global instruments or are dematerialised securities.

24.19. Poland

According to Article 169 of the Polish Civil Code:

"§ 1. If a person not authorised to dispose of movable goods transfers them and releases them to an acquirer, the latter shall acquire title at the moment of obtaining possession, unless he acts in bad faith.

§ 2. However, if a thing that has been lost, stolen or otherwise forfeited by the owner is transferred before the lapse of three years from the moment of the loss, theft or forfeiture, the acquirer may acquire ownership only after the lapse of the

aforementioned three years. This limitation shall not apply to money or bearer documents or things acquired at an official public auction or in executory proceedings."

This rule is an exception to the principle of nemo plus iuris transferre potest quam ipse habet, protecting in this way the acquirer of a movable thing, as long as the acquirer acts in good faith. This acquirer receives title the moment he/she receives it into his/her possession. The rule in § 2 does however limit the rights of the acquirer acting in good faith in instances where the acquired item or good is a thing that has been lost as a result of loss, theft or by other means against the will of their owner, although this limitation does not include in particular bearer documents and so bearer securities as well. This means that if the transferred items or goods are bearer securities, the acquirer receives title to them (and with them all entitlements arising from title) at the moment they pass to the acquirer's possession, and this irrespective of whether and how they were lost by their owner, on condition, of course that the acquirer remains acting in good faith. The limitation described in § 2 may though be applied to securities other than bearer securities, an in particular to registered securities. The issue of whether Article 169 of the Civil Code is applicable to securities which do not exist in physical form is however a debatable point. It is even difficult to call dematerialised securities as items sui generis, in the way that money and securities in traditional form are. The doctrine may find adherents calling for Article 169 of the Polish Civil Code to apply analogously to dematerialised securities, based on the lack of rules in statutory provisions clearly regulating this point, and on the need to extend those holding title to dematerialised securities the same form of protection as the holders of securities in document form.

24.20. Portugal

Under Portuguese law, the rights of the purchaser of securities acting in good faith are not affected by the unlawfulness of the seller, provided the acquisition has been carried out according to the applicable rules of conveyance (article 58. CVM).

The before mentioned provision is also applicable to the holder of any rights of guarantee on securities.

24.21. Slovenia

A transferee acting in good faith is protected by provisions of Art. 16 of ZNVP:

(1) The rights arising from dematerialised securities may be exercised only by their legal holders.

(2) Legal holders of dematerialised securities shall be the persons on whose behalf dematerialised securities are entered in the central register unless the entry of dematerialised securities on behalf of such persons is carried out without an order given by the issuer, the previous holders or without any other valid legal instrument.

(3) Notwithstanding the provision of the preceding paragraph, persons acting in good faith on behalf of which dematerialised securities were entered in the central register shall become legal holders and obtain the rights arising from dematerialised securities even if the entry of dematerialised securities on behalf of such persons is carried out without an order given by the issuer, the previous holders or without any other valid legal instrument.

(4) If dematerialised securities are entered on behalf of individuals on the basis of transactions closed on the organised market, buyers of such securities shall be deemed bona fide persons for the purpose of the previous paragraph.«

24.22. Slovakia

Unless a separate law stipulates otherwise, a buyer shall become owner of the security even if seller did not have the right to transfer security, except for if the buyer knew or must have known at the time of transfer that seller did not have the right to transfer security. Only the court of justice can give a ruling on breach of acting in good faith.

24.23. Finland

See response to questions 21 and 23.

24.24. Sweden

There is no lien in favour of the intermediary. An intermediary that wishes to obtain a security interest must (just as other creditors) have an agreement with the account holder.

Upper-tier attachment

For CSD *Accounts the questions of upper-tier intermediary lacks relevance. If the securities are held on a CSD Nominee Account the question about upper-tier attachment may arise concerning the records of the intermediary (other securities account).*

24.25. United Kingdom

Under English law, there are three alternative rules governing disputes between a good faith purchaser and a person with a prior interest. Their application depends on the legal nature of the disputed asset.

24.25.1. The common law rule applies unless it is displaced by either (ii) or (iii) below. It is nemo dat quod non habet, or no-one can give that which she does not have. Under this rule, the predecessor in title generally prevails over the good faith purchaser.

24.25.2. The law merchant rule applies where the disputed asset is a negotiable instrument. As indicated in the answer to question 23 above, the good faith purchaser of a negotiable instrument (known as holder in due course) takes the asset free from any prior defects in title, and can (unknowingly) acquire good title from a thief.[90] While a holder in due course is under no general duty to investigate title,[91] she has a duty to investigate any suspicious circumstances.[92] The holder in due course must have given value, but value is presumed.[93]

24.25.3. The rule of equity applies where the original owners was deprived of, and seeks to recover, an equitable interest in the disputed asset. In order to prevail, purchaser must show that she is the good faith purchaser of a legal interest for value without actual, constructive or imputed notice of the prior interest.

Because in an indirect holding system the interests of clients and collateral takers are equitable and intangible, rules (i) and (ii) are less likely to apply than (iii). The good faith purchaser may find it hard to satisfy the requirement for a legal interest, unless it transfers the asset out of the indirect holding system, and places itself in a direct, legal relationship with the issuer.

---

[90] See section 38 of the Bills of Exchange Act 1882. However, even the holder in due course may be affected a forgery.

[91] See *London Joint Stock Bank Ltd v Simmons* [1892] AC 201.

[92] *Jones v Gordon* (1877) 2 App Cas 616

[93] Section 27(2) of the Bills of Exchange Act.

25. QUESTION NO. 25
ARE THERE RULES REGARDING LIENS OF INTERMEDIARIES OVER INVESTOR'S SECURITIES ACCOUNTS? IF SO, WHAT ARE THEY AND ARE THEY MANDATORY?

25.1. Belgium

Article 31 of the law of August 2, 2002 on the supervision of financial markets states that "the institutions in charge of a securities clearing or settlement system benefit from a lien on all securities [and cash] booked in an account and on all other rights of a participant in such clearing system entered into an account, as own assets. Such lien secures the claims of such institutions against a participant in the clearing or settlement system, arising out of the clearing or the settlement of subscriptions to securities or transactions on securities." This lien benefits to Euroclear Bank as operator of the Euroclear System but also, for example, to National Bank of Belgium in its capacity of operator of the settlement system for Belgian dematerialised public-debt securities or to Clearnet, for its exposures in relation to the clearing of trades on Euronext Brussels. National Bank of Belgium also benefits from another statutory lien (established by its organic law) to secure any credit extensions granted to banks, in the course of monetary policy transactions that may also include intraday credit for the smooth functionning of payment system operating on a real-time gross settlement basis (part of the Target System).The statutory lien laid down in the above-mentioned Article 31 of Belgian 2002 law also applies to banks and investment firms to secure their securities transactions carried out on behalf of their customers, over the securities held by such financial institutions as a result of such transactions.

The "Article 31 lien" is also applicable by law to assets of clients of systems' participants to the extent however that the lien will only secure then the exposures of the intermediary (operator of a system) deriving from transactions settled on behalf of clients of the Participant (whoever they may be, even though the clients in question are not those whose assets are recorded in the Participant's account) but not for Participant's own transactions. However, for example, Euroclear Bank has explicitly waived the application of such statutory lien with respect to assets of clients (of its Participants) which have been expressly identified as customer assets in the System, as laid down in Section 10. 1 (b) of the Euroclear Operating Procedures.[94]

25.2. Czech Republic

Safekeeper of securities has under provision of section 34 /10/ of Securities Act a lien to deposited securities for the claims connected to contract of safekeeping. Since CSD is not considered to be a safekeeper as regards dematerialized securities, only other intermediaries who have a customer account in CSD benefit from the lien.

---

[94] *"b) Without prejudice to the generality of the provisions of the Terms and Conditions, and without prejudice to any collateral arrangements entered into between Euroclear Bank acting in its separate banking capacity and any Participant, Euroclear Bank hereby waives the statutory lien referred to in the sub-section (a) over the balance of all securities credited to a Securities Clearance Account which has been separately and expressly identified in writing by the Participant as an account to which solely customer securities are credited, except where the Participant has agreed in writing that the lien should continue to apply to the customer securities credited to such Securities Clearance Account."*

25.3. Denmark

There is no lien in favour of the intermediary. An intermediary that wishes to obtain a security interest must (just as other creditors) have an agreement with the account holder.

25.4. Germany

A general statutory lien of a custodian over investors' security holdings does not exist under German Law. However, according to Section 4 Paragraph 1 Securities Deposit Act there may be a lien between CSD and custodian or among custodians on all securities it holds in custody for the other custodian limited to fees (e.g. custody or settlement fees) and other claims related to these securities (e.g. if any, the purchase price).

Furthermore, a bank executing a purchase order of a customer has a statutory lien over the securities purchased and held in safe custody for its claim of the respective purchase price (Section 397 Commercial Code).

Any other lien has to be created by contractual pledge. Such pledge is created by Section 14 of the General Business Conditions of the German Banks respectively by Section 21 of the General Business Conditions of the German Savings Associations (Sparkassen). Such pledge secures all claims which the bank / savings association may have against the customer provided they result from their banking business relationship.

25.5. Estonia

No specific rules regarding liens of intermediaries over investor's securities accounts exist under the Estonia law. Creating a lien against an investor's securities account in cases where necessary contractual arrangements and consent of the investor support that is permissible under the Estonian law.

When the owner of the nominee account maintains the internal records in a foreign state then the law of that foreign state determines the rules regarding the lien against the investor's securities account.

25.6. Greece

Article 6 para 2 of Law 2396/1996 prohibits explicitly credit institutions and investment firms from using customers' securities held with these intermediaries for their own account. This provision is jus cogens and it could there from be derived that even liens of intermediaries on investors' securities accounts are not allowed.

Exemptions from this provision are set out a) in specific provisions of Securities Legislation, providing for securities through the Derivatives Market of ATHEX, if customer's consensus has been provided, and b) in Law 3301/2004, implementing in to Greek Law the Financial Collateral Directive 2002/47/EC.

25.7. Spain

There are no special rules in general terms. However, the right of retention (ius retentionis) foreseen in the Spanish Civil Code for the deposit agreement is applicable. An intermediary may renounce to exercise such right under the general rules (if such renounce does not prejudice third parties and is not contrary to "public order").

The rules governing the constitution and effects of limited rights in rem and other encumbrances in securities held by means of book-entry will be also applicable to liens created voluntarily by the owner of the securities in favour of the intermediary. This means that any encumbrance of lien created as a security interest in favour of the intermediary has to be annotated in the securities account, or otherwise would not be effective against third parties.

25.8. France

25.8.1. Principle

French legislation has vested with the AMF the authority to set the conditions governing the exercice of the activity of custody of securities. The AMF General Rules contain rules governing the duties of a custodian ("teneur de compte conservateur") of securities. the custodian is under the duty :

to maintain and preserve the securities;

not to use securities recorded in its books in the name of its customer without the consent of such customer;

transfer ownership over such securities without accountholder's consent;

to redeliver those securities, if need be.

Intermediaries – custodians ("teneur de compte conservateur") and clearing houses benefit under various circumstances either from a statutory lien ("privilege") mandatory title retention provision or a contractual security interest.

25.8.2. In respect of a DVP System:

Article L. 431-2 of the MFC, as modified by Ordinance n° 2005-303 of 31 March 2005[95], contemplates that:

"[…] where the securities settlement system provides for a continuous irrevocable settlement, the transfer of ownership occurs under the conditions of the Règlement Général of the AMF. Such transfer occurs to the benefit of the purchaser provided that the purchase price has been paid to the financial intermediary. **Such financial intermediary remains the owner as long as the purchaser has not paid the price**."

25.8.3. In respect of custodian intermediaries

(i.) Statutory lien

Article L. 431-3 of the MFC provides that :

"[…]Where a custodian or a depositary proceeds to the settlement of an operation, by delivery of financial instruments against payment, in taking the place of its failing client, it may benefit from the provisions of this article: it then acquires the full property of the financial instruments or cash received from the counterparty.

[95] To become effective upon promulgation of the AMF Rule.

The provisions of the insolvency code do not prevent enforcement of that provision nor are creditors of the defaulting customer entitled to exercise rights over those assets.

(ii.) Contractual pledge

Article L. 431 of the MFC governs the creation of a pledge over a financial instruments ("nantissement de compte d'instruments financiers"). Such pledge secures financial obligations identified in the pledge declaration. Under a pledge over a financial instruments account, title to securities standing to the credit of a financial instruments account remains vested with the pledgor. A pledge over a financial instruments account transfers only "possession" of financial instruments standing to the credit of the account, and grants a right of retention to the pledgee.

25.8.4. In respect of clearing houses

Article L. 442-6 (which applies in respect of clearing houses) of the MFC provides that:

"Whatever their nature, the deposits made by clients to the benefit of investment services providers […] for purposes of hedging or guaranteeing the positions taken on a financial instruments market, are transferred by way of outright transfer of title to the provider,[…]for the payment of, on the one hand, the debit balance resulting from the automatic liquidation of the positions and, on the other hand, any other sum due to the provider.

No creditor of a participant in a clearing house, of an investment service provider referred to above or of the clearing house to the extent applicable may assert a right over those deposits even pursuant to title I or II of book VI of the Commercial Code" (governing insolvency proceedings).

According to Article L. 442-7 of the MFC, the provisions of the second paragraph of Article L. 442-6 of the MFC (see above) apply also to any creditor of an account party, any representative of an account party or of a participant in a clearing house as well as to a judicial administrator. The above restrictions also apply to insolvency proceedings conducted abroad.

25.8.5. More generally

In case of insufficiency of cover, the intermediary may require the client to reduce its positions or to increase the amount of the cover in the account opened in the books of the intermediary. Failing posting of such additional cover such intermediary may liquidate, totally or partially, the positions of the client.

The above rights so recognised to the intermediary are related to the statutory lien (privilege) granted by Article 132-2 of the French Commercial Code to agents ("commissionnaires"). A "commissionaire" is an intermediary who acts in his own name but for the account of a client. A "commissionaire" has a statutory lien (privilege) over the value of the goods purchased or sold for the account of his client.

25.9. Ireland

A bank has a common law lien over 'securities' belonging to a customer which have come into the possession of the bank in the course of its banking business. A common law lien is the right to retain possession of property of another until a

claim is satisfied. It cannot arise unless the liener has actual or constructive possession. An intermediary may be a bank and include in the custody agreement a lien provision. However, the banker's lien does not extend to (interests in) securities held by banks as a custodian/intermediary for clients and custody liens do not confer automatic rights of sale. It is customary, therefore, to include an express power of sale and application of the proceeds of sale to the discharge of obligations in a custody agreement. This can raise difficulties as this power of sale may be considered to comprise a floating charge (or, in certain circumstances, a fixed charge over book debts) which could be void for want of registration. If an intermediary has funded the purchase of assets by the investor it is arguable based on English authority that, prior to being reimbursed by the investor, the intermediary enjoys an automatic beneficial interest in those assets which may operate by way of security.[96]

25.10. Italy

A contractual lien may be created over the securities registered in the investor's account to the benefit of its intermediary in the form of regular pledge (that is, without transfer of title). The Italian Financial Collateral Law has substantially reduced the formalities required to perfect a regular pledge and foreclose on the underlying collateral.

Following the opening of an investor's insolvency proceeding and upon failure by the liquidator to comply with the investor funding obligations assumed by operation of law, "in derogation of the applicable provisions, the participant [that is, an intermediary participating in the system] may foreclose for the capital, interest and expenses on […] the price of the financial instruments received in consideration for the orders executed in good faith and with respect to which it has retention right as security for its claims, less ..." (emphasis added).

(A) The intermediary may also retain non-proprietary incoming securities, since Italian law does not distinguish between the proprietary securities of the investor and the securities of the investor's clients; (B) the participant may sell the retained securities "in derogation of the applicable provisions", that is, without complying with specific formalities; and (C) such right of immediate foreclosure is not subordinated to any higher-ranking claims.

Sources of law:

Articles 2, 3 and 4 of the Italian Financial Collateral Law;

Article 6 of the Finality Law;

Article 53 of Royal Decree No. 267 of 16 March 1942.

25.11. Cyprus

Pursuant to Art 11 of the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001 a trustee has a paramount right over the price on the sale of a security over the rights of the investor's creditors. Pursuant to the same article, in case of death or insolvency of the investor the trustee, within 30 days, may sell such number of securities as are required to cover the cost of financing their purchase. It is noted that these provisions cover the case of a third

---

[96] Chinn v Collins [1981] AC 533

party which has financed the purchase of the securities in the first place and which is entitled to be appointed as a trustee. Such a trustee has the right to open depository and trading account in relation thereto.

25.12. Latvia

Without a customer's consent, an investment brokerage firm and a credit institution shall be prohibited from executing transactions in the financial instruments belonging to or held by that customer.

According to the FIML the lien on the securities that belong to investor and in respect of which book entries are made in securities accounts with an intermediary and those that belong to intermediary and in respect of which book entries are made in financial instruments accounts with the LCD only pursuant to an order by a bailiff in due course of the Law on Civil Process.

25.13. Lithuania

There is no pure concept of lien in Lithuanian law. However, there is a retention right provided in the Civil Code which concept is contiguous to lien. The scope of the retention right is very broad and statutory regulation of the retention right is rather vague. The person may exercise the retention right only in case he/she is a possessor of the **thing** to be detained and he/she has some due (matured) right against the owner of the thing. The retention right expires when the owner of the detained thing implements his/hers due obligations to the person exercising retention right, or when the owner presents other collateral, or when the person exercising the retention right loses the possession of the property, except for the cases of the lease or pledge of the detained thing upon the consent of the person exercising retention right. Also it is very important the right of retention is not be dividable, therefore the possessor may retain the entire thing until his/her claim is fully satisfied. Also, the creditor is entitled to all incomes from the detained thing in order to pay the amounts due to the creditor by the debtor in priority to the other creditors. As it is indicated above, the retention right is applicable only in respect of the things. The Civil Code does not provide for retention right in respect of intangible assets. However, Art. 1.101(10) of the Civil Code stipulate that for keeping of dematerialized securities the rules of custody shall be applicable. These rules have to be applicable by analogy since custody provisions of the Civil Code are tailor for regulation of custody of things, but not intangibles. Art. 6.840(5) of the Civil Code explicitly provides for retention right of custodian in respect of the thing in custody as long as the custodian is paid full amount of the remuneration by the depositor, unless otherwise is stipulated in the agreement between the parties. According to the aforementioned, intermediaries have a right of retention over investors' securities. However, the rules are not mandatory, since the parties may exclude retention right in the agreement.

25.14. Luxembourg

Pursuant to Article 17 of the Securities Act, "depositories principally operating a securities settlement system enjoy the benefit of a privilege on all securities, claims, monies and other rights booked to accounts held with them, in connection with the system they operate, as own assets of a participant, to the extent that such assets are free of any collateral security notified to or accepted by the depository. This privilege secures the claims of such depositories against a participant to their securities settlement system which have arisen in connection with the clearing or settlement of transactions on securities or other financial instruments or of the netting of such transactions."

Article 17 is to be completed by the draft law n° 5152 on as follows:

"…effected by the participant for its own account or for account of its clients, including claims arisen under loans or advances.

The same depositories equally enjoy the benefit of a privilege on all securities, claims, moneys and other rights booked to "client assets" accounts of their participants with them. This privilege exclusively secures the claims of such depositories against the participant arisen in connection with the settlement or liquidation of transactions on securities or other financial instruments or of the netting of such transactions effected by the participant for account of its clients, including claims arisen under loans or advances."

Ordinary depositories do not benefit of any lien with exception to the general right of retention which a depository enjoys pursuant to Article 1948 of the Civil Code until payment of all claims in direct relation with the deposit.

25.15. Hungary

Liens of CSDs are regulated in the Capital Market Act, but rules for liens of intermediaries are outlined only in their General Terms and Conditions.

25.16. Malta

Yes. The civil code gives a privilege for certain dues while the ISA (control of assets) regulations eliminates such right unless expressly provided for in the agreement between the parties. See regulation 3(3).

25.17. Netherlands

Please note that as matter of statutory law, the intermediary has a right of retention on the investor securities, securing all claims of the intermediary against the investor. Furthermore, the intermediary is entitled to set-off claims it has vis-à-vis the investor against any claims of the investor against the intermediary, provided that the statutory requirements for set-off are met. Reference is made to the answer to Question 13. Please note that it is standard practice for banks that act as an intermediary to also stipulate that the investor grants them a right of pledge on all the assets to which the investor is now entitled or to which it may be entitled in the future. Furthermore, it is standard practice to contractually extend the statutory right of set-off and the statutory right of retention so as to secure both present and future claims of the intermediary against the investor whether or not due and payable or contingent.

25.18. Austria

General business conditions of Austrian credit institutions (securities account providers) provide generally for a lien of the credit institution over any movables and rights which are held by the credit institution. In case of securities the lien will extend over interest and dividend coupons (e.g. no 49 of the GBC of the largest Austrian bank). The lien secures all claims of the credit institution against the customer arising from its business relation including joint accounts and even if the claims are conditional, under time limitation or not due as yet. There are limits to the lien to allow ordinary business of the customer.

Section 9 para 1 Deposit Act rules that securities held in accordance with the Act may be subject to retention. In case the depositary entrusts the securities to another depositary (the second or upper-tier depositary/account provider) the latter may exercise a lien or a retention right only for such claims which have arisen in

relation to these securities or in case there is an agreement between the depositaries. These rules do not apply in case the depositary informed the other depositary for the individual transaction expressly and in writing that he himself (and not his customers) is owner of the securities. In case the other depositary is abroad the first depositary must inform the foreign depositary expressly and in writing that the securities are not its property.

The depositary's lien and retention right are not mandatory and may be changed by agreement. The same is true for the statutory lien which the depositary (credit institution/securities account provider) owns in case it was acting as commissary when buying securities for the customer (section 397 Commercial Code).

The Austrian CSD expressly waived in section 19 para 2 of its GBC the statutory retention right provided in the Deposit Act (it is internationally considered to be an impediment to business relations if a retention right (lien) would be exercisable over the securities by a CSD).

25.19. Poland

According to Article 773 of the Polish Civil Code, which applies to legal relations between an intermediary and investor, to secure claims for the commission and the claims for the reimbursement of the expenses and advance payment given to the investor, as well for securing all other dues resulting from investor's orders, the intermediary shall have the statutory right of making a pledge on the securities, which are the object of these orders.

25.20. Portugal

A general statutory lien of a Financial Intermediary over investors' securities accounts does not exist. Pledges and other encumbrances over the securities can be created for the benefit of the Financial Intermediary, in general terms. This means that any encumbrance or lien created as a security interest in favour of the Financial Intermediary has to be registered in the securities account, or otherwise will not be effective against third parties.

The right of retention (ius retentionis) provided for in the Portuguese Civil Code is applicable.

25.21. Slovenia

General rules of acquisition of a lien (as a third party right) of holder's registry member (i. e. intermediary, beneficiary to lien) over dematerialised securities entered in the investor's (client) dematerialised securities' account apply (see answer to Q7).

25.22. Slovakia

The Act covers only relationship between investor and intermediary (stock broker).

25.23. Finland

In the book-entry system, section 9 of the mandatory Act on Book-Entry Accounts provides that:

The entries registered in a book-entry account may include the pledge of a book entry, with the exception of a business facilities mortgage, as well as a levy of execution and a protective measure pertaining to the book entries. Such registration shall pertain to the book-entry account in to. Where such registration is to

apply only to certain book entries registered in the book-entry account, a separate account shall be opened for them.

The registration of a right, restriction or measure referred to in paragraph 1 above shall indicate the commitment or other basis that the book entries are liable for, as well as whether the yield or capital on the book entry is to be paid to the account holder or pledge holder or the competent execution authority. Unless otherwise agreed upon or stipulated, a dividend or interest or other such yield shall be paid to the account holder, and amortization, subscription and warrant rights, the right to a new share and other payments to be deemed as capital of the book entries pledged shall be paid to the pledge holder or the competent execution authority.

A secondary pledge may not be registered on a right of pledge registered in a book-entry account. Nor may a right of pledge for another receivable be registered on a pledged book entry.

Regarding holdings outside the book-entry system, reference is made to the ambiguities explained under 12.

25.24. Sweden

Normally an investor could not enforce rights against an upper-tier intermediary.

25.25. United Kingdom

A lien arises by operation of law in favour of a banker over its clients' documents of title in respect of sums due. However, not all intermediaries are bankers, and in an electronic environment may be unlikely that the intermediary has possession of documents of title.

If the intermediary has funded the purchase of client assets, prior to the reimbursement of the purchase price it arguably enjoys an automatic beneficial interest in those assets, which may operate by way of security.[97]

It is customary for intermediaries to take contractual security from investors. This is often expressed as a lien with a power of sale in the event of default. However, under English law a common law lien is based on possession, and therefore predicates physical assets. Such liens may be likely to take effect as floating charges.

---

[97] *Chinn v Collins* [1981] AC 533.

26. QUESTION NO. 26

CAN THE INVESTOR ENFORCE RIGHTS AGAINST AN UPPER-TIER INTERMEDIARY (I) NORMALLY, (II) IN THE EVENT OF BREACH OF DUTY BY THE INTERMEDIARY, (III) IN THE EVENT OF BREACH OF DUTY BY THE UPPER-TIER INTERMEDIARY, (IV) IF THE EVENT IS INSOLVENCY RATHER THAN BREACH OF DUTY?

26.1. Belgium

Under the Royal Decree, accountholders with a designated settlement institution do not have direct rights against subcustodians appointed by such settlement institution either in the case of breach of duty or insolvency, subject however to the direct right of recovery of clients of an intermediary against the settlement institution or the other affiliate holding a clients position in the name of the intermediary as explained in answer 15 above.

26.2. Czech Republic

Although the investor whose dematerialized securities are credited to the owner account in the books intermediary is considered to be the owner of securities credited to customers account of that intermediary in CSD, there are no legal provision governing enforcement of investors rights against CSD (or other upper tier intermediary). In the event of insolvency of participant in CSD, securities credited to the customers account should be distributed to the investors as it implies from the application of securities safekeeping contract pursuant to section 34 of Securities Act. The distribution of securities, however, is effected by insolvency administrator rather than the investor or upper tier intermediary. As a conclusion, there are no legal provisions providing for enforcement of investors rights against upper tier intermediary.

26.3. Denmark

Only in the event of breach by the intermediary and intermediary insolvency, the investor can enforce rights against an upper-tier intermediary, cf. answer to Question no. 12.

26.4. Germany

As already described in our answers to Questions 6 and 25, the general presumption of Section 4 para 1 Securities Deposit Act is – again - the foundation of the protection of securities deposited by the investor (or his custodian bank) with a (another) custodian bank or CSD.

Furthermore, it has to be distinguished:

26.4.1. Normally:

Under Sections 7 and 8 Securities Deposit Act, the investor has in principle a statutory claim for return of securities held in collective safe custody in Germany against all upper-tier custodian bank in the custody chain. There is a common legal understanding that this claim for return is suspended as long as the investor may direct the respective claim successfully against the first-tier custodian bank he has his securities account with.

26.4.2. in the event of breach of duty by the intermediary:

A breach of duty is understood as the refusal of the first-tier custodian bank to follow a claim of return of the investor. In this case, the investor

may address his claim for return to an upper-tier custodian bank or the CSD pursuant to Sections 7, 8 Securities Deposit Act.

26.4.3. in the event of breach of duty by the upper-tier intermediary:

The answer to (ii) applies mutatis mutandis.

26.4.4. in case of insolvency of the intermediary / upper-tier intermediary:

See answer to Question 15.

26.5. Estonia

Regarding situation (i) - as far as the Estonian law is concerned there are no rules that would provide the investor with the right to instruct an upper-tier intermediary (e.g. Estonian CSD) in making entries on the account that is opened in the name of the intermediary.

However an intermediary is obliged to follow investor's instructions. That means that the intermediary should execute the investor's instruction, which requires the number of securities corresponding to the internal records to be transferred from the nominee account to the account instructed by the investor.

What was stated in respect of situation (i) applies also to the situations (ii) – (iv) as well. Investor can instruct only the intermediary to whom it has direct contractual relations.

26.6. Greece

Normally, there is no direct contractual relationship between the investor and the upper-tier intermediary. Therefore, in such a case, only in case of malfeasance (unerlaubte Handlung) could the investor claim his rights against an upper-tier intermediary. In case of a clause between the investor and the intermediary, providing that the latter has no liability towards the investor for the actions of the upper-tier intermediary, the investor could have the right to force the intermediary to claim the latter's rights from the upper-tier intermediary. In the event of a breach of duty of the intermediary, the investor has no recourse against the upper-tier intermediary.

In event of upper-tier intermediary's insolvency, where the latter is registered in Greece being a credit institution or an investment firm, intermediary's – and, in extension, investor's – rights are protected according to article 6 para. 3 of Law 2396/1996, as explained above.

26.7. Spain

26.7.1. As explained before, the feature of the upper-tier intermediary does not exist in the Spanish registry system. However, as a general rule the account holder (registered owner) may enforce its property right erga omnes.

26.7.2. Should a breach of duty by the intermediary maintaining the account produce any damage to the investor, the responsibility regime outlined in answer to question 16 above will be applicable (full restitution obligation save in the case that the damage is produced due to the exclusive fault of the account holder, and if possible, obligation to return in kind).

26.7.3. N/A

26.7.4. In the case of insolvency, the investor's protection is based on the characterisation of his rights as proprietary rights in securities. Another piece of evidence of such nature is the immediate transfer of securities procedure at the CNMV's request described in the answer to question 15 above.

26.8. France

No.

An investor does not have any relationship with an upper-tier intermediary (see paragraph 16 above).

See also in this respect (27) below.

26.9. Ireland

(i) On the assumption that the investor does not have a direct relationship with the upper-tier intermediary, it will only be able to enforce rights through the intermediary and not directly against the upper-tier intermediary. The position may be different if the upper-tier intermediary has expressly accepted any enforceable obligations to the investor under the arrangements, which would be unlikely.

(ii) Not in itself. The investors would be entitled to pursue remedies against the lower tier intermediary for breach of contract or breach of trust, as the case may be and, in the case of a breach of trust, the investor may take a tracing action to recover any trust property.

(iii) Likewise, not in itself. In principle, those rights would be enforced by the lower-tier intermediary.

(iv) Not in itself. In principle, those rights would be enforced by the lower-tier intermediary.

26.10. Italy

The investor does not have a contractual relationship with the upper-tier intermediary, but only with the intermediary with whom its securities are registered in book-entry form. The investor contractually allows the intermediary to sub-register such securities with the upper-tier intermediary and hence only such intermediary creates a contractual relationship with the upper-tier intermediary. The upper-tier intermediary may directly be liable vis-à-vis the investor in tort but not in contract. Such conclusion applies also in the event of breach of duty or insolvency of the intermediary.

At the level of the upper-tier intermediary the securities of the same type pertaining to different investors of the same (lower-tier) intermediary are commingled in one account held by such (lower-tier) intermediary on behalf of all its clients. Accordingly, one investor alleging the (lower-tier) intermediary's violation of securities registration rules may not verify its position through the registrations of the upper-tier intermediary, since such registrations are not required to evidence such single position.

26.11. Cyprus

I recall my previous answer under Q15. The question of insolvency does not arise and questions of breach of duty are dealt with under administrative law. No contract is entered into with the CSE as the relations between the CSE and the participants are governed by the relevant laws and regulations. It is conceivable that certain decisions would be deemed to fall outside the ambit of administrative law and within the ambit of tort.

26.12. Latvia

26.12.1. investors have contractual relations with an intermediary who provides investment service for investors. For this reason investor can not enforce the rights against an LCD;

26.12.2. in the event when an intermediary breach its duties investor can claim against him in due course of the Law on Civil Process. Investors have a right to make a complaint to the Financial and Capital Market Commission.

26.12.3. only in the events when LCD directly provides the service for investor, e.g. the investor whose securities are registered in the Initial Register administered by LCD.

26.12.4. the LCD is unlikely to become insolvent. But if theoretically it happens then the investor can claim against due to course of the law regulating the procedure of insolvency.

26.13. Lithuania

26.13.1. In normal cases no.

26.13.2. No.

26.13.3. Yes, under civil liability in tort rules.

26.13.4. Yes, if upper-tier intermediary has taken over management of personal securities accounts from the second-tier intermediary.

26.14. Luxembourg

Under the Securities Act, accountholders do not have direct rights against upper-tier intermediaries appointed by their intermediary, subject however to the direct right of recovery of clients of such intermediary in event of the latter's insolvency (cf answer to question 15).

26.15. Hungary

No, only by means of trial under the Civil Code.

26.16. Malta

No ,

26.16.1. until such time as the investor is recorded in the books of the upper tier intermediary he has no rights against such intermediary and in any case in situations like the CSD there is no right to enforce other than simply being recorded as the owner in place of an intermediary who refuses to transfer/deliver the assets to the investor. In that case the upper tier intermediary will take not of any court order to that effect and enter any changes necessary in its books.

26.16.2. in the event of breach of duty by the intermediary,

Same as (i) above

26.16.3. in the event of breach of duty by the upper-tier intermediary,

There are no direct contractual rights against the upper tier intermediary and so breach of duty claims cannot be made until such time as assets have been delivered to the investor and the upper tier intermediary notified with such change.

Under trust law there could be a remedy based on tracing when the upper tier intermediary co-operates in a breach of trust with the intermediary. A beneficiary of the trust (an investor) can recoup assets from such their party in good faith for the benefit of the trust (with the intermediary) and the investors also has a contractual and trust remedy for the removal of the intermediary as trustee. (see article 33, trusts and trustees act on constructive trusts)

26.16.4. if the event is insolvency rather than breach of duty?

Same as (i) above

26.17. Netherlands

Generally speaking, the answer is "no". It has been argued in legal literature, however, that this should be possible on the basis of Sections 7:420 and 421 of the Netherlands Civil Code - which provisions relate to agency contracts - in the event of a breach of duty by the intermediary and in the event of insolvency of the intermediary.

26.18. Austria

The basis for the answer is the fact that the investor is owner of the securities and made an agreement for the administration of the securities with the account provider. In case the account provider holds the securities with another account provider, e.g. the CSD, there is the statutory presumption of section 9 Deposit Act that the second account provider, the "upper-tier" account provider, knows that the securities are not owned by the first securities account provider ("Fremdvermutung"). Therefore the first question is, what are the rights to be enforced by the investor. In case these are rights of an obligatory nature, stemming in particular from the administration agreement, the rights may only be enforced against the account provider with whom the investor has a contract. This would not hinder that the investor attaches rights which the first account provider contractually owns against the upper-tier account provider, e.g. in respect of payments of interest or dividends. In case the rights are absolute ("in rem") like property, the investor may enforce them directly against anybody who infringes his property rights, also against an upper-tier account provider. The exercise of these absolute rights might be contractually restricted.

Therefore (i) normally an investor would not be prompted to enforce its property rights against an upper-tier account provider, (ii) in the event of breach of duty by the first account provider, the investor might be prompted, depending on the nature of the breach of duty by the first account provider, to enforce its property rights against the upper-tier account provider, (iii) in the event of breach of duty by the upper-tier account provider the investor might be prompted to enforce its property rights against the upper-tier account provider in case the first account provider does not protect the interests of the investor in accordance with the account agreement and (iv) in the event of insolvency of the upper-tier account provider the investor will enforce its property rights in case the first account provider did not protect its interests, i.e. has not asked for delivery of the securities owned by the investor (see also answers to question (15)).

26.19. Poland

(26) The investor may only direct claims to KDPW as an upper-tier intermediary when particular actions or omissions of KDPW which led to the losses for the investor (direct or indirect losses) may be considered a civil wrong (*tort*). KDPW owes no duty of care to the investor. Neither does KDPW take responsibility for the non-performance, or improper performance by intermediaries managing securities accounts of their obligations to investors.

26.20. Portugal

26.20.1. As explained before, the concept of "upper-tier intermediary" is not recognised under Portuguese Law. However, as a general rule, the account holder (registered owner) may enforce its property right erga omnes.

26.20.2. If a breach of duty by the financial intermediary maintaining the account produces any damages to the investor, the intermediary must indemnify those damages. The fault of the financial intermediary is presumed when the damage caused is within the scope of contractual or pre-contractual relations and, in any event, when originated by the violation of the information duties.

26.20.3. If that has been contractually agreed and in what concerns the services that such "upper-tier intermediary" is to render to the investor, the answer is yes, generally speaking.

26.20.4. In case of insolvency, the investor's protection is based on the characterisation of his rights as proprietary rights over the securities credited to his/her Individual Ownership Account. As mentioned before, "sub-accounts" held with "upper-tier intermediaries" are not Individual Ownership Accounts.

26.21. Slovenia

Non applicable for "final client level" type of dematerialisation.

26.22. Slovakia

The Act on securities and Investment services does not cover the rights of investor against upper-tier intermediary in any case.

26.23. Finland

Regarding book-entry system, the question of upper-tier intermediary lacks relevance. If the securities are held on a custodial nominee account, the question of

upper-tier intermediaries may arise. However, not even in this case is it likely that enforcing against upper-tier intermediary would be accepted.

Outside the book-entry system, the rights of the investor depend to a significant extent on the contract, but generally it can be assumed that the investor does not have a right to enforce against an upper tier intermediary.

26.24. Sweden

A creditor of an investor cannot claim securities from an upper-tier intermediary. The insolvency administrator of an investor could claim securities from an upper-tier intermediary to the same extent as the investor could.

26.25. United Kingdom

26.25.1. The normal arrangement is for the intermediary to contract as principal with both the investor and the upper tier intermediary. It would therefore be unusual for the investor to be party to the contract with an upper tier intermediary. While in theory contractual rights might arise in favour of the investor against an upper tier intermediary in the absence of privity under the Contracts (Rights of Third Parties) Act 1999, a standard well drafted contract between the upper tier intermediary and the intermediary would exclude this. On this basis, the investor cannot normally enforce rights against an upper tier intermediary as a contractual matter.

As explained above (see in particular the response to question 7), the general view is that an investor having securities credited to a securities account with an intermediary has equitable co-ownership rights, in common with other account holders to whose accounts securities of the same description are credited at a given time, in the segregated pool of underlying securities or interests in securities held by the intermediary. Where the investor's direct intermediary itself holds interests with an upper tier intermediary, the lower tier intermediary's pool of segregated securities is itself regarded as a trust asset (namely an equitable co-ownership interest in the segregated pool of securities of the relevant description held by the upper tier intermediary). In that case, the rights of investors holding accounts with the lower tier intermediary will be regarded as arising under a sub-trust. Under general principles of English trust law, beneficiaries under a sub-trust are not in general entitled to have recourse to the head trustee, but must look exclusively to their own trustee (in this case the lower tier intermediary). This position is likely in practice to be reinforced by express provisions in the custody or other account agreements, both that between the upper tier and lower tier intermediary and those between the lower tier intermediary and its account holders.

26.25.2. The fact that the (lower tier) intermediary was in breach of its contractual obligations, or its duties as trustee, would not of itself entitle its account holders to enforce rights directly against the upper tier intermediary. The account holders would be entitled, individually or collectively, to pursue remedies against the lower tier intermediary for breach of contract or breach of trust. Such remedies would include applying to the court for an order compelling the lower tier intermediary to remedy the relevant breaches of duty. The court would also have power, in particular in a case where the lower tier intermediary was unable or unwilling to perform its

duties as trustee, to appoint another person as trustee, either in addition or in substitution for the lower tier intermediary[98] . If the lower tier intermediary's breaches of duty included the misappropriation or threatened misappropriation of securities forming part of the pool of customer securities, the court would also have the power to grant to account holders, or some of them as representative beneficiaries, a protective order freezing securities accounts of the lower tier intermediary with the upper tier intermediary to the extent that the court was satisfied that such an order was necessary to prevent a breach or further breach of the fiduciary obligations of the lower tier intermediary.

26.25.3. The fact that the upper tier intermediary was in breach of its contractual obligations, or its duties as trustee, would likewise not of itself entitle account holders of the lower tier intermediary to enforce their rights directly against the upper tier intermediary. In principle, those rights would be enforced by the lower tier intermediary. The position if the lower tier intermediary were unable or unwilling to do so is explained in (ii) above.

If the upper tier intermediary were an authorized person under the Financial Services and Markets Act 2000 and its breaches of duty included breaches of certain rules made by the Financial Services Authority under that Act[99], a private investor (broadly, an individual) who had suffered loss as a result of the breach could bring a claim for breach of statutory duty under section 150 of that Act. It is likely that such a claim would be brought by the lower tier intermediary or by another person appointed to act on behalf of the account holders collectively[100].

26.25.4. The power of the court to appoint a new trustee[101] extends to cases where the original trustee (in this case the lower tier intermediary) is insolvent. As explained in (ii) above, the court would also have power to grant a protective order freezing the securities accounts of the lower tier intermediary with the upper tier intermediary pending such an appointment and the determination of the respective rights of the account holders.

---

[98] Trustee Act 1925, section 41.

[99] The rules that are so actionable include the rules in the FSA's Client Asset Sourcebook (CASS), as to which see the responses to earlier questions, in particular question 4.

[100] See section 150(3) of the Financial Services and Markets Act 2000 and article 6(3)(c) of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (S.I. 2001 No. 2256).

[101] See (ii) above and the preceding footnote.

27. QUESTION NO. 27

IN WHAT CIRCUMSTANCES CAN (I) A CREDITOR AND (II) A NON-CREDITOR THIRD PARTY (SUCH AS A LIQUIDATOR) OF THE INVESTOR CLAIM SECURITIES FROM AN UPPER-TIER INTERMEDIARY?

27.1. Belgium

To the extent that the upper-tier intermediary is a settlement institution under the Royal Decree regime, neither creditors or non-creditor third parties can claim securities. In accordance with Article 11 of the Royal Decree, attachment of securities accounts opened with a settlement institution is not permissible.

27.2. Czech Republic

Neither creditor nor non-creditor third party of the investor may claim securities from upper tier intermediary.

27.3. Denmark

A creditor of an investor cannot claim securities from an upper-tier intermediary. The insolvency administrator of an *investor can claim from the upper-tier intermediary to the same extent as the investor could. See answer to Question no. 26.*

27.4. Germany

A creditor needs a court order (gerichtliche Verfügung) or an executory title by a court (Vollstreckungstitel) to claim securities from an upper-tier custodian bank or CSD.

A liquidator would need documents to proof that the first-tier custodian bank holds the respective securities in the name of the bankrupt investor. Any other non-creditor would need an executory title by a court.

27.5. Estonia

The enforcement of the creditor's or third party's rights against investor's assets held via a nominee account is to be conducted under the general legal framework. There are no rules providing exhaustive list of circumstances.

Certainly the first pre-condition is that the creditor or non-creditor third party has obtained the information about the fact that a particular set of the debtor's (investor's) assets is held with the intermediary.

27.6. Greece

If an investor's creditor has an enforceable court decision against the investor, which constitutes an executing title, than he can enforce it against any person having at his disposal assets of the investor. Thus, only in the case that the upper-tier intermediary has assets of the investor registered in its records, in investor's name, can the investor's creditor claim the investor's securities. Otherwise, such a claim is not possible.

Same as above applies in respect of an investor's liquidator.

27.7. Spain

In no case. The execution of third parties rights against the investor has to be made in the securities account in which the securities are credited in the name of the investor, i.e. the securities account held by the intermediary in the name of the investor.

27.8. France

A creditor or a non-creditor third party of the investor cannot claim securities from an upper-tier intermediary.

Under the French indirect holding system, only the holder of the securities account opened in the books of the intermediary which is at the end of the chain and is acting for own account is the owner of the securities held with that intermediary (subject to the rights of the registered intermediary – *intermédiaire inscrit* – and the beneficial owner for whom he is acting - see above). The other securities accounts in the chain of upper tier intermediaries are only mirrors of such a securities account. It should be noted that the book entries recorded in the books of an upper-tier intermediary do not reflect per se the rights over the relevant securities (see also paragraph 16 above).

(See also question 25 above).

27.9. Ireland

On the basis of our response to (26), neither a creditor nor a non-creditor third party should be in a position to make such a claim.

27.10. Italy

See Question (26).

27.11. Cyprus

This extremely remote given the legal framework governing the CSE.

27.12. Latvia

According to the FIML (Article 125) the securities that belong to investor and in respect of which book entries are made in securities accounts with an intermediary shall be recovered in due course of the Law on Civil Process where there is an order by a bailiff, in the cases prescribed by tax laws where there is a request by tax administration bodies, or in the cases prescribed by other laws where there is a request by the State Revenue Service.

27.13. Lithuania

Enforcement rules regarding attachment of securities held in the indirect system are rather vague. It is stipulated in Art. 728(1) of the Code of Civil Procedure that in case of execution from securities, the bailiff shall submit to intermediaries, the issuers and the CSDL a demand to check whether there is any security held in the name of the debtor and to withhold realization of securities up to due amount. The respective target persons withhold realization of securities up to due amount and notify the bailiff thereabout. The bailiff then imposes an attachment on the respective securities. The problem is that there is no identification of particular investors in omnibus accounts opened with the CSDL by the second-tier intermediaries. The CSDL could only withhold operation in the SSS in respect of such securities if the participants orders had not been placed on the SSS before receipt of the bailiff's demand with the CSDL.

In case the upper-tier intermediary has taken over the management of personal securities accounts from the second-tier intermediary a creditor could claim securities under general civil enforcement order. A liquidator of the company would act in the name of the issuer therefore his orders to the upper-tier

intermediary, that has taken over the management of personal securities accounts, would be deemed as orders of the investor.

27.14. Luxembourg

Unless in the event of insolvency of the intermediary, an investor and a fortiori a creditor and a non-creditor third party of the investor, may not claim any securities from an upper-tier intermediary.

Furthermore, to the extent that the upper-tier intermediary is a securities settlement system and in accordance with Article 15 of the Securities Act, attachments of securities accounts opened with a settlement institution are not permitted.

27.15. Hungary

Only if there is a court order regarding that specific claim.

27.16. Malta

The rights of a creditor of the investor are the same as those of the investor and so the above rules apply.

27.17. Netherlands

A creditor of an investor cannot claim securities from an upper-tier intermediary. The insolvency administrator of an investor can claim from the upper-tier intermediary to the same extent as the investor could. Reference is made to the answer to Question no. 26.

27.18. Austria

27.18.1. A creditor of the investor would need an enforcement title (usually a court decision), be it an order or a judgment (execution title), and needs to prove that among the securities held by the upper-tier account provider are those of the investor that are subject of the court decision.

27.18.2. A non-creditor third party would need a court decision as in (i) establishing the rights of the non-creditor third party to the securities of the investor. The liquidator of the investor "steps into the shoes" of the investor and must prove that he is the duly appointed liquidator of the investor.

27.19. Poland

Neither a creditor of the investor, nor any other person (including a liquidator of the investor) may claim securities from an upper-tier intermediary.

27.20. Portugal

Under no circumstances. The execution of third parties rights against the investor has to be made in the securities account in which the securities are credited in the name of the investor, i.e. the securities account held by the intermediary in the name of the investor.

27.21. Slovenia

Non applicable for “final client level” type of dematerialisation.

27.22. Slovakia

If investor goes bankrupt, liquidator pays-off the debts of investor in an order set by law. Only claims of owners of securities can be satisfied. Usually, neither creditor nor any other third party can claim securities from an upper-tier intermediary.

27.23. Finland

Regarding book-entry system, the question of upper-tier intermediary lacks relevance. If the securities are held on a custodial nominee account, the question of upper-tier intermediaries may arise. However, not even in this case is it likely that claiming from an upper-tier intermediary would be approved. The same applies to assessment on holdings outside the book-entry system.

27.24. Sweden

A creditor or a non-creditor third party of the intermediary could only claim securities held by an upper-tier intermediary if the securities belong to the intermediary.

27.25. United Kingdom

It is hard to predict with complete certainty the outcome of complex litigation. However, in relation to attachment proceedings by a judgment creditor seeking to enforce a judgment against an investor holding securities with a lower tier intermediary, it is the general view that, since an attachment can extend only to the property and rights of the judgment debtor concerned and in this case the rights of the judgment debtor (the investor) can be enforced only against the lower tier intermediary, an order having the effect of attaching the securities[102] can likewise be made only against the lower tier intermediary. The same principle would apply in respect of any other person seeking to enforce rights of an investor, for example a liquidator or trustee in bankruptcy of the investor or an insurer of the investor with rights of subrogation in respect of insurable losses caused for example by the negligence of the upper-tier intermediary. The position will therefore be as discussed in the response to question 26 above.

[102] The remedies in principle available are likely to be 9a) a charging order and 9b) in the case of a pre-trial or interim application, a freezing injunction.

28. QUESTION NO. 28
IN WHAT CIRCUMSTANCES CAN (I) A CREDITOR AND (II) A NON-CREDITOR THIRD PARTY (SUCH AS A LIQUIDATOR) OF THE INTERMEDIARY CLAIM SECURITIES FROM AN UPPER-TIER INTERMEDIARY?

28.1. Belgium

Same as above under Question 27.

28.2. Czech Republic

Creditor of the intermediary may not claim securities from an upper-tier intermediary. Insolvency administrator of the insolvent intermediary can claim securities form upper-tier intermediary on behalf of the investors.

28.3. Denmark

A creditor of an intermediary can only claim securities (or rather levy in the securities) held at the upper-tier intermediary, if these securities are owned by the intermediary (and are not merely maintained for investors). Similarly, in general an insolvency administrator of the intermediary can only claim securities held at the upper-tier intermediary, if these securities are owned by the intermediary (and are not merely maintained for investors). The administrator may authorized to claim to securities maintained for investors from the upper-tier intermediary, but only in order to deliver the securities to the investors.

28.4. Germany

In principle, this is not possible with regard to securities belonging to customers of the custodian bank as intermediary due to the strict provisions of Section 4 para. 1 Securities Deposit Act.

28.5. Estonia

There are no such circumstances (3) of § 6 of the ECRSA provides expressis verbis that securities credited to a nominee account with regard to the owner of the nominee account and the creditors thereof, are deemed to be the securities of the client and they do not form part of the bankruptcy estate of the owner of the nominee account. Subsection (3) provides in addition that measures for securing an action filed against the owner of a nominee account, or other restrictions on transfer of the assets of the owner of the nominee account, applied in order to secure proceedings conducted with regard to the owner of the nominee account by a state or local government agency, do not extend to securities of third parties held in the nominee account.

28.6. Greece

Where the intermediary has fulfilled its obligation to declare to the upper-tier intermediary that the assets held with the latter belong to the intermediary's customers (investors) and the upper-tier intermediary has so recorded – i.e. that the intermediary's account, kept with it, is held on the intermediary's customers account – the execution of an enforceable court decision against the intermediary is not possible under such circumstances. If the upper-tier intermediary does not argue to the intermediary's creditor execution that the intermediary's account held with it is a customers' account, the latter has the right to demand stay of execution proceedings.

Intermediary's liquidator has no right to claim from the upper-tier intermediary securities belonging to the intermediary's customers, unless such a claim is made in order to hand out those securities to their beneficiary (customer/investor).

28.7. Spain

In no case. The registered owner's rights in securities will never be affected by claims against the intermediary.

28.8. France

See in this respect (27) above.

A creditor of the intermediary may only claim securities held for own account and credited to a securities account maintained with an upper- tier intermediary. Those securities would need to be segregated from securities held for the account of customers.

It should be further noted that pursuant to Article L. 211-4-1 of the M&FC, securities recorded in the current accounts of the central depositary cannot be subject to any attachment. Article L. 211-4-1 further provides that securities recorded in an account opened in the name of an authorised financial intermediary with another authorised financial intermediary cannot be subject to any attachment when such securities are owed by its clients.

28.9. Ireland

The circumstances in which an attachment order would be granted are outside the ambit of these responses. However, such an order would only be granted if the securities were identifiably held on trust by the upper-tier intermediary for the intermediary so that the intermediary itself could have claimed them or, potentially, if the non-creditor third party had obtained rights superior to those of the intermediary.

28.10. Italy

Italian segregation rules prohibit without exceptions the creditors and the liquidator of the intermediary from claiming securities pertaining to such intermediary's investors from the upper-tier intermediary.

Sources of Law:

Articles 22 and 36(6) of the FLCA.

Shortfalls

28.11. Cyprus

Same as under Q27

28.12. Latvia

According to the FIML (Article 125) the securities that belong to intermediary and in respect of which book entries are made in securities accounts with the LCD shall be recovered in due course of the Law on Civil Process where there is an order by a bailiff, in the cases prescribed by tax laws where there is a request by tax administration bodies, or in the cases prescribed by other laws where there is a request by the State Revenue Service.

28.13. Lithuania

Intermediaries, holding securities in custody under the Lithuanian law, are not legal owners of securities credited in omnibus accounts opened with the CSDL. Therefore creditors of intermediary cannot claim securities held by the intermediary for his clients with the upper-tier intermediary. The same rule would be applicable to the liquidator of the intermediary. In certain cases liquidator of the intermediary, acting as a representative of the latter, could only instruct the CSDL to transfer securities held for his clients to management of other intermediaries or may be obliged to coordinate with the CSDL in other ways. E.g. when the agreement between the account manager and the issuer concerning management of the issuer's securities accounts is terminated and the issuer fails to pass over such authorization to another account manager, the account manager who has terminated the agreement must provide to the CSDL all information from the personal and other securities accounts managed under the above-mentioned agreement. Or in the case when the account manager loses the status of the CSDL participant, the client, who has made an agreement with this account manager on his securities accounting, shall have the right to terminate the agreement. Upon termination of the agreement on these grounds, the account managers must transfer management of the personal securities accounts to another account manager indicated by the client, and in the event the latter has not indicated such an account manager - to the issuer's agent.

28.14. Luxembourg

A creditor and a non-creditor third party of the intermediary can only ascertain their rights on securities which are part of the own assets of the intermediary. Thus, they are not entitled to claim securities from an upper-tier intermediary which represent client assets.

28.15. Hungary

Only if there is a court order regarding that specific claim.

28.16. Malta

The creditors of the intermediary have no rights over the assets of customers and so they cannot make any claim on investors assets at all

A liquidator on the other hand has a duty to ensure that all investor assets are immediately transferred to another intermediary or as the customer or the regulatory authority in Malta requests. (see regulation 5(3), ISA (control of assets) regulations and article 18(7) of the trusts and trustee act)

28.17. Netherlands

Reference is made to the answer to Question 6.

28.18. Austria

Neither a creditor nor a non-creditor third party or the liquidator (receiver) of the first account provider have any right to claim securities of an investor (who is the owner of the securities) from an upper-tier account provider.

In case of liquidation of the first account provider the investors will arrange to have their securities held by another "first-tier" account provider. The securities would stay with the upper-tier account provider but would be held in the name of this newly engaged account provider. This is the consequence of ownership and its protection by the special rule of section 9 Deposit Act presuming that securities of a "first-tier" account provider are owned by its customers.

28.19. Poland

Neither a creditor of the intermediary, nor any other person (including a liquidator of the intermediary) may claim securities from an upper-tier intermediary. This conclusion results from the fact that even securities which are owned by the intermediary exist only in the form of book-entries in securities accounts maintained by the intermediary for itself, and not in those of an upper-tier intermediary.

28.20. Portugal

Under no circumstances. The registered owner's rights in securities will never be affected by claims against the intermediary.

28.21. Slovenia

Non applicable for "final client level" type of dematerialisation.

28.22. Slovakia

Both creditor and non-creditor of the intermediary cannot claim securities of intermediary's clients. Client securities are segregated from intermediary's own securities in separate accounts. This segregation is requested by law.

28.23. Finland

The possibility of (i) creditor or (ii) a non-creditor third party of the intermediary to assert claims in respect of securities against an upper-tier intermediary shall be assessed in the light of the custody agreement. Generally, the Finnish insolvency law provides that the bankruptcy estate takes the place of the bankrupt debtor and that the liquidator/administrator has the right to act under the control of the estate and the creditors. Whether or not the estate is able to claim the securities to be included in the estate successfully depends on the level of segregation of the securities and whether the securities of the investors can be clearly identified from the securities of the bankrupt debtor.

28.24. Sweden

There are no explicit rules regarding shortfalls in the Financial Instruments Account. The Swedish book-entry system makes it possible regarding CSD Accounts to control and trace every transfer in the accounts and thereby prevent shortfalls. The risk of shortfalls for an investor is also reduced by the possibility to hold an Owners' account directly with the CSD. The CSD is as mentioned before supervised by Finansinspektionen. Furthermore a CSD is most unlikely to become insolvent.

The strict liability in the Financial Instruments Accounts Act for the CSD and the account-operators protects the investor. The main principle is set forth in chapter 7, section 2.

Section 2. A central securities depository shall be liable for losses incurred by the owner of a financial instrument as a consequence of incorrect or misleading information in a Swedish CSD register or, in other cases, as a consequence of an error in conjunction with the establishment or maintenance of such a register or, where the error was committed by an account operator, the operator shall be liable. Liability shall not arise, however, where the central securities depository or account operator proves that the error was due to circumstances beyond its control, and the consequences of which could not reasonably have been avoided or overcome. Indirect losses shall be compensated only where such are due to the negligence of

the central securities depository or the account operator. The aforementioned provision with respect to the owner of a financial instrument shall also apply to pledgees and persons to whose benefit restrictions on the right of disposition apply.

The first paragraph shall apply mutatis mutandis where the error is committed by a party retained by the central securities depository or an account operator.

A central securities depository shall be jointly and severally liable with an account operator for any damage attributable to the account operator. However, the liability of the central securities depository shall be limited to SEK five million for each event of loss. The central securities depository shall be entitled to compensation from the account operator for any amounts paid by the securities depository as a consequence of the joint and several liabilities.

As mentioned above there are no explicit rules regarding shortfalls in Sweden. Regarding other securities accounts the intermediary should always maintain the holdings on the level of its records. In case of shortfall the intermediary shall refill the position or – if it is not possible to refill – compensate the investor.

If the intermediary becomes insolvent the outcome of the shortfall is difficult to predict. The court could apply some kind of loss sharing rule. Another solution could be that the court could try to decide (find) whose securities are missing. It is important to note that the situation will apply when there is a discrepancy/shortfall between the numbers of securities held in a CSD Nominee Account and the records of the intermediary holding the account for investors.

The rules of Directive 97/9/EC on investor-compensation schemes are disregarded in this analysis.

28.25. United Kingdom

Such a person could normally only claim securities in circumstances where the intermediary could have claimed them for its own benefit. If the securities are held by the intermediary for investors, they would be protected from the claims of the intermediary or persons claiming through it by the trust law principle that trust assets are not available to creditors of the trustee). As explained in paragraph (iii) of the answer to question 24 above, a person who in good faith, for value and without actual, constructive or imputed notice of the rights of the (lower tier) intermediary's account holders obtained a legal interest in securities held by the lower tier intermediary with the upper tier intermediary could in principle claim rights superior to those of the lower tier intermediary's account holders. It is however unclear to what extent, if at all, this could occur. If the securities accounts held with the upper tier intermediary were governed by English law, they would represent equitable rights in respect of which such a person could not obtain a legal interest. If the upper tier intermediary's accounts were governed by another law, it is likely that that other law would determine whether the rights of such a creditor or non-creditor third party would be recognized in competition with or in priority to those of the lower tier intermediary's account holders.

29. QUESTION NO. 29

IS A SHORTFALL (I.E. THE INTERMEDIARY'S POSITION WITH AN UPPER-TIER INTERMEDIARY IS LESS THAN THE AGGREGATE RECORDED POSITION OF THE INTERMEDIARY'S ACCOUNT-HOLDERS) AT THE LEVEL OF THE INTERMEDIARY POSSIBLE?

29.1. Belgium

Yes short-falls may happen, due e.g. to forged physical certificates, erroneous credits, or reversals at an upper-tier intermediary.

What rules are applied to resolve the resulting difference of positions? Are there any rules on how to handle such a situation from an accounting point of view (for example through an interim securities debit balance)?

There are no specific rules in Belgian law requiring an intermediary to apply specific procedures in case of a discrepancy of different positions.

How are shortfalls handled in practice?

This is not a matter of law and will depend on the intermediary in question. Intermediaries may include in their contractual arrangements a buy-in procedure obliging the client to remedy to the shortfall by acquiring replacement securities on the market (or through lending and borrowing arrangements organised by the intermediary). In case of failure, the intermediary may be entitled to acquire securities on behalf and at the expenses of the client affected by the shortfall. Loss-sharing arrangements may also apply ultimately.

29.2. Czech Republic

The law does not stipulate any rules to deal with shortfalls. Given the provision of section 34 of Securities Act under which securities deposited with fungible securities of other owners are common property of all owners, damage arising from the shortfall would be distributed among the investors, whose securities are held in the customers account proportionally to their positions recorder in the books of intermediary. Under the terms applicable to securities safekeeping contract pursuant to Securities Act it is the duty of the intermediary to protect customers securities from the loss, destruction, damage a devaluation. Liability of intermediary to the customers for the breach of abovementioned duties by way of shortfall can be avoided only in limited circumstances.

29.3. Denmark

A shortfall is rare, but possible, cf. answer to Question no. 30. Often the intermediary will be obliged to acquire securities to "cure" the shortfall, cf. answer to Question no. 16. If the intermediary is unable to do so due to insolvency (or it is one of the cases where the intermediary has no obligation to do so), the question arises how the account holder´s position is with respect to the remaining securities (the rules of EC law which guarantees investor protection up to a certain amount are disregarded in the following analysis). Probably, the position is that account holders which hold securities of a kind with respect to which there is no shortfall can withdraw their securities. Account holders holding securities of a kind of which there is a shortfall are probably entitled to the remaining securities (which consequently are not split between the creditors of the intermediary). The question is whether these latter account holders share pro rata or after a first-in-time-principle. The probable answer is that a first-in-time principle will be applied (meaning that the account holder who acquired its securities first prevails and so on).

29.4. Germany

No, as far as clearing and settlement of domestic transaction is concerned. Each credit to a securities account corresponds to a debit of another account. No debit becomes effective unless there are sufficient securities within the account to be debited. Claims for delivery of securities not yet fulfilled are not sufficient.

29.5. Estonia

There are no rules for this occasion under the Estonian law. According to our knowledge there has been no such like events in practice. Most likely scenario of the solution in a hypothetical case would be that the damaged party obtains a "compensatory claim" against the intermediary.

29.6. Greece

In respect of DSS, where accounts held within DSS are in the investors' name, a shortfall of the Intermediary as Operator of its investors' accounts is not possible, except in cases of intermediary's (Operator's) a) fraud or b) breach of duty (see below under 31).

In respect of BoGS, article 8 para. 3-5 of law 2198/1994 provides for investors' rights in case of a shortfall of the Participant. According to these provisions, if the «investor/customer portfolio account» of the Participant is not sufficient for the satisfaction of a claim of an investor, relevant investors' claims are, by virtue of legal privilege, satisfied on the Participant's «own portfolio account», including also any securities of the Participant held in the «investor/customer portfolio account» of another Participant. If such accounts are not sufficient to cover the respective claims, investors will be satisfied pro rata. Outstanding claims of the investors to the securities are satisfied by use of the remaining assets of the Participant in respect of which they are granted a special privilege which ranks ahead of other privileged creditors such as employees, the state and social security entities. Thus Investors' claims against the Participant with respect to interest, capital and other rights arising out of the securities are satisfied preferentially on the Participant's assets and rank before other privileged creditors.

29.7. Spain

For securities in which IBERCLEAR is the issuer's CSD, and from a legal standpoint, is not possible. The major responsibility of the entity in charge of the book-entry registry is the supervision and control of the absolute correlation of the aggregate balance of securities credited in the securities accounts and the total amount of securities issued. IBERCLEAR conducts periodical reconciliations to ensure that there are no shortfalls.

The breach of this obligation will not only imply the "restitution in kind" obligation, but also, the opening of an administrative sanctioning proceeding based on the breach of the rules on maintaining book-entry registries.

What rules are applied to resolve the resulting difference of positions? Are there any rules on how to handle such a situation from an accounting point of view (for example through an interim securities debit balance)? How are shortfalls handled in practice?

If a shortfall were to happen, the intermediary would have to immediately acquire more securities and, if known by the supervisory authorities, it would most probably be subject to an administrative sanctioning proceeding.

29.8. France

29.8.1. Temporary and definitive shortfalls

In practice, a distinction is made between temporary and definitive shortfalls.

For cash trades, deliveries and payments take place within three trading days of the trade date.

Where a client fails in delivering cash or securities within this period, a temporary shortfall occurs.

In such a case, the intermediary will take the place of its failing client. If the intermediary does not hold the cash or the securities to be delivered, it may enter into repurchase agreements or securities lending transactions.

In this respect, Article L. 431-3 of the MFC provides that:

"[…]Where a custodian or a depositary proceeds to the settlement of an operation, by delivery of financial instruments against payment, in taking the place of its failing client, it may benefit from the provisions of this article: it then acquires the full ownership of the financial instruments or cash received from the counterparty. […]."

Moreover, Article 332-32 of the AMF General Rules provides that delivery of financial instruments resulting from transactions by an authorised intermediary acting for own account, whether or not in relation to transactions for the account of clients, is subject to systematic controls of availability in the pool held for own account in order to avoid delivery failures or use of financial instruments recorded in the name of third parties. In the absence of availability of securities held for own account in sufficient numbers, the custodian is required to borrow related financial instruments.

If the intermediary fails in delivering cash or securities to be delivered within the regularisation period, the clearing house may initiate buy-in or sell-out procedures. Shortfalls which remain unsettled after the performance of buy-in or sell-out are considered as definitive shortfalls.

Buy-in procedure (shortfall due to a lack of delivery)

On the evening of the sixth clearing day following the settlement date, the selling clearing member to which a shortfall belongs receives a notification from the clearing house.

Such notification requires the clearing member to settle the shortfall by making sufficient provision on its central securities depositary or securities settlement system account to allow the shortfall to be settled in the normal daily settlement process at the latest on the evening of the seventh clearing day following the theoretical settlement date. Otherwise the clearing house initiates the buy-in procedure for the quantity of securities necessary to settle the shortfall.

The clearing house initiates a buy-in for any shortfall which remains unsettled the evening of the seventh clearing day following the theoretical settlement date.

On the morning of the eighth clearing day following the theoretical settlement date, a buy-in attempt is launched using a tender price. During the eighth clearing day following the theoretical settlement date, selling clearing members, including the one to which the shortfall belongs can deliver part or all of the relevant securities to the clearing house's buy-in account. After confirmation of receipt of securities, the clearing house performs the buy-in, either partly or fully.

Shortfalls which remain unsettled following the buy-in process are settled by cash compensation.

Sell-out procedure (shortfall due to a lack of payment)

The clearing day when the cash failure occurs, the buying clearing member to which a shortfall belongs receives a notification from the clearing house. Such notification requires the clearing member to settle the relevant shortfall by crediting its central bank or commercial bank account to allow the shortfall to be settled in the normal daily settlement process at the latest on the following clearing day. Otherwise the clearing house initiates the sell-out procedure and sells the quantity of securities necessary to settle the shortfall.

The clearing house disposes of the securities corresponding to any buying position which remains unsettled on the morning of the first clearing day following the theoretical settlement date.

29.8.2. Drawing on the securities pool

Article L. 533-7 of the MFC prevents intermediaries from using financial instruments owned by their clients without their consent. This prohibition is sanctioned by criminal law (Article L. 314-1 of the French Criminal code).

Such rule is also reflected in Article 332-4 of the *Règlement Général* of AMF. Under such rule the custodian is required to organise its internal procedures so as to guarantee that any movement affecting custody of financial instruments held for account of a third party is evidenced by a transaction recorded in an account of the accountholder.

The custodian is also required to comply with segregation rules.

In case of insufficiency assets, the custodian is required to borrow relevant securities (Article 332-32 AMF Rules).

29.9. Ireland

Shortfalls are possible at the level of the intermediary and even if a trust or similar arrangement is recognised in the insolvency of the intermediary; the investor will still suffer loss if all of its securities are not there or in the circumstances outlined in the response to question (15) above where the costs of the insolvency official are borne by the investor’s assets. Investors are particularly at risk in respect of commingled accounts because shortfalls attributable to one investor may be borne by other investors sharing the account. If an intermediary provides a contractual settlement service, this may increase the risk of shortfalls.

In the ordinary course of business, temporary shortfalls will arise and be eliminated from time to time. Other shortfalls may be eliminated by the intermediary buying securities at its own expense in order to protect its reputation. If a very large

shortfall arises, the intermediary may be unwilling to meet the cost of eliminating the shortfalls. If the investor could establish personal liability of the intermediary (see further the response to question (30) below), a personal claim for the loss suffered may be brought against such intermediary. If the intermediary is insolvent, such personal rights may be worthless. The courts will seek to allocate the shortfall between the investors.

The rules of tracing are available to resolve a shortfall, by notionally allocating the "missing" securities" among the accounts of clients in accordance with rules[103] such as "first in, first out". In certain cases, the courts may decide that an application of such rules would be unnecessarily complex, however, in which case, the courts may determine that the loss should be borne rateably by the investors. Mr Justice Murphy, in his judgment in the High Court case of **In the matter of W & R Murrogh and in the matter of the Stock Exchange Act 1995[104]** favoured a rateable distribution of assets over the traditional tracing rules but distinguished between various asset categories before applying such rateable distribution rules.

29.10. Italy

See Answer (31.10).

29.11. Cyprus

Technically in the context of the CSE the system does not permit shortfalls as any credit would be matched by a corresponding debit. The issue arises where there is a divergence between the technical result of the system and the legal rights of individuals though again this is highly unlikely since systemic registration is, as explained above, the point of departure for the legal recognition of a transfer of ownership or the registration of a charge or encumbrance. Furthermore, in case of non completion of a transaction because of failure by an investment firm intermediary to perform its obligations e.g. because it fails to deposit the requisite funds for the completion of the transaction then the director of the CSE has the power to use funds of the investment firm deposited with the CSE for the completion of the transaction or even to sell securities belonging to the investment firm in default for the same purpose (Art 16 of the Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001). Independently of the above provision, Art 43 of the Securities and Stock Exchange Regulations of 2001 provides that the director of the CSE may intervene and buy and sell securities to cover any shortfall. This is done at the expense of the intermediary at fault.

The only weakness in the above system lies with the opening of omnibus or pooling accounts by custodians or trustees. According to the Investor's textbook regulation 595/2002 such custodian or trustee is obligated to have in place internal accounts exhibiting the ultimate account holders. Furthermore periodic controls by internal auditors are required. In case of wrong insertions in the system then the rectification procedure available to the director may be used. In case this procedure does not resolve the issue then the investor may have recourse against the custodian

---

[103] Clayton's Case (1816) 1 Mer 572, Re Hallett's Estate (1880) 13 Ch D 695, Re Oatway [1903] 2 Ch 356, Roscoe v Winder [1915] 1 Ch 62

[104] Unreported, 6 May 2003.

or trustee in contract or for breach of fiduciary duty. The claim would be in damages as the registration based system is not likely to lead to a reversal of the transactions. Particularly so in the case of bona fide purchasers.

29.12. Latvia

A shortfall on the level of intermediary is possible only in the case when stock exchange trades should be settled. For these transactions the settlement date can be postponed. For off-exchange trade settlement the date may not be postponed. If there is no sufficient amount of securities or cash for settlement the off – exchange trade, the LCD shall terminate this settlement movement and shall inform both intermediaries involved in this trade. The LCD does not provide any provision transfers of securities or funds in case of intermediaries default. Intermediary has the right to borrow securities from other intermediary. In case of cash default the Riga Stock Exchange can used the assets from Guarantee fund to settle the trade.

29.13. Lithuania

Yes it is possible. The shortfalls are handled by postponement of settlement day and cancellation of settlement.

In case of default in central market transaction in VSE, the SSS postpones the appropriate settlement transfer to the following settlement day, but not longer than the day S+10 inclusive. If during the settlement on the day S+4, the CSDL shall identify lack of securities again, on the day S+5 VSE shall organise a special procedure for purchase of securities. If securities are not available on the market, the settlement of the transaction is cancelled.

In securities default in case of settlement of transactions during a tender offer, public sale and public offering of a share issue, the SSS postpones the appropriate settlement up to the day S+2 and then cancellation is applied.

In cases of securities default in regard of settlement of negotiated deals, the SSS immediately notifies participants about the shortage. The settlement movements pertaining to the negotiated deals that have failed due to a deficiency of securities on S day, shall be postponed to the following settlement day, but not longer than the day S+2. In the event of failure to execute the settlement movements of such negotiated deals on the day S+2, their execution shall be terminated.

In cases of the OTC transactions, if while checking the general securities account of the CSDL participant the SSS identifies a deficiency of securities, it shall without delay deliver to both parties to the settlement movement the due messages, notifying about a deficiency of securities in the general securities account. If by the end of the settlement day the deficiency of securities has not been eliminated, the SSS shall terminate this settlement movement and shall notify the parties to the settlement about termination of the settlement movement concerned due to a securities default.

The CSDL does not provide any provisional transfer of securities or funds in case of participants default. Lending and borrowing of securities are mainly based on repurchase or financial collateral arrangements between the SSS participants. In cases of default of cash payment in the central market transactions, the settlement is postponed to the day S+1. If cash default is repeated on the day S+1, the Guarantee Fund managed by VSE is used.

29.14. Luxembourg

Yes short-falls may happen, due e.g. to forged physical certificates, erroneous credits, or reversals at an upper-tier intermediary.

What rules are applied to resolve the resulting difference of positions? Are there any rules on how to handle such a situation from an accounting point of view (for example through an interim securities debit balance)?

There are no specific rules in Luxembourg law requiring an intermediary to apply specific procedures in case of a discrepancy of different positions. The matter is thus subject to contractual arrangements.

How are shortfalls handled in practice?

This is not a matter of law and will depend on the intermediary in question. Intermediaries may include in their contractual arrangements a buy-in procedure obliging the client to remedy the shortfall by acquiring replacement securities on the market (or through lending and borrowing arrangements organised by the intermediary). In case of failure, the intermediary may be entitled to acquire securities on behalf and at the expenses of the client affected by the shortfall. Loss-sharing arrangements may also apply ultimately.

29.15. Hungary

In case of dematerialised securities the CSD ensures the accuracy of the total issued outstanding amount of securities, so such a shortfall cannot occur.

29.16. Malta

It is theoretically possible and in case of loss of securities in pooled accounts of identical assets all investors will suffer the lost pro rata to their share in the pool.

What rules are applied to resolve the resulting difference of positions?

The right of specific performance exists where there are available securities to be bought on a market. If not then the right of damages arises at law to the loss in value.

Are there any rules on how to handle such a situation from an accounting point of view (for example through an interim securities debit balance)?

All investment services providers are bound by conduct of business rules issued by MFSA. Rule 7.9/10 obliges the licensee to carry reconciliations and should shortfalls appear, to make a report to MFSA if they are unable to resolve the discrepancy.

With listed securities market officials have the power to resolve disputes arising during trading sessions in a final manner. In case of widespread failure of the systems, the trading session can be halted and interrupted.

How are shortfalls handled in practice?

We have no information on the subject, apart from pro-rated sharing of loss.

29.17. Netherlands

As far as securities subject to the Securities Giro Administration and Transfer Act are concerned, please note that in the event that, for reasons for which the institution cannot be held liable, a collective deposit would be insufficient to meet all claims for delivery of the underlying securities, the Securities Giro

Administration and Transfer Act provides for a system of apportionment, pursuant to which the deficiency is apportioned among all clients being entitled to the collective deposit, proportional to their interest therein.

A similar apportionment system has been incorporated in the terms and conditions used by the Securities Depository Companies described in the answer to Question 8. In the event that, for reasons that are not the result of wilful misconduct or gross negligence on the part of the Securities Depository Company the rights held by the Securities Depository Company of a specific type fall short compared to the rights corresponding thereto of customers vis-à-vis the Securities Depository Company, the efficiency in question shall be apportioned by the Securities Depository Company among those customers who held such rights vis-à-vis the Securities Depository Company at the close of business on the day in the Netherlands preceding the day of discovery of the deficiency in the Netherlands, pro rata to the amounts of their rights at the said moment.

In this case, the Securities Depository Company is under no other obligation than to take measures to remove the cause of the deficiency to the extent possible. In particular, the Securities Depository Company shall not be under an obligation, to acquire rights to eliminate the deficiency.

29.18. Austria

One should distinguish two scenarios:

29.18.1. The shortfall occurs because the account provider **credits more securities** to the accounts of its customers than the account provider itself holds (itself or with an upper-tier account provider):

Such a situation should not occur and may in practice occur as the consequence of too many transactions to be handled at a certain point of time. At the level of the Austrian **CSD** such a situation **cannot** occur in view of the strict rules to be applied in crediting and debiting of securities (see answers to question (20) C. In case of "first-tier" account providers such a situation may, but should not occur, in particular in view of provisional bookings. The account provider will clarify the entries at the end of the working day and start a new trading day with correct, i.e. settled holdings. In case the account provider would be responsible for the shortfall it would have to make a cover purchase or pay for the short fall.

In case of cross border securities transactions General Business Conditions of Austrian credit institutions provide (e.g. no 67 of the GBC of the largest Austrian bank) that the securities may be jointly held together with other securities belonging to other customers or the account provider itself in case the account provider did not acquire property of the securities to be purchased for the customer, but only an obligatory title for delivery of these securities (i.e. "Wertpapierrechnung"). The GBC provide that all economic and legal detriments and damages which affect the entire "cover holding" ("Deckungsbestand") by measures, events or attachments ("Zugriffe") of third parties for which the account provider is not responsible, are to be shared rateably (see answers to question (15), second para).

29.18.2. b) The other scenario would be, that the **upper-tier** account provider, e.g. the CSD suffers a **loss** of securities for what ever reason.

Losses of the collective holding of the CSD itself or of its holding with another securities account provider for which losses the **CSD is not responsible** have to be borne by the co-owners rateably to their shares in the collective securities holdings. The CSD will either reduce the holdings of its customers rateably or will purchase securities and distribute the purchase price rateably among the affected customers. In case the CSD would be responsible for the loss it would have to **purchase** the missing securities and credit them rateably to the securities accounts of the affected customers.

29.19. Poland

(29) If entries on securities accounts managed by an intermediary are performed correctly (i.e. on the basis of, and according to documents sent by KDPW indicating the result of settlements performed by KDPW), then in principle, no shortfall should be possible. Shortfalls may however result from securities entries on the securities account despite the fact that documents containing the results of settlements sent by KDPW did not authorize the intermediary to perform such entries. In such situations, the intermediary (KDPW participant) is obliged to identify his error and eliminate the mistake from the account.

Moreover, owing to the fact that KDPW manages omnibus depository accounts incorporating all the clients of an intermediary, shortfalls on the securities account may take place as a result of an intermediary executing a securities sale transaction of a given client, without having that client's order (transaction performed in error). In such instances, the intermediary is obliged immediately to eliminate the consequences of such an error, which is performed either by means of a purchase transaction for securities which were sold as a result of the error, or through borrowing these securities, or by transferring these securities onto the investor's accounts from the intermediary's proprietary account. Intermediaries are bound here by special registration procedures issued by KDPW, which define the registration rules for such transactions performed in error.

29.20. Portugal

No, in what concerns securities integrated in a national centralised securities system. In this situation the managing entity of the national centralised securities system is the issuer's Central Securities Depository and is in charge of the supervision and control of the absolute correlation of the aggregate balance of securities credited in the securities accounts and the total amount of securities issued. The managing entity of the national centralised securities system conducts periodical reconciliations to ensure that there are no shortfalls. Each credit to a securities account corresponds to a debit of another account. No debit becomes effective unless there are sufficient securities within the account to be debited.

According to article 92. CVM 1. the centralised system managing entity must adopt the necessary measures to prevent and correct any discrepancies between the amount, total and category of securities issued and those in circulation. If the accounts refer only to one part of the category, the control over the entire category is ensured through proper co-ordination with other centralised systems.

If a shortfall were to happen, the intermediary would have to immediately acquire more securities and could be subject to an administrative sanctioning proceeding. Furthermore, the centralised system managing entity would be liable for damages caused to financial intermediaries and issuers as a result of the omission, irregularity, error, shortcomings or delay in performing registrations and in transferring information that it should provide, except if it is the fault of the injured party (94. CVM). Additionally, the centralised system managing entity has the right to redress against the financial intermediaries for the compensation paid to the issuers, and against these, for the indemnities paid to financial intermediaries whenever the facts on which liability is based are imputable, in either case, to the financial intermediaries or the issuers.

Generally speaking (article 87. CVM), the registering entities of book entry securities (being the Issuer or a Financial Intermediaries) are liable for damages caused to holders of rights over those securities or third parties, arising from omission, irregularity, error, shortcoming or delay in the performance of registrations or their destruction, except if proved that the injured parties are responsible. The registering entities also have the right to redress against the centralised system's managing entity for the compensation due, whenever the facts on which liability is based are imputed to them. Whenever possible, compensation is fixed in securities of the same category as those to which the registration refers.

29.21. Slovenia

Non applicable for “final client level” type of dematerialisation.

29.22. Slovakia

A shortfall at the level of intermediary is possible, although not very likely. Central securities depository makes daily reconciliation of securities with intermediary – member of depository. If difference cannot be solved, member may submit official letter of complaint. Depository is obliged to reply to letter of complaint within 30 days, if necessary this term can be extended to 60 days. If depository upholds complaint, it can according to depository’s Operational rules:

(a) amend records in its registration

(b) acquire securities via the stock broker

(c) propose other solution.

Debit balance of omnibus account as well as of accounts of final owners is not possible.

The Act on Securities and Investment Services does not address relation between intermediary and upper-tier intermediary other than that between member of the depository and the central securities depository. Agreement closed between intermediary and its client, who may be in position of intermediary, may cover this problem, but the Act on securities and investment services does not address content of agreement in much detail.

29.23. Finland

As a centralised system, the Finnish book-entry system makes it technically possible to control and trace every transfer in the book-entry accounts and thereby to prevent multiplied securities or otherwise uneven or illogical credits and debits in the accounts. There is no need for rules concerning an intermediary’s insolvency or other incompetence such as shortfalls to provide the account holders with their

securities. The strict liability imposed upon account operators protects investors in case of erroneous registrations. An account operator is liable to compensate damage caused by an incorrect registration irrespective of whether it is due to e.g. his negligence, fraudulent act by the account holder or a third party or even a technical fault in the system.

A Registration Fund has been established in order to guarantee the fulfilment of the account holders' liability in damages. The account operators are to pay contributions to the Fund and this increases their interest in maintaining the correctness of the operations. The Registration Fund is to compensate an injured party if an account operator has not paid an evident and undisputed claim payable by it according to the Act on Book Entry Accounts. The compensation on the basis on an incorrect registration by an account operator in relation to one investor is limited to 25 000 euros and to several investors to 10 million euros.

If a shortfall shall be addressed outside the book-entry system, several problems may arise. There are not explicit rules to govern a shortfall. Generally, the intermediary is expected to always maintain the underlying holding at least on the level of its records and should a shortfall occur, the intermediary shall acquire the position to cover the shortfall. If the intermediary is not able to refill the position, it shall compensate to the investors affected. If the intermediary becomes insolvent and is not able to refill or compensate (the shortfall becomes incurable), the outcome of the shortfall is difficult to predict. Most likely the bankruptcy court would apply some kind of loss sharing rule, but whether loss sharing would be applied proportionally across all investors holding the same security or resorting to some other method, would most likely depend on the merits of the case. One can not exclude the possibility that the bankruptcy court could try to establish, whose securities are actually missing. It is also not beyond imagination that a bankruptcy court could embrace the ‘first-in-first-out’ principle. It shall be noted that this assessment will also apply to securities incorporated in the book-entry system, when the securities have been credited in a custodial nominee account (omnibus account) and there is a discrepancy with a shortfall between the number of securities held in the custodial nominee account and the records of the intermediary holding the account for the benefit of its customers.

29.24. Sweden

There are no explicit rules regarding shortfalls in the Financial Instruments Account. The Swedish book-entry system makes it possible regarding CSD Accounts to control and trace every transfer in the accounts and thereby prevent shortfalls. The risk of shortfalls for an investor is also reduced by the possibility to hold an Owners’ account directly with the CSD. The CSD is as mentioned before supervised by Finansinspektionen. Furthermore a CSD is most unlikely to become insolvent.

The strict liability in the Financial Instruments Accounts Act for the CSD and the account-operators protects the investor. The main principle is set forth in chapter 7, section 2.

Section 2. A central securities depository shall be liable for losses incurred by the owner of a financial instrument as a consequence of incorrect or misleading information in a Swedish CSD register or, in other cases, as a consequence of an error in conjunction with the establishment or maintenance of such a register or,

where the error was committed by an account operator, the operator shall be liable. Liability shall not arise, however, where the central securities depository or account operator proves that the error was due to circumstances beyond its control, and the consequences of which could not reasonably have been avoided or overcome. Indirect losses shall be compensated only where such are due to the negligence of the central securities depository or the account operator. The aforementioned provision with respect to the owner of a financial instrument shall also apply to pledgees and persons to whose benefit restrictions on the right of disposition apply.

The first paragraph shall apply mutatis mutandis where the error is committed by a party retained by the central securities depository or an account operator.

A central securities depository shall be jointly and severally liable with an account operator for any damage attributable to the account operator. However, the liability of the central securities depository shall be limited to SEK five million for each event of loss. The central securities depository shall be entitled to compensation from the account operator for any amounts paid by the securities depository as a consequence of the joint and several liabilities.

As mentioned above there are no explicit rules regarding shortfalls in Sweden. Regarding other securities accounts the intermediary should always maintain the holdings on the level of its records. In case of shortfall the intermediary shall refill the position or – if it is not possible to refill – compensate the investor.

If the intermediary becomes insolvent the outcome of the shortfall is difficult to predict. The court could apply some kind of loss sharing rule. Another solution could be that the court could try to decide (find) whose securities are missing. It is important to note that the situation will apply when there is a discrepancy/shortfall between the numbers of securities held in a CSD Nominee Account and the records of the intermediary holding the account for investors.

The rules of Directive 97/9/EC on investor-compensation schemes are disregarded in this analysis.

29.25. United Kingdom

Shortfalls are possible. Temporary shortfalls due to operational error are not uncommon.

If the shortfall is due to the negligence or other breach of duty by the intermediary, it would incur personal liability to clients to eliminate the shortfall, by providing the missing securities or (possibly) paying their price. However, where a shortfall arises without the fault of the intermediary or a third party, the legal position is that it must be borne by clients, who take the burdens of ownership including the risk of loss to their assets. The rules of tracing are available to resolve a shortfall, by notionally identifying the "bad securities" among the accounts of clients in accordance with certain traditional rules.[105] However, in relation to active accounts, the application of these traditional rules is complex and their result potentially

[105] *Clayton's Case* (1816) 1 Mer 572, *Re Hallett's Estate* (1880) 13 Ch D 695, *Re Oatway* [1903] 2 Ch 356, *Roscoe v Winder* [1915] 1 Ch 62.

arbitrary, and it seem likely that the loss would be borne pro rata among all the affected clients.[106]

In practice, if a shortfall is identified by a solvent intermediary, it is understood to be normal practice for the intermediary to eliminate it at its own expense, for reputational and client relationship reasons.

[106] See *Barlow Clowes International v Vaughan* [1992] 4 All ER 22.

30. QUESTION NO. 30
WHAT DUTY IS THERE ON THE INTERMEDIARY TO AVOID SHORTFALLS?

30.1. Belgium

Based on general principles of Belgian law on depositary contract, a custodian has an obligation to properly safekeep assets deposited with it and to restitute the securities deposited. In case of securities shortfall, the intermediary will be liable for the loss unless the loss is due to a force majeure or to any event beyond its control (or the control of any sub-custodian).

30.2. Czech Republic

There are no measures required to be taken the intermediary to avoid shortfalls.

30.3. Denmark

The intermediary must take adequate steps to ensure its customers' right of ownership, cf. Securities Trading Act Art. 72. Consequently, the intermediary has a legal obligation to try to avoid shortfalls. Generally, the intermediary is not entitled to dispose over its customers securities without their consent (e.g. an agreement on right of use if the intermediary is also a collateral taker). Unless the intermediary commits acts of fraud or negligent bookkeeping, a shortfall should only occur if either customer securities are "lost" at an upper-tier intermediary or if the intermediary becomes insolvent after having exercised a right of use (in the latter case, the shortfall will often only be apparent as the costumer often can obtain satisfaction of its claim for securities through a close-out-netting).

It should be noted that the Danish (Nordic) system where ordinary investors can hold on an individual account with the CSD, reduces the investors risk of shortfall significantly, as the CSD is extremely unlikely to become insolvent.

30.4. Germany

The avoidance of shortfalls is achieved through

strict adherence to the principle of linking a credit in securities to a corresponding debit,

orderly and accurate record keeping according to the provisions of the Securities Deposit Act and the Announcement of the BAFin as Banking Supervisory Authority on 21 December 1998 regarding the Requirements for a Proper Custody Business and for a Proper Fulfilment of Delivery Obligations,

and, in addition, application of general account-keeping principles.

30.5. Estonia

Under the Estonian law only licensed securities market participants (investment firms and credit institutions) have the right to own nominee accounts. Named institutions owe the highest standard of care as to the correctness and reliability of the services they provide.

30.6. Greece

Segregation of investors' assets a) from intermediary's assets and b) between investors themselves is an obligation imposed by law. Further, law imposes to intermediaries the obligation not to dispose off customers' securities without their consent.

Another obligation imposed to intermediaries is to refrain from selling on the account of investors securities, which will be unlikely to be registered in their accounts held by the intermediary (or in latter's omnibus account) on settlement date of the respective sale's transaction. Intermediaries must be able to rely on the fact that the settlement of transactions executed within a regulated market will be completed on time. A sound book-keeping system of the intermediary contributes to the avoidance of mistakes resulting to shortfalls.

Another issue could arise due to the fact that often transactions are settled through a custodian, which holds the securities, and not through the intermediary which executes the transaction. Delays, misunderstandings or other negligence in this trilateral relationship, i.e. custodian, executing intermediary and customer, could result to shortfalls. In order to face such problems, DSS and BoGS offer mechanisms, which give to the transacting parties the possibility to buy or to borrow the short fallen securities, as explicitly stated in the relevant Regulations (see under Section 9 part Biii of the BoGS Regulation regarding lending facilities).

30.7. Spain

The entity in charge of the book-entry registry must act with due diligence and care as to guaranty the aforementioned correspondence. With the exception of the case that the damage is produced due to the exclusive fault of the investor, should an investor be deprived of certain securities, the entity in charge must provide restitution, preferably with securities of the same kind, purchasing securities of the same characteristics for their delivery to the damaged party.

In addition, such infringement may entail the opening of an administrative sanctioning proceeding based on the breach of the rules on maintaining book-entry registries.

30.8. France

The *Règlement Général* of AMF contains rules governing the duties of a custodian (*teneur de compte conservateur*) of securities.

Among the duties of a custodian *vis-à-vis* its clients, the custodian is under the duty :

- to maintain and preserve the securities;
- not to use securities recorded in its books in the name of its customer without the consent of such customer;
- not to transfer ownership over such securities without accountholder's consent;
- to redeliver those securities, if need be.

The custodian is also required to comply with segregation and strict accounting rules.

See also in this respect (29) above.

30.9. Ireland

This will depend on the contractual arrangements between the parties but the intermediary, where it is a trustee, owes at minimum a duty of reasonable care in relation to the investor's assets. There is no absolute certainty, as a matter of Irish law, regarding the standard of a trustee's duty of care, there being no statutory

provisions in this regard. The standard of care expected of a professional trustee is likely to be higher than that of an "ordinary prudent man of business"[107].

30.10. Italy

See Question (31).

30.11. Cyprus

As explained, shortfalls are avoided by the linking of credits and debits. We would further reiterate our response to Q29 above.

30.12. Latvia

According to the LCD rules and regulations the intermediary is responsible for providing sufficient amount of securities in the account with the LCD or provide sufficient amount of cash in accounts with LB. The participant due to whose fault the settlement of the transaction are being postponed due to the securities or cash default, may have to pay penalties to the LCD and/or Riga Stock Exchange.

30.13. Lithuania

The CSDL does not act as the Central Counterparty and thus does not guarantee securities or funds transfer. It is an obligation of the SSS participant to have a sufficient amount of securities in the general securities accounts with the CSDL. The participant, on whose initiative or due to whose fault the settlement movements are being postponed to the following settlement day or terminated due to securities and (or) cash default, might be obliged to pay penalties to the CSDL and the VSE.

30.14. Luxembourg

Based on general principles of Luxembourg law on deposit contracts, a custodian has an obligation to properly safekeep assets deposited with it and to restitute the securities deposited. In case of securities shortfall, the intermediary will be liable for the loss, unless the loss is due to an event of force majeure or to any event beyond its control (or the control of any sub-custodian).

30.15. Hungary

To be completed

30.16. Malta

Any intermediary has the duty to account for what was given to him or what he purchased for customers. Failure in that duty gives rise to clear legal remedies under the law of mandate, deposit and trusts.

30.17. Netherlands

The intermediary must take adequate steps to ensure its customers' right of ownership and consequently has a legal obligation to try to avoid shortfalls. Generally, the intermediary is not entitled to dispose over its customers securities without their consent. Unless the intermediary commits acts of fraud or negligent bookkeeping, a shortfall should only occur if either customer securities are "lost" at an upper-tier intermediary or if the intermediary becomes insolvent after having used the securities without having been authorised thereto.

---

[107] Bartlett v Barclays Bank Trust Co [1980] Ch 515

30.18. Austria

Any securities account provider should follow the accounting principles (see answers to question (3) above) that any credit of securities requires a counter-booking (debiting) in another securities account. The principle should be observed that bookkeeping follows after the facts have occurred.

30.19. Poland

(30) In order to avoid shortfalls, intermediaries should above all make entries on securities accounts on the basis of and in accordance with documents sent by KDPW containing the results of settlements performed as well as verifying whether the balances on the securities accounts managed by them correspond with the balances on the depository accounts managed in KDPW.

30.20. Portugal

The entity in charge of book-entry registry, either the Issuer, a Financial Intermediary or the Central Securities Depository, must act with due diligence and care as to avoid any shortfalls.

30.21. Slovenia

Non applicable for "final client level" type of dematerialisation.

30.22. Slovakia

Intermediary reconciles daily with the central securities depository in order to avoid shortfalls between overall position of intermediary and total position of its clients.

30.23. Finland

In the book-entry system, shortfalls should be technically impossible. If there is a technical error, APK and the account operators have the right to enter corrective registrations in the system to cure the error pursuant to section 16c, subsection 4 and section 24 of the Act on the Book-Entry Accounts. Regarding a shortfall between a custodial nominee account and the records of the intermediary, the intermediary is liable to refill or compensate the shortfall as explained under (29) above.

Regarding Finnish physical securities outside of the book-entry system, pooling of securities has not been explicitly regarded as an accepted practice, as explained under questions (6) – (10) above. Thus, intermediaries would generally not end in situations with shortfalls without risking that their actions or inactions (or rather, the persons acting on behalf of the intermediary) could be reviewed in light of the penal code. Under prudential rules, set out in the Regulation 201.13 by the Financial Supervision Authority addressed under question (3) above, A securities intermediary must also keep customer's assets requiring physical custody segregated from its own assets and in fire- and burglar-proof premises.

30.24. Sweden

As mentioned in the answer to question 29 a shortfall should be more or less impossible regarding CSD Accounts. In general an intermediary is not entitled to dispose over its customers securities without consent.

30.25. United Kingdom

The intermediary has a duty of reasonable care in relation to client assets. However, as indicated above shortfalls may arise without breach of duty by the intermediary.

31. QUESTION NO. 31

DOES THE TREATMENT OF SHORTFALLS DIFFER ACCORDING TO WHETHER THERE IS (I) NO FAULT ON THE PART OF THE INTERMEDIARY, (II) IF FAULT, FRAUD OR (IV) IF FAULT, NEGLIGENCE OR SIMILAR BREACH OF DUTY? DOES THE TREATMENT OF SHORTFALLS DIFFER ACCORDING TO WHETHER THE INTERMEDIARY IS SOLVENT OR INSOLVENT?

31.1. Belgium

As treatment of shortfalls are a matter of contract between intermediaries and their accountholders. Accordingly, treatment of shortfalls may depend on the specific provisions of the relevant contract. For Euroclear Bank as example, shortfalls caused by the negligence or wilful misconduct of Euroclear Bank would be treated differently from shortfalls caused by other factors. Pursuant to Section 17(a) of the Terms and Conditions Governing Use of Euroclear dated November 2004 (the "T&Cs"), securities losses caused by the negligence or wilful misconduct of Euroclear Bank, it would be the responsibility of Euroclear Bank to correct such shortfall. Pursuant to Section 17(b) of the T&Cs, if a securities loss is caused by any other factor, Euroclear Bank shall take such steps with respect thereto in order to recover the securities or damages in respect thereof. In such a case, Euroclear Bank shall charge to those sharing the reduction in securities arising out of such securities loss (proportionately in accordance with the amount of such sharing) the amount of any cost or expense incurred in connection with such recovery.

31.2. Czech Republic

The liability of the intermediary does not differ in case of fault, fraud, negligence or absence thereof on the side of intermediary. Treatment of shortfall also does not differ in case of insolvency of the intermediary.

31.3. Denmark

In principle, the treatment of shortfalls is the same regardless of how the shortfall has arisen. However, if the intermediary is solvent it seems unlikely the shortfall will lead to dispute between the investors or between investors and creditors of the intermediary, as the investor most often can hold the intermediary responsible for the shortfall (and thus oblige the intermediary to replace the missing securities), cf. answer to Question 16.

31.4. Germany

In case the shortfall was caused by force majeur or other circumstances outside the controllable sphere of the custodian bank or the CSD there is no liability of the respective intermediary to replace to destroyed, lost etc. securities, i.e. by means of buy-in. The collective pool is then reduced.

In case of negligence or wilful misconduct the intermediary is liable insofar as he has to replace the respective securities or to pay damage in cash.

Does the treatment of shortfalls differ according to whether the intermediary is solvent or insolvent?

In case the intermediary is a custodian bank there is no difference. In case the CSD would become insolvent the lower-tier custodians would be liable according to Sections 3 para 2, 7 para 2 Securities Deposit Act to the extent the CSD would have been liable.

31.5. Estonia

There are no rules regarding handling of shortfalls under the Estonian law.

31.6. Greece

ATHEX and ACSD settlement system deals with shortfalls in the same manner irrespective of their cause, giving to the short fallen intermediary the possibility to acquire the missing securities for settlement purposes. Same applies regarding BoGS.

In respect of transactions effected in ATHEX, in the event that the intermediary is not in the position to pay for the missing securities, the Auxiliary (Subsidiary) Settlement Fund – comprising a group of assets managed by the ATHEX with a view to immediately cover unsettled obligations of a defaulting intermediary – intervenes substituting the defaulting intermediary and settles itself and on its own account the uncovered transactions. This applies irrespective of the cause of the shortfall.

Regarding BoGS, please refer to (29), describing the lending facilities provided by the BoGS Operating Regulation, not differentiating in terms of the cause of the shortfall.

31.7. Spain

The different levels of fault or wilful misconduct on the intermediary side are irrelevant for the purposes of establishing its liability. The above mentioned regime, establishes the responsibility of the entity in charge of the book-entry registry, save in the case that the damage is produced due to the exclusive fault of the investor. Should the latter be the case, the entity in charge of the book-entry registry has to prove the existence of such exclusive fault. The above is notwithstanding criminal law implications.

Does the treatment of shortfalls differ according to whether the intermediary is solvent or insolvent?

No.

31.8. France

No

31.9. Ireland

(i) As a matter of Irish trust law, an intermediary which is a trustee will be liable for any loss in the value of the trust assets resulting from a breach of trust, even in circumstances where it acted reasonably and honestly, unless such liability is excluded under the instrument establishing the trust (see below regarding exclusion clauses). All losses to the trust arising therefrom must be made good by the trustee from his own assets. The trustee must make restitution in respect of the loss which has been sustained by the trust, even if it did not in fact personally benefit as a result of the breach. There must be some causal connection between the breach of duty and the loss in order to establish liability. If there is no loss to the investor, the intermediary will not be liable to pay damages or compensation but the intermediary may be obliged to rectify the breach and any costs of rectification are for the account of the intermediary. In addition, any profits of a breach must be held to the investor's account.

Typically, therefore, intermediaries will seek to exclude liability by including an exculpatory provision in the relevant document to limit the circumstances in which liability to make good shortfalls to trust assets would arise (e.g. no liability other than for wilful misconduct, wilful breach of trust or negligence). If such an exculpatory provision is effective, it will relieve the intermediary from personal liability to investors in respect of the shortfall. If the exclusion clause is ineffective, however, the investors could proceed with a personal claim against the intermediary in respect of their losses. There is no Irish authority on the validity and enforceability of trustee exclusion of liability clauses.

Even if an exclusion clause is effective, it will limit the intermediary's personal liability to the investor but will not prevent an investor from taking an action in rem (tracing remedy) to recover any trust property. If a shortfall has occurred, however, there may be few or any assets to recover.

(ii) See the response at (i) above and note that although there is no Irish authority in this regard, it is generally accepted that liability for fraud cannot be excluded under any exculpatory provision. See further our responses to question (32) below.

(iv) See the response at (i) above. In the absence of Irish authority on the issue, it is unclear whether and, if so, to what extent, liability for negligence could be excluded. See further our responses to question (32) below.

Investors with claims in respect of an insolvent intermediary's personal liability for breach of duty would be unsecured creditors in the insolvency. An investor with a proprietary claim for breach of fiduciary duty would generally have priority in insolvency over personal claims.

31.10. Italy

At closing of any settlement day, the Italian CSD reconciles the registrations of the proprietary account and the omnibus clients account held with it by each of the intermediaries participating to the Italian CSD system with those of the issuers' accounts (every new issue is registered in a non-operating account opened by the relevant issuer with the Italian CSD).

The Italian CSD then informs each of the intermediaries of the balance of both the proprietary account and the omnibus clients account existing prior to and following the settlement process.

On the day following such settlement day, each intermediary reconciles (i) the balance of its proprietary account held with the Italian CSD with that of its proprietary account held internally and (ii) the balance of its clients account held with the Italian CSD with the aggregate of the balances of its investors' accounts held with such intermediary.

The intermediaries must notify the Italian CSD of conflicts between account balances within the day following the relevant settlement day, otherwise information rendered by the Italian CSD will be deemed approved.

The intermediary is liable vis-à-vis the investor for damages arising from its wrongful transfer or account keeping of securities.

Sources of law:

Article 35 of the Euro Decree;

Articles 41 and 42 of the Markets Regulation;

Articles 17(3) and (4) and 19 of the CSD Regulation.

31.11. Cyprus

No the treatment is the same.

31.12. Latvia

There is no special treatment on shortfalls in the events mentioned in the question.

31.13. Lithuania

There is no diversification of treatment of the shortfalls, i.e. the CSDL does not investigate the reason of securities shortfall in the omnibus account of the intermediary in respect of postponement or cancellation of settlement of the transaction.

31.14. Luxembourg

As treatment of shortfalls are a matter of contract between intermediaries and their accountholders. Accordingly, treatment of shortfalls may depend on the specific provisions of the relevant contract.

31.15. Hungary

To be completed

31.16. Malta

i. No fault on the part of the intermediary,

Remedies in contract do not depend on fault but performance. It is possible to raise a defence in contract of "force majeure" and in that case an intermediary can protect itself to some extent, eg. Market disruptions.

ii. if fault,

Fault gives rise to remedies in contract

iii. fraud

Fraud gives rise to a greater measure of damages against the contracting party as an intermediary will also be liable for damages even if they could not have been foreseen provided they are the direct consequence of his acts (art 1137, civil code)

iv. if fault, negligence or similar breach of duty?

These breaches give rise to ordinary damages which could be foreseen (article 1136)

Does the treatment of shortfalls differ according to whether the intermediary is solvent or insolvent?

As the assets of customers are ring-fenced it should not make a difference however for the action for damages for breach of contract, the recoverability of the damages will naturally vary if the intermediary is insolvent.

31.17. Netherlands

Reference is made to the answer to Question 29.

31.18. Austria

Section 6 para 1 Deposit Act provides that in case of collective securities holding ("*Sammelverwahrung*") the securities account provider is liable to the depositor (account holder) for the shortfall except that the loss affecting the collective holding is based on circumstances for which the account provider is not responsible.

Any securities account provider who is acting in breach of his obligations, be it through negligence, wilful misconduct or fraud, will be responsible for the shortfall.

It is, at least tacitly part of the account agreement made between the investor and the "first-tier" account provider as well as of any account agreement with a "higher-tier" account provider made by a "lower-tier" account provider to find a person responsible for any shortfall. In case no responsible person can be found or in case of force majeur the shortfall (loss) will have to be borne rateably by all account holders (co-)owning the same category of securities which has been affected.

The same principles apply in respect of treatment of shortfalls in case the account provider is solvent or insolvent. In case of insolvency of an upper-tier account provider the lower-tier account provider might be liable for any shortfall occurring due to the insolvency of the upper-tier account provider in case the upper-tier account provider was not carefully selected by the lower-tier account provider. In principle the bankruptcy as such should not cause any shortfall in securities, since these are owned by the investor (see e.g. answers to question (12)).

31.19. Poland

Shortfalls are treated in the same manner irrespective of whether they are the fault of the intermediary, or not (although it would be difficult to imagine examples of the latter arising). In instances where the intermediary is declared bankrupt, if as a result of a shortfall the investor were to lose securities, then he would be able to make a claim for compensation from the investor compensation scheme.

31.20. Portugal

No (articles 87. and 94. CVM).

Does the treatment of shortfalls differ according to whether the intermediary is solvent or insolvent?

No.

31.21. Slovenia

Non applicable for “final client level” type of dematerialisation.

31.22. Slovakia

If shortfall occurred due to fault, negligence or similar breach of duty, entity that was in breach of such duty would be responsible for any damages resulting from shortfall. This rule applies equally to both depository and intermediary (member of depository). In case of fraud, court of justice is involved to determine scope of responsibility of relevant entity.

Solvency of intermediary does not make any difference in treatment of shortfall.

31.23. Finland

In case of a shortfall, an intermediary would generally not be able refer to no fault on the intermediary's side to avoid liability. Negligence, fault and fraud will rise the possibility to review the action or inaction by the intermediary in accordance with the penal code.

As explained above under question 29, the intermediary would be expected to refill or compensate the shortfall. In practice the intermediaries tend to cure and refill the shortfalls without the investors or third parties becoming aware of the fact that there is a discrepancy between the underlying holding of the intermediary and the records of the intermediary. If the intermediary becomes insolvent and is not able to cure the shortfall, it is ultimately the bankruptcy court who would have to determine the treatment of the shortfall.

31.24. Sweden

Generally speaking the treatment of shortfalls should be the same regardless of reason for the shortfall and the intermediary would in all cases be expected to refill the shortfalls or compensate the investor for the shortfall. However, in case of insolvency it is the court that ultimately would have to determine the treatment of the shortfalls.

31.25. United Kingdom

(i.) If there is no fault on the part of the intermediary, it incurs no liability in relation to a shortfall.

(ii.) A fraudulent intermediary is most likely to be in breach of fiduciary duty to its clients. Breach of fiduciary duty may give rise to a proprietary claim (which would be effective against an insolvent intermediary). Personal liability for breach of fiduciary duty is not subject to common law rules of causation and remoteness[108] and the plaintiff is not obliged to mitigate its losses.[109] Therefore clients may be able to claim consequential losses, subject to contractual exclusions.

(iii.) If the shortfall is due to the intermediary's negligence, liability to restore the shortfall would arise even if the client has suffered pure economic loss.[110] However, common law rules of causation and remoteness would apply, so that the client may not be able to recover consequential damages.

(iv.) If the intermediary were insolvent, clients having claims in respect of the intermediary's personal liability for breach of duty would be unsecured creditors, and their ability to recover would depend on the outcome of the

---

[108] *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16, per Millett LJ.

[109] *Bishopsgate Investment Management v Maxwell (No 2)* [1994] 1 All ER 261, *Target Holdings v Redferns* [1996] AC 421 at 440.

[110] *Hedley Byrne v Heller* [1964] AC 465

insolvency. However, a proprietary claim for breach of fiduciary duty would in general have priority in insolvency over personal claims.

32. QUESTION NO. 32
CAN THE RESPONSIBILITY OF THE INTERMEDIARY FOR NEGLIGENCE OR WILFUL BEHAVIOUR (E.G. OF ITS EMPLOYEES) BE CONTRACTUALLY EXCLUDED OR REDUCED?

32.1. Belgium

Under Belgian law, parties to a contract can exonerate themselves from contractual liability. However, there are limitations on the use of exoneration clauses. Parties cannot exonerate themselves for (i) violations of specific rules of law that are considered of a mandatory nature under Belgian law; (ii) fraud or intentional fault (i.e., wilful misconduct). Moreover, exoneration clauses may be held invalid if they deprive the related obligation of every objective (i.e., completely negates the objective of the obligation).

32.2. Czech Republic

Responsibility of the intermediary can be contractually excluded or reduced.

32.3. Denmark

Generally, responsibility for gross negligence and wilful behaviour cannot be excluded. Responsibility for ordinary negligence can be excluded only, if it is considered reasonable (an overall assessment of the contract, surrounding circumstances etc.).

A CSD has a strict liability for errors relating to bookkeeping of CSD-accounts. This liability of the CSD cannot be reduced by contract, but the damages awarded in an individual case can be reduced if the person who incurred the loss acted negligent, cf. Securities Trading Act Art 80(3). The liability for each *error cannot exceed 500 million Danish kroner (equivalent to approx. 67 million Euro). If the reason for an error made by the CSD is an error made by the account manager, the account manager (and not the CSD) is liable (if a Danish account manager is not able to pay the claim for damages, the damages must be paid by all the other Danish account managers (even though they did make the error); foreign account managers may ask to become subject to these rules). The CSD´s responsibility under Securities Trading Act Art 80(2) towards a transferee acting in good faith (see answer to Question no. 24) cannot be reduced by contract.*

32.4. Germany

See Answer to Question 16.

32.5. Estonia

Provisions of the LOA against unfair contract terms would not give effect to unreasonable limitation of liability as far as a natural person is concerned. In other cases it might be possible in theory, but it is highly likely that no client would enter such contract where responsibility for wilful behaviour is excluded or reduced.

32.6. Greece

While it is possible to limit liability to gross negligent behaviour, any further limitation by way of contractual arrangement is void by virtue of Art. 332 GCC. Gross negligence constitutes under Greek law a threshold minimum, above which the assumption of liability by the parties is obligatory. However, intermediary's liability in terms of choice of upper-tier intermediary (*culpa in eligendo*) and informing it about the fact that securities belong to intermediary's clients (*culpa in*

instruendo) could not be limited. Please refer also to (16). Besides, article 2 para 7 ss. b of Law 2251/1994 provides that terms limiting the contractually upheld obligations and liabilities of the provider of services are considered abusive. Further ss m of para 7 of the same article states that abusive is also a term which limits or excludes excessively the service provider's liability.

32.7. Spain

No.

32.8. France

In practice, some intermediaries exclude their responsibility contractually. Such clauses could be considered as abusive and may be subject to cancellation by a court when the investor is a consumer. Furthermore, it should be noted that exclusion of contractual liability for gross negligence or wilful misconduct is not enforceable under French law.

32.9. Ireland

It is common for an intermediary to seek to modify its fiduciary duties and impose restrictions on liability[111] and also to take out liability insurance in respect of losses incurred as a result of actual/alleged breaches of duty, neglect, error, mis-statement, omission and breaches of statutory duty (other than arising from fraud or theft). As outlined above, however, such exclusions, to the extent that they are enforceable (see above in this regard), will operate only to limit the personal liability of the intermediary and will not prevent an investor from exercising any proprietary rights which it may have. There is also general authority to the effect that there is a core minimum level of duty that cannot be excluded by any relieving provisions in a contract. In addition, any exclusion is subject to statutory restrictions imposed upon any such exclusions and overriding fairness requirements when dealing with an investor who acts as a consumer.[112]

32.10. Italy

The general rule of Italian contract law is that any contracting party must indemnify the other party from any foreseeable damage "immediately and directly" caused to it by the counterparty's breach. Such indemnification is required by law. The expression "immediately and directly" is similar, but not identical, to the common law concepts of "proximate cause" and "direct liability". In general it excludes liability for indirect damages, but includes consequential damages, as long as they are reasonably foreseeable (except in the case of fraud, where damages need not have been foreseeable) and there is a reasonable causal connection between the breach and the resulting damages.

No contractual limitations of liability arising from gross negligence or wilful misconduct are allowed; only those arising from ordinary negligence may be excluded. The law does not draw the line between ordinary and gross negligence and thus the distinction is left to the interpretation on a case-by-case basis. Liability may also be limited to a pre-determined amount by a penalty clause, except that such limitation may not become a *de facto* exclusion of liability for gross negligence.

---

[111] Kelly v Cooper Associates [1993] AC 205

[112] Unfair Terms in Consumer Contracts Regulations 1995 (SI 27 of 1995)

The limitation of liability mentioned above only relates to the liability in contract and hence may be opposed by the intermediary to the relevant contractual counterparty only, but it may not apply vis-à-vis third parties in connection with a possible liability in tort of the intermediary nor with respect to possible regulatory liabilities.

Sources of Law:

Article 1229 of the Civil Code.

32.11. Cyprus

An intermediary is limited in the exclusion of his liability by the relevant Code of Professional Conduct which obligates the intermediary to assume obligations of diligence and good practice in his dealings with his clients.

32.12. Latvia

According to the FIML when providing investment services to customers, an intermediary shall have the obligation to perform as a decent and careful manager and ensure that the services are provided in a professional and careful manner in a customer's interests. Prior to starting the provision of investment services and ancillary (non-core) investment services, an intermediary shall sign a written contract with a customer for the provision of investment services and ancillary (non-core) investment services. In a contract for the provision of investment services signed with a customer, an investment brokerage firm and a credit institution shall not include provisions that are contrary to the provisions of mentioned before or imply consequences that are likely to be directed against a customer in any manner.

32.13. Lithuania

No.

32.14. Luxembourg

Under Luxembourg law, parties to a contract can exonerate themselves from contractual liability. However, there are limitations on the use of exoneration clauses. Parties cannot exonerate themselves for (i) violations of specific rules of law that are considered to be of a mandatory nature under Luxembourg law; (ii) fraud or intentional fault (i.e., wilful misconduct). Moreover, liability limitation clauses may be held invalid if they deprive the related obligation of all substance (i.e., completely negates the scope of the obligation).

32.15. Hungary

To be completed

32.16. Malta

Yes, subject to the public policy rule that one cannot exclude liability for gross negligence, wilful misconduct or fraud.

It is possible to exclude liability for delegates when the customer chooses the delegate. In that case the exclusion of liability can even go so far as for insolvency. (see ISA (control of assets) regulations, reg. 9)

32.17. Netherlands

Generally, responsibility for gross negligence and wilful behaviour cannot be excluded. Responsibility for ordinary negligence can be excluded. Please note

however that exclusion may not be upheld if it is considered to be unreasonably burdensome or against reasonable fairness.

32.18. Austria

A reduction of responsibility for wilful behaviour is not possible. Enterprises are liable for acts or omissions of their employees in the same way they are liable for themselves (section 1313a General Civil Code).

Austrian law distinguishes **negligence** (sometimes called "light" or "simple" negligence) and **gross negligence**. Generally speaking liability for gross negligence cannot be excluded. In exceptional cases, depending on the circumstances, exclusion of liability for gross negligence might be successfully argued.

See also answers to question (16).

32.19. Poland

The intermediary may, in the agreement with the investor, limit or exclude liability for losses arising as a result of negligence. However, the stipulation that the intermediary is not liable for damage which it might cause the investor intentionally would be null and void. The intermediary is liable, for his own actions or omissions, for actions and omissions by the persons with the assistance of whom it performs its obligations (e.g. its employees), as well as the persons whom it entrusts with the performance of the obligation.

32.20. Portugal

No.

32.21. Slovenia

Non applicable for “final client level” type of dematerialisation.

32.22. Slovakia

Responsibility of intermediary for negligence or wilful behaviour cannot be excluded or reduced by contract concluded with depository.

32.23. Finland

Pursuant to Finnish law on tort, a person cannot effectively exclude his responsibility for wilful behaviour or gross negligence in a contract.

32.24. Sweden

The intermediary – account operator or CSD – responsibility towards an investor regarding the information in the register is regulated in chapter 7 of the Financial Instruments Accounts Act. The liability is set forth in Section 2, see answer to question 29.

The liability of the CSD and the account-operator towards the investor cannot be reduced by contract. The responsibility between the CSD and the intermediary towards each other could be part of a contract. However, only ordinary negligence can be excluded. It is not possible to exclude responsibility for gross negligence or wilful behaviour in Sweden.

32.25. United Kingdom

Yes, subject as follows. A properly drafted limitation clause can exclude liability for negligence and gross negligence[113] but cannot relieve liability for actual fraud, i.e. dishonesty.[114] Any exclusion is subject to a statutory reasonableness test if (arguably) the account agreement is based on the intermediary's standard terms of dealing[115] or the client deals a consumer.[116]

---

[113] *Midland Bank Trust (Jersey) Ltd v Federated Pension Services* [1995] JLR 352.

[114] *Armitage v Nurse* [1998] Ch 241, 712.

[115] Unfair Contract Terms Act 1977, s. 3.

[116] ibid and the Unfair Terms in Consumer Contracts Regulations 1999.

33. QUESTION NO. 33

IF AT ANY LEVEL THE UNDERLYING SECURITIES ARE PHYSICAL, WHAT IS THE POSITION IF THEY ARE DESTROYED, E.G. STOLEN, BURNED, RUINED BY WATER?

33.1. Belgium

Belgian company law foresees a replacement procedure (duplicata) by the issuer under certain conditions (opposition, proof of destruction, etc) laid down in the law of 24 July 1921 relating to the involuntary dispossession of bearer securities.

33.2. Czech Republic

The destruction of the physical securities results in liability of the securities safekeeper. In case the securities are registered, securities can be replaced by the issuer.

33.3. Denmark

Generally, as the securities do not exist, the rights in the destroyed documents no longer exist. However, the underlying obligations (of e.g. a bond issuer) and ownership rights (e.g. of stockholders) still exist. Consequently, the persons having rights in the destroyed securities can demand that new physical certificates (securities) are issued as a replacement. There is a special court procedure which must be used to establish that a document has been destroyed (or otherwise lost) and thus can be replaced by new one.

33.4. Germany

Lost or destroyed bearer bonds (Inhaberschuldverschreibungen) may be declared void pursuant to Section 799 Civil Code by way of a special procedure ending with a court decision (Sections 1003 to 1024 Code of Civil Procedure - Zivilprozessordnung). According to Section 799 para 2 Civil Code the issuer is obliged to issue a new certificate to the person who has obtained the court decision declaring the lost or destroyed certificate void.

The same procedural steps have to be taken in case a share certificate has been lost or destroyed (Section 72 Stock Corporation Act).

33.5. Estonia

No physical securities can be registered with the Central Register, which is why the occurrence of this situation is impossible.

33.6. Greece

Not applicable for DSS and BoGS

33.7. Spain

The responsibility regime of the entity in charge of the book-entry registry remains the same, irrespective of the original form of representing securities.

For the purposes of including physical securities in the registry system according to its applicable regulations, the entity in charge has to set up a structure for the safe custody of the physical securities. Therefore, the entity in charge of the book-entry registry will be held responsible for any potential damage or loss of the physical security. Should any of these cases take place, the entity in charge of the book-entry registry could initiate a judicial procedure before court, claiming for a court

resolution cancelling the certificate and compelling the issuer to prepare and deliver a duplicate copy.

33.8. France

Pursuant to the law on dematerialisation n° 81-1160 dated December 30, 1981 as codified in Article L. 211-4 of the MFC, all securities issued in whatever form in France and subject to French law are required to be registered in an account by way of book entry.

However, two types of securities may still be represented in tangible form:

(4) Under Article 540-1 of the AMF General Rules, EUROCLEAR FRANCE S.A. may create certificates evidencing French financial instruments subject to Article L. 211-4 of the MFC if such certificates are dedicated to circulate outside France. Under Article 8.1 of EUROCLEAR FRANCE S.A. Operation Rules, such certificates are in bearer form.

(5) Securities issued by French issuers outside France may also be represented in tangible form, on the basis of Article L. 211-4 of the MFC, which limits the scope of dematerialization to securities issued on French territory and subject to French law.

As far as such securities are concerned, Decree n°56-27 of January 27, 1956 shall apply.

33.9. Ireland

The position will depend on whether the underlying securities are in registered or bearer form. The register is the root of title in the case of a registered security. The loss or destruction of a certificate in respect thereof should not affect the title of the investor as holder, except as a matter of evidence. In such circumstances, an investor will generally apply to the issuer for a replacement certificate; the issuer is likely to require an indemnity before the issue of a replacement, to protect itself from loss in the event of fraud etc.

A security in definitive bearer form constitutes an instrument of title. We would not expect that an issuer would provide a duplicate and loss/destruction will generally comprise a loss of the asset constituted by it.

33.10. Italy

This Question (33) only applies to immobilised securities, which are represented by certificates deposited with the Italian CSD (see Question (18).

If the physical certificate is destroyed (e.g., stolen, burned, ruined by water, etc.), the procedure to replace the destroyed certificate varies depending on whether the destroyed certificate was in registered or bearer form. Registered securities are subject to a special judicial proceeding denominated “amortisation proceeding” whereby the holder files a request to obtain an amortisation decree from the court ordering payment of the amount represented by the destroyed certificate or the issuance of a new certificate. Bearer securities are subject to substitution by the issuer upon evidence of destruction.

The Italian CSD, rather than the investor, holds the right to the securities’ repayment or replacement.

In order to reduce the risk of destruction and insure itself against such risk, the Italian CSD: (i) requests issuers to deposit only global certificates bearing a clause that forbids circulation outside the Italian CSD system and commits the issuer to replace the destroyed certificate with a new one; (ii) has entered into insurance policies; and (iii) has set up a special liability fund.

Sources of law:

Articles 2007 and 2027 of the Civil Code;

Article 85(3) of the FLCA;

Articles 31 and 32 of the Markets Regulation;

Article 10(2) of the Italian CSD Regulation.

33.11. Cyprus

This possibility does not exist as the CSE system provides for full dematerialisation (Art 12 of the Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996).

33.12. Latvia

N/a, since the securities that are registered and circulating in the SSS are dematerialised.

33.13. Lithuania

N/A, since all the securities circulating in the SSS are dematerialized.

33.14. Luxembourg

Luxembourg company law foresees a replacement procedure (duplicata) by the issuer under certain conditions (stop order, proof of destruction, etc) laid down in the law of 3 September 1996 relating to the involuntary dispossession of bearer securities.

33.15. Hungary

The issuer shall retire the destroyed pieces and new securities shall be printed. These changes shall be followed by the necessary debiting/crediting of the accounts.

33.16. Malta

The terms of issue usually allow for the re-issue or substitution of physical securities to such persons as prove to be the owners of the securities.

33.17. Netherlands

Although generally speaking bearer shares or bonds are represented by the physical certificate, the underlying obligations (of e.g. a bond issuer) and ownership rights (e.g. of stockholders) remain intact even if the physical certificate is destroyed. Consequently, the persons having rights in the destroyed securities can demand that new physical certificates (securities) are issued as a replacement. There is a special court procedure which must be used to establish that a document has been destroyed (or otherwise lost) and thus can be replaced by new one.

33.18. Austria

In case the account provider is responsible for the destruction of the physical securities, since he acted negligently in protecting them, he will be held liable for any damage caused thereby. The risk will probably be insured.

The destroyed securities will be replaced by the issuer in accordance with a certain procedure ("Kraftloserklärungs-Verfahren") for the legal annulment of securities. In case of negligence by the account provider (CSD) he/his insurance will have to bear the costs of these proceedings.

In case the securities are stolen or destroyed and there was no negligence of the account provider or another person involved and the securities cannot be annulled and replaced, the loss must be shared by all holders of this category of securities with the account provider where the loss occurred (section 21 of the GBC of the CSD; see attachments).

33.19. Poland

Securities admitted to public trading, as well as other securities, which may be registered by intermediaries on securities accounts, or in other registration systems, are entirely dematerialised.

This relates also to those securities which were issued in the form of paper documents and then dematerialised following admittance to public trading. The result of their admittance to public trading is that they lose validity as documents, in the form in which they existed previously.

33.20. Portugal

According to article 51. CVM, book entry and physical securities that are deposited may, in case of destruction or loss, be reconstituted from available documents and back up registrations.

Reconstitution is carried out by the entity in charge of registration or deposit, with the cooperation of the issuer.

The reconstitution project should be published and communicated to each possible holder and the reconstitution may only be carried out at least 45 days following the publication and communication.

After the publication and communication, any interested party may object to the reconstitution, requesting the judicial reform of the securities lost or destroyed.

When all certificates in a centralised deposit are destroyed, without the respective registrations having been affected, it is considered that the same are converted into book entry securities, except if the issuer, within 90 days of communication of the managing entity of the centralised deposit system, requires the judicial reform.

The process of reformation of documents regulated by Article 1069 et seq. of the Code of Civil Procedure applies to the reform of book entry securities, with the necessary adaptations.

33.21. Slovenia

Non applicable for “final client level” type of dematerialisation.

33.22. Slovakia

Depository registers dematerialised and immobilized securities in compliance with the Act on Securities and Investment Services. In case that the underlying securities

are destroyed, they could be declared null and void and a new issue of physical securities will be issued. In the Slovak central securities depository no issue of securities has been immobilized since the company's establishment in 1993.

33.23. Finland

If physical securities are destroyed, the Finnish law provides that the security certificate can be declared null and void in a regulated process in accordance with the Act on Extinguishing of Instruments from 1901. Upon application by the holder, the competent district court can declare a certificate null and void and the holder shall be entitled to exercise his rights on the basis of the court decision. The holder is also entitled to ask the issuer to replace the void certificate with a new certificate against compensation of the costs.

33.24. Sweden

As stated before no Swedish securities exist in the system regulated by the Financial Instruments Accounts Act. If, for whatever reason, securities have been issued they shall not constitute evidence of a legal obligation, see chapter 4, section 5 in the Act.

Section 5 Share certificates, issue certificates, interim certificates, or warrant certificates referred to in the Companies Act or the Insurance Business Act, or promissory notes or comparable documents may not be issued in respect of financial instruments registered pursuant to this Act. Where such documents have been issued, such documents shall not constitute evidence of a legal obligation. Nor shall the provisions of the Companies Act apply to such document.

It should be noted that Section 5 should not apply with respect to financial instruments issued in a country other than Sweden.

For physical securities Swedish law provides a process in which the document can be declared null and void.

33.25. United Kingdom

The position depends on whether the underlying securities are in registered or bearer form. If in registered form, the register is the root of title and any certificate merely evidence of title. The loss of (legible) certificates should not affect the title of the holder, except as a matter of evidence. The holder should be able to apply to the issuer for replacement certificates. The issuer is likely to require an indemnity before it will issue replacement certificates, to protect itself from loss in the event of fraud.

If the underlying securities are in definitive bearer form, they constitute instruments of title, and their status is comparable to that of paper money. It is highly unlikely that the issuer would be willing to provide duplicates, and loss of the paper almost certainty entails loss of the asset.

CORPORATE ACTIONS/VOTING RIGHTS[117]

34. QUESTION NO. 34: WHAT ARE THE RIGHTS OF THE INVESTOR, AND HOW DO THEY OPERATE IN PRACTICE, AS AGAINST (I) THE ISSUER, (II) THE INTERMEDIARY, (III) THE UPPER-TIER INTERMEDIARY (A) IN RELATION TO VOTING OR RECEIVING OF INFORMATION ON SHAREHOLDERS' MEETINGS AND (B) IN RELATION TO CORPORATE ACTIONS, E.G. PAYMENTS OF DIVIDENDS AND COUPONS, AND ANY OTHER ACTION THAT AFFECTS PRICE OR STRUCTURE?

34.1. Belgium

Article 13 of Royal Decree 62 provide that in spite of the fact that investors can only assert their right of co-ownership against their intermediary with whom their securities are held on account (see answer to question 12 above), the investors can however directly assert the rights attached to the securities (economical and non-economical rights) against the issuer, as far as Belgian law is concerned.

On a cross-border basis, investors rights are usually set forth under the documentation of the issuance or are part of companies law for shareholders. In practice, under indirect holding patterns governed by Royal Decree n° 62, corporate actions and information and income payments are processed through the first-tier intermediaries and are then devolved down the chain of custodians to the ultimate investors.

34.2. Czech Republic

[to be completed]

34.3. Denmark

The investor (account holder holding for himself) is under corporate law consider the owner (shareholder) against the issuer. This is true regardless of whether the securities are held on an individual account with a CSD or through a tier of intermediaries. The rights of the investor against other than the issuer – that is against the intermediaries is dealt with infra in part I (and is not considered a question of corporate law). As to the operation in practice, se answer to question no. 35.

34.4. Germany

34.4.1. <u>Rights against the Issuer:</u>

With respect to (German) securities kept in collective safe custody, i.e. in book entry form, in Germany the investor is the co-owner of the securities and, thus, entitled to exercise any and all rights arising out of the securities against the issuer. This principle applies to all bearer securities which used to be the most common form of shares. With respect to registered shares Section 67 para 2 Stock Corporation Act ("SCA") provides that in relation to the company only such persons shall be deemed to be shareholders who have been registered as such in the share register. The legal nature of this provision is that of an irrebuttable presumption. It has to be noted,

[117] These questions are of equal interest to, and may overlap with enquiries made by, those in the Commission dealing with company law and corporate governance issues.

however, that such registration is not necessary to acquire (co-)ownership of registered shares. Registered shares which are endorsed or assigned in blanc may be transferred like bearer shares. Section 67 para 2 SCA becomes relevant only when the purchaser wants to exercise e.g. voting rights in a shareholders´ meeting in his own right.

However, in order to be able to exercise his rights out of securities held in book-entry form the investor needs always the support of his custodian bank (the first-tier intermediary) and, in some respect, of Clearstream Banking as CSD (the upper-tier intermediary). In practice, the investor authorizes his custodian bank through the custody agreement to take all steps necessary that he receives dividend payments or any other distribution and that he is able to attend and vote at shareholders´ meetings either personally or through proxy. This does not change, however, the general principle, that the rights against the issuer are rights of the investor.

- **Receiving information on shareholders´meetings:**

Notice of a shareholders´ meeting has to be published in the Electronical Federal Gazette (*Elektronischer Bundesanzeiger*, Sections 25, 121 para 3 SCA) at least 30 days prior to the date of the meeting or prior to the date (which may not be earlier than 7 days prior to the meeting) until which shareholders have to give notice to the company of their intention to attend the meeting or until which they have to prove their entitlement to attend the meeting (new Section 123 para 2 and 3 SCA). The notice of a shareholders´ meeting has to state time, place and agenda of the meeting as well as the prerequisites for attending and voting at the meeting. In case of bearer shares, the custodian bank informs the investor when a shareholders´ meeting has been convened notwithstanding the right of each shareholder to request, after the publication of the notice, from the company to be provided with such notice (Section 125 para 2 SCA). In case of registered shares the company has to inform all shareholders, who have been registered in the share register at least two weeks prior to the meeting, of such meeting and of its agenda (Section 125 para 2 SCA).

- **Voting:**

In case of bearer shares the (co-)owner is entitled to vote at the meeting, in case of registered shares the registered shareholder. Voting rights may be exercised either personally by the shareholder or through a proxy which may be any person authorized to that effect by the shareholder (for details see below "Rights against the intermediary"). So far it has been common practice to stipulate in the articles of association of corporations with bearer shares that the shares have to be lodged with a depository or blocked in the securities account up to 7 days prior to the date of the meeting. A recent amendment of the SCA through the UMAG (effective since November 1, 2005) introduced the concept of a record date for bearer shares which may be implemented by amending the articles of association accordingly, as follows: Only shareholders owning shares at the beginning of the 21st day prior to the date of the meeting are entitled to attend and vote at the meeting provided that a written confirmation of such shareholding from the custodian bank carrying the securities account of the

shareholder is submitted to the company up to 7 days prior to the meeting (new Section 123 para 3 SCA). This concept of record date is limited to attending and exercising rights at the shareholders´ meeting, but does not apply to the right to receive dividends etc.

In case of registered shares it has been and will be common practice to require in the articles of association that the shareholders have to send a notice of their intention to attend the meeting to the company up to 7 days prior to the meeting (Section 123 para 2 SCA); the UMAG did not change this concept.

- **Corporate actions:**

  Payment of dividends: As a rule, dividends are paid against presentation of dividend coupons which are normally issued in bearer form, though the share certificate may be in registered form. The presentation of such coupons to the issuer and the collection of the dividend is the traditional service of the custodian bank of the investor and, in case of collective safe custody, of Clearstream Banking AG, Frankfurt, as CSD. Due to the success of global share certificates, individual dividend coupons disappeared also and have been either replaced by global dividend coupons or abolished entirely; in the latter case dividends are paid by the company against a statement from the CSD confirming the number of shares held through such CSD on the qualifying date which is in Germany generally the end of the day of the respective shareholders´ meeting.

  Payment of interest coupons and repayment of bonds: As a rule, almost all bonds issued in Germany are bearer bonds. Again, the right to payment of interest and capital amounts when due is with the investor. However, the CSD and the custodian banks collect those payments on the basis of authorizations contained in their Business Conditions forming part of the custody agreement.

  Restructuring of bonds: As a consequence of the a.m. principle that the investor holds all rights neither the custodian bank nor the CSC are entitled to agree on any restructuring of the terms and conditions of bonds unless they are authorized to that effect by the investor. The Business Conditions of custodian banks or of the CSD do not provide for such authorization. Under rather narrow prerequisites the holders of bonds of German issuers may pass majority resolutions amending the terms of bonds which would bind all bondholders.

  Exercise of subscription rights for new shares: Subscription rights for new shares resulting from a capital increase are basically exercised like dividend rights, i.e. against presentation of the dividend coupon designated by the company as evidence of the right to subscribe for the new shares. In case of global share certificates a process has been established whereby subscription rights are credited by the CSD to the securities accounts of its participants and correspondingly by such participants (the custodian banks) to the securities accounts of the investors. However, contrary to the case of dividend rights, the custodian bank acts only upon express instruction of the investor. Such subscription rights may be traded like bearer shares in book-entry form. Sometimes, subscription rights are

exercised and transferred only on the level of investor – custodian bank without involving the CSD. The investor, or his custodian bank on his behalf, signs a subscription statement (Zeichnungs-schein) which is backed by a statement of the custodian bank confirming the existence and number of subscription rights (Depotbescheinigung).

34.4.2. Rights against the intermediary:

The investor has a contractual relationship with his custodian bank, i.e. the first-tier intermediary. Upon request and instruction by the investor the intermediary has to sell, transfer or deliver securities credited to the securities account of the investor. The right to request delivery (Auslieferung) of securities kept in collective safe custody is governed by Sections 7 and 8 Securities Deposit Act ("SDA"). As part of the contractual obligations the custodian bank has to collect dividends when due, forward the exercise of subscription rights to the issuer or its agent, issue statements of evidence to enable the investor to attend shareholders´ meetings etc. It is also common practice that the custodian bank is prepared to act as proxy for its customer and to exercise his voting rights in shareholders´ meetings, although, mainly for cost reasons, banks become more and more reluctant to offer such services. There is no legal obligation for custodian banks to render such services. However, if a custodian bank offers such service, it has to follow the procedures set forth in Sections 128 and 135 SCA. Thereunder it has (i) to ask for a written power of attorney ("proxy") to exercise voting rights which may be issued by the customer in general form valid for an unlimited number of domestic companies and valid until revocation (Section 135 para 2 and 4 SCA) and (ii) to inform the customer as to how the bank will vote in the shareholders meeting unless it receives explicit instructions from the customer for the exercise of his voting rights (Sections 128 para 2, 135 para 5 SCA).

The intermediary is not obliged and, normally, not prepared to enforce rights through legal action, if the issuer fails to fulfil its obligations. Of course, he has to confirm the amount or number of securities held by the customer in order to enable him to give proof of his holding and to enforce his rights resulting thereof. This is particularly important in cases where no single securities (share or bond certificates) have been issued which otherwise would be presented to the court. It may happen that the court requests presentation of the original global certificate which would have to be done by the CSD.

34.4.3. Rights against the upper-tier intermediary:

As described above, it is the (co-)owner or registered owner of the shares who is entitled to exercise rights resulting from shares. Under its General Business Conditions the CSD as upper-tier intermediary has a contractual relationship with its customers which are the custodian banks of the investors and has to render such services as are necessary to enable the investor to receive dividends and other rights granted by the issuer and to attend and vote at shareholders meetings. Clearstream Banking AG as CSD, however, does not offer to exercise voting rights in shareholders´ meetings of German companies**.**

Under German law the investor has no direct contractual right against the upper-tier intermediary to request delivery of securities kept by the CSD in collective safe custody. He has to enforce his right against his custodian bank which, in turn, has a contractual right against the CSD. Somewhat unclear is the situation with respect to the right in rem of the investor, i.e. whether his position as co-owner gives him a direct claim for delivery against the CSD. It seems to be the prevailing opinion that either such claim does not exist due to the effect of Sections 7 and 8 SDA or that it may not successfully be exercised against the CSD.

Shares of foreign companies listed in Germany:

Registered shares of foreign companies listed on a German Stock Exchange (Official Market or Regulated Market) are traded in Germany usually on the basis of either (i) share certificates kept in cross-border collective safe custody via a bilateral CSD account relationship pursuant to Section 5 para 4 SDA or (ii) share certificates registered in the name of Clearstream Banking AG, Frankfurt, or of a foreign or domestic custodian bank and endorsed in blanc or (iii) a global bearer certificate issued by Clearstream Banking AG holding a corresponding number of shares abroad as trustee. The most common scheme is (i). According to its General Business Conditions and the Terms and Conditions of the global bearer certificate Clearstream Banking AG is prepared to either exercise voting rights for investors according to their instructions (however not without such instructions) or to take such steps as are necessary to enable the investors to exercise themselves voting rights, provided the applicable foreign law and the statutes of the company permit such exercise.

Shares of foreign companies credited WR:

As described under Q 7 above, securities purchased and held in custody abroad are credited to the securities account "WR". The intermediary (first-tier custodian bank or CSD as upper-tier intermediary) acquires ownership or such other entitlement to the securities which is customary in the respective country and holds such entitlement as fiduciary trustee for the investor. The intermediary collects dividends as part of its services. As to the exercise of voting rights, subscription rights for new shares or rights under a tender offer etc., the intermediary acts only upon instruction of the investor. Whether or not and under what conditions and prerequisites the ultimate investor can attend and vote at a shareholders´ meeting of a foreign company depends upon the corporate and other law governing the issuer. As a rule, German custodian banks do not exercise voting rights in respect of foreign shares which are not listed in Germany. According to its General Business Conditions Clearstream Banking AG is generally prepared to exercise voting rights upon instruction of the investor (via his custodian bank) or to take such steps as are necessary to enable the investors to exercise voting rights, if permitted by the foreign law and the statutes of the company.

34.5. Estonia

Provisions of (i) the law (e.g CC in the case of a share), (ii) issuer's incorporation documents (e.g. Articles of Association in the case of shares) and where relevant, (iii) additional contractual terms (e.g. Terms Sheet in the case of debt instruments) determine the investor's rights attached to a particular instrument.

For instance, § 226 of the CC provides that a share grants the shareholder the right (i) to participate in the general meeting of shareholders and (ii) in the distribution of profits and, (iii) upon dissolution, in the division of the remaining assets of the public limited company, as well as (iv) other rights provided by law or prescribed by the Articles of Association.

As a general rule, rights attached to a book entry security belong to the owner of the securities account to which the security is credited.

There are special rules in (4) of § 6 of the ECRSA that apply to the performance of rights attached to a book-entry security, which is credited to a nominee account and is held through intermediary (i.e. through the owner of the nominee account) by the investor. Those rules provide that:

(i) the owner of a nominee account (i.e. intermediary) is entitled to exercise the rights arising from securities held in the nominee account and is liable for performance of the obligations arising from such securities.

(ii) in the exercise of voting rights and other rights arising from a security, the intermediary must follow the investor's instructions.

(iii) at the request of the investor, the intermediary must grant authorisation to the investor, in the required format, for the investor to represent the intermediary in the exercise of rights arising from securities.

With respect to item (iii) above there is also a specific regulation, Regulation No. 52 of 21 March 2003 on the "Procedure for Granting the Authorisation as a Single List for Representing the Owner of the Nominee Account at the General Meeting of Shareholders" (hereinafter referred to as "Regulation No. 52"), that enables the intermediary to grant authorisation to its clients (i.e. investors), in the form of a single list, to represent the intermediary at the general meeting of shareholders.

Thus, vis-à-vis the issuer or other third parties (including upper-tier intermediary) the intermediary is the one entitled to exercise the rights attached to book-entry securities credited to a nominee account. Based on (4) of § 6 of the ECRSA when doing so it has the obligation to follow the instructions of the investor.

However, as the investor is deemed to be the owner (see (3) of § 6 of the ECRSA) of the book-entry security in the nominee account, the rights (fruits, benefits and advantages) attached to a security at the level of relation between the investor and intermediary belong to the investor.

This means that the intermediary is obligated to ensure that the investor can enjoy and have the benefits of the rights in accordance with the service level agreed upon in the account agreement entered into between the intermediary and investor.

Detailed provisions concerning the rights and obligations (including detailed procedures) of the intermediary vis-à-vis the investor with regard to performance and administration (e.g. notification of the investor about pending corporate actions) of rights attached to a security are thus usually provided in the account agreement (also known as a custody agreement).

34.6. Greece

In Greece, corporate rights of share/securities holders (regarding societes anonymes governed by Greek Law) are regulated in Law 2190/1920 on Sociétés Anonymes. According to the particular Law share/securities holders have a) the right to participate in the issuer's shareholders General Meetings, b) voting rights, c) rights to a dividend and d) preference rights in relation to issuance of new shares. Additionally, Law 2190/1920 structures certain rights as minority rights (e.g. right to request information by the Board of Directors on the financial affairs and the assets of the issuer, the right to convene or adjourn the General Meeting of the shareholders etc.). Regarding shares listed in the ATHEX, these rights belong to the persons who are registered as account holders in the DSS.

34.6.1. Issuer:

Rights against the issuer deriving from the ownership of securities may only be exercised by the person appearing as the registered shareholder, which in our case is the securities account holder, within the DSS.

As **ex lege** presumed shareholder, the account holder holds the right to participate and vote at general meetings of the issuer pertaining to the securities registered in the securities' holder account and exercise all financial and administration rights attaching to the securities (See above). Third parties (e.g. beneficial owners or end investors) could exercise such rights only by delegation, acting as representatives of the account holder. Accordingly, only the securities account holder is entitled to dividends/coupons etc.

As such, if the securities are held directly by the investor, the rights mentioned above vest directly in the investor; however if the securities are held by the intermediary/account provider (see bellow under ii) for the account of the investor, then all aforementioned rights against the issuer can only be exercised by such intermediary/account provider.

34.6.2. Intermediary (account provider):

Regarding the issue raised herein, the term "intermediary" (account provider) could have two meanings: a) the Account Operator within the DSS, which operates the securities account of the investor (account holder) in the DSS, and b) the account holders within the DSS being foreign investment firms or credit institutions holding securities (shares issued by Greek societes anonymes) in their name for the account of end investors through an omnibus account. In the latter case, the DSS does not flag it self the identity of the omnibus account as an account held for customers of the account holder. The identification of the end investor should be made at the intermediary's (account holder's) level. For an analysis of the legal status of the latter in Greece see below under (2).

Where the intermediary acts as the Account Operator (first case above) the rights deriving from the securities are exercised directly by the investor, who is the securities account holder in the DSS. In the second case the rights deriving from the securities are exercised by the intermediary, as the securities account holder. In the latter instance, the rights of the investors

against the intermediary are determined by the terms and conditions of the private agreement entered into by the parties.

34.6.3. Upper-tier intermediary:

It is highly unlikely that the investor will have any direct rights against the upper-tier intermediary with respect to the securities held by the latter.

If the DSS would be considered as an upper-tier intermediary, article 2 para 3 of the DSS Operation's Regulation determines that DSS is only liable for the correct registration of the data provided to it. Furthermore, investors (account holders within the DSS) have rights only against their account operator. In principle, the account operator is the only responsible and entitled to execute transfers on the accounts operated by it or, at least, its consent is required for such a transfer (e.g for off-exchange transactions), except in cases specifically provided by the DSS Operation's Regulation (e.g. transfer of shares upon inheritance).

34.7. Spain

34.7.1. For securities "listed" in a Spanish Regulated Market, and therefore included in the IBERCLEAR system, and held directly in IBERCLEAR or in an account opened and maintained by a Participant in IBERCLEAR.

As stated several times in this questionnaire, these investors are deemed to have a direct legal relationship with the issuer, and have as many rights as each security is deemed to confer to its holder, according to the law applicable to that security, the terms of the issuance, etc. (Article 15 of Royal Decree 116/1992). Therefore, the holder has the right to receive any cash distribution coming from the issuer (principal or dividends, coupons, etc.), and to exercise "political rights" arising from the securities (i.e. to assist and vote in General Shareholders' meetings, to demand information from the issuer regarding the agenda of the GSM, etc.).

The procedure established to exercise the rights arising from the securities vary:

- Economic and pre-emptive rights (Article 25 of Royal Decree 116/1992): Payment of dividends and other distributions, as well as pre-emptive rights are exercised through the participants in IBERCLEAR. Once the issuer passes and announces the relevant corporate action, IBERCLEAR, when required by the issuer to do so, issues a certification of the balance of securities that each holder has in the "record date" set by the issuer (the date in which is necessary to have acquired the securities in order to be entitled to exercise the given right) and gives this information to the issuer or, if designated by the issuer, to its payment agent (generally, a participant in IBERCLEAR).

  If it is a "downward flow" (from the issuer to the investors, i.e., a dividend) the issuer then has to pay to each Participant an amount equal to the dividend multiplied by the number of securities evidenced in the certification issued by IBERCLEAR.

If it is an "upward flow" (from the investors to the issuer, i.e. a share capital increase), the Participants have to pay to the issuer or its payment agent as much money as securities they intend to subscribe (by themselves of for their clients). Once the money is received and the corporate action is duly executed (should it be the case, through duly recording it in the Mercantile Registry, the CNMV, etc.), IBERCLEAR inscribes the securities in the accounts of the participants, and the participants in the accounts of their clients.

If the capital increase gives existing shareholder a pre-emptive right to subscribe the newly issued shares, there is 15 day negotiation period for these rights (for listed companies). IBERCLEAR automatically credits in the accounts of the participants, in the form of new securities with its own ISIN code, as many rights as securities previously owned by them or their clients. The participants credit them in the accounts of their clients in the corresponding amount. At the end of the negotiation period, each participant and their clients may subscribe for as many newly issued shares as subscription rights they have.

As a general rule, all of these cash transfers are made using the settlement processes provided by IBERCLEAR (the central bank accounts that the participants use in the settlement processes), in order to facilitate and speed them up. Issuers may choose to pay or to collect payments through other means different to central bank money.

- Political rights: As a general rule, the right to attend and vote in GSM requires the investor to demonstrate its condition. This may be done through a "legitimating certificate" that the participants in IBERCLEAR are obliged to issue at the investors' request. However, issuers' by-laws generally foresee that the investor needs to present an "attendance card". This card is issued and sent to the domicile of the investor by the issuer, where the shares are "registered" (nominative); or, for the rest of the shares, these cards are issued by the Participants in IBERCLEAR, who send them to the domicile of the investors. The investors then decide whether to attend the meeting, to delegate the vote in a proxy-holder, or not to act at all. Since 2003, the issuers are obliged to provide for "distance-voting" through postal mail or electronic means.

  Participants in IBERCLEAR are obliged by law to facilitate to the investors the exercise of the rights arising from the securities. Any denial or obstruction to the exercise of the rights by the investor against the issuer (i.e. not passing down the dividends received from the issuer) could lead to administrative fines, apart from the civil liabilities incurred.

34.7.2. For other securities: There are no specific provisions for other securities. The exercise of rights attached to indirectly held securities is subject to the provisions of the relevant account agreement with the intermediary, and depends on the type of security and the lex societatis applicable to it. Notwithstanding, it is understood that the intermediary is obliged to

facilitate the investor the exercise of such rights, and many Scholars would argue that a lack of diligence in "passing down" the economic flow coming from the securities, or in giving notices of GSM, etc., would make the intermediary liable for any damage that this conduct may cause to the investor.

34.8. France

34.8.1. Shareholder's meetings

I. Issuer

As a matter of principle, all shareholders are entitled to participate in general meetings (Article 1844 of the Civil Code).

However:

- the articles of association may limit the number of voting rights allocated to each shareholder at meetings provided that such restriction applies to all shares without distinction to any category other than shares with priority dividend non voting rights (Article L. 225-125 of the Commercial Code); and

- a shareholder who has not fully paid up the shares subscribed for is not entitled to participate in, and to vote at, general meetings (Article L. 228-29 of the Commercial Code)

Voting rights may be exercised by the shareholder itself (a) or by proxy (b).

(a) Any shareholder may:

- personally participate in the general meetings;

- vote on a remote basis, either by post or by electronic means (Article L. 225-107 of the Commercial Code and Article 119 and following of decree n° 67-236 dated March 23, 1967).

(b) Any shareholder may:

- appoint another shareholder or his/her spouse as a proxy (Article L. 225-106 of the Commercial Code);

- give blank proxies (in such a case, the shareholder is deemed (i) to approve the resolutions submitted or approved by the board of directors or the management board (directoire) and (ii) to vote against any other resolutions) (Article L. 225-106 of the Commercial Code).

Information on shareholders' meetings:

- before any general meeting, any shareholder may request to be provided with a number of documents (e.g. accounting

documents…) (Articles L. 225-108, L. 225-115 and L. 225-116 of the Commercial Code);

- issuers whose securities are offered to the public or admitted to a listing ("appel public à l'épargne") are required to publish a notice of the general meeting ("avis de reunion") at least 30 days before the general meeting (Article 130 of decree dated March 23, 1967). The purpose of such notice is to inform the shareholders that a general meeting has been scheduled.

- any issuer must publish a notice of the general meeting ("avis de convocation") at least 15 days before the general meeting and must specify, inter alia, the agenda and the text of the resolutions to be submitted to the general meeting (Article 120 and Articles 123 to 127 of decree dated March 23, 1967). The purpose of such notice is to call the shareholders to a general meeting.

II. Intermediary

A custodian (*teneur de compte conservateur*) has to conduct its activity with care in order to facilitate the exercise of the rights related to financial instruments (Article 332-4-1° of the AMF General Rules). In this respect, the custodian is under the duty, *inter alia,* to convey to the issuer the request of its client to be provided with the documents related to such meeting before the relevant shareholders' meeting or otherwise to make those documents available to its clients subject to such documents being made available by the issuer pursuant to the contractual obligations of such issuer (Article 332-38 of the AMF General Rules).

III. Upper-tier intermediary

Investors do not have any relationship with upper-tier intermediaries.

34.8.2. Corporate actions

I. Issuer

Dividends

The distribution of dividends is determined by the general meeting of shareholders (Article L. 232-12 of the Commercial Code).

The right to dividends belongs to each shareholder. The right to dividends belongs to those who are shareholders as of the date the general meeting decides to distribute dividends (Paris Court of Appeal, November 29, 1996).

However, a shareholder who has not fully paid up subscribed shares is not entitled to receive dividends (Article L. 228-29 of the Commercial Code).

In joint-stock companies (sociétés par actions), the articles of association may specify that the general meeting shall have the option of granting to each shareholder, for all or part of the dividend distributed, a choice between a payment in cash or in shares (Article L. 232-18 of the Commercial Code).

The terms and conditions for the payment of dividends are set by the general meeting or, failing this, by the board of directors, the management board (directoire) or the managers (gérants), as applicable. (Article L. 232-13 of the Commercial Code).

The payment of dividends must occur within a maximum period of nine months after the end of the accounting year (Article L. 232-13 of the Commercial Code).

With respect to shares, payment of unclaimed dividends is subject to a five years statute of limitation. Thereafter, dividends are paid to the State (Article L. 27 of the State Property Code – Code du Domaine de l'Etat).

Preferential right to subscribe for new shares

According to Article L. 225-132 of the Commercial Code, the shareholders have preferential rights to subscribe for new shares in case of capital increase. However, shareholders may individually waive their preferential right. Furthermore, the general meeting of shareholders may cancel such a preferential right for the whole capital increase or for one or more tranches of such capital increase (Art. L. 225-35 of the Commercial Code).

II. Intermediary

With respect to bearer shares and administered registered shares (*nominatif administré*)[118] (see question 1) admitted to the EUROCLEAR FRANCE S.A. operations, EUROCLEAR FRANCE S.A. **may** receive directly from the issuer for the account of the participants the aggregate amount of dividends or interest payments to which such participants are entitled (Operating Rules of EUROCLEAR FRANCE, Art. 7.1). In such a case, EUROCLEAR FRANCE S.A. further credits the account of each relevant participant with the relevant amount of dividends or interest for distribution to the owners of securities. Payment of dividends is made to the financial intermediaries maintaining securities accounts. Such financial intermediaries then credit the account of each relevant client.

---

[118] Pursuant to Article R. 211-4 of the Regulatory Part of the M&FC (promulgated by Decree n° 2005-1007 of August 2, 2005), the owner of registered shares may designate an authorised intermediary to maintain its account held with the issuer. In such case, entries made in the account with the issuer also appear in the administrative account maintained with the authorised intermediary and the accountholder may in such case only give instructions to the relevant authorised intermediary. Pursuant to Article R. 211-5 M&FC, securities which are required to be held in registered form (*valeurs mobilières à forme obligatoirement nominative*) may only be traded on a stock exchange when held in an administrative account.

With respect to registered securities not held through an administration account, the issuer credits the securities account of each shareholder with the amount of dividends.

With respect to other rights such as distribution in the form of securities or exchange of securities (*opérations sur titres*), such rights **are** exercised through EUROCLEAR FRANCE S.A. which presents the rights to the issuer or the intermediary acting as representative of the issuer and such rights are credited to EUROCLEAR FRANCE (Operating Rules of EUROCLEAR FRANCE S.A., Art. 7.2)

Under Article 332-5-1° and Article 332-5-3° of the AMF General Rules, the custodian is under the duty to inform the owner of the securities account on :

- any transaction relating to financial instruments for which a reply of the owner is requested,

- any event modifying the rights of the owner in relation to financial instruments under custody, when the custodian considers that the owner has not been informed of such event.

The French Supreme Court has further decided that the custodian is under the duty to inform its clients on the events affecting financial instruments and the rights attached thereto. This duty does not extend to events affecting the issuer (Cass. Com. January 9, 1990).

III. Upper-tier intermediary

Investors do not have any relationship with upper-tier intermediaries.

34.9. Ireland

34.9.1. In the case of equities, the memorandum and articles of the company generally provides that such rights are held only by registered members of the company. No trusts may be entered on the register of members of Irish companies[119] and companies' articles of association commonly reinforce this with broader prohibitions on the recognition of rights of persons other than the registered member[120] . Therefore, in an indirect holding system, the investor has no rights enforceable against the issuer in the normal course.

Members holding through intermediaries could exercise voting rights by the appointment of proxies[121]. A shareholder which has more than one vote has a statutory right[122] to cast votes on a poll[123] both for and against a resolution. This enables a nominee to give effect to voting instructions from different account holders of an intermediary.

In the case of debt securities, this will depend on the terms thereof and, if direct rights are granted by an issuer to an investor holding an indirect interest in securities, how those rights are granted. A person who is not a party to a contract cannot enforce rights conferred on him thereunder other than in certain limited circumstances such as, for example, where the contract is executed as a deed poll.

34.9.2. If the intermediary holds the securities and associated rights on trust for the investor, it must exercise those rights in accordance with the investor's instructions and account to it for benefits accrued. Given administrative difficulties that can arise, intermediaries often seek to limit their obligations in this regard, particularly as regards the timing of receipt of instructions on which they may act.

34.9.3. The investor would not normally enjoy any direct rights against an upper tier intermediary in relation to meetings/corporate actions. The principle that an intermediary that is a trustee must exercise rights in accordance with investors' instructions and account to investors for all benefits, as out lined at (ii) above, is relevant regardless of the relevant "tier".

34.10. Italy

We have focused our analysis on the position of shareholders only.

---

[119] Section 123 of the Companies Act 1963

[120] For example Table A, the statutory form of articles of association which applies to companies that do not expressly adopt different or varied forms of articles, provides (regulation 7) that "the company shall not be bound by or be compelled in any way to recognise (even where having notice thereof) any equitable, contingent, future or partial interest in any share… or any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder".

[121] Section 136 of the Companies Act 1963

[122] Section 138 of the Companies Act 1963

[123] Section 137 of the Companies Act 1963

The investor benefits from "administrative rights", including the right to intervene in the shareholders' meeting and the right to vote, and "financial rights", including the right to receive dividends. The aforementioned rights are enforceable against the issuer. The exercise of both types of rights is however necessarily intermediated by the custodian/intermediary.

34.10.1. In order to intervene in the shareholders' meeting, the investor shall ask the intermediary to inform the issuer of his/her intention through a notification to be sent to the issuer (i) within two working days of the date of receipt of the investor's request or (ii) within such longer period between the latter date and (x) the term provided by the issuer's bylaws for the deposit of the intermediary's certification attesting the shareholder's right; or, failing such provision, (y) the time scheduled for the beginning of the shareholders' meeting (note that the notification requirement has recently replaced the previously existing certification requirement and, therefore, the provisions under (i) and (ii)(y) should be fully comprehensive; since, however, certain company's bylaws may still refer to the certification requirement, the provision under (ii)(x) is aimed at covering such cases).

The intermediary shall issue the notification on the basis of the data shown in its records.

The intermediary shall promptly inform the issuer as soon as any shares – to which the notification refers – are transferred prior to the shareholders' meeting.

34.10.2. To receive dividends, the investor must have the shares on its account on the record date. Once such condition is met, the dividends on the shares held by the investor are automatically credited to the investor account.

This is the result of the following procedures:

(i) For Italian shares

On a date determined by the issuer, the CSD instructs the banks indicated by the issuer to make payments in favour of the beneficiary intermediaries, which, in turn, credit the investors' accounts.

(ii) For foreign shares

The Italian CSD makes payments in favour of the beneficiary intermediaries, having received the relevant funds from foreign banks or from the foreign CSDs with which it has account agreements in place, for their transfer to the investors' accounts.

34.11. Cyprus

34.11.1. No notice of any trust, expressed, implied or constructive may be entered on the register of members of companies registered under the Laws of Cyprus (Article 112, Companies Law). Table A of the same law which contains the statutory form of articles of association which are applicable by default to companies that do not adopt a different form includes a similar regulation (reg. 7) whereby no person is recognised by the company as holding any share upon any trust. Therefore, an investor, beneficially entitled to a share, cannot enforce a right deriving from that share against the issuer. It is a matter of contractual arrangements the extent to which an intermediary will follow instructions given by the

ultimate investor for the purpose of furthering rights under shares. In the context of debt securities, in the absence of legal provisions, it is a question of the terms and conditions of the debt instrument whether an investor has direct rights against an issuer.

34.11.2. The investor would have only contractual rights against the intermediary depending on the terms and conditions contained in the agreement between them. Assuming that the intermediary is also an investment firm, the intermediary would have obligations arising from the relevant law (Investment Firms Law 2002-2004) and the relevant code of conduct.

34.11.3. In the normal course of things the investor would not have an actionable claim against an upper tier intermediary. Only the intermediary below would have such a claim and it is up to him to pursue it at the investor's behest or pursuant to his fiduciary duty vis a vis the investor.

34.12. Latvia

Investor's rights as against the issuer are stipulated in the Commercial Law of Latvia. According to the Commercial Law, each shareholder has the right to attend general meetings of shareholders, to address such meetings and to exercise voting rights with respect to its shareholdings. Shareholders who represent at least one twentieth of the equity capital of the company have the right, to request the institution convening the meeting of shareholders to include additional issues in the agenda of the meeting.

Shareholders may participate at a meeting of shareholders either in person or through a representative. A proxy shall be completed in writing and attached to the minutes of the meeting. A proxy may be submitted up to the beginning of the meeting. A special proxy is not necessary for persons who represent a shareholder on the basis of law. These persons shall present documents that certify their authorisation.

Shareholders have the right to receive information from the board of directors regarding the activities of the company and to become acquainted with all of the company's documents. These rights may be restricted in each concrete case by a decision of a meeting of shareholders if there is a justified suspicion that the shareholder may utilised the information acquired in contradiction to the aims of the company, and thus causing significant harm or losses to the company or to one of the subjects included with the company in a group of companies, or a third person.

34.12.1. If the shares are the subject of the Financial Instrument Market Law (hereinafter – FIML) and have been listed in the regulated market issuer should send information on shareholders' meetings and corporate events to the regulated market organizer who publishes this information on it's web page. If the shares have not been listed the issuer should sent the information on the shareholders' meeting and corporate events directly to every shareholder (if the issuer have registered shares) or by publication in the official newspaper (if the issuer has only bearer shares).

34.12.2. If the securities are the subject of FIML and are credited in the securities account, the intermediary receives information on shareholders' meeting and corporate events through regulated market and also from Latvian Central depository. According to the rules of LCD, the intermediary (LCD

participant) shall inform the financial instruments owner about all corporate actions, as well as about the facts and circumstances regarding financial instruments owned or held by the owner.

34.12.3. According to the LCD rules the LCD shall provide the execution of corporate actions for financial instruments registered with the LCD and put into public circulation in the Republic of Latvia. Financial instruments issuer shall notify the LCD in writing about the planned corporate actions and submit to the LCD information necessary for the execution of the corporate action at least 10 weekdays before the first activity that the LCD has to perform in order to execute the corporate actions.

If the financial instruments issuer has submitted to the LCD inadequate or incomplete information, the LCD shall have the rights to refuse the execution of corporate actions, notifying about it the financial instruments issuer in writing.

The execution of corporate actions shall occur by issuing orders to LCD participants and/or making records in correspondent accounts.

The LCD orders for the execution of corporate actions shall be binding to LCD participants and LCD participants are obliged to execute these orders.

34.13. Lithuania[124]

34.13.1.

(1) Art. 21 of the Law On Companies provide that persons who were shareholders of public limited-liability company at the end of the record date shall have the right to attend and vote at the General Meeting or repeated General Meeting themselves, unless otherwise provided for by laws, or may authorise other persons to vote for them as proxies or may transfer their right to vote to other persons with whom an agreement on the transfer of the voting right has been concluded. The record date of the public limited-liability company shall be the fifth working day before the General Meeting or the fifth working day before the repeated General Meeting. Such provisions suggest that the priority is given to the direct relationship between the shareholder (the investor) and the issuer. Only upon the decision of the investor, i.e. upon issue of a mandate, the relationship in question may become indirect for a particular time.

(2) It also depends on the aforementioned provisions whether the investor shall have direct rights against the issuer or against the intermediary if the latter was authorized to act as an investor's representative. In case the intermediary was authorized to act as investor's representative, the latter would be liable against the investor under general civil liability rules. However, the issue of the mandate would not deprive investor's rights against the issuer, i.e. the investor could dispute decisions of the General Meeting violating his interests or in case the representative acted *ultra*

---

[124] *Abbreviations used in the questionnaire section II. and V.:* **CSDL** – Central Securities Depository of Lithuania; **LSC** – Lithuanian Securities Commission; **VSE** – Vilnius Stock Exchange; **BoL** – Bank of Lithuania (Central Bank); **SSS** – Securities Settlement System; **FOP** – Free of Payment; **DV**P – Delivery versus Payment; **OTC** – Over the Counter

vires, it might be possible to dispute representative's actions under certain circumstances.

(3) Concerning investor's rights against the upper-tier intermediary (the CSDL in this case), the investor has no rights against him in relation to voting or receiving of information on shareholders' meetings if the CSDL was not authorized to acts as a representative of the investor in the General Meeting.

34.13.2. Investor's rights against the issuer/intermediary/upper-tier intermediary in relation to receive dividends and other payments depend on the type of securities.

In respect of Government Securities (T-bills, government bonds and saving notes) the receivables are paid to investors through the intermediaries which receive the monetary funds either from the Ministry of Finance, acting as a representative of the issuer, or from the CSDL (depending on the conditions stipulated in the agreement executed between the Ministry of Finance and the CSDL). In case the intermediary, including the CSDL acting as manager of personal securities accounts, failed to credit receivables to investor's account the investor would not be entitled to address to the issuer of securities. However, it is not clear whether the investor could directly address the issuer in case the issuer failed to credit intermediaries' accounts in order the latter could distribute the receivables to respective investors. In respect of rights against the upper-tier intermediary (the CSDL), theoretically it might be possible to claim damages from the CSDL, if the latter failed to transfer the receivables, received from the issuer, to the intermediaries in order the latter could transfer receivables to investors. However, practically the resolution of the latter issue might depend on many circumstances, e.g. on the term and conditions of the agreement executed between the intermediary and the investor.

In respect of dividend, following Art. 60 of the Law On Companies, the shareholder shall have the right to claim the payment of dividend as the creditor of the company. Such provision suggests direct relationship between the investor and the issuer. On the other hand, following the Order of Registration of Securities, approved by the LSC, the issuer has to indicate the type of payment of dividend in the prospectus (memorandum) of the issue of the securities registered with the LSC. Therefore it is not forbidden to establish in the prospectus (memorandum) that dividend shall be paid only through investors' intermediaries. However, whether such condition deprive the investor from the rights against the issuer in case the latter failed to transfer the receivables to the intermediary in order the latter could credit investor's account is arguable. In respect of rights against the upper-tier intermediary (the CSDL), usually it is unlikely that the investors could address any claims against him in respect of funds transfer.

In respect of corporate bonds, Art. 55 of the Law On Companies, provides for that the investor shall have the same rights as other creditors of the company. Also the same article establishes order of issue of bonds offered for public trading. Before issuing of such bonds, the issuer must conclude an agreement with an intermediary (entering a notice to that effect in the prospectus of the bonds). Under the agreement, the intermediary shall undertake to safeguard the interests of the bonds owners (the investors) in their issuer and the issuer shall undertake to pay remuneration to him. The intermediary must protect the rights and legitimate

interests of the bond owners in the same way he would protect his own rights and legitimate interests as if he was the owner of all issued bonds. The intermediary shall have the right to apply to the court for the protection of the rights of bond owners. Owners of over 1/2 of bonds of particular issue shall have the right to: (1) dismiss the intermediary protecting their interests and demand that the issuer concludes an agreement with the intermediary of their choice; (2) to notice the intermediary acting for their interests that the violation committed by the issuer in relation to the particular issue of bonds is not material and therefore certain actions are not needed to protect their interests (the provision shall not apply to the violations committed by the issuer in relation to bonds redemption and the payment of interest). Where the issued bonds are secured by pledged assets or mortgage, the intermediary also exercises the rights of the security holder for the benefit of all bonds owners. Third parties may offer directly to the bonds owners or through the intermediary surety or guarantee for the discharge of obligations of the issuer arising because of the issue of bonds. In case of failure to discharge all or some of these obligations, the intermediary must transfer the funds received from the third parties to the bonds owners. If the bonds owner or the intermediary managing his securities accounts does not claim the redemption of the bond within 3 years after the redemption date indicated in the bond subscription agreement, the bonds owner shall loose the right to claim for redemption. The aforementioned provisions suggest that the relationship between the investor might be either direct or indirect. Also the same questions arise as in case of share holding, i.e. it is not clear whether the investor could directly address the issuer in case the issuer fails to credit intermediaries' accounts in order the latter could distribute the receivables to respective investors. In respect of rights against the upper-tier intermediary (the CSDL), usually it is unlikely that the investors could address any claims against it in respect of funds transfer.

34.14. Luxembourg

Pursuant to Article 6 of the law of 1 August 2001 relating to the circulation of securities and other fungible instruments (the "Securities Act"), the principle is that in the event of immobilisation of securities or other financial instruments ("Securities"), the depositor of Securities has the same rights as if the Securities had remained with it.

The depositor has a right in rem of an intangible nature, up to the number of Securities booked to its account, on the entirety of the securities and other financial instruments of the same kind deposited with or held in an account by its depository.

(1) In practical terms, the investor's rights in relation to voting or receiving of information on shareholders' meetings are exercised by means of the production of a certificate, set up for the purposes set out therein, by the depository certifying the number of securities or other financial instruments booked to the account.

For the purposes of participating in a general meeting of a company, the numerical list of securities or other financial instruments booked to an account with a depository may validly be replaced by a certificate delivered by such depository to the depositor which confirms the unavailability of the securities or other financial instruments booked to the account up to the date of the general meeting. (Art. 8 of the Securities Act)

(2) In relation to corporate actions, information is provided to the investor via the chain of the relevant intermediaries between the issuer and the investor, based on the securities position held by each element to the chain on the relevant accounts, in accordance with the contractual arrangements existing between the investor and its depository.

34.15. Hungary

The rights of the investor against the issuer emerge from the security and are determined by the given security. The investor can exercise rights against the issuer if the intermediary certifies that he is the owner of the given securities at a given date.

Against the intermediary the investor has rights of disposal with the securities credited to his account, he has the right to information, etc. These rights are based on the account agreement.

34.16. Malta

34.16.1. Voting: if shares are held directly in the issuer, then naturally the voting rights vest directly in the holders of the shares. If the shares are held via an intermediary or an upper-tier intermediary, then whereas in practice the issuer will only recognise the legal owner of the shares as having voting rights (i.e. the intermediary), the intermediary would either be acting as mandatory for the investor or as trustee. Depending on the contractual arrangement with the intermediary, the investor can ask the intermediary to sign a proxy in the investor's favour.

34.16.2. Dividends: if the shares are held directly, then the right to dividends vest directly in the investor. If the shares are held via an intermediary, then whereas in practice the issuer will only recognise the legal owner of the shares as entitled to the dividend (i.e. the intermediary). However, this dividend should be entered into as a credit in the intermediary's clients account in virtue of his position as mandatory/trustee. Such a dividend will then be credited to the investor's account with the intermediary.

34.16.3. Upper-tier intermediaries like the csd do not receive notices or dividends.

34.17. Netherlands

34.17.1. **Issuer:**

Pursuant to Dutch private international law, the rights of the investor against the issuer, in respect of shares issued by such issuer, are determined by the law of the country of incorporation of the issuer. As far as Dutch companies are concerned, these rights of the investor against the issuer are laid down in the second book of the Dutch Civil Code. According to the relevant provisions set forth therein, each shareholder has the right to attend general meetings of shareholders, to address such meetings and to exercise voting rights with respect to its shareholdings. The management and the supervisory board shall provide to the general meeting all the information it requests, unless this conflicts with a substantial interest of the company. Pursuant to the Dutch Civil Code, shareholders also have the right to receive all coupons and dividends and all other income and distributions, whether paid in cash or in kind, on or

relating to their shareholdings as the same become payable. Furthermore, they are entitled to receive all rights resulting from a rights issue, stock split or other similar corporate event, or other securities granted or distributed by the issuer with respect to their shares.

If shares are held directly in an issuer which is bound by the Dutch Civil Code, which will be the case if the shares concerned are registered shares and the investor is registered as a shareholder with the company, the rights mentioned above vest directly in the investor. If the shares are not directly held in the issuer but through an intermediary, a distinction must be made between the situation that the securities concerned are not subject to the Securities Giro Administration and Transfer Act and the situation that they are subject to this Act. In the first case, the investor has no rights against the intermediary, it is the intermediary which has rights, both as to payments and as to voting against the issuer, whilst the investor merely has a position towards the intermediary. In the latter case the investor has a direct right with respect to the securities, including, but not limited to, voting rights and to rights to receive coupons and dividends. However, he is not able to exercise these rights against the issuer directly but only through the intermediary, as will be further explained below.

34.17.2. Intermediary:

A distinction has to be made between, on the one hand shares which are subject to the Securities Giro Administration and Transfer Act of June 1977 (Wet giraal effectenverkeer) and on the other hand shares which are not subject to the Securities Giro Administration and Transfer Act.

The rights which the investor has against the intermediary with respect to shares subject to the Securities Giro Administration and Transfer Act are primarily determined by the Securities Giro Administration and Transfer Act and the further regulations issued pursuant to said Act and more specifically by the Giro Depots Regulation (Reglement Girodepots) and in addition thereto, by the relevant terms and conditions of the custody agreement entered into by the intermediary and the investor, or as the case maybe, by the relevant terms and conditions of the intermediary applicable to its relationship with the investor.

If the shares are subject to the Securities Giro Administration and Transfer Act and are held by an intermediary which is an institution admitted as a participant by the central institution designated as such under the Act (Euroclear Netherlands), the investor will be, together with other investors who have invested in shares of the same type, a co-owner of the collective depot which the intermediary holds at the central institution. As a co-owner, the investor will have voting rights and rights to receive coupons and dividends and other payments in respect of the pro rata interest of its holding in the collective deposit. However, he is only able to exercise these rights through the intermediary. According to Section 15 of the Securities Giro Administration and Transfer Act, the intermediary shall ensure that the joint owners can exercise the voting rights attached to the shares, each co-owner pro rata to its interest in the collective deposit. Pursuant to Section 25 of the Giro Depots Regulation, Euroclear Netherlands is responsible for the collection and the passing through to the

intermediary of dividends, interest and other cash payments payable in connection with the shares including amounts resulting from redemptions and repayments which amounts are to be passed through by the intermediary to the investor. According to Section 36 Giro Depots Regulation, Euroclear Netherlands is being indemnified by the intermediary against claims resulting from wrongful execution by Euroclear Netherlands of its responsibilities and obligations.

The rights which the investor has against the intermediary with respect to shares which are not subject to the Securities Giro Administration and Transfer Act, are exclusively determined by the custody agreement between the intermediary and the investor, or as the case maybe, by the relevant terms and conditions of the intermediary. Pursuant to such a custody agreement or, as the case maybe, such terms and conditions, the intermediary will be obliged to collect and pass through dividends and other income and payments relating to the securities to the investor and to notify the investor about any corporate action to be taken in connection with the securities.

34.17.3. **Upper-tier intermediary:**

The investor will not have any rights in respect of securities against the upper-tier intermediary, unless otherwise provided for by the law of the country of the relevant upper-tier intermediary.

34.18. Austria

There is a **direct relationship** between the investor (account holder) and the issuer (compare question (9)).

34.18.1. **General**: **Voting** may occur, although very rarely, in case of debt securities and regularly in case of equity securities. The respective terms and conditions and contractual framework ("meetings of noteholders") or the articles of association will regulate, in connection with applicable corporate law, how voting is organised and how respective information must be spread. These documents and laws determine the rights of the investor and the obligations of the issuer in this respect. In addition thereto it has become practice that the issuer provides information on these subjects to the relevant principal paying agent/CSD/ICSD, as the case may be, which in turn passes this information on to its customers, i.e. banks which in turn pass this information to the account holders (investors).

34.18.2. The rights of the investor against the issuer operate in practice as follows:

In case there are payments to be made by the issuer (e.g. coupon payments, dividend payments, redemption payments), the issuer will (on presentation of the relevant coupon or security) pay the required funds, as a rule, to the CSD or ICSD which presented the respective securities for payment/redemption. As part of the contractual arrangements between lower tier account providers and investors (deposit agreements), the entity which received payment from the issuer will have to distribute the sums received to the cash accounts of its account holders (as a rule banks) in the amount corresponding to the number of securities credited to the irrespective securities accounts. The account holders then distribute the

moneys received to the cash accounts of their customers (investors) in the amount which corresponds to their respective securities holdings. In case of other corporate actions the same flow (i.e. from the issuer to the investor) would happen e.g. in case of share splits.

In case of increase of share capital and possible participation of all existing shareholders in the increase, the flow of information on the potential subscription of new shares would go down the chain from the issuer to the investor and the exercise of subscription rights as well as the payment thereof would go up from the investor's account provider to the upper tier account provider/CSD or ICSD and to the issuer.

In case of convertible bonds investors will instruct their account holder whether they exercise their conversion right or not, which instruction will be passed on to the upper tier account provider and to the issuer who in turn will provide the required number of its own shares or the redemption money. Similarly the flow will go "upstream" in case of debt issues combined with warrants (entitling the holders to receive shares of other companies or other assets).

34.18.3. The involvement of the Austrian CSD is regulated in its General Business Conditions (see attachments) in sections 10 to 14. Measures which are not covered by these provisions may be performed on special request.

The contents of the relevant sections of the GBC of the CSD are as follows: Section 10 General Rules of Securities Administration: collecting information by the CSD, advance information of the account holders, time limits for instructions of the CSD; section 11 Income (Yields): collection of redemption money at maturity, credit of collected amounts, conversion/exchange, withholding tax, settlement/accounting, adaptions in respect of value dates; section 12 Capital Measures: technical measures, credits and debits on securities and cash accounts, instructions related to capital measures, settlement/accounting, adaptions in respect of value dates; section 13 General Meetings: ensuring participation in the general meeting, proxy voting in Austria; section 14 Other Measures of Securities Administration: results of drawings, talons, definitives, destruction of invalid securities, instructions to exercise options, instructions to buy or sell pre-emption rights.

Moreover there are certain rules laid down in the Clearing Rules (Sections 32 to 36) for trades made on the Vienna Stock Exchange which are of a technical nature and not of interest for this questionnaire.

34.18.4. The rights and obligations between the investor and its account provider are laid down in the GBC of the account provider (see e.g. the attached GBC of the largest Austrian bank, chapter "Special Business", II. Custody of Securities and Other Assets, no. 69 to 72 of which nos 70 and 72 are in particular relevant in this context). It is rare that the GBCs are amended by specific stipulations.

As a rule the account provider will offer the investor the following services: Collection of interest, dividend and profit coupons as well as procuring respective new coupons. Drawings by lot, calls and other such

measures will be monitored in case notices have been published in the "Amtsblatt der Wiener Zeitung" (official gazette of the daily journal "Wiener Zeitung") or in the "Mercur" (official publisher of drawings by lot). Securities drawn by lot or called, as well as interest, dividend and profit coupons will be collected. In case the securities are held by an upper tier account provider, the obligations listed above will lie with the upper tier account provider. In case of securities kept abroad, the account provider is not obliged to inform its customer of the identification numbers of the securities credited in "Wertpapierrechnung" (securities accounting) in particular of securities drawable for redemption. The account provider will determine by lot to which customer the securities drawn will be allotted. In case the numbers of the securities drawable for redemption are communicated, the numbers will be only of importance for the drawing and redemption as long as this is the case according to foreign practice. In case redemption moneys of drawable securities would be rateably apportioned and in respect of some customers remaining amounts would not add up to denominations of the securities (notes), then the customers whose securities (notes) will be redeemed will be drawn by lot.

In respect of domestic securities, the account provider will check at delivery whether they are affected by public notices. The check will be made on the basis of domestic information at hand. Public notice procedures for cancellation of securities will be checked also after delivery.

In case there was a notice in the "Amtsblatt der Wiener Zeitung" (official gazette of the daily journal "Wiener Zeitung") or information reaches the account provider on behalf of the issue (principal paying) agent or from a foreign custodian (account provider), the account provider will try to notify the investor in case of conversion, capital increase, capital decrease, merger, exercise or sale of pre-emptive rights, demand for payment, consolidation, reorganisation, reorganisation offer, validation and other measures relating to the securities. In case the investor has not given instructions in time, the account provider will act in its best discretion considering the interests of the investor and will in particular realise at the latest possible time any rights which would otherwise lapse.

34.19. Poland

The investor, in whose securities account securities are recorded, has rights directly against the issuer of any such securities. Therefore, the investor is entitled to exercise his rights against the issuer on a direct basis. This rule is directly applicable when it comes to the exercising by the investor of his right to vote, right to participate in the general meeting of shareholders, right to obtain information related to the subject matter of any such general meeting, etc. In order to make those rights exercisable for the investor, the latter has a right to demand that the intermediary institution keeping his securities account issues a registered depository certificate confirming his ownership of the securities recorded in the account.

The investor may also assert claims for the payment of securities-related benefits (dividend, interest, etc.) directly against the issuer. The issuer, however, is not obligated to make any such payments directly to the investor; instead, it may

request that the National Depository (*Krajowy Depozyt Papierów Wartościowych, KDPW*), acting in the capacity of an upper-tier intermediary, handles the payment of the benefits. Based on the participation agreement entered into with an issuer, the National Depository has an exclusive obligation towards the issuer to distribute the benefits obtained from such issuer so as to assure that the eligible persons obtain them. Generally, there is no legal relationship between the National Depository and the investor; therefore, the Depository is not contractually liable towards the investor for a defective distribution of the benefits obtained from the issuer; instead, the Depository is so liable towards the issuer. The benefits are distributed by the National Depository to intermediaries keeping the investors' accounts. At the time when the benefits are received by the appropriate intermediaries, the issuer is released from the obligation towards the investor, while the liability towards investors for making the benefits obtained from the National Depository available to them is transferred on intermediaries keeping the investors' securities accounts.

34.20. Portugal

[to be completed]

34.21. Slovenia

Procedure on issue of dematerialised securities

All "transferable securities" in the meaning defined in Article 4 of the Directive for Markets in Financial instruments 2004/39/EC that are (were) issued in Republic of Slovenia are (were) issued as dematerialised securities. Pursuant Par. 1 of Art. 11 of ZNVP on the issue of dematerialised securities, the issuer shall issue and give the KDD an order to issue dematerialised securities on behalf and for the account of the issuer by entering in the central register the information about the essential components of dematerialised securities and to credit them to the accounts of their holders who have subscribed and paid such securities. Procedures upon the issue of dematerialised securities are described in more detail in Answer to Q2.

All entries in the central registry are directly enforceable against the issuer

The concept of "final client level" type of dematerialisation has been applied by ZNVP. By that concept the holder of the securities, registered on his account of dematerialised securities (i. e. "on whose behalf dematerialised securities are entered in the central registry"), is at the same time legal (and beneficial) holder ("owner") of those securities (Art. 16 of ZNVP). Basic legal concepts of dematerialisation are described in more detail in Answer to Q1.

Due to the concept of "final client level" dematerialisation upon entry in central registry (e. g. upon execution of transfer of securities debiting former holder's account and crediting new holder's account) new holder acquires rights arising out of securities (object of transfer) against the issuer. Rights of a holder of dematerialised securities (i. e. rights of a holder of a dematerialised securities account on which the securities are registered) are directly enforceable against the issuer and against any third party (erga omnes).

Legal nature of rights of a holder of dematerialised securities are described in more detail in Answer to Q7.

Additional legal effect against the issuer with registered dematerialised securities

Dematerialised securities may be issued either as a registered security or a bearer security (Art. 5 of ZNVP).

Same rules of transfer of dematerialised securities to other account and of entry (registration), modification or deletion of third party rights in dematerialised securities or of legal facts related to dematerialised securities apply to both types of dematerialised securities. The only (legally relevant) distinction is:

With registered dematerialised securities KDD is authorised pursuant Par. 1 Art. 65 of ZNVP to maintain a share ledger or a register of registered securities on behalf of and for the account of the issuers. The transfer of rights arising from registered securities or registration of third-party rights to registered securities in the central register shall (in addition to general legal effect against the issuer described above) have the legal effects of an appropriate entry in the share ledger or register of registered securities with respect to the issuer (Par. 2 Art 65 of ZNVP). Legal effect of an entry of a transfer in a share ledger of registered shares pursuant Art. 232 of Companies Act (ZGD) is ***notification to the issuer*** (share company) ***of a transfer*** (i. e. of a new share holder). The same legal effect has an entry of a transfer in a register of registered securities with respect to the issuer pursuant Art. 223 of Obligation Code (OZ).

34.22. Slovakia

Execution of rights of the investor against the issuer are ruled by the Act on Securities and Investment Services and by other relevant legislation e.g. by provisions of Commercial Code regarding shares, by the Act on Bonds concerning bonds, the Act on Collective Investments regarding units of the unit trust, etc. (In our response we will focus only on rights associated with shares.)

Investor's rights against the issuer in relation to voting are exercised on the basis of statement of issuer's registry prepared by the central depository including details on beneficial owners (§107 par.5d of the Act No. 566/2001 Coll. on Securities and Investment Services as amended, further referred to as „the Act"). Alternatively, investor can justify ownership of shares by presenting the statement of its securities account to issuer at shareholder's meeting.

Generally in Slovakia, there is a direct relationship between issuer and investor as to informing on shareholder's meetings or on corporate actions (both for announcements of corporate actions and payment of dividends and coupons). However, investor may conclude an agreement with intermediary (e.g. Agreement on securities custody, §41 of the Act) according to which intermediary should inform the investor on any corporate actions or distribute proceeds of corporate actions.

Investor has no rights against the upper-tier intermediary (currently in Slovakia the CSD is the upper-tier intermediary and its members are intermediaries; clients of CSD members are considered to be the beneficial owners of securities) in respect of receiving information on shareholder's meetings, voting or corporate actions.

34.23. Finland

Regarding **securities incorporated in the book-entry system**, the investor is regarded as the legal owner irrespective of the pattern of the holding, i.e.

irrespective of whether the investor is registered directly in the book-entry system or whether he is represented by a nominee.

34.23.1. General meetings

i. The investor is regarded as the shareholder as against the issuer regardless of whether the shares are held directly or indirectly. For directly held shares, the issuer recognizes the investor's holding on the shareholder list entitling to participation in a GM without any intermediation. The issuer may also use this list for sending invitations to the GM directly to the shareholders.

When securities are held with a nominee, a custodian, usually a bank or a securities institution authorised to manage shares on behalf of an investor, may be entered in the shareholder list instead of the shareholder as holder of the shares deposited with the custodian (nominee registration). However, the custodian is not entitled to participate in a GM based on the nominee registration or use the voting rights pertaining to nominee registered shares. If the investor of such nominee registered shares wishes to attend a GM, he is entitled to be temporarily re-registered (no later than 10 days before the GM) in the shareholder list in his own name and to attend the GM. When registered in the shareholder list, the investor can issue a proxy for another person (such as the custodian) to attend the GM physically.

In its articles of association, a company may impose a requirement on all shareholders to sign up for the meeting.

ii. If the shares are held directly in accounts maintained in the book-entry system, the investor's rights in respect of a voting do not depend on the intermediary or the custody agreement. If the shares are held indirectly and registered in the name of the nominee, the rights of an investor against the intermediary depend on the custody agreement. When the Finnish regulatory regime is applied to the custody agreement, guideline 201.9 issued by the Finnish Financial Supervision Authority provide general instructions in respect of the agreement between a custodian and an investor. The guideline does not require the custodian to facilitate investor's participation to a GM. Furthermore, it shall be noted that the obligations relating to a custody relationship will be regulated in the level 2 rules relating to the MiFID –directive.

iii. Where the shares are held indirectly, the investor has no enforceable rights against an upper-tier intermediary with whom he does not have an agreement.

34.23.2. Dividends and corporate actions

i. (i and ii) The investor is regarded as the shareholder as against the issuer regardless of whether the shares are held directly or indirectly. The information recorded on the book-entry accounts determines the right to dividends. While the issuer has access to the shareholder list, the information on deviations from the general

shareholder's rights to dividends is not available for the issuer in every detail. For example, pledging of the shares (and pertaining dividends) and assignment of the dividend right are only recorded on the book-entry accounts and not on the shareholder lists.

Pursuant to the Act on Book-Entry Accounts, the issuer is deemed to have discharged its obligation to pay dividends by paying a lump sum of dividend to each account operator in accordance with the amount of shares administered by the respective account operator. The liability to pay to the investor is transferred by law to the account operator when the issuer pays the lump sum to the account operator. The account operator, in turn, gains payment protection by paying the dividend to the recipients in accordance with the information registered on the book-entry accounts.

Regarding indirectly held securities, the nominee receives the dividend payment from the account operator. In accordance with Section 28, Subsection 2 of the Act on the Book-Entry System, nominee registered shares do not entitle one to exercise other rights of the owner vis-à-vis the issuer than the right to withdraw funds, to convert or exchange the book entry and to participate in an issue of shares or other book entries. Normally, the rights and obligations relating to the dividend payment (e.g. with regard to tax processing) depend on the custody agreement between the investor and the respective custodian.

The principles of dividend payments are applied also to other corporate actions in which remuneration or stock are payable by the issuer to the investor.

If the custodian is an intermediary subject to Chapter 4 of the Securities Markets Act, it has general obligations in respect of conduct of business towards its customers. In accordance with these provisions, the intermediary is e.g. liable to provide to the customer information relating to the securities if the information may have a material effect on the decision-making of the customer.

ii. Where the shares are held indirectly, the investor has no enforceable rights against an upper-tier intermediary with whom he does not have an agreement.

34.24. Sweden

1) Rights against the issuer are determined by the terms of the securities issue. Such terms are usually derived from a combination of statutory law (for instance company law as regards shareholders' rights and contract law as regards bonds) and explicit prospectus terms.

2) Rights against the intermediary/account provider are determined either by statutory law (such as Financial Instruments Accounts Act), regulatory instruments (regulations of Financial Supervisory Authority) or by contract/account agreement between the intermediary and its client.

3) Non-contractual rights against an upper-tier intermediary have no legal ground.

a) Only shareholders who are registered by name as owners in the shareholders register on the specified record date are entitled to vote and to receive GM information from the company. Intermediaries who are registered as such (i.e. **not** as owners) are not entitled to vote or to exercise any shareholders' rights. Registered intermediaries however have an obligation to pass on information from the issuer to the underlying client (whether this client is "owner" or another "non-registered" intermediary) and to follow instructions from underlying owners to register their names in order to be allowed to participate at GM. In practice this is processed to a large extent through the centralised shareholders registers, maintained by the CSD.

b) Companies are obliged to pay dividends to anyone who is registered as shareholder or intermediary on the specified record date for dividends (or other corporate actions). Registered intermediaries are obliged to pass on any rights received on account of clients to those clients. The obligations of intermediaries are primarily regulated by contract/account agreement.

It should be noted that the nominee according to the Financial Instruments Accounts Act, chapter 3 section 12 is obliged to inform the CSD about the ownerships of the nominee-registered shares.

Section 12. *Upon demand by the central securities depository, a nominee shall provide information to the securities depository with respect to the shareholders whose shares are managed by him. The information shall include the shareholders' names, personal identification numbers or other identification numbers, and mailing addresses. The nominee shall, in addition thereto, state the number of shares of different classes owned by each shareholder. The information shall relate to the circumstances at the time determined by the central securities depository.*

34.25. United Kingdom

(i) In the case of shares, the memorandum and articles of the company concerned normally provide that such rights are held only by members, that is those whose names are entered on the register of members of the company. No trusts may be entered on the register of members of English companies[125] and companies' articles of association commonly reinforce this with still broader protections against the recognition of rights in a person other than the registered holder[126] . Therefore, in an indirect holding system, the investor has no rights enforceable against the issuer in the normal course. Law reform has been called for in this area, but has not been implemented.

In practice members holding through intermediaries are enabled to exercise voting rights by the appointment of proxies[127]. A shareholder which has more than one

---

[125] Companies Act 1985, s. 360.

[126] For example Table A, the statutory form of articles of association which applies to companies that do not expressly adopt different or varied forms of articles, provides (regulation 5) that "the company shall not be bound by or recognize any interest in any share except an absolute right to the entirety thereof in the holder".

[127] Members have a statutory right to appoint proxies up to 48 hours before the meeting – section 372 of the Companies Act 1985.

vote has a statutory right[128] to cast votes on a poll[129] both for and against a resolution. This enables a nominee to give effect to voting instructions from different account holders of an intermediary.

In the case of debt securities, the terms of issue will likewise typically include provisions entitling the issuer to recognize only the registered holder (in the case of registered securities) or the person in possession of the certificate (in the case of bearer securities) as entitled to exercise or enjoy the rights attached to the securities. In the case of issues where only global certificates are issued, either during an initial period or throughout the life of the relevant securities, it is common for account holders who have securities credited to their accounts with a specified ICSD or ICSDs to be given direct rights, under a deed poll executed by the issuer, to enforce payment against the issuer in certain circumstances (generally where the issuer is insolvent and fails to comply with an obligation to issue definitive certificates).

(ii) In an indirect holding system, the intermediary generally holds the securities and all rights associated with them on trust for investors. Accordingly, the default position is that it must exercise rights in accordance with investors' instructions, and account to investors for all benefits derived from the securities. However, intermediaries in practice sometimes encounter considerable operational difficulties in relation to meetings and corporate actions. There may also be legal difficulties, for example where the intermediary as registered shareholder is not permitted to vote part of the holding one way and part of the holding another way (in accordance with the differing instructions of investors)[130]. Therefore it is common for intermediaries contractually to restrict their duties to investors in relation to meetings and corporate actions, in particular so as to ensure that they are not obliged to give effect to instructions that are not received a reasonable time in advance and that they are entitled to reasonable remuneration for the work involved. For administrative reasons, it is also common for intermediaries contractually to restrict their obligation to account for fractional and/or small value entitlements. Such contractual provisions are generally enforceable.

(iii) The investor would normally (e.g. in the absence of negligence or fraud) enjoy no direct rights against an upper tier intermediary in relation to meetings or corporate actions. The principle that an intermediary, by virtue of its fiduciary duties as trustee, must exercise rights in accordance with investors' instructions, and account to investors for all benefits derived from the securities, will operate at each level of a chain of intermediaries, subject to any contractual limitations on any intermediary's obligations, such as those described at (ii) above.

---

[128] Companies Act 1985, section 374.

[129] Members and their proxies also have the right to demand a poll, the threshold for this purpose being law (five members or members representing 10% or more of the members entitled to vote) – section 373 of the Companies Act 1985.

[130] Though this difficulty will not arise in respect of shares in UK companies - see above and the preceding three footnotes.

35. QUESTION NO. 35: HOW CAN THESE RIGHTS BE EXERCISED? WHO IS ENTITLED TO ASSERT RIGHTS AGAINST THE ISSUER IN RESPECT OF SECURITIES CREDITED TO A SECURITIES ACCOUNT? UNDER WHAT CIRCUMSTANCES IS THE INTERMEDIARY REQUIRED TO PASS BENEFITS ON TO THE INVESTOR? HOW IS THIS ACHIEVED IF THERE IS AN OMNIBUS OR A NOMINEE ACCOUNT?

35.1. Belgium

See answer to question 34 above.

Normally, in the practice of intermediaries acting under Royal Decree n° 62, rights are exercised only against the next intermediary up the chain. For example, the issuer informs the top-tier intermediary (usually a securities settlement system) of an upcoming meeting. This intermediary then informs the relevant intermediaries holding the securities in the securities settlement system. These intermediaries, in turn provide the information to the ultimate investors. These investors can then instruct their custodians as to how they wish to vote. These intermediaries provide these instructions to the top-tier intermediary who provides an aggregate voting instruction to the issuer company. Under Belgian law, intermediaries must inform their clients of any information they are aware of (or that they should know as professional) affecting the rights of such clients or the securities held by such clients.

In a Belgian domestic context, payment of dividends, interests and principal amounts (when due) to a settlement institution (CIK, Euroclear Bank or NBB clearing system) is discharging the issuer. Such corporate income payments will be distributed in turn by the settlement institution to the participants up to their respective positions, which will discharge the settlement institution (see article 14 of Royal Decree n° 62).

For participation to general assemblies and more generally for the exercise of corporate rights , the intermediaries or the settlement institutions will issue (blocking) certificates, confirming the deposit in their books of the number of relevant securities in the name of the relevant owner (or of its intermediary) on the date of exercise of such rights, and , for the sake of the participation to general assemblies, the unavailability of the deposited securities until the date of the relevant general assembly (article 15 of Royal Decree n° 62).

35.2. Czech Republic

[to be completed]

35.3. Denmark

A distinction has to be made between the right to receive dividends and the right to exercise other corporate actions (voting rights etc.).

35.3.1. Dividends.

Dividends can be paid by the issuer (through the issuer CSD) to the person who is registered as account holder in the CSD regardless of whether the account holder is acting as intermediary or nominee for others. If the account holder is acting as intermediary he is obliged to pass on the dividends to his account holders (the end-investors), but if he fails to do so

e.g. due to insolvency the end-investor cannot demand that the issuer makes a new payment to the end-investor. It is possible on a account to list another person than the account holder as the one who should receive the dividends (in which case the issuer can only pay to that person), but of course if the account holder is acting as intermediary for several persons (as an intermediary usually does) this is not in practice as option as only one person per CSD-account can be listed as the receiver of dividends.

35.3.2. Voting rights and similar corporate actions.

A distinction must be made between bearer shares and registered shares (both can exist in dematerialised form). In case of *bearer* shares the only condition to exercise voting rights is that the shareholder proofs his ownership at the general assembly. If the shareholder has an individual account with a CSD this can be done by showing an account statement from the CSD (provided by the account manager managing the CSD-account). If the account holder does not have an individual account with the CSD but instead holds through an intermediary (often a bank) who in turn has an omnibus account with the CSD, the documentation of ownership of the bearer share must be provided by both an account statement from the CSD (evidencing the banks holding of securities) and an account statement from the bank (evidencing that the shareholder is the "true" owner of a specific part of the securities maintained by the bank).

In case of *registered* shares a condition to exercise voting rights is that the shareholder is noted by name in the books of the issuer. If the securities are held on an individual account with a CSD, the CSD can notify the issuer of the name of the account holder (share holder). The rule that the name of the owner of the registered share must be noted in the books of the issuer through a notification by the CSD also applies if the securities are held through an intermediary (who in turn maintains the securities on an omnibus account with the CSD). However, the CSD can only notify the issuer of one person per account in the CSD. Consequently, in order for the end-investors to obtain individual voting rights, the omnibus account must be divided into individual CSD-accounts (one per investor) if each investor shall be able to vote.

For both *bearer and registered* shares the following general rules apply. The issuer can in its corporate charter decide that in order to exercise voting rights proof of ownership from the shareholder must be produced 5 days (or a shorter, but not a longer, period) before the general assembly is held. Further, in the corporate charter it can be decided that securities do not entitle to voting rights at a general assembly which was announced before the proof of ownership was produced to the issuer. Finally, if the shareholder (the end-investor) wishes that someone else e.g. the intermediary exercises the voting rights on the shareholders behalf, the shareholder must inform the issuer that the intermediary is entitled to vote on the shareholders behalf (the fact that the intermediary holds the securities for the investor does not in itself give the intermediary authority towards the issuer to exercise voting rights).

35.4. Germany

First, see the answers to Q 34. In addition:

Voting rights resulting from German shares may be exercised either personally by the shareholder attending the meeting or via proxy, i.e. on the basis of a power of attorney issued by the shareholder in writing. The proxy can be any person attending the meeting. The most common procedure is to grant a proxy to the custodian bank provided such bank is prepared to represent its customers in the respective shareholders´ meeting. As to the form of the proxy see Q 34. The custodian bank holding a proxy has to remind its customer yearly of his right to revoke such proxy at any time (Section 135 para 2 SCA)

The intermediary is required to pass all benefits on to the investor. This follows from his contractual relationship as custodian bank or trustee with the investor. In case of an omnibus account or nominee account the person or entity knowing the identity of the individual investors would be, based on the underlying contractual relationship, required to pass on the benefits proportionally.

35.5. Estonia

As discussed above (34) execution of rights by the investor against the issuer (e.g. voting at the general meeting of shareholders) and other third parties always requires authorisation of the intermediary. The latter means that only the intermediary (i.e. the person indicated in the shareholders' register) is entitled to assert the rights against the issuer.

Considering that the investor is deemed to be the beneficial owner of the book-entry security in the nominee account, the intermediary is required to pass any benefit (including interest and dividend payments) to the investor, except if otherwise provided in the account agreement.

35.6. Greece

When the shares are held directly in the name of the investor and thus the latter is the securities account holder in the DSS, the rights attaching to the securities are exercised by the investor himself. Accordingly, when the securities are held by the intermediary for the account of the investor, only the intermediary – as the securities account holder – is entitled to exercise such rights.

The obligation of the intermediary to pass benefits on to the investor derives from article 6 para 2 and 3 of Law 2396/1996 in conjunction with the Code of Business Conduct Rules of Investment Firms (especially para 4.3. and 8.1.c.). Furthermore, this could be a matter to be dealt with in the private agreement between the two parties.

As regards omnibus account, the DSS does not technically acknowledge collective holdings 'for account' (omnibus accounts). Nevertheless, the obligation to register the end investor in the DSS, representing a prudential rule, could not be imposed to foreign credit institutions and investment firms. The latter are not prohibited by Greek Law to invest on ATHEX, acquiring securities held with the DSS, via an omnibus account, i.e. to hold these securities in an omnibus account under their own name held with an Operator in the meaning of DSS, which acts as custodian and administrator of this account. However, the omnibus account would not be identified as such with the DSS, but only with the Operator. Hence, the manner in which the benefits will be passed on to the end investor by the intermediary will be again a matter of the private agreement between the parties and any Business

Conduct Rules for investment firms or other law applicable in the foreign intermediary's jurisdiction.

35.7. Spain

A. How can these rights be exercised?

Investors may prove "*erga omnes*" their condition through a "legitimating certificate" that the participants in IBERCLEAR are obliged to issue at the investors' request. These certificates are statements that contain the name of the investor, the name of the issuer, description of the issuance (i.e. ISIN code), number of securities, nominal or face value, and if it is the case, the fact that those securities have been the object of a security interest agreement (i.e. a pledge, etc.). For GSM, please see the reference to "attendance cards" in 34 above.

B. Who is entitled to assert rights against the issuer in respect of securities credited to a securities account?

The investor whose name is recorded in the accounts opened and maintain by the participants in IBERCLEAR, or by IBERCLEAR when the investor is the participant acting for its own account. Issuers are deemed to have complied with its obligations if they fulfil them vis-à-vis these investors. If it happens that the investor is a nominee or the account is opened for the benefit of many (omnibus account) but in the name of one, the issuer would considered this one as the one entitled to assert rights against him.

C. Under what circumstances is the intermediary required to pass benefits on to the investor?

Generally speaking, there is no circumstance that would entitle an intermediary not to pass down the benefits coming from the issuer. However, account agreements may establish specific arrangements (i.e. the possibility to set off dividends again non paid fees, etc.). Although there is no specific provisions for indirectly held securities, as stated in 34 above.

D. How is this achieved if there is an omnibus or a nominee account?

Omnibus or nominees accounts are not recognised as such. A nominee is treated by Spanish law as any other client of a depositary. In practice, if a client would qualify as a "nominee" according to its law of origin, the benefits are passed down to the client that would then pass them down to the investors on whose behalf it is acting. As regards voting rights, the intermediary would give the client notice of the GSM, and the latter would ask the investors for instructions on how to vote. As the client is deemed to be the shareholder, it would vote following the instructions of the investors. If one investor may want to attend the GSM, the client whose name is evidenced in the books of a participant in IBERCLEAR is entitled to give a proxy to this effect, therefore achieving the desired outcome (the investor attending the GSM and exercising the rights by himself).

35.8. France

A. How can these rights be exercised? Who is entitled to assert rights against the issuer in respect of securities credited to a securities account?

All securities issued in whatever form in France and subject to French law are required to be recorded in an account by way of book entry in the name of their owner. The owner is entitled to assert rights against the issuer in respect of securities credited in his securities account.

Those rights are however normally exercised through EUROCLEAR FRANCE S.A. acting as CSD (see above, question 34).

B. Under what circumstances is the intermediary required to pass benefits on to the investor?

The investor has a property right over the securities recorded in his securities account maintained with the authorised intermediary-custodian. *Vis-à-vis* the custodian, the relationship between the custodian and investor is characterised as a depositary contract ("*contrat de dépôt"*) (see above question 8). **The custodian is under the duty to pass any benefit to its client** (Article 332-37 of the AMF General Rules).

C. How is this achieved if there is an omnibus or a nominee account?

Reference is made to question 6. Pursuant to Article 332-4 of the AMF General Rules, the custodian is required to ensure that are segregated (*distinguées*) in the books of the CSD customers' assets (including those of Collective Investment Undertakings) on deposit and proprietary assets.

Under its operating rules (Art. 5.6), EUROCLEAR FRANCE S.A. offers to its participants the possibility to segregate assets according to different types of holders of securities.

Such segregation is made by EUROCLEAR FRANCE SA participants in accordance with the rules set in Article 332-4 of the AMF General Rules and may occur either:

- by opening different securities accounts; or

- by subdividing securities accounts in different sub-accounts.

Those accounts are in fact collective accounts.

Article 332-17 of the same rules provides that the custodians are required to comply with account identification rules (*nomenclature*) set by the AMF. Such identification results in distinguishing for control purposes financial instruments held by (i) Collective Investment Undertakings, (ii) other customers and (iii) proprietary securities.

In respect of nominee accounts held for the account of registered intermediaries (see question 6), Article L. 228-1 of the French Commercial Code specifically contemplates that such accounts may be collective accounts.

Pursuant to the provisions of Article 151-1 of Decree n° 67-236 of March 23, 1967 (as modified by Decree n° 2002-803 of March 3, 2002), such nominee accounts may be held directly with the CSD.

35.9. Ireland

As indicated above, rights may only be exercised directly against the issuer by the direct holder of securities (in the case of a nominee account, the nominee as holder of record). Intermediaries that are trustees are required to pass on all benefits to the investor, except to the extent that this obligation is validly limited by contract. The obligations of an intermediary that is not a trustee will be determined by the contract between the intermediary and the investor. The issue of omnibus accounts is a difficult one; as indicated above, it is unsafe to assume that a specific trust has been established over specific assets forming part, only, of the balance on an omnibus account (see our response to question (2)). In practice, intermediaries often hold assets of various clients in omnibus accounts and usually seek to address difficulties in relation to fractional entitlements and split votes by a contractual limitation on the intermediary's duties.

35.10. Italy

Who is entitled to assert rights against the issuer in respect of securities credited to a securities account?

The person in whose name the securities account is opened.

Under what circumstances is the intermediary required to pass benefits on to the investor?

Not Applicable.

How is this achieved if there is an omnibus or a nominee account?

Not Applicable.

35.11. Cyprus

Only the registered holder of the securities may assert rights against the issuer. To the extent that the registered holder is not the ultimate owner, rights and obligations between such a holder and the ultimate or beneficial owner are governed by contract. Rights pass to the investor under the stipulations of such a contract. The above principles apply to omnibus and nominee accounts as well. It is a matter for the registered holder to deal contractually with the ultimate investors with issues having to do with fractions holdings and voting.

35.12. Latvia

If the shares are the subject of FIML (the shares are registered by LCD) the shareholder can participate in the shareholders meeting if he is registered in the shareholder list prepared in the procedure provided by LCD rules. To clarify the owners of financial instruments eligible to participation in the meeting, the issuer shall submit a written claim to LCD. According to the contract on servicing the financial instruments' account, a LCD participant shall notify the owner of financial instruments and the holder of financial instruments about the meeting and the procedure of blocking of financial instruments. Should the owner of financial instruments wish to take part in the meeting, he should give order to the LCD

participant to block the financial instruments. LCD participants shall forward information about owners of blocked financial instruments to the LCD. The LCD shall summarise information received from LCD participants about owners of blocked financial instruments with rights to financial instruments into the list of the meeting and submit it to the Issuer on the date indicated on the Issuer's claim. Only shareholders who have blocked the shares and have been included in the shareholders' list prepared by LCD have the right to participate in the shareholders meeting with the voting rights.

NOTE: the aforementioned procedure should be mandatory for shares that are subject of FIML and are registered by LCD.

For exercising the corporate actions the issuer should announce the record date. LCD prepares the full shareholders' list on the record date in a similar way as described before and send this list to the issuer if it's necessary for purposes to withhold the tax. If the full list is not necessary for exercising the corporate action, LCD communicates the information about the record date to all LCD participants and they should fix the owner of shares on this date. LCD shall transfer all cash amounts to be settled in dividends, coupons, principal or other cash proceeds and received from an issuer to LCD participants within one business day, according to the number of financial instruments on corresponding accounts as of the record date and taking into account information about tax deduction provided by the issuer. LCD participant shall, within one business day after receiving the cash transfer from LCD, transfer the dividends or other cash proceeds for deregistered financial instruments to the cash account of a beneficiary.

According to the FIML without a customer's consent, intermediary (an investment brokerage firm and a credit institution) shall be prohibited from executing transactions with the financial instruments belonging to or held by that customer. LCD participant shall, within one business day after receiving the cash transfer from LCD, transfer the dividends or other cash proceeds for deregistered financial instruments to the cash account of a beneficiary.

35.13. Lithuania

Please, refer to answers to the questions No 34 and 36.

Also some notes in respect of investment funds have to be made. The investors jointly own the investment fund. The investment fund is managed by the holding company and kept in custody of the depository in an omnibus account. The depository of the fund may be only commercial bank which has a registered office or a branch in the Republic of Lithuania and which is entitled to provide investment services, the CSDL or central securities depositories of the European Union states, provided they are entitled to engage in safekeeping of monetary resources. The profit of the investment fund is distributed to the investors through the depository of the fund.

35.14. Luxembourg

Pursuant to Article 8 of the Securities Act, these rights are exercised with respect to securities held in book entry form upon presentation of a certificate as to the holdings of the investor issued by the latter's depository. The investor may also choose, where possible, to have the securities physically delivered or to be registered in the books of the issuer.

The investor may also grant a power of attorney to the relevant intermediary with voting instructions.

Payments, e.g. dividends, interest, reimbursements, are typically collected by the intermediaries pursuant to contractual arrangements with the investor.

Except in the event of the intermediary's insolvency there is no relationship between the investor and the upper tier intermediary.

35.15. Hungary

The investor himself is entitled to exercise these rights holding a certificate from the intermediary. All benefits are due to the investor who is certified to be the owner of the securities at the relevant date. In case of nominee account, the nominee is entitled and obliged to carry out all necessary steps but benefits are due to the investor (beneficial owner). Omnibus accounts exist at upper-intermediary level, i.e. they are not relevant to the question of exercising rights against the issuer or the intermediary.

35.16. Malta

As a general rule, it is only the registered owner of the shares (i.e. the intermediary) who can assert rights against the issuer. The circumstances under which the intermediary is required to pass benefits on to the investor depends on the contractual arrangement with the investor.

In discretionary arrangements the intermediary is not normally bound to pas son all information. When the arrangements are of a nominee nature then all information received must be passed on for instructions to be obtained from the customer.

The holder of an omnibus account has the same obligations towards its customers – whether middle tier intermediaries or individual account holders. The obligations are applied at each level where there is an intermediary.

35.17. Netherlands

If the shares are subject to the Securities Giro Administration and Transfer Act, according to Section 11 of this Act, the intermediary can exercise all the rights of the investor to which he is entitled against the issuer except from the right to convene a meeting of shareholders or of holders of other securities, to attend and to address such a meeting, to exercise voting rights and to cause an inquiry to be made into the policy and affairs of a legal entity as referred to in Section 2:345 of the Dutch Civil Code. Pursuant to Section 25 of the Giro Depots Regulation for institutions, this intermediary is obliged to pass all benefits accruing on, or received in connection with shares, on to the investor.

If the shares are not subject to the Securities Giro Administration and Transfer Act, the intermediary can exercise all the rights in connection with the securities against the issuer under the provisions of the custody agreement between the intermediary and the investor, or as the case maybe, by the relevant terms and conditions of the intermediary applicable to its relationship with the investor and under the provisions of the Dutch Civil Code. This intermediary is required to pass through all benefits to the investor under the provisions of the custody agreement between the intermediary and the investor and under the provisions of the Dutch Civil Code.

If there is an omnibus account or a nominee account, the obligations of the intermediary towards the investor will be determined on the basis of the administration of the intermediary. Pursuant to the intermediary's general terms and conditions, this administration is conclusive evidence, subject to counter evidence being presented by the investor.

35.18. Austria

First, see answers to question (34).

It is the investor who is entitled to assert the rights against the issuer, but he has mandated his account provider to exercise most/some of these rights. His account provider in turn has impliedly mandated the upper tier account provider to assert (certain of) these rights against the issuer.

As described in the answers to question (34) assertion of rights in case of omnibus or nominee accounts is no problem, since these rights are asserted **globally**, i.e. for a certain amount or a certain number of securities corresponding to the number of securities held on these accounts. The ultimate allocation by the last account provider in the chain where the investor maintains the securities account is no problem, since the account provider must know his customers.

35.19. Poland

Where an investor participates in, and votes during, a general meeting of shareholders, his right to obtain a registered depositary certificate is realisable only by the intermediary who keeps the investor's securities account, and upon the investor's personal appearance at the intermediary's premises. By issuing the depositary certificate, the system participant blocks the securities specified in the content of the certificate. Up to the date of expiration of the registered depository certificate or return thereof, the securities which are the object of the certificate may not be traded. Participation in a general meeting of shareholders is conditional upon submitting a registered depository certificate to the issuer.

In the case of benefits provided in the form of monies or securities, the investor's rights are realised through the National Depository. The issuer transfers the amount of the benefit to the National Depository or specifies in what manner dematerialised securities should be distributed to the eligible persons. The National Depository transfers the amount of the benefit it has received to participants (intermediaries keeping the investors' accounts), in accordance with entitlement status determined on the basis of balances on the intermediaries' accounts and information obtained from them, or records the securities provided by the issuer on depository accounts of the intermediaries. The participants (intermediaries), in turn, transfer the benefits to the eligible investors by crediting their bank accounts (cash accounts) or by making appropriate entries in their respective securities accounts.

What follows from the above is that the payment of monetary benefits related to the underlying securities is made when the issuer so instructs the institution managing the depository-settlement system; the latter, based on participation agreements, cooperates with the system's participants in making the payments. While the system's participants keep securities accounts which identify the holders of the rights in securities, it is the participants' responsibility to transfer the benefits to the investors.

The payments of securities-related monetary benefits may also be made without an active role of the National Depository. In practice, this applies to registered securities for which the issuer keeps registers of the holders of the rights in securities. In the case of any other securities, the payments must be made through the agency of the National Depository in order to assure a smooth running of the process and in order to properly identify the holders of the rights.

Only securities holders may assert claims against the issuer related to the issuer's performance of its responsibilities resulting from the securities.

35.20. Portugal [to be completed]

35.21. Slovenia

As explained in Answer to Q34 all entries in the central registry are directly enforceable against the issuer. In other words: legal holder of securities (i. e. a holder of a dematerialised securities account on which the securities are registered) is entitled to exercise the rights of the investor (i. e. the rights in relation to voting or receiving of information on shareholders' meetings and in relation to corporate actions, e.g. payments of dividends and coupons, and any other action that affects price or structure) directly against the issuer.

Omnibus and nominee accounts do not occur in the "final client level" dematerialisation (for more detail see Answer to Q6).

35.22. Slovakia

Owner of securities account (account defined by §105 of the Act – beneficial owner account called „securities owner's account") is entitled to assert the rights against the issuer in respect of securities credited to such account or any other entity authorized by owner of securities account to do so on owner's behalf.

In Slovakia, issuer itself should organize payment of benefits to its shareholders, but according to Operational Rules of the central securities depository redemption of securities or payment of dividends can be organized also by depository if the issuer requests provision of such service by depository. (So far, no issuer has requested this service.) If depository were asked to distribute dividends or to redeem securities, it would cooperate with its members – intermediaries. Otherwise intermediary may pass the benefits to the investor if such activity is covered by agreement on securities custody they have concluded.

Although in the Slovak CSD omnibus accounts are used, depository is authorised to prepare the statement of issuer's registry including the details on beneficial owners for the purpose of redemption of securities, payment of benefit or for the purpose of organizing the general meeting (§107 par. 5c of the Act).

35.23. Finland

Securities in the book entry system

If the holding is credited to a securities account in the book-entry system directly in the name of the investor, the investor is entitled to exercise the rights either directly against the issuer or assign and authorize another person to exercise the rights on his behalf.

If the securities are credited to an omnibus account and the holding is registered in the name of the nominee (i.e. the intermediary), the intermediary is in general liable to pass benefits accruing from the securities to the investor who is considered as the owner. The extent of such liability and relating fees are governed by the custody agreement between the investor and the intermediary.

Securities outside the book entry system

Provisions are less clear concerning securities held outside the book entry system. For example there are no explicit provisions concerning the case where the intermediary holds in Finland foreign (dematerialized or immobilized) securities on a custodian nominee account on behalf of the Finnish investors. The Act on Book-Entry Accounts does not cover these situations. Only general conduct of business rules of the Securities Markets Act are applicable.

35.24. Sweden

See above! As a general rule it is only the registered owner of the shares who can assert rights against the issuer. In Sweden there is no distinction between an "omnibus" account and a "nominee" account. An intermediary is not allowed to keep own securities in the same account as customers' holdings.

35.25. United Kingdom

As indicated above, in the normal course only the direct holder of securities (or the registered holder of shares) is entitled to assert rights against the issuer, and the intermediary is generally required to pass on all benefits to the investor, except to the extent that this obligation is limited by contract. Where there is an omnibus account, difficulties can arise in relation to fractional entitlements and split votes, and these are usually resolved by the intermediary contractually limiting its duties, as indicated above. In a nominee account, the rights must be exercised by the nominee as holder of record.

36. QUESTION NO. 36: HOW IS IT ENSURED THAT NO MORE THAN THOSE SO ENTITLED EXERCISE, OR BENEFIT FROM, THE RIGHTS ATTACHING TO SECURITIES?

36.1. Belgium

As a matter of custodial practice, intermediaries holding under Royal Decree n° 62 "position" corporate action instructions before sending them to the issuer, its agent or next intermediary up the chain. This means that the intermediary should not send instructions unless the client has a corresponding holding in the relevant exercised securities.

36.2. Czech Republic [to be completed]

36.3. Denmark

With respect to individual accounts at a CSD, this is ensured by the fact that only the account holder can proof ownership (bearer shares) and have his name noted in the books of the issuer (registered shares). With respect to securities held on an omnibus account at the CSD, it must be registered on the account that it is maintained by the account holder for others (but the names of the end-investors are not registered). If such a registration is made, the account holder (intermediary) cannot exercise voting rights against the issuer (except if the end-investors have notified the issuer that the intermediary is entitled to vote on their behalf, cf. answer to question no. 35.). Of course, if the intermediary (deliberately) fails to register on the CSD-account that is maintained for others, there is no way that the issuer (or the CSD) can know, that the intermediary is in fact not the true owner. Consequently, the intermediary appearing as the true owner will be able to exercise voting rights against the issuer. Finally, with the respect to dividends, it should be mentioned that the investor receives dividends though its intermediary, which in principle means that if the intermediary becomes insolvent, the dividends may not reach the investor cf. answer to question no. 35.

36.4. Germany

Each intermediary (first-tier custodian bank as well as CSD) is required by Section 14 Securities Deposit Act (SDA) to keep books in which all investors or, in case of CSD, participants and their holdings are recorded.

36.5. Estonia

The obligation of the intermediary (see (7) of § 6 of the ECRSA) to maintain accurate records regarding investors, i.e. the clients should in general prevent the occurrence of the negative scenario described in question (36).

However, there are some specific provisions of the law aimed at ensuring that, for instance, in relation to voting authorisation only those persons registered as beneficial owners by the intermediary can vote. Under the (4) of § 3 of the Regulation No. 52, the intermediary is entitled to provide the issuer with an updated list of persons authorised to vote if there has been a change in the list of beneficial owners as the result of a transfer registered in the books of intermediary.

36.6. Greece

The DSS Operation's Regulation sets out specific procedures that need to be followed in order to determine the securities holders entitled to collect dividends

and exercise preference and voting rights. The said procedures include the issuance of certificates by ACSD ascertaining the beneficiaries of such rights. Thus, the aforementioned rights can only be exercised by the holders of such certificates.

36.7. Spain

IBERCLEAR is in charge of controlling that there are no more than 100% of the issued securities recorded in the system. When there is a corporate action, IBERCLEAR gives the issuer a certification stating how these 100% securities are distributed among the participants in the system. The issuer only pays to the intermediaries-participants according to this certification. Each participant has then to distribute the amounts to each accountholder recorded in its books.

36.8. France

36.8.1. Generally

The French securities holding system permits to ensure that no more than those so entitled exercise, or benefit from, the rights attaching to securities.

Indeed:

- **all securities issued in whatever form in France and subject to French law are dematerialised and required to be registered in an account by way of book entry;**

- **securities whatever their form are required to be recorded in the name of their owner;**

- **registered securities are held in accounts maintained with the issuer** (provided that holders of registered securities may also designate an authorised financial intermediary to administer their accounts held with the issuer. Such securities are then held through an administration account ("*titres nominatifs administrés*") (See the answer to questions 1 and 34);

- bearer securities are held in accounts maintained with an authorised financial intermediary;.

- French corporate law is based on the principle of equality among holders of the same type or class of securities whether the securities are equity securities or debt securities (Article L.211-2 of the M&FC);

- distribution of rights and dividends is centralised through EUROCLEAR FRANCE;

- custodians are subject to strict accounting rules set in Articles 332-17 and following of the AMF General Rules and are subject to the AMF supervision, control and sanctions, if need be.

36.8.2. Voting rights

Issuers (with respect to shares in registered form) and authorized financial intermediaries (with respect to bearer shares) are responsible for identifying the shareholders and verifying the number of voting rights.

i. Securities in registered form

As the issuer knows the identity of its shareholders, the issuer has the ability to ensure that no more than those so entitled exercise the voting rights.

Moreover, pursuant to Article 136 of Decree n° 67-236 of March 23, 1967, the right of a shareholder to participate in general shareholders' meetings may be subject to the recording of the shareholders or of the registered intermediary (*intermédiaire inscrit*) on the register of registered shares (*titres nominatifs*) maintained by the issuer.

ii. Securities in bearer form

In respect of bearer securities, the name of the investor remains unknown to the issuer.

However, French law authorizes the issuer if the articles of association so permit to seek identification of holders of bearer securities (Art. L. 228-2 of the Commercial Code – See question 6).

Moreover, pursuant to Article 136 of Decree n° 67-236 of March 23, 1967, the right of a shareholder to participate in general shareholders' meetings may be subject to the transfer of a certificate to the place designated in the notice of a shareholder meeting ("avis de convocation" (see the answer to question 34)), such certificate purporting to acknowledge the unavailability of bearer shares recorded until the date of such shareholders' meeting. Such certificate is delivered by the custodian.

iii. Nominee and omnibus accounts

Article L. 228-3-2 of the French Commercial Code provides that:

- - a registered intermediary may, pursuant to a general management authority over the securities, forward for a general meeting the vote or proxy of a shareholder;
- - before dispatching proxies or votes for purposes of the general meeting the registered intermediary is required at the request of the issuer or of its agent to provide the list of non resident owners of the securities to which such voting rights relate;
- - a vote or proxy issued by a registered intermediary either not having reported its capacity as such or not having disclosed the identities of the securities' owners, may not be taken into account.

Furthermore, special rights linked to registered securities such as double voting rights may only be exercised to the extent information disclosed by the registered intermediary permits control of compliance with the conditions required to exercise such rights.

See also the answer to question 6.

36.8.3. Dividends

See the answer to question 34.

36.9. Ireland

Rights will generally be exercised by the direct holder. Where this is an intermediary acting as trustee, it will be subject to the fiduciary duties outlined above to act in the interests of investors. It is likely that a non-trustee intermediary will be subject to equivalent intermediaries. In each case, an intermediary may seek to restrict its obligations and duties (see above in this case). If an intermediary misuses, or misallocates the benefit of, relevant rights of an investor in breach of its duties and obligations, judicial and, in certain circumstances, regulatory, remedies may be available.

36.10. Italy

This question has to be dealt with in connection with the two different types of rights (administrative and financial).

As mentioned above under (34), the exercise of the right to participate and vote in a shareholders' meeting and to receive dividends is intermediated by the intermediary: the entitlement of a shareholder to participate and to vote in a meeting is ascertained on the basis of the record data system kept by the intermediary. The intermediary can issue the notification to the issuer only if the person making the request is entitled according to the intermediary records131.

As far as dividends are concerned, only those having their shares recorded on their account on the record date may receive dividends. Again, the entitlement to receive dividends is ascertained on the basis of the record data system of the intermediary.

The reconciliation procedure ensures on a daily basis that the records kept by the CSD and those kept by the intermediaries match.

When all the transactions carried out in a business day have been processed, the CSD checks, for each class of financial instruments handled by the system, that the sum of the balances of the accounts opened by intermediaries in their own name and in the investors' name match the balance of each issue.

Once this check is completed, the CSD sends intermediaries an opening and closing balance, specifying the quantities of financial instruments that are not freely transferable and indicating any transfers made during the day and not notified yet.

---

[131] It should be noted that, when issuing the notification, the intermediary does not confer any further legal title to the investors, but merely evidences the investors' entitlement.

Within one day as of the registration date, intermediaries shall check - for each class of financial instruments - that the balance of the account opened in their name with the CSD matches the balance of the account they keep and that the balance of the account opened by them in the name of their clients with the CSD matches the sum of the balances of the investors' accounts opened with them.

36.11. Cyprus

The direct holder is subject to contractual or common law obligations vis à vis the ultimate investor in relation to his acts or omissions relating to shares registered in his name. Such obligations may be e.g. fiduciary duties. Of course, if the registered holder of the securities is an investment firm, which is more likely than not, then regulatory remedies may also be available.

36.12. Latvia

The mechanism of preparing the shareholders' list and exercising corporate actions (see item 35) ensure that only those who are entitled could benefit from the rights attaching to securities.

36.13. Lithuania

In respect of voting rights there are particular rules of convocation of General Meetings, registration of the participating shareholders in the General Meeting. In case the shareholder is represented by the other person, the power of attorney has to be presented. The issuer is entitled to request at any time that the account managers present a list of owners of its securities. This right shall be exercised by submitting an inquiry to the CSDL. The CSDL shall provide, depending on the choice of the issuer, either a list of account managers or a list of securities owners. In the latter case intermediaries shall be obliged to submit the CSDL with the list of the investors upon the request of the CSDL. Regarding transfer of voting rights, such agreement on transfer of voting rights right enters into force as of disclosure to the issuer of the data on the number of transferred votes, time limit of transfer, grounds for the entitlement to the voting right, shareholder of the issuer who transfers the right and the person who achieves the right (inasmuch as is provided in incorporation documents of a legal person, laws or the established practice of a legal person).

In respect of payment of dividend, only those persons who were shareholders of the company at the end of the day when the General Meeting declared the dividends or were entitled to receive dividends on other legal grounds shall be entitled to the dividend. Also special rules on withholding of trade of shares in VSE are established in respect of investors' protection.

In respect of government securities, only those investors who were the owners of securities on the last business day prior to the maturity day of securities or interest payments are entitled to redemption or interests rates receivables. On the maturity day of securities or interest payments the CSDL provides to the Ministry of Finance the message specifying the quantity of the securities of the same issue credited in securities accounts. The CSDL also indicates the accounts of the participants of the CSDL or the account of the CSDL for the transfer of receivables. The Ministry of Finance then transfers the receivables into the specified accounts either of intermediaries or the CSDL, if the latter is responsible for distribution of receivables under the agreement executed between the Ministry of Finance and the CSDL. The intermediaries transfer the receivables to the investors on the maturity

day of securities or interest payments, unless otherwise provided in the agreements executed between the intermediaries and their clients.

In respect of corporate bonds, the issuer has the same right to request at any time that the account managers present a list of owners of its securities. This right shall be exercised by submitting an inquiry to the CSDL. The CSDL shall provide, depending on the choice of the issuer, either a list of account managers or a list of securities owners. The receivables might be paid either to the owner or to the intermediary.

Notably, there are no special rules related to transfer of dividends or bond receivables to the investors by the intermediaries, except for the case related to the Government Securities.

36.14. Luxembourg

Article 6 of the Securities Act provides that the investor remains the legal owner of the securities ("*the depositor of securities has the same rights as if the securities had remained with it*"). Therefore, only the investor is entitled to exercise, or benefit from, the rights attaching to securities.

Intermediaries in Luxembourg have to segregate their own assets from client assets and may only act in respect of client assets upon the investor's instructions.

Furthermore, Article 38 of the law of 10 August 1915 relating to commercial companies, as amended, (the "Companies Act"), grants the right to the issuer to suspend the voting rights if several persons assert property rights on a share or smaller denomination of one share until only one person has been has been designated as the sole owner of the share or smaller denomination of one share vis-à-vis the issuer.

36.15. Hungary

Since the owner of a given security is the investor at whose account the securities are registered at a given time, and the quantity of securities on accounts has to equal with the number of securities outstanding, certificates of ownership for a given time entitle one and only one owner to a given security.

36.16. Malta

In practice, the issuer will only recognise the registered owner of the shares or any person holding a signed and notified proxy from such person – usually the intermediary.

36.17. Netherlands

There are no specific rules or measures under Dutch Law to ensure that no more than those so entitled, exercise or benefit from, the right attaching to securities. Please note however, that in order to prevent voting rights on the same securities being exercised twice, securities need to be lodged for the purpose of meetings with the intermediary designated as the company's agent for this purpose and the investor's own intermediary needs to provide such agent with a statement concerning the number of shares which are held in administration with such intermediary for the investor. Furthermore, the issuer or, as the case maybe, Euroclear Netherlands, will require proof from the relevant intermediary that it is entitled to receive the payments made to it in connection with the securities, which

proof consists of the relevant intermediary deliver the relevant dividend or coupon rights to the issuer or, as the case maybe, Euroclear Netherlands.

36.18. Austria

See answers to questions (34) and (35).

36.19. Poland

In accordance with the Polish law, where an issuer delivers a benefit through the agency of the National Depository, the issuer's obligation to deliver cash or securities is deemed to have been met when any such benefit is received by an intermediary who is a direct participant of the National Depository. While it is the intermediaries who are able to identify the investors eligible to obtain securities-related benefits, from that moment on, the intermediary is solely responsible for making those benefits available to the investors whose securities accounts are kept by it.

36.20. Portugal [to be completed]

36.21. Slovenia

Only a person, registered as a securities holder in central registry (on a specific, register date) is entitled to exercise the rights attaching to securities (se Answers to Q34 and 35 above). With registered dematerialised securities it is deemed that all holders of those securities (i.e. holders of dematerialised securities accounts in central registry on which those securities are registered) have presented themselves in the relation to the issuer as legal holders (Par. 1 Art. 35 of ZNVP). KDD provides the issuer data on holders of dematerialised securities on (any) record date, i. e. date relevant for entitlement to payment of dividend or any other entitlement due to issuers corporate actions or in relation to voting.

36.22. Slovakia

Only owners of securities and their pledgees are included in the statement of issuer’s registry worked out by depository for the purpose of securities redemption, payment of benefits or organization of general meeting. In addition to that, owners of securities may produce the account statement to prove their ownership of securities to issuer in order to exercise their right to participate in the general meeting.

36.23. Finland

The issuer distributes the dividend and other proceeds in accordance with the issued stock which is registered in the Finnish trade register at each point of time. With regard to shareholders who are registered directly in the book-entry system, the registrations in the system entitle the investor to exercise his rights. A person whose right is not registered shall have a valid legal ground to exercise a right.

In respect of investors whose securities are credited to an omnibus account (and, thus, nominee registered), the rights are exercised through intermediaries i.e. custodians. The issuer only accepts exercise to the maximum of the omnibus account and it is for the custodian to settle the rights vis-à-vis the investors. In this respect, the custodian has an incentive to make sure that there are not valid claims by investors exceeding the rights provided by the issuer based on the holding credited to the omnibus account. With respect to the right to participate in a GM,

the investor is required to register in the shareholder list as further elaborated in (34) above. Consequently, this right is not exercised through intermediaries.

36.24. Sweden

As stated before, the main rule in chapter 6 section 1 of the Financial Instruments Accounts Act is that only the person registered on a CSD-account is entitled to exercise or benefit from the rights attached to the securities in that account. Of course there could be limitations but they must be registered on the account. Regarding nominee-registered securities it is the responsibility of the nominee to ensure that the right investor benefits from the ownership of securities.

This is ensured trough the use of specified record dates in combination with centralised distribution of rights and payments from the issuer to the top-tier account holders. Those top-tier account holders are both end investors holding CSD-accounts in their own names and intermediaries holding CSD-accounts on behalf of their clients. A registered intermediary is not entitled to receive more dividends than the securities on its CSD-accounts account for. Nor can a registered intermediary register voting rights in the names of its clients for more shares than it is registered for in the shareholders register. (N.B. As pointed out above the registered intermediary itself is not entitled to vote for any shares that it holds for its clients!) This follows from the Companies Act.

The main rule in chapter 6 section 1 of the Financial Instruments Accounts Act is that only the person registered on a CSD-account is entitled to exercise or benefit from the rights attached to the securities in that account.

36.25. United Kingdom

As indicated above, rights attaching to securities are generally exercised by the legal holder of record. This person will generally be subject to a fiduciary duty to act in the interests of investors. If a fraudulent intermediary misuses the benefit of such rights, investors would generally be able to seek judicial and/or regulatory remedies. In practice, many intermediaries adopt a policy of not voting unless specifically instructed to do so, even where they have sufficient authority to vote in their discretion in the absence of express instructions.

37. QUESTION NO. 37: IS THE INVESTOR ENTITLED TO EXERCISE A RIGHT TO SET-OFF OR NET AGAINST THE ISSUER RIGHTS IN RESPECT OF SECURITIES WITH OBLIGATIONS THAT THE INVESTOR MIGHT HAVE TO THE ISSUER?

37.1. Belgium

This would depend on the specific documentation of the issuance or on the local laws applicable to the issuance. However, such rights are not generally encountered in practice except in the very rare cases of private placement type offerings.

Under Belgian law, through the recent extension of the favourable netting regime to all persons (article 14 of the Law dated December 15, 2004 on financial collateral), it would be possible to set-off or otherwise net reciprocal claims towards the issuer notwithstanding the insolvency of the latter provided that there is a netting agreement between the investor and the issuer governed by Belgian law.

37.2. Czech Republic [to be completed]

37.3. Denmark

Yes, there are generally no restrictions on the investors right to set-off against the issuer, except if the issuers claim relates to initial payment of the capital required to create the issuer (form the company).

37.4. Germany

In theory yes as far as payment obligations on both sides are concerned. In practice, however, the stream of e.g. dividend payments goes from the issuer to the CSD and further on to the first-tier custodian bank. Consequently and under normal circumstances, the investor would have to use the dividend credited to his money account for the payment of his obligation to the issuer.

In case of insolvency, however, when the issuer or the insolvency administrator legally refuses to pay the (full) amount to the investor, the investor may make use of his right to set-off provided the prerequisites thereof under insolvency law are met.

37.5. Estonia

The general legal framework (mainly provisions of the LOA) as a general rule permits offsetting of mutual obligations. There are no special provisions prohibiting offsetting of mutual obligations between the investor and issuer.

The owner of a nominee account is entitled to enforce its offsetting right against the issuer, if offsetting involves rights attached to book-entry securities credited to a nominee account.

37.6. Greece

No. However, this statement does not prohibit, in case of an issuer with registered shares or bonds, a shareholder or bondholder having for any contractual or legal reason obligations towards the issuer, to exercise his rights to set-off or net against the issuer regarding his due claims on dividends or monetary claims deriving from bonds, based on the general provisions of the GCC.

37.7. Spain

There is no specific provision for answering this question. General rules on setting-off may apply, including those provided for in the Spanish Insolvency Act.

In practice, payment of economic rights is made automatically through the settlement system, and therefore the possibility of an issuer wanting to retain payments for this cause is remote.

As regards the investor, it is possible that in a case of insolvency of the issuer the investor may want to set off its own obligations against dividend payments or other distributions owed by the issuer to him. But this possibility is only provided for if the requisites for setting off (i.e. that both rights are liquid, due and effectively claimable) would have existed prior to the judicial declaration of insolvency (article 58 of the Insolvency Act of 9 July 2003"Ley Concursal").

In any case, this possibility would only be available for investors that are deemed to have a direct legal relationship with issuers, and therefore not for indirectly held securities.

37.8. France

The sole obligation that an investor may have to the issuer relates to his obligation to pay up the shares he has subscribed. In this respect, Articles L. 225-128 and L. 228-7 of the Commercial Code provide that shares may be paid up by way of set-off, provided that debts owed by the issuer are liquid and due (Article L. 225-128).

37.9. Ireland

We have addressed set-off in the responses to question (13) above. The availability of set-off in the insolvency of the issuer must be considered on a case by case basis. Set-off will be particularly relevant to debt securities (because only monetised claims may be set off), it may also be relevant to certain cash claims arising in respect of equities (for example, rights to final dividends that have been validly declared represent a debt due to the shareholder as a matter of common law, unless the articles of association adjust this right) and the contractual terms of the issue of such securities should be reviewed in the first instance. Contractual restrictions on set-off (including, for example, on the ability of indirect holders of rights), other than set-off under insolvency rules, will be effective. As outlined above, under statutory insolvency set-off rules, set-off of "mutual credits and debts" only is permitted and mutuality in this context focuses on the parties to the debts (between the same parties acting, in each case, in the same capacity). Set-off of monetary obligations owed directly by an investor against monetary rights arising under securities and owed indirectly to that investor through the intermediary, will not be unavailable merely because of the involvement of that intermediary (assuming that the investor can evidence its beneficial ownership of the relevant securities). As indicated above, difficulties may arise as regards evidencing a beneficial interest where the investor holds through pooled (omnibus) accounts. The effect of other relevant laws, other than Irish law, would need to be taken into account in determining whether mutuality exists.

37.10. Italy

It is our understanding of this question that you are asking whether an investor may offset or net any rights that the investor might have against the issuer (and which

derive from the fact that he holds securities) with any obligations (deriving from its status as shareholder or otherwise) that it may have towards the issuer.

In general, Italian law does not prohibit setting off a credit of the shareholder vis-à-vis the issuer against any corresponding credit of the issuer against the shareholder. According to case law, however, certain limitations apply under specific circumstances, e.g. where the credit of the issuer arises from the shareholder's obligation to fully pay its shares.

With reference to claims that the shareholders may have against the company for the payment of dividends, it should be noted however that, owing to the procedure for the payment of dividends, in practice it is impossible for the conditions allowing the set-off to arise, due to the fact that dividends are automatically credited to the investors account.

37.11. Cyprus

Assuming that Cyprus law applies to the legal relations in question the following hold true: As earlier stated, set-off is generally unavailable under Cyprus law. This is true for all kinds of claims. Monetary and otherwise. Setting-off of mutual obligations is only permitted if specifically provided by contract. Hence, assuming on privity of contract between issuer and ultimate investor, such a right would not be available to the investor against the issuer in case of intermediary insolvency or otherwise Cyprus

37.12. Latvia

No.

37.13. Lithuania

It is not explicitly forbidden. However, even in case of situation when all the conditions for the set-off are met (i.e. mutuality of obligations of the same kind and both of them are matured), there is a possibility that general prohibitions of the set-off might be applicable.

37.14. Luxembourg

We assume that this question relates to bonds only.

The law does not explicitly provide for a set-off or netting of the issuer's obligations against the investor's rights and vice versa. However, it is conceivable to contractually agree on such mechanisms – the main difficulty being however that, depending on the circumstances, the chain of all intermediaries must be informed about such set-off or netting.

37.15. Hungary

No.

37.16. Malta

No. The issuer will only recognise the registered owner of the shares and so set-off rights do not arise.

37.17. Netherlands

No.

37.18. Austria

In general: No. Since the handling of rights as listed in (34) above is mass business it is generally not possible to administer specific rights to set-off or net any rights against the issuer with obligations that the investor might have. Moreover, in the situation where such a set-off or netting could take place, i.e. at the level of the upper tier account provider (CSD or ICSD) which has direct contact with the issuer, the individual investor is – in general – not known. Although possible, the cost of such set-off or netting transactions would as a rule be disproportionate to the counter claims. If not, special arrangements could be made, subject to agreements with the account providers.

37.19. Poland

Generally speaking, the investor is entitled to set off his debt owed to him by the issuer against the issuer's claim against him (provided that the two claims are deductible.) A shareholder, however, may not, by his unilateral statement, set off his claim against the company for the payment of share-related benefits against the company's claims against him; in this case, the consent of the company is required.

37.20. Portugal [to be completed]

37.21. Slovenia

General rules on set-off apply (see Answer to Q13).

37.22. Slovakia

Investor is not entitled to set-off or net against the issuer the rights in respect of securities with obligations that investor might have to the issuer, because it would mean decrease of registered capital of the company. For decrease of registered capital provisions of Commercial Code (§211-§216) apply that name the exact ways that decrease should be made, but setting-off securities with obligations is not included. Moreover, it is prohibited to use the funds generated from decrease of registered capital to meet the claims of shareholders (§215a, par.2).

37.23. Finland

Distribution of profit in a limited liability company is governed by Chapter 12 of the Finnish Companies Act (734/1978). A decision to distribute profit shall be made by the GM of the company in accordance with the law. If a shareholder has received profit through breach of the provisions governing distribution of profits, such profit shall be refunded to the company with interest. Thus, an investor cannot effectively set-off the right to profit against issuer’s potential claims contrary to the provisions on distribution of profit. Nevertheless, Finnish law endorses in general a broad right of set-off of mature and reciprocal claims. Legally a set-off which does not breach the provisions on distribution could be valid.

37.24. Sweden

The right to set-off between a company and a shareowner is partly regulated in the Companies Act. For example debt due to the company based on share subscription shall not be set-off against a claim against the company. However in certain situations – new issue – a set- off could be possible.

Apart from the rules in the Companies Act a there are certain conditions for a non-contractual right to set-off in Swedish Law. The counterclaim should be valid, matured and measurable against the principal debt. Furthermore the two debts must, as rule be mutual. There is no restriction of the right to set-off on the grounds that the creditor's right is founded in book-entry securities. However it must be pointed out that the set-off cannot be settled through the book-entry system/CSD, but has to be exercised through the administrator of the estate.

Contractual right to set-off is usually called netting – the issuer-investor relationship does not seem to be relevant in such cases. It may be of some interest to note that the Swedish netting legislation is very liberal regarding obligations in connection with trading in financial instruments.

37.25. United Kingdom

In such circumstances, the availability of set-off in the insolvency of the issuer must be considered on a case by case basis. Set-off is relevant primarily to debt securities, and the starting position will be the terms of issue of the securities. If, as is common, the terms of issue restrict rights of set-off or entitle the issuer to ignore rights of persons other than direct holders (or both), these provisions will be effective as a contractual matter. Consequently, the investor will not be able to exercise rights of set-off outside insolvency proceedings. In any insolvency proceedings to which English law applies, the availability of insolvency set-off is governed by rule 4.90 of the Insolvency Rules 1986, which makes set-off of mutual credits and debts mandatory. Mutuality for this purpose is assessed on the basis of beneficial, rather than nominal, ownership. Accordingly, the involvement of an intermediary should not of itself make set-off unavailable where the investor has allocated rights in relation to the underlying securities and is therefore able to demonstrate beneficial ownership of identified securities. It is less clear whether this is the position in relation to an investor who holds through pooled (omnibus) accounts. Where an investor holds through accounts governed by a law other than English law, the effect of that law would need to be taken into account in assessing whether there were mutual debts capable of set-off under Rule 4-90.

III. CHOICE OF THE SECURITIES LOCATION/PLACE OF ISSUE

****

38. QUESTION NO. 38: ARE THERE ANY RULES AND, IF SO, WHAT THAT HAVE THE EFFECT OF RESTRICTING AN ISSUER'S ABILITY TO CHOOSE THE LEGAL AND/OR OPERATIONAL LOCATION OF ITS SECURITIES FOR THE PURPOSES OF THE ISSUE PROCESS?

38.1. Belgium

There is no general Belgian law rule or regulation that would limit the issuer's ability to choose the "location" of its securities for the issue process ("primary market"). In particular there is no requirement under Royal Decree n° 62 for an issuer to issue and deposit its physical bearer certificates in a CSD (such as CIK or Euroclear Bank) , nor to immobilize its registered securities in book-entry form with the latter. Such securities may remain in physical or registered form or be immobilised with any CIK or EB **affiliate** to circulate in book-entry form under RD n° 62. Of course, for Belgian government bonds (as well as the commercial paper governed by a law of July 22, 2001) issued in dematerialised form, such securities have to be primarily maintained on accounts with authorised account keepers opened in NBB clearing System (see answer to question 2). There was a specific restriction with respect to dematerialised securities belonging to clients of NBB participants which had to be held on (omnibus or segregated) accounts with NBB Clearing system, which lead to concentrate in NBB's books holding and transfer of such dematerialised securities. This restriction has been now removed with the new law of December 15, 2004 (implementing the EU Collateral Directive in Belgium) opening the possibility for NBB participants to hold such dematerialised securities with another NBB affiliate or even with another financial institutions which does not participate directly to NBB clearing system (Explanatory Report of the law of 15/12/2004, Doc 1407/001, Chambre, session 2004-2005, p. 51, commentary of article 19). Ultimately of course, the total depot in dematerialised securities remains in NBB Clearing system (see answer 2).

There is a draft bill approved by the Government in July 2005 and sent to the Parliament for consideration which is now forcing the abolishment of bearer securities to replace them by either registered securities or by fully dematerialised securities, after a period of transition ending in 2012/2013. This new legislation, when adopted, will oblige the issuer to select a CSD (CIK or NBB clearing system) for issuing in dematerialised form (in order to preserve the integrity of the whole issue to the extent that such securities are represented from the outset in book-entry form) securities listed on a regulated market. For securities which are not listed on a regulated market , the issuer may issue them in dematerialised form directly with one designated financial institution acting as account keeper, without any need to "sub-deposit" them with a CSD (similarly to what exists already today for immobilised securities under RD n° 62).

In terms of conflict of laws, it is generally admitted that issuers can only issue shares representing their capital base in accordance with their articles of association and with the applicable lex societatis (the law governing the company issuing the shares), which is in common law countries determined by reference to the place of incorporation of the company, and in continental law systems, by reference to the place of the main seat of the company. The same for domestic bonds governed by the same lex societatis. Alternatively, for international bonds, the applicable law

could also be the *lex contractus*, the law governing the issue of such international bonds (as selected in applicable contractual issuing documentation, e.g. the prospectus, etc.).

38.2. Czech republic

The first factor which could determine the location of securities are **rules concerning dematerialization of securities**. Generally, the choice of the dematerialized or certificated form of securities is up to the issuer. Certain restrictions on the dematerialized form come from the legal stipulation of classes of securities eligible for dematerialization. The transient legislation (see question 1) only provide for dematerialization of shares, share subscription certificates, units of collective investment funds, bonds, investment coupons, coupons and option warrants. Capital market undertakings act, on the other hand, provide for dematerialization of any fungible securities. From other point of view, shares of bank must be dematerialized (section 20 of Act n.21/1992 Coll., on Banks), which is the exceptional case of compulsory dematerialization in Czech law. Entity entitled to operate the register of dematerialized securities is the central securities depository (Securities Centre under transient legislation). Difference in case of units of collective investment and short term bond is mentioned in answer to question one. If dematerialization of securities is the issuer's option, legislation governing particular classes of securities may prevent **dematerialization abroad**. For example, stock company must issue its shares either in dematerialized form in accordance with Capital Market Undertakings Act or in physical form. It implies from Commercial Code, that stock company may not issue dematerialized securities abroad. In case of physical shares, on the other hand, there seems to be no restriction for issue abroad. As to the bonds, the issuance abroad is expressly recognized. The issuer from Czech Republic must notify Czech Securities Commission of the details of the issue. The issue of bonds either in physical or dematerialized form falls under Act no. 190/2004 Coll., on Bonds, which sets the equal requirements for bonds issued in the Czech republic either by domestic or foreign issuers. If the units of collective investment are issued in dematerialized form, the issuer has a choice of the entities, which operate the register of its securities. Not only central securities depository, but also management company (which may be the issuer of the units itself), investment firm, bank or foreign entity entitled to carry out business in the Czech Republic, may operate the register of dematerialized units, provided that they are licensed for safekeeping services.

38.3. Denmark

No, in principle there are no restrictions relating to the choice of issue process. E.g. foreign securities can be issued though a domestic CSD. However, it should be mentioned that a domestic issuer (meaning a company formed under Danish law) that wishes to issue through a foreign CSD may probably only be able to do so by immobilisation of the stocks (and not be dematerialisation). The reason is that only a dematerialisation through a domestic CSD (or through a domestic authorised market place) deprives the stockholders (10% is required) from demanding that the issuer issues a physical certificate evidencing the ownership of the stocks.

Once securities have been issued and credited to an account, the proprietary issues relating to the holding of the securities on the account are governed by the law of the state, where the account is maintained.

38.4. Germany

Generally speaking, one has to differentiate between the law governing the (rights flowing from the) securities and the law governing the transfer of the securities. As regards the law governing the securities, one has to further differentiate between bonds (where the issuer is relatively free to choose the applicable law) and company shares (where there are certain requirements with regard to the applicable law).

As regards bonds, the issuer is free to choose the law applicable to the contractual obligations embodied in the bond (the so called "*Wertpapierrechtstatut"*- Main Securities Statute) pursuant to Art. 27 Introductory Law of the Civil Code. In case of shares, the Company Law statute determines the applicable law as the one of the legal seat (or, more recently, also place of incorporation) of the stock company.

The issuer is also free to determine the location where he wants to issue the securities. This is done by choosing the CSD he wants to deposit the securities in. This choice usually also includes a choice as to the law governing the proprietary aspects of such a security (the so-called "*Wertpapiersachstatut*"), such as the manner in which it can be transferred, since the *Wertpapiersachstatut* is determined by the location of the account where a security is legally recorded, Art. 9 (2) SFD (or if SFD is not applicable by *lex cartae sitae)*.

This could lead to a split legal regime with respect to the rights embodied in the security (*Recht aus dem Wertpapier*) determined by the Main Securities statute and the rights (transfer of ownership and creation of interests) with regard to the security certificate (*Recht am Wertpapier*).

For German Federal bonds which are traditionally dematerialised such a split is explicitly prevented by the *Bundeswertpapierverwaltungsgesetz* (Law on the Administration of Federal Bonds of Germany - *BWpVerwG*). It states that German Federal bonds, , are issued by entry in the Federal Debt Register led by the Federal Debt Administration Authority (*Bundeswertpapierverwaltung*) and registration of a *Wertpapiersammelbank* pursuant to Section 1 para 3 Securities Deposit Act to create a collective registered claim (*Sammelschuldbuchforderung*). This collective registered claim is deemed by law as a collective holding of single bonds (see also answer to Question 1). However, the requirement to register a *Wertpapiersammelbank* as fiduciary holder of the Federal Bonds does not hinder cross-border or internal settlement in settlement systems other than CBF as the German CSD.

The choices available to the issuer with regard to the applicable law and /or location of the security have certain consequences. If the issuer chooses a specific jurisdiction and/or location for his issue, and intends to list the security on a German stock exchange and / or to deposit his issue via a paying and settlement agent with the CSD, he is bound to the respective rules and regulations to ensure orderly trading, clearing and settlement.

38.5. Estonia

§ 2 of the ECRSA provides a list of instruments that require mandatory registration with the Central Register. Such instruments are as follows:

i. debt obligations issued by the Republic of Estonia, the local governments of the Republic of Estonia and other legal persons in public law132;

ii. debt obligations issued by legal persons in private law registered in Estonia, the public offer prospectus of which shall be registered in the Financial Supervision Authority pursuant to the Securities Market Act;

iii. the shares of public limited companies registered in Estonia;

iv. the units of investment funds registered in Estonia which are traded on a regulated securities market;

v. the units of pension funds registered in Estonia;

vi. subscription rights for shares, and for securities subject to entry in the register which are publicly issued or publicly tendered.

The requirement that makes registration of certain instruments mandatory may seem to have restrictive effect on the issuers' ability to choose a legal or operational location for the purposes of the issue process.

However the availability of arrangements like: (a) links with other CSD-s, (b) GDR-s (global depository receipts) (b) nominee accounts remove this restrictive effect.

As a matter of fact, the mandatory registration requirement has not prevented arrangements whereby shares of the listed Estonian Companies are traded on markets of other Member States or where trading in another market is conducted via GDR programs.

38.6. Greece

The decision of a domestic issuer on the choice of the legal and/or operational location of its securities is affected by the fact that the issuance of dematerialised securities can only be realised should such securities become listed in ATHEX. Indeed, only in such a case will its securities be (and must be) in dematerialised form, held through book entries within the DSS. On the contrary, should a domestic issuer list its securities in a foreign regulated market, its securities will not be in dematerialised form, but, subject to the rules governing the said market, could be immobilised. On the other hand, it is not possible for securities of a foreign issuer listed in ATHEX to be held in dematerialised form, through book entries, within the DSS. The above statement does not affect the trading, clearing and settlement practices regarding the transactions which are effectuated in the ATHEX through the ACSD in terms of foreign securities or in a foreign regulated market through its Central Securities Depository concerning domestic (Greek) securities.

More specifically, as explained above under 1.1, Greek Law imposes the mandatory dematerialisation of securities issued by Greek entities and listed in the ATHEX (Article 39 of Law 2396/1996) as well as of Government bonds registered

[132] Securities specified in clause (i) above which are tendered in a foreign state and which, pursuant to the conditions of issue, shall not be publicly tendered in Estonia need not be entered in the Central Register.

within the BoGS (Articles 5 seq of Law 2198/1994). The field of application of such Greek law on dematerialized securities registered within the DSS and the BoGS solely captures securities which have been issued by Greek issuers. This derives from the fact that Greek law can not impose regulations on foreign companies affecting their securities' form and type (e.g. the rights flowing from the securities), unless the jurisdiction of the place of the company's incorporation expressly allows it ("renvoi'). Indeed, Greek law regulates the nature of the rights encompassed in the relationship between the account beneficiary (shareholder/bondholder) and the securities issuer (e.g. the rights flowing from the securities) only when the latter is incorporated in Greece.

The particular ascertainment does not imply restrictions on the ability of i) a Greek issuer to list its securities in another EU regulated market or ii) another EU (or non EU) issuer to list its securities in the ATHEX. However in both these cases the following must be noted:

(3) Greek Law on dematerialisation would not apply.

(4) Foreign law provisions (including the laws of other EU-Member States) providing for the dematerialisation of securities listed in their regulated markets, could not have an impact on Company Law aspects of the Greek issuer, regarding the securities' holder rights flowing from the securities towards the issuer. Foreign law can only govern issues regarding i) security transactions effectuated in the regulated market within its jurisdiction as well as ii) the clearing and settlement of these transactions in a system governed by its jurisdiction, e.g. the transfer of securities.

(5) In cases of registered shares of a Greek société anonyme not listed in the ATHEX but listed in a foreign regulated market, treatment of the shareholders' rights could vary in case of insolvency of the intermediary (account provider) in which accounts are held, depending on the law governing this intermediary (account provider).

(6) It is uncertain whether the interaction between Greek company Law and Greek Securities Law, in cases where Company Law is affected by the provisions of Securities Law, directly or indirectly, will be accepted by the Greek Authorities Supervising Societés Anonymes and the Greek Courts, even in respect of Securities Law provisions of other EU Members, especially where the said provisions are not derived from EU Law[133].

[133] For example, in order to achieve delisting of a Greek company with shares listed in the ATHEX, Greek securities law requires that a relevant resolution is passed in the General Assembly of the company by a specific majority vote. Due to the cohesion and interaction of the legal system and according to the teleological and systemic interpretation of the relevant provisions, the competent supervisory authorities agree that the said provisions of securities law also affect company law: therefore, it is not possible, even according to the provisions of company law, to resume indirectly to delisting without the required, based on securities law, majority of the company's General Assembly. This applies to squeeze out cases, which do not require such a high percentage of majority vote in order for a relevant resolution to be passed, as delisting. What will thus be the case where a delisting rule is not imposed by Greek law, but by a law governing the regulated market of another Member State? And, further, what will be the case if such rule is not an imperative one, but a contractual term governing the operation of the regulated market?

(7) In terms of securities issued by a foreign issuer and held through a Greek intermediary, Greek law provides for the protection of the investor-client of the intermediary (account provider) in case of the latter's insolvency. These provisions apply irrespective of the nationality of the issuer whose securities are held through a Greek intermediary (see more details under 40 b).

38.7. Spain

1. There are no specific rules restricting the issuer's ability to choose the operational location (i.e. the CSD) of its securities. Each issuer has to choose a certain CSD for each issue. Afterwards the rest of the issues of the same description need to be registered in the same CSD, in order to ensure that in every case there is only one CSD controlling 100% of each issue.

2. As regards applicable law, a differentiation should be made between equity securities and other securities.

3. In the case of shares or share-convertible bonds in a Spanish public company ("Sociedad Anónima"), under the Spanish Corporate Act ("Ley de Sociedades Anónimas") those securities may only be issued subject to Spanish Law.

4. In the case of fixed income securities and other kind of securities, the issuer may choose the law applicable to the contractual aspects of the issue. However, when an issuer decides, in general, to choose a foreign law, it is a general opinion that this election may not contravene certain aspects of Spanish Law that are considered mandatory, such as the quorum needed in the General Shareholder's Meeting to pass the resolution by virtue of which the securities are issued, and other aspects that may be considered as part of the Lex Societatis.

38.8. France

Pursuant to the dematerialisation law n° 81-1160 dated December 30, 1981 as codified in Article L. 211-4 of the M&FC, all securities **issued in whatever form in France** and subject to French law are dematerialised and required to be registered in an account by way of book entry maintained by the issuer of the securities or by an authorised financial intermediary.

Subject to the qualifications below, there is no rule which would have the effect of restricting a French issuer's ability to choose the legal and/or operational location of its securities for the purpose of the issue process.

As described in question 2, the issue of securities[134], and in particular equity securities (i.e. ordinary shares or preference shares) is rooted in Company Law under Articles L. 228-1 and following of the French Commercial code.

---

[134] Securities are described in question 1. In particular, shares are securities that afford or may afford direct or indirect access to equity or voting rights in respect of the issuer.

(a) In respect of equity securities

Conditions of issue, capacity and rights attributable to securities are governed by the French Commercial Code (*lex societatis*). The conditions under which securities are created in France are described in question 2-B. Subject to those requirements, nothing would prevent terms and conditions of issue to be governed by foreign law (*lex contractus*).

(b) In respect of bonds

In respect of bonds, Article L. 228-90 of the French Commercial Code acknowledges the possibility to issue bonds outside of France[135]. Such Article does exempt bond issuers from certain mandatory provisions of the French Commercial Code relating to bond issues (such as, for instance, the requirement to contemplate bondholders assemblies (*masse des obligataires*) and to designate bondholders' representatives), all subject to the terms and conditions of issue. Terms and conditions of issue of debt instruments issued by a French entity may be governed by foreign law subject to mandatory provisions of the French Commercial Code.

Registered securities (*titres nominatifs*) either debt or equity are recorded in the books of the issuer.

(c) In respect of both equity securities and bonds

Under the Euroclear France S.A. Operation Rules, Euroclear France records in its books, in an issue account, the aggregate of all securities which are subject to its operations.

However, nothing under French law would prevent to use a CSD other than Euroclear France SA (i.e. a CSD outside of France) in the context of the issue of equity securities or bonds subject to the ability of such CSD to satisfy the conditions described under question 44(b).

38.9. Ireland

The register of members of an Irish company must be kept in Ireland.[136]

38.10. Italy

Financial instruments traded or intended to be traded on regulated markets (as well as certain types of financial instruments widely held among the public) are subject to a mandatory dematerialisation regime (See Question 1 above).

Issuers must deposit with an Italian CSD each issue of financial instruments that are subject to mandatory dematerialisation. As discussed above, the only Italian CSD is currently Monte Titoli S.p.A.

---

[135] This is common practice in respect of eurobonds.

[136] Section 116 of the Companies Act 1963

The Italian Securities and Exchange Commission (**Consob**) has clarified that the mandatory dematerialisation regime only applies to financial instruments governed by Italian law. Bonds issued by Italian issuers in international markets are usually governed by a foreign law; in such cases, the relevant foreign law will also govern the requirements as to the form (including dematerialisation) and circulation of the instruments. Similarly, financial instruments governed by non-Italian law but listed on an Italian regulated market are exempt from the Italian mandatory dematerialisation rules.

The Consob has not addressed the case where shares issued by Italian entities are to be listed on a foreign regulated market. In our view, although such shares are governed by Italian law (*see* Question 39 on the Issuance Law), the Italian mandatory dematerialisation rules should not apply because the combination of the above-mentioned provisions of law and Consob rulings on similar matters would indicate that the dematerialisation rules would only apply to securities governed by Italian law which are to be listed on an Italian regulated market.

Sources of Law:

Articles 28 and 29 of the Euro Decree;

Consob Ruling No. DM/99048465-ter of 17 June 1999.

38.11. Cyprus

According to Art 105 of the Companies Law 113 the register of members of a company registered in Cyprus must be kept in Cyprus.

38.12. Latvia

According to the legislative acts of Latvia there are some types of financial instruments that should be registered by Latvian Central depository (hereinafter – LCD). These types are:

1. Government bonds of Latvia (if the bonds are issued in Latvia);

2. financial instruments that are planning to list in the regulated market (stock exchange) registered in Latvia;

3. investment certificates of the investment funds' that are registered according to the Investment Management Company Law of Latvia by Financial and Capital Market Commission.

According to the Commercial Law of Latvia the capital and the changes in the capital of the capital companies (limited liability companies and stock companies) shall be registered in the Commercial Register of Latvia. There are no any other rules which would prohibit the issuer to choose the legal/operational location of its securities for the purposes of the issue process.

38.13. Lithuania

The Rules on Accounting and Circulation of Securities provide for a general provision that securities issue registration accounts and general securities accounts shall be opened with the CSDL for every securities issue made by any of the

issuers. Also the Law on Companies suggests that shares and bonds of the public companies have to be dematerialized through the CSDL.

Certain exception are applied to the debt securities issued by the Government of Lithuania which if issued under the Lithuanian law shall be dematerialized through the CSDL and if issued under the foreign law may be dematerialized through a foreign securities depository.

38.14. Luxembourg

One needs to distinguish between equity and debt instruments. Whilst for equity instruments, the law applicable to the issue process is the law of the country incorporation of the company, an issuer may choose to issue debt instruments subject to a different law than the law of incorporation of the company.

There are no restrictions for an issuer to choose the operational location of its securities for the purposes of the issue process. With respect to registered securities, a register needs to be held at the issuer's registered office, sub-registers may be held elsewhere.

38.15. Hungary

There are no limitations.

38.16. Malta

No such rules exist.

38.17. Netherlands

In answer to this question, a distinction should be made between two situations; on the one hand, the situation that there is an issuer incorporated in or organised under the laws of the Netherlands, wishing to choose foreign law as the law governing the securities to be issued by it, a foreign jurisdiction as venue of issuance and/or a foreign CSD as depository; on the other hand, the situation that there is an issuer incorporated outside the Netherlands or organised under foreign law, wishing to choose Netherlands law as the law governing the securities, the Netherlands as venue of issuance and/or Euroclear Netherlands as its CSD.

As a matter of Netherlands law, an issuer incorporated in or organised under the laws of the Netherlands is free to choose the law governing bonds or other debts securities issued by it, including the law governing the issuance of such securities, free to choose any jurisdiction as venue of issuance and free to issue these securities within any CSD. This means that such bonds may be issued under Netherlands law as well as under foreign law, that they may be issued in the Netherlands as well as abroad and that they may be issued within Euroclear Netherlands as well as in a foreign CSD. As regards shares or other equity issued by an issuer incorporated in or organised under the laws of the Netherlands, these can only be governed by and issued in accordance with Netherlands law as the law of the issuer's country of incorporation (*lex societatis*). Although Netherlands law as such does not contain explicit restrictions on the issuer's ability to choose a foreign jurisdiction as venue of issuance or to have the shares issued within a foreign CSD, there may be certain requirements of Netherlands corporate law that effectively restrict the issuer in the possibility to freely select a foreign jurisdiction and a foreign CSD for the purpose of issuing shares or other equity. Reference is

made in this connection to Netherlands law requirements as regards the form of the shares, their transferability and the maintenance of the shareholders' register. Whether an issuer incorporated in or organised under the laws of the Netherlands will indeed be able to issue debt or equity securities in a foreign jurisdiction will primarily be a matter of foreign regulatory law. One may expect that the issuance of securities in such jurisdiction, certainly if it concerns an EU jurisdiction, is prohibited unless certain requirements – for instance the publication of a prospectus – have been met. Similarly, the listing rules of a foreign securities exchange will determine whether the securities concerned may be granted an official listing on such exchange and the rules and regulations pertaining to the foreign CSD will determine whether the securities concerned may be included in the system operated by such CSD. If bonds issued by an issuer incorporated in or organised under the laws of the Netherlands are concerned, this should not be too much of a problem, since the documentation could be drawn up with a view to the rules and regulations of the foreign jurisdiction and the foreign CSD. If shares are concerned, a mismatch may occur between requirements set forth by Netherlands company law and the rules and regulations of the foreign jurisdiction and/or the foreign CSD.

As a matter of Netherlands law, a foreign issuer is free, subject to what is stated below in respect of Netherlands regulatory law and the rules and regulations pertaining to Euroclear Netherlands, to choose Netherlands law as the law governing the securities issued by it, the Netherlands as venue of issuance and/or Euroclear Netherlands as its CSD. However, regarding the issuance of shares or other equity issued by a foreign issuer, it should be noted that, similarly as in the opposite situation mentioned above, such shares and the issuance thereof, will be governed by the law of the foreign country as the law of the issuer's country of incorporation (*lex societatis*). Therefore, there might be certain requirements of this foreign corporate law regarding shares, which may effectively restrict the issuer in its possibility to freely select the Netherlands as venue of issuance and Euroclear Netherlands as its CSD for the purpose of issuing shares or other equity. As far as Netherlands regulatory law is concerned, the Securities Trade Supervision Act (in Dutch: "*Wet Toezicht Effectenverkeer 1995*") prohibits the issuance of securities in the Netherlands outside a closed circle. This prohibition shall not apply if, amongst others, (i) the securities have been admitted to an official listing on a securities exchange or (ii) a prospectus has been made generally available. Please note that a foreign issuer, on the basis of the EU Prospectus Directive, or as the case may be, on the legislation providing for the implementation of such Directive into national law, can obtain a prospectus 'passport' from a securities supervisory authority in an EU/EEA Member State, and may use this approved prospectus to issue securities into another Member State.

38.18. Austria

There are no such rules in respect of **debt certificates**.

As regards **equity securities** (shares in companies limited by shares), they will be issued in connection with the setting up of a company limited by shares or in connection with a capital increase. In both cases the creation of the securities requires the authorisation by the competent Austrian court. There are no specific rules which would prohibit the issuer to choose the legal and/or operational location of its securities for the purposes of the issue process. For all practical purposes the location will be in Austria, close to the issuer.

38.19. Poland

Securities representing interests in corporations (shares and stocks) should be issued in accordance with the laws of the country in which the issuer has its registered office. Other securities (debt securities, depository receipts) may be issued in accordance with the laws of any country other than that in which the issuer has its registered office.

What follows from the above is that the place of issue of securities should be in the territory of the Republic of Poland. However, according to the Polish law, securities may be also issued outside Poland. Any possible restrictions in this respect are imposed under foreign exchange law and relate to the alienation and acquisition of securities in non-EU countries, as well as issuance settlement.

Remarkably, the option to choose the venue of issuance is something different from the option to choose the law governing the issuance and the option to choose the localisation of the securities issued. Furthermore, the meaning of the term "localisation" of securities may differ, depending on whether the relevant "localisation" criterion is registration of securities in the upper-tier depository system or recording thereof in an account identifying an investor. For the purposes of clarity it has been accepted that by "localisation" of securities should be understood, in the first place, the venue of registration thereof in the upper-tier depository system. Therefore, according to the relevant legal framework, if securities are admitted to public trading in Poland, they should be registered in the National Depository. On the other hand, if we assume that the recording of securities in an account identifying an investor is the localisation criterion, worth mentioning is a situation in which securities accounts are kept by a participant in the National Depository abroad. In this case, the accounts in which the securities are recorded are kept outside Poland, even though the securities themselves are registered in the National Depository.

If securities issued by an issuer are admitted to public trading outside Poland, they may be registered in any system other than the Central Depository-Settlement System.

38.20. Portugal

We should distinguish between equity securities and debt instruments.

According to article 40.1 CVM, the personal law of the issuer regulates the contents of the securities, except if, in relation to bonds and other debt securities, it is stated in the registry of the issue that a different legal regime is applicable.

Therefore, the issuance of shares of a Portuguese company should be made in accordance with the Portuguese Companies Code, but the issue of bonds of the same company may be made in accordance with the rules of other legal system. Such issue has, nevertheless to be registered with the issuer and it has to state the applicable law.

Once the securities are issued, article 41 CVM states the regime applicable to the transfer and to the creation of guarantees on such securities, which is the following:

38.20.1. In relation to securities integrated into a centralised system, by the law of the State where the management entity of such system is located;

38.20.2. In relation to securities registered or deposited and not integrated in a centralised system, by the law of the State in which the entity where the securities are registered or deposited is located;

38.20.3. In relation to securities not included in the previous sub-paragraphs, by the individual law of the issuer.

38.21. Slovenia

Pursuant Art. 7 of ZNVP issuers of "serial securities" (i. e. "transferable securities" in the meaning defined in Article 4 of the Directive for Markets in Financial instruments 2004/39/EC) of which the first sale was carried our by public offering pursuant to ZTVP-1 (latter treats public offering procedure as a rule) are required to issue dematerialised securities. Regardless thereof banks, insurance companies, stock broking companies and management companies are obliged to issue dematerialised securities.

All other issuers may issue dematerialised securities, if they choose (Art. 10 of ZNVP).

The manner in which issuers issue dematerialised securities is defined in Art. 11 of ZNVP:

On the issue of dematerialised securities, the issuer shall issue and give the Clearing and Depository Corporation an order to issue dematerialised securities on behalf of and for the account of the issuer […]. (for the following proceedings of KDD see answer to Q2).

Considering that in the Republic of Slovenia there is only one Clearing and Depository Corporation (KDD, see answer to Q1), domestic issuers (i. e. issuers governed by Slovenian law), if obliged to issue dematerialised securities or if they choose to do so, do not have the ability to choose the legal and operational location of their securities for the purposes of the issue process.

38.22. Slovakia

Currently, if issuer wants to issue securities bearing ISIN with SK-prefix, he has to apply with the local regulator - Financial Market Authority ("FMA") for approval of Prospectus. Such Prospectus is valid only for securities issues registered in the Slovak Republic and according to Slovak law. Dematerialised securities with SK-prefix must be registered in one of legally recognized registrations, depending on type of security (registration kept by CSD for all types of securities except for T-bills; registration kept by the National Bank of Slovakia ("NBS") for T-bills issued by government and by the NBS; registration of units of open-end unit trusts kept by depository of open-end unit trust).

Nevertheless, issuer may apply with foreign regulator for approval of prospectus in order to issue securities in other Member State. In this case issuer must follow rules set by foreign regulator and by foreign depository that registers the issue.

38.23. Finland

Finnish issuers are generally free to choose the location of their securities in the issue process. Nevertheless, the choice regarding the form of issue has an impact on the location. If an issuer chooses to issue securities under the Finnish Act on the Book-Entry System in a book-entry form, the location of the system is, by definition, Finland.

There is a notable exception to the general rule on freedom of choice of location of securities. Pursuant to Section 25 Subsection 1 of the Act on the Book-Entry System:

"A Finnish limited company that has issued a share which has been admitted to public trading referred to in the Securities Markets Act shall incorporate its shares in the book-entry system unless the Financial Supervision Authority grants an exception for a special reason."

This provision requires Finnish companies listed on regulated markets in Finland to dematerialize their shares and locate them in the book-entry system maintained by the Finnish Central Securities Depository Ltd. (APK). In terms of a Finnish share admitted to trading organised on professional basis (Finnish equivalent to Multilateral Trading Facility MTF or Automated Trading System ATS) in accordance with Chapter 3, Section 16 of the Securities Markets Act, there is no obligation to incorporate the share in the book-entry system, since such trading is not considered to constitute a regulated market. Finally, other securities than shares listed on a regulated market are not subject to the requirement to incorporate in the book-entry system irrespective of whether the security is listed or not.

Furthermore, the legal requirement to dematerialize the securities initially in the book-entry system does not mean that the issuer could not choose another location for operational and processing purposes. In fact, there are existing significant and illustrative examples of utilization of the choice:

APK acts as the primary registration system for the dematerialized shares of Nokia Corporation. More than 90 per cent of the Nokia shares are owned by foreigners. Besides Helsinki, the share is actively traded in Stockholm and in New York. Furthermore, Nokia is also listed at a few other exchanges, including Deutsche Börse. The trades made at other exchanges than at Helsinki Stock Exchange are primarily settled in the respective market; in Stockholm and in New York as depository receipts, in Germany through the link established between APK and Clearstream. In 2004, the Nokia ADR was the most traded foreign share on Wall Street both in terms of units and of value. The underlying Nokia shares are deposited in an omnibus account with a Finnish subcustodian for the American ADR issue.

A similar example can be presented in respect of the fixed income market. MTS Finland, which began trading in April 2004, was established as an electronic platform for trading Euro-denominated debt securities issued by the Finnish government, although interbank trade in government benchmark bonds is conducted through the EuroMTS system in London. MTS Finland operates in association with MTS Associated Markets S.A. in Belgium. While the Finnish government bonds are incorporated in the Finnish book-entry system, settlement of the trades executed on MTS Finland takes place in either Clearstream Banking Luxembourg or Euroclear Bank.

It shall be noted that when a foreign security is admitted to trading organised on professional basis (Finnish equivalent to Multilateral Trading Facility MTF or Automated Trading System ATS) in accordance with Chapter 3, Section 16 of the Securities Markets Act, there are no specific obligations set on the issuer towards the trading system or towards Finnish investors. Consequently, the issuer has no obligation to use the Finnish book-entry system either.

38.24. Sweden

There are in principle no restrictions relating to the choice of issue process. But the same financial instrument may not be registered in more than one Swedish central securities depository. Furthermore a limited liability company must retain the same central securities depository to carry out all registration measures relating to shares and certain rights in the company, see chapter 4, section 2 and 4 in the Financial Instruments Accounts Act.

Section 2. *Shares in a Swedish CSD registered company must be registered in a Swedish CSD register for the company. Shares in a Swedish company which is not a Swedish CSD registered company may not be registered in a Swedish CSD register.*

The provisions of this Act in respect of shares in Swedish CSD registered companies shall also apply in respect of the following rights in such companies, namely:

1. *pre-emptive rights to participate in new issues of shares as referred to in Chapter 4 of the Companies Act (SFS 1975:1385) and Chapter 4 of the Insurance Business Act (SFS 1982:713);*

2. *rights obtained as a consequence of subscription for shares in conjunction with new issues pursuant to Chapter 4 of the Companies Act and Chapter 4 of the Insurance Business Act; and*

3. *rights obtained as a consequence of a subscription for new shares pursuant to Chapter 5 of the Companies Act.*

Section 4. Registration pursuant to sections 2 or 3 shall take place in accordance with an agreement between the central securities depository and the issuer. Where the financial instruments have been issued in a country other than Sweden, such registration may also take place in accordance with an agreement between the central securities depository and the undertaking with comparable duties in such country, provided the financial instrument has been detached for such purpose.

The same financial instrument may not be registered in Swedish CSD book-entry accounts at more than one Swedish central securities depository. A limited liability company must retain the same central securities depository to carry out all registration measures relating to shares and such rights in the company as are referred to in section 2, second paragraph.

38.25. United Kingdom

The register of members of a company registered in England and Wales must be kept in England and Wales.137

[137] Companies Act 1985, s. 353(1).

IV. THE CROSS-BORDER DIMENSION

39. QUESTION NO. 39: ARE FOREIGN SECURITIES, MEANING THOSE THAT ARE (I) GOVERNED BY A FOREIGN LAW (II) ISSUED BY A FOREIGN ENTITY, (III) ISSUED WITHIN IN A FOREIGN JURISDICTION OR (IV) ISSUED IN A FOREIGN CURRENCY, TREATED DIFFERENTLY FROM DOMESTIC ONES AND, IF SO, HOW (AS REGARDS THE ISSUER, INTERMEDIARIES AND INVESTORS)? DOES THE ANSWER DEPEND ON THE FOREIGN COUNTRY TO WHICH THE SECURITIES ARE RELATED?

39.1. Belgium

As long as a security qualifies as a financial instrument within the (broad) meaning of Article 2 of the Act of 2 August 2002 relating to the supervision of the financial sector and financial services, it may be held with an intermediary on a book-entry basis under the basic regime of Royal Decree n° 62 (see answers to part I): In this respect, Belgian law makes no distinction between a "foreign" security within the sense of points (i) to (iv) of the question, and Belgian securities issued by Belgian issuers under Belgian law. Article 4 of Royal Decree 62 specifies that securities may be held by the intermediary in sub-deposit either with another depositary in Belgium or abroad. Such foreign holdings will be in turn reflected in the books of the Belgian intermediary acting under Royal Decree 62 as a security entitlement (co-ownership right in a book-entry pool of fungible securities of the same kind) which will constitute the subject matter of the holding and transfer in its books.

However, constraints under the local law of the underlying security, either the law governing the security, the issuer or the law governing the most upper-tier holding of the security may prevent the holding of the security pursuant to the Royal Decree 62 framework. For example, where legislation prevents the holding at the upper tier on a pooled basis in an omnibus account (especially for registered securities), it will not be possible to take the security in deposit on a fungible basis pursuant to Belgian law as this would bring the Belgian intermediary in breach of the upper tier country rules requiring a segregation per owner in the books of the CSD or in the records of the issuer or of its agent. This would prevent internal transfer of any such securities position in the books of the Belgian intermediary.

39.2. Czech Republic

There are no rules, which in express word deal with securities governed by a foreign law. Foreign securities are defined by section 1 of the Securities Act as "securities issued abroad". Legal provisions concerning movable property apply to securities. These rules include conflict rules of private international law. The content of the securities holder's (investor) rights are therefore determined by the securities location. Securities location is not clearly determined in case of dematerialized securities. However, the section 92 of the Capital Market Undertaking Act, which governs domestic securities, strongly supports conclusion, that dematerialized securities are located by the first tier intermediary. As regards rights arising from securities, there is no specific legal regulation. General conflict of law rules governing particular classes of right (contractual rights, shares in company, in rem rights) would apply. Particular foreign legal system identified by the conflict of laws rules would also set condition on which these rights could be attached to the securities. In conclusion, there is a possibility for the securities governed by foreign law to be issued in the Czech Republic.

Securities issued by foreign entity are defined in Foreign Exchange Act, n. 219/1995 Coll. Issuance of securities by foreign entities in the Czech Republic is generally not restricted. In specific case of bond issue, Act n.190/2005 on Bonds requires a notification of the bond issue to the Czech Securities Commission. Trading in securities issued by foreigners is not restricted. Duties of investment firms to their customers are not distinguished on the ground of securities issuer.

Securities issued in foreign jurisdiction are defined as foreign securities by the Securities Act. Issue of foreign securities is governed by foreign legal system of the securities location as well as the rights to the foreign securities. From the perspective of public law there is no difference between foreign and domestic securities.

There is no difference between securities issued in domestic and foreign currency.

39.3. Denmark

Generally, foreign securities are treated the same as domestic securities with respect to the intermediary and the investors. However, as explained in answer to Question no. 15, 17 and 40, a distinction is made between securities held on an individual account in the domestic CSD and securities hold on other kinds of accounts. Generally, the relation to the issuer is governed by the law that governs the issue (typically lex societatis).

39.4. Germany

Foreign securities are not treated differently from domestic ones as far as issuance by a foreign entity (ii) or within a foreign jurisdiction (iii) or in a foreign currency (iv) are concerned. The treatment may be differently, however, if the securities are governed by a foreign law as the Main Securities Statute. Such law determines whether the respective securities are e.g. negotiable (and fungible) instruments or only documents of evidence (*Beweisurkunden*). If their function is limited to evidence certain rights which are not capable for being transferred by transferring such document, they would not fall under the term "securities" as defined in Section 1 Securities Deposit Act. Consequently, they would not be eligible for the collective safe custody system of the German CSD and for transfer of co-ownership rights by book entry. Therefore, it has to be carefully determined case by case whether a security governed by a foreign law may be treated in all respects like a domestic security.

However, the German banks have developed already in 1960 the system of "WR-credit" which allows acquisition and transfer and trading also of such foreign instruments which do not fulfil the prerequisites of the term "securities" under the Securities Deposit Act (see answer to Question 7). Therefore, only legally but not economically certain foreign securities may be treated differently from domestic ones.

39.5. Estonia

Provisions of the ECSRA are applicable only in respect of foreign securities:

(i.) that are directly registered with the Central Register (the Estonian CSD acts as the primary registrar for the issuer of instruments), from now on also referred to as *"Directly incorporated foreign securities"; or*

(ii.) that have been credited to securities accounts opened in the Central Register through operation of the respective link relationship between the Estonian CSD and the foreign depository, from now on *"Foreign securities incorporated via link"*.

Directly incorporated foreign securities

Although provisions of the ECSRA do not prohibit direct incorporation of foreign securities, those situations have been very rare and limited only to debt instruments.

There has been no direct incorporation of foreign equity instruments in practice and this is thought to be due to the uncertainties it could create in light of lex societatis' rules applicable to the administration of a shareholders' register.

There are no specific rules or derogations regarding "Directly incorporated debt securities" as to the regime applicable to registration of (i) transfers and (ii) provision of collateral. Thus from a technical standpoint, it could be stated that "Directly incorporated foreign securities" are processed and treated in the same way as "domestic" book-entry securities.

With regard to investors' and intermediaries' perspective, in terms of applicable jurisdiction, it is worth noting that the obligations and liability that the issuer owes to investors based on "Directly incorporated foreign debt securities" may be subject to different jurisdiction (typically lex societatis or English Law).

Foreign securities incorporated via link

There are functioning link relationships with Latvian and Lithuanian CSDs. These links enable the respective Latvian and Lithuanian debt and equity securities to be credited to securities accounts in the Central Register.

There are certain aspects, which differ compared to domestic securities:

"Foreign securities incorporated via link" may be subject to cross-border deliveries (e.g. from Estonia to Latvia and vice versa)

Special rules and procedures applicable to corporate actions processing (e.g. The Estonian CSD completes the entries necessary to effect corporate action in the books of the Central Register based on the instructions received from the contracting depository).

In every other aspect (processing of domestic transfers, jurisdiction applicable with respect to issuers' obligations), everything is the same as described above for "Directly incorporated foreign securities".

Foreign securities to which the ECSRA does not apply

There is no special regulation regarding the custody and administration of foreign securities to which the ECSRA does not apply.

However, there are general rules applicable under the SMA that come into play with regard to keeping client's assets.

General rules that apply to every custody arrangement (including those that involve foreign security) between a domestic investor and a domestic investment firm are provided by § 88 of the SMA as follows:

- An investment firm is required to keep the assets of the client entrusted to it separate from its own assets and those of other clients of the investment firm, unless the investment firm and the client have expressly agreed otherwise in writing. The express written agreement of the client is also necessary to hold the securities of the client in a nominee account.

- An investment firm is required to take adequate measures to protect assets belonging to the client and the rights of the client and to ensure that the assets of the client are maintained and invested in accordance with the agreed conditions.

- An investment firm is required not to use assets belonging to a client in its own interests, unless the client has expressly agreed to this in writing.

- An investment firm, which keeps the assets of clients in a nominee account or in a securities account or bank account opened in the name of the investment firm is required to keep separate records of the assets of each client.

- Assets of clients managed by an investment firm, including assets of clients maintained in the name of the investment firm as well as assets acquired on account of such assets, belong to the respective clients and shall not be included in the bankruptcy estate of the investment firm, nor shall the claims of the creditors of the investment firm be satisfied on account of such assets.

Furthermore, provisions of the LOA regarding the payment instruction, settlement contract and transfers are applicable (the legal basis for debiting and crediting the account, obligations of the account manager to maintain records on debit and credit entries, notification obligations etc.).

39.6. Greece

Foreign securities held by a Greek intermediary are not treated differently from domestic ones in the case of the intermediary's insolvency.

However, the following ought to be noted:

As explained above under (38), Greek Law on dematerialisation could not apply on foreign securities listed in the ATHEX,. Indeed, the rules governing the ACSD and establishing the rights of the account holders of securities registered within the DSS as the securities' beneficial owners (e.g. shareholders or bondholders) would not apply to foreign issuers. Thus, in case of foreign securities traded in the ATHEX, the question is shifted to the level of the intermediary (account provider), through which the securities are held, as in this case the ACSD does not actually operate as a Central Securities Registry, but merely as a clearing and settlement system for transactions operated in the ATHEX, providing in parallel custodian services to its account operators (regarding this matter, please see question 2.4.). Concerning

foreign corporate bonds and debentures governed by Greek Law, Greek Law could apply – and therefore no differentiation to domestic securities would occur – if these corporate bonds and debentures a) are listed in the ATHEX and, thus, registered and held, in book entry form, within the DSS or b) are registered in book-entry form within the BoGS.

39.7. Spain

39.7.1. There are no general rules governing this matter. However, from the practical side, according to internal rules of the Spanish CSD, IBERCLEAR would treat as a foreign security any security that:

(i.) Is issued by a foreign issuer under a foreign law.

(ii.) Is issued by a foreign issuer but under Spanish Law, although only for the lex societatis issues (for example, whether the law of origin considers that type of security as a transferable one or whether has been duly issued).

(iii.) Issued by a Spanish issuer under a foreign law, if the original CSD is a foreign CSD.

39.7.2. The consequence of considering a security as a foreign one is that it is subject to different requirements in order to obtain registration in the Spanish CSD. Foreign securities may be registered in IBERCLEAR under a double regime (through a link between IBERCLEAR and the issuer's CSD, or with the help of a "link entity" that is in charge of ensuring that the same amount of securities included in IBERCLEAR is held in custody in the issuer's CSD for the benefit of the Spanish system). In the case of securities that are registered through a "link entity", IBERCLEAR conducts certain analysis of the legal regime applicable to those securities in order to ensure that there are no legal impediments (i.e. the securities are not transferable under the foreign applicable law) for including the securities in the system. To this effect, the issuer must file certain documents (i.e. a legal opinion or the documents evidencing the existence of the issuer and the securities).

39.7.3. Once such securities have been included in the CSD, they are subject to the same rules and regulations regarding transfers, dispositions, taking of security/collateral, etc.

39.8. France

French law (Article L. 211-1 of the M&FC – see question 1) lists, within the definition of financial instruments, financial instruments issued under foreign law equivalent to those listed in Article L 211-1-I, para. 1 through 4 of the M&FC (i.e. shares, debt instruments, shares in collective investment undertakings and forward financial instruments)

The Euroclear France operation rules do provide that Euroclear France may admit in its system financial instruments:

- referred to in paragraphs 1, 2 or 3, of paragraph I, of Article L. 211-1 of the M&FC (i.e. shares, debt instruments and shares in collective investment undertakings);

- of the same nature issued under foreign law.

Such instruments must be compatible with the operation of the current accounts of Euroclear France.

With respect to foreign securities, Article R. 211-8 of the M&FC, provides that:

registered securities may be recorded in the name of the foreign CSD of which the French CSD is a member;

bearer securities may be deposited with this foreign CSD.

In accordance with the provisions of Article 4.3 of the Euroclear France operation rules, Euroclear France holds foreign securities admitted to its operations in accordance with the international circulation mode thereof either through physical certificates held in its vaults or otherwise with a foreign CSD or intermediary. When exclusively in registered form, such instruments are recorded in the name of Euroclear France acting as nominee for the real owners (i.e. beneficial owners) or otherwise in the name of a CSD or an intermediary mandated by Euroclear France.

Provided that the above compatibility requirement is met, securities issued under foreign law benefit from the same Euroclear France current account regime as those applicable to securities issued under French law.

Furthermore, under Article L. 431-2 of the M&FC, foreign securities recorded in a securities account maintained with an intermediary in France are subject to the same rules in respect of transfer of title. They are also subject to the same rules in respect of pledges over a securities account pursuant to Article L. 431-4 of the M&FC or other security over securities pursuant to Article L. 431-7-3 of the M&FC (close-out netting and collateral mechanisms).

It should further be noted that the assimilation of foreign securities with domestic securities has further been strengthened by the abrogation of Decree n° 49-1105 of August 4, 1949 which remained applicable to foreign securities following the mandatory dematerialisation becoming effective in 1984. Such Decree has been abrogated by Decree n° 2005-1007 of August 2, 2005 which has codified the regulatory part of the M&FC.

39.9. Ireland

The rules of law governing the rights and obligations of intermediaries and investors holding securities with intermediaries do not generally distinguish between underlying securities on the basis of any of the factors mentioned above. To the extent, however, that conflicts of law rules would determine that a law of another jurisdiction would be relevant (such as the law governing the issuer or the law by which securities accounts held with an upper tier intermediary is governed), that other law would be relevant to a determination of these issues.

39.10. Italy

39.10.1. Governing Law

Pursuant to Italian international private law, the law governing equity securities is the law of the country where the issuer is incorporated, whereas the law governing fixed income securities or other negotiable instruments (*titoli di credito* or *titres de crédit*) – excluding cheques and bills of exchange – is the law of the place where such fixed income securities or negotiable instruments are issued (**Issuance Law**). The Issuance Law regulates the terms and conditions of the issuance of a security, such as its form, validity requirements and extinction, whereas the parties may chose the law governing the rights and obligations arising from the contractual relationship underlying the issuance and sale of such security. The meaning of the expression "issued" for the purposes of the Issuance Law is debated among legal scholars. The currently prevailing opinion is that "issued" means "created". An immobilised security should be deemed created when the relevant certificate is duly completed and signed; instead, it is unclear whether dematerialised securities should be deemed created when the relevant corporate body of the issuer resolves on its issuance or when, subsequently to such resolution, the securities are first recorded in an issuer's account at the chosen or applicable CSD.

39.10.2. Dematerialisation.

The scope of application of Italian mandatory dematerialisation rules is discussed in Question 38.

39.10.3. Listing

In addition to the general conditions for admitting securities to listing, the Italian Stock Exchange Regulation establishes specific requirements for foreign issuers including evidence of (i) their substantial compliance with the Italian provisions concerning information to be made available to the public, the Consob or the Italian Stock Exchange and (ii) the absence of impediments to the exercise of all the rights attaching to the securities admitted to listing.

For the admission of financial instruments issued by companies or entities organised under the law of an EU Member State and existing in the form of paper certificates, the certificates must comply with the provisions in force in such Member State. If the certificates do not comply with the provisions in force in Italy, such fact must be disclosed to the public.

The Italian Stock Exchange Regulation requires that paper certificates representing financial instruments issued by companies or entities subject to the law of non-EU countries must enable the holders of such financial instruments to exercise all the relating economic and administrative rights.

With respect to financial instruments issued by an Italian company or entity and subject to a foreign law, the issuer must demonstrate that there are no impediments to the exercise of rights attaching to the instruments for which admission to listing is sought. For the admission of instruments represented by paper certificates, such certificates must

comply with the foreign law under which they were issued. If the certificates do not comply with the rules in force in Italy, such fact must be disclosed to the public.

39.10.4. Clearing and Settlement

There are no specific clearing and settlement rules for foreign securities.

Sources of Law:

Articles 25 and 59(3) of the Law No. 218 of 31 May 1995;

Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980;

Articles 28 *ff.* of the Euro Decree;

Article 23(2) of the Markets Regulation;

Articles 2.1.4 and 2.1.5 of the Italian Stock Exchange Regulation;

Operating Rules for Settlement Systems (Express II) and Related Activities.

Sources of Doctrine:

RADICATI DI BROZOLO, La legge regolatrice dei titoli di credito, *in* Banca, borsa, tit. cred., *1998, I, p. 452;*

CELLE, Commento all'art. 59 della l. n. 218 del 1995*, in* Nuove leggi civ.*, 1996, p. 1403;*

BALLARINO, Diritto internazionale privato*, Padova, 1999, pp. 379 and 751.*

39.11. Cyprus

No distinction is made under Cyprus law based on the classification in question for purposes of treatment of securities. It is, of course, a different issue if conflict of law rules point to another legal system altogether.

39.12. Latvia

Financial Instrument Market Law of Latvia (FIML) is applicable for all financial instruments for which an intermediary provides investment services. From this point of view all financial instruments (foreign and domestic) are treated in the same way. Rules and regulations of LCD are applicable for those financial instruments that are registered by LCD. According to the LCD rules LCD shall book-enter dematerialised financial instruments issued outside Latvia (foreign securities) if the said financial instruments are registered in a financial instruments account of the LCD with a foreign central depository or an organisation handling financial instruments settlements. There are no other special requirements for foreign securities.

39.13. Lithuania

There is no different treatment in respect of foreign and domestic securities. The answer does not depend on the foreign country to which the securities are related.

39.14. Luxembourg

The Securities Act explicitly applies without distinction to any kind of financial instruments subject to Luxembourg or foreign law and irrespective of the form in which they have been issued under their governing law (Art. 1 Securities Act).

Hence, domestic and foreign securities are treated alike.

39.15. Hungary

Yes, the CSD offers a lower range of services relating to foreign securities. Due to the cooperation between the supervising authorities, registration and handling of EU member state-related securities more simple than that of third country-related securities.

39.16. Malta

Same rules would apply, but of course private international law rules also come into play.

39.17. Netherlands

In general, foreign securities are treated the same as domestic securities. It should be noted, however, that there might be a few differences. With respect to the issuer it is important to note that the issuance must comply with the Securities Trade Supervision Act. Except for the "passport" rule mentioned under the answer to Question (38), issuers from EU Member States are not treated different from domestic issuers. As for third country issuers; the securities supervisory authority of the first Member State in which the securities are issued can approve the prospectus and provide a "passport", provided that the prospectus complies with international IOSCO standards, and the Prospectus Directive.

With regard to intermediaries it should be noted that foreign securities might be held via a subcustodian. If this is the case, several complications can arise, for instance with respect to voting rights and dividend payments, due to the multi-tier character of the securities holding.

With regard to investors, similar complications with respect to voting rights and dividend payments may arise. There may also be differences in the treatment of foreign and domestic securities as a matter of tax law.

39.18. Austria

The "foreign" securities listed in the question are not treated differently from domestic ones. As far as the CSD is concerned, they must be accepted in the same way as "domestic" securities and fall under the same rules (section 5 of the GBC of the CSD).

39.19. Poland

39.19.1. In general, foreign securities as such are not treated different from domestic securities. Note, however, that:

a) foreign laws and international private law will have impact on the contents of rights of the investor and obligations of the issuer vested in the securities.

b) under the Polish Foreign Currency Law there are certain restriction to acquisition of foreign securities without special permission (cf. answers to the questions below).

c) certain public law admission to trading/licensing requirements pertaining specifically to foreign issuers or intermediaries, determine the presence of those entities on the Polish regulated securities markets.

39.19.2. The answer depends on the foreign country to which the securities are related. Securities and entities from EU Member States are generally treated equally with the domestic ones, and another broader group, also with certain facilitation of entry to the Polish market, are the securities and entities from the OECD/WTO countries.

39.20. Portugal

There are no rules that treat differently foreign securities in relation to domestic ones.

However, the listing in a Portuguese market of securities issued by entities subject to a foreign law are subject to some specific requirements, like the presentation of a certificate issued by the authorities of the regulated market in which the securities are listed or the existence of an financial intermediary liaison, which must be a credit institution that is authorised to exercise its activities in Portugal and is a member of the centralised listed securities safekeeping and settlement systems for the securities being listed.

The issuer's financial intermediary liaison will be responsible for:

a) presenting and monitoring the entire listing process before the CMVM, the market operators, and the centralised safekeeping and settlement system;

b) guaranteeing the exercise of the economic rights inherent in the listed securities;

c) facilitating the presentation of all information that the issuer is required to provide under the terms of the law and any applicable regulation.

39.21. Slovenia

Foreign securities are generally treated equally as domestic ones. Specific provisions for cases when issuer's head of office is located abroad (outside Slovenia) are indicated below.

39.21.1. regarding the issuer (the term »foreign issuer« applies with no distinction to all issuers with their head office abroad)

Pursuant Art. 43 of ZTVP-1 securities issued by foreign issuers may only be offered to the public exclusively by a stock broking company which has obtained an authorisation to provide services relating to

initial offerings and which, with regard to securities in question, has made an agreement on the provision of those services.

ZTVP-1 stipulates as compulsory that above mentioned stock broking company performs certain actions in the name and on behalf of foreign issuer instead of the foreign issuer itself that otherwise (if issuer be domestic) could have performed issuer alone:

a) obtain an authorisation for the initial public offering of securities granted by the Securities Market Agency prior to the commencement of the public offering (Art. 44 of ZTVP-1),

b) notify the Securities Market Agency of the number of securities subscribed and paid-in no later than seven days after the expiration of subscription deadline (Art. 35 with reference to Par. 2 of Art. 47 of ZTVP-1),

c) publish data on securities subscribed and paid-in stating whether the public offering in question was successful or not, in a daily newspaper available in the entire territory of the Republic of Slovenia (Art. 36 with reference to Par. 2 of Art. 47 of ZTVP-1),

d) eliminate the uncovered irregularities in the procedure of public offering, within the deadline, stated by the Securities Market Agency, and submit to the Securities Market Agency a report in which the measures for eliminating irregularities are described (Par. 2 of Art. 38 with reference to Par. 2 of Art. 47 of ZTVP-1).

Pursuant Art. 48 of ZTVP-1 secondary public offering of securities issued by foreign issuers in the territory of the Republic of Slovenia shall (and actually is) only possible on an organised market. The stated provision restricts methods of secondary public offering in comparison with domestic issuers.

To acquire authorisation for organised trading in securities domestic as well as foreign issuers have to fulfil identical requests with two significant distinctions:

a) whilst application for authorisation for organised trading of domestic issuer must be furnished with the document issued by KDD certifying that the securities to which the application refer are dematerialised securities (point 2 of Par. 3 of Art. 55 of ZTVP-1), foreign issuer is obliged to furnish the application with a document stating the contents of the foreign law applying to the securities which the application refers to with regard to the validity of the issue, as well as method and validity of transfers and trading in those securities (Par. 2 of Art. 49 of ZTVP-1),

b) Art. 61 of ZTVP-1 (notification made by the Securities Market Agency of the stock exchange and KDD on its decision regarding the granting of authorisation for organised trading) does not apply to foreign issuers.

Pursuant to Art. 374 of ZTVP-1 the Securities Market Agency must adopt its decisions within the following deadlines:

a) if the application concerns the granting of an authorisation for an initial public offering or the granting of an authorisation for organised trading, within thirty days of the receipt of the application for the granting of an authorisation (Par. 2),

b) if the application concerns the granting of an authorisation for the initial public offering of securities issued by foreign issuers, the granting of an authorisation for organised trading in securities issued by foreign issuers, within two months of the receipt of the application for the granting of an authorisation (Par. 4).

39.21.2. regarding the intermediary

Intermediaries in the meaning of a legal person holding dematerialised securities on behalf of another person do not occur (see answer to Q1).However, pursuant Par. 2 of Art. 46 of ZNVP-1 the stock broking company that performs certain actions in the name and on behalf of foreign issuer instead of the foreign issuer itself (see point 1 above) is jointly and severally liable to the holders of securities issued by foreign issuers together with the persons referred to in Art. 23 of ZTVP-1:

a) If the prospectus or abstract from the prospectus states information which is not in accordance with the truth, the persons publishing and/or participating in the publishing of the prospectus (a person made responsible by the issuer, an auditor and other persons who might affect the contents of the prospectus) shall be jointly and severally liable to the holders of the securities in question for any loss, if they knew or should have known about the nature of the said data.

b) The persons referred to in the first paragraph hereunder shall also be liable for any loss if omissions are made from the prospectus or abstract from the prospectus with regard to crucial information about either the issuer or the securities capable of affecting the investor's decision with regard to the purchase of the securities in question.

c) The persons referred to in the first paragraph hereunder shall be absolved from their liability if they can prove that the investor, at the time of acquiring the securities, was familiar with the inaccuracies stated in the prospectus or abstract from the prospectus.«

39.21.3. regarding the investor

Once foreign securities are acquired by an investor, their foreign “nature” by itself does not have any impact on the substance of investor's rights with regard to those arising out of the securities against the issuer as well as the right(s) to dispose with securities, except in the extent stated above (secondary public offering).

39.22. Slovakia

The Act on Securities and Investment Services ("the Act") does not define the term "foreign securities". If the Act addresses domestic securities, we may presume that foreign securities are those that are:

1. governed by a foreign law (other than law of the Slovak Republic)
2. issued by foreign entity in compliance with foreign law
3. issued within foreign jurisdiction.

The Act defines so-called "Euro-securities" which are:

1. subscribed and sold by the group of persons, if at least two members of such group have a seat in different Member States,
2. are offered mainly in one or several Member States other than State where the issuer has its seat,
3. can be subscribed only through the bank or other financial institution.

Generally speaking, securities issued by foreign entity or in foreign currency are still considered to be domestic securities as long as they are issued in accordance with Slovak law. Foreign securities are treated by intermediaries and issuers in the same way as domestic ones; only arrangement of their record-keeping and settlement differs from arrangements applied to domestic securities.

39.23. Finland

Foreign securities or rights pertaining to foreign securities can be incorporated in the Finnish book-entry system in accordance with section 26 b of the Act on the Book-Entry System. The provision states the following:

"In order to establish international links, the Central Securities Depository may… incorporate in the book-entry system a foreign security kept in a foreign institution [i.e. a foreign CSD]… or a right attached to or based on such a security and handled in the foreign system. The securities or rights relating to the book entries to be incorporated shall, on the basis of an agreement between the Central Securities Depository and the foreign institution, be registered in the foreign system in the account of the Central Securities Depository or separated in another manner for the owners of the book entries. The total of the book entries incorporated shall correspond to the total of the securities or rights separated in the foreign institution. The book entries may be incorporated in the book-entry system notwithstanding the provisions on an issuer of this Act and of the Act on Book-Entry Accounts. Provisions on the incorporation procedure shall be issued in the rules of the Central Securities Depository."

"… the Central Securities Depository may, on application by the issuer, approve the incorporation of a foreign security or a right attached to or based on it in the book-entry system. If a certificate indicating the right has been issued of the book-entry to be incorporated and if the certificate is not invalidated in connection with the incorporation, the Central Securities Depository shall ensure that the certificate is not put in public circulation simultaneously with the book entry. The same shall apply to a right attached to or based on a foreign security to be incorporated in the

book-entry system. Prior to the incorporation of a foreign security in the book-entry system, the Central Securities Depository has to be able to ensure that the incorporation and handling of the book-entries may take place without endangering the reliable and appropriate operation of the book-entry system and the protection of the investor. Provisions on the incorporation procedure shall be issued in the rules of the Central Securities Depository."

When a foreign security has been incorporated in the book-entry system in accordance with the provisions cited above, it will be processed and treated in the same way as Finnish securities from the investors' and intermediaries' perspective.

Finnish law on issuers of securities and especially the Finnish Companies Act provides a specific framework for dematerialized securities with e.g. provisions on voting rights in an AGM, right to dividends etc. Consequently, in most cases a foreign issuer could not logically be treated in accordance with the same rules as the Finnish issuer, since in most cases the law governing the foreign issuer as a company (*lex societas*) does not operate in the same way as the Finnish law.

Outside the book-entry system, i.e. regarding physical foreign securities that have not been incorporated in the book-entry system, the Finnish law does not recognize any specific meaning for a 'securities account'. There is no written law in respect of custody accounting relating to such holdings, either. As explained in Chapter 1 of the Questionnaire, Finnish law is mostly silent in respect of proprietary aspects concerning treatment holdings in a fungible pool. The Act on Book-Entry Accounts is not applicable when determining the rights of an investor holding securities with an intermediary bank if the securities are not credited on an individual account in the book-entry system. There is ambiguity as to the manner in which the Finnish law shall be applied to holding, transfer and pledging of securities or security interests held with an intermediary.[138] Finnish proprietary law governing fungibles and movables held with a third party is largely based on principles rather than express law and these principles have not been developed to address the needs of active cross-border securities trading. However, there seems to be no fundamental difference in treatment of the investor, intermediary or issuer between domestic and foreign securities held outside of the book-entry system.

It shall be noted that when a foreign security is admitted to trading organised on professional basis (Finnish equivalent to Multilateral Trading Facility MTF or Automated Trading System ATS) in accordance with Chapter 3, Section 16 of the Securities Markets Act, there are no specific obligations set on the issuer towards the trading system or towards Finnish investors. Consequently, the issuer has no obligation to use the Finnish book-entry system either.

In terms of practical significance, the investments in foreign securities by Finnish investors outside the book-entry system outweigh by far the investments made in foreign securities incorporated in the book-entry system. In accordance with

---

[138] A Ministry of Finance Working group stated in 2002 that "…Finland lacks legislation that could be applied to securities holdings or records kept in Finland outside the book-entry system... The absence of substantive law causes ambiguity as to what kind of rights the owner has in respect of foreign securities which are held in custody in Finland and for which records are maintained in Finland. Consequently, it is also unclear, how such shares can be pledged or transferred validly…" (See report VM 14/2002, Multi-tiered holding of securities")

information published by the Bank of Finland, at the end of 2003 the investments by Finnish investors in foreign securities were worth 85 billion euro. The greater part (84 per cent) was held in the EU area. Only worth about 7.3 billion euro (translating into 8.6 per cent of total holdings in foreign securities) was held in foreign securities incorporated in the book-entry system.

39.24. Sweden

Generally, foreign securities are treated as domestic securities with respect to the intermediary, the investor and the issuer. Regarding most notable the issuer private international law rules also come into play.

39.25. United Kingdom

In general, the rules of English law governing the rights and obligations of intermediaries and investors holding securities with intermediaries do not distinguish between underlying securities on the basis of any of the factors mentioned above. Of course, in so far as the answers to any of the preceding questions depend on matters that are governed by the law of the issuer or the law by which securities accounts held with an upper tier intermediary is governed, and that law is not English law, the answer to those questions would depend on that other law.

40. QUESTION NO. 40: ARE THERE ANY RULES WHICH SPECIFICALLY DEFINE A DOMESTIC INVESTOR'S RIGHT TO FOREIGN SECURITIES CREDITED TO A DOMESTIC ACCOUNT? IF SO, WHAT IS THE NATURE OF THE RIGHT GIVEN AND DOES IT DIFFER FROM THE RIGHT OF INVESTOR TO DOMESTIC SECURITIES?

40.1. Belgium

Royal Decree 62 does not contain any provision(s) specifically defining the nature of an investor's right to foreign securities, distinctively from domestic securities, as this right is the same as with respect to domestic securities (a co-ownership right in a book-entry pool of fungible securities described in our answer to question 7).

40.2. Czech Republic

Domestic investor right to foreign securities credited to owner account in separate register of securities (section 93 of Capital Market Undertaking Act) operated by the domestic investment firms is characterized, indiscriminately from domestic securities on owner account, as ownership (co ownership to pooled securities). Foreign securities are specifically mentioned in the list of assets credited to owner account operated by the domestic investment firm. However, applicable general conflict of laws rules point to the law of securities location, which seems to be allocated to the first tier intermediary (see also question 39(i)). In conclusion, investor right to foreign securities credited to a domestic account is the ownership, unless prevail private international law rules, role of which is unclear.

40.3. Denmark

There are different rules dealing with securities held on an individual account with a domestic CSD and securities held on an account with an intermediary other than a domestic CSD, respectively. See answers to Question no. 15 and 17. However, there is no distinction based on whether the underlying securities are domestic or foreign.

40.4. Germany

The acquisition and the legal status of the domestic investor's rights investor with regard to foreign securities are only partially addressed in Section 5 (4), 22 Securities Deposit Act.

With regard to contractual rules the acquisition and holding of these securities is subject to the Special Conditions for Securities Dealings (*Sonderbedingungen für Wertpapiergeschäfte* – hereafter SCSD) reflecting the market practice.

If so, what is the nature of the right given and does it differ from the right of the investor to domestic securities?

There are basically two legal ways for an investor to "hold" securities issued into a foreign CSD:

If the foreign security is held in cross border collective safe custody with or via the German CSD pursuant to Section 5 para 1 (e.g. as global bearer certificates) and 4 ("qualified" link with another national CSD) of the Securities Deposit Act, the investor acquires (co-)ownership (right *in rem*) which is valid *erga omnes*. There is no legal difference to domestic securities held in collective safe custody.

In case the foreign security which is not eligible for cross border collective safe custody is safe-kept abroad otherwise (e.g. via a foreign custodian bank) the investor acquires a right *in personam* against his custodian bank making the investor the fiduciant and the domestic custodian bank the fiduciary owner of such securities under the foreign jurisdiction (WR-Credit, cf. sect 22 Safe Custody Act) (see also answer to Question 7).

From the perspective of German conflict of law rules, it does not make any legal difference whether rights under the securities are governed by German or any other Law.

40.5. Estonia

As to foreign securities to which the ECSRA applies (i.e. Directly incorporated foreign securities and Foreign securities incorporated via link) – no specific rules defining investors rights and/or the nature of those rights differently from those applicable to domestic book-entry securities.

As to foreign securities to which the ECRSA does not apply (i.e. not credited to a securities account in the Central register) – there are no clear rules and definitions as to the description and nature of rights. However, a minimum standard of rights and their protection can be deducted from provisions of the SMA (specifically § 88 referred to above).

40.6. Greece

There are no rules which specifically define a domestic investor's right to foreign securities. However, the following differentiation must be made:

Regarding foreign securities governed by (domestic) Greek Law and held within the DSS or the BoGS, Greek Law applies in respect of investors' rights arising from book entries within the DSS or BoGS. Nevertheless, this could not apply to shares issued by foreign issuers regarding the DSS, according to the literal letter of the law. Hence, there is no differentiation between those and domestic securities, provided however that the law of the country of the registered offices of the foreign issuer allows for the law of a foreign jurisdiction to regulate matters in respect of the issuer's relationship with the securities' beneficial owner (e.g. the rights flowing from the securities towards their issuer) as well as the form of the securities.

Regarding foreign securities governed by foreign law and held by a domestic investment firm or a domestic credit institution (i.e. incorporated in Greece), the rules regulating

(8) the investor's rights to securities credited to accounts held by these domestic intermediaries (account providers), in the event of the latter's insolvency, and

(9) the protection of the investors' rights in case of seizure from any intermediary's (account provider's) borrowers neither differentiate between domestic and foreign investors nor between domestic and foreign securities. In terms of the investors' protection in cases of insolvency please see question 1.2 above. Furthermore, according to paragraphs 3 and 4 of the newly inserted article 4b of law 1806/1988, added by article 43 par. 4 of law

3371/2005, the protection provided to investors is being extended to investment firms placed under special liquidation procedures139.

In addition, through newly added paragraphs 5 and 6 in article 6 of Law 2396/1996, inserted by article 55 of the recent law 3371/2005, it has been determined that securities held by domestic investment firms or credit institutions, for their clients' account, may not be seized by the borrowers of investment firms or credit institutions. The said provisions explicitly make reference to those securities which are registered in the accounts of the above intermediaries (account providers) in book entry form140. The said provisions do not differentiate between domestic and foreign securities.

40.7. Spain

If the foreign securities are included in IBERCLEAR'S book-entry register system they are subject to the same rules and regulations regarding transfers, dispositions, taking of security/collateral, etc., as those applicable to domestic issues.

40.8. France

The investor has proprietary *in rem* rights over the domestic securities recorded in his securities account (see questions 7 and 8).

Similar rights are recognized to investors over foreign securities.

This characterisation is supported by Article L. 431-2 of the M&FC, as modified by Ordinance n° 2005-303 of 31 March 2005 and Law 2005-811 of July 20, 2005, which contemplates that the **transfer of ownership** in respect of financial instruments **issued under foreign law** and admitted to the operations of a central depositary or settled through a securities settlement system referred to in Article 330-1 of the M&FC results from book entry in the account of the buyer on the date and under the conditions defined by the AMF General Rules. Domestic securities are similarly governed by the provisions of this Article.

---

[139] The newly inserted provisions state the following: "3. If an investment firm is dissolved or put under liquidation procedures, the general financial instruments and the cash accounts belonging to its clients are separated from the firm's assets which are to be distributed, and are attributed to their beneficiaries, unless: a) a pledge has been established on them, in which case these are handed over to the pledgee or b) the investment firm has a claim against their beneficiaries, in which case the opposing similar claims are set off. 4. Financial instruments and cash accounts belonging to investors-clients of the investment firm and being separated from the firm's assets which are to be distributed, do not include solely financial instruments and cash accounts belonging to investors' clients of the investment firm as defined in the rules of property law, but also financial instruments in materialized or dematerialized form, and cash accounts held, directly or indirectly, by the investment firm for the account of its investors-clients, which are connected with the provision of investment services by the said firm to its investors-clients and in respect of which clients have a claim which is confirmed by the registrations in the books and data of the investment firm, as well as by any other written means of proof."

[140] These provisions contain the following: "5. Creditors of investment firms shall in no event seize or confiscate proprietary assets of clients to which the investment firm provides investment services, and which are either in the form of bank deposits accounts held in the name of the firm or financial instruments, provided that the assets' beneficiaries are the above clients according to the company's books, as prescribed by article 6 of the present Law, or to any other written evidence. Regarding financial instruments, the above provision is applicable also on credit institutions legally providing investment services. 6. The above provision on non seizure or confiscation does not apply exclusively to financial instruments owned by clients-investors of the investment firm according to property law rules, but also to those instruments that are held, directly or indirectly, with an investment firm and whose actual beneficiary, according to the company's books, as prescribed by article 6 of the present Law, or to any other written evidence, is a client to whom the firm provides investment services, irrespective of whether the name of the beneficiary-client is registered into the registry of the custodian or of any other securities depository or registry system."

Furthermore, the provisions of Article L. 431-4 of the M&FC governing pledges over securities accounts apply equally to both domestic and foreign securities.

40.9. Ireland

There are no such rules.

40.10. Italy

There are no such rules in Italy. Italian law attributes to the account holder the economic and administrative rights of an owner-depositor of financial instruments, irrespective of whether the securities are sub-deposited with a sub-custodian in a jurisdiction where the holder is deemed to hold a security entitlement rather than the financial instruments themselves.

40.11. Cyprus

There are no such rules.

40.12. Latvia

There are no special rules that define a domestic investor's right to foreign securities credited to a domestic account. In respect of investor's rights the similar provisions of FIML should be applicable for domestic and foreign securities.

40.13. Lithuania

There are no special rules. For those purposes foreign securities are treated in the same manner as the domestic ones.

40.14. Luxembourg

No, there are no specific rules defining a domestic investor's right to foreign securities credited to a domestic account. The holding of foreign securities in a securities account with a Luxembourg depository subject to Luxembourg law does not change the nature of the rights to the securities.

40.15. Hungary

There are no special rules.

40.16. Malta

The same rules described above in relation to domestic securities with intermediaries apply, even if the securities credited to the domestic account are foreign. It should be noted however that regulation 10(2) of the ISA (Control of Assets) Regulations refers to the law of the country in which the book-keeping system is maintained to determine issues relating to transfer, transmission and pledges of securities

40.17. Netherlands

There are no rules which specifically define a domestic investor's right to foreign securities, credited to a domestic account. All securities in a domestic account, are treated in accordance with the character of the relevant rights (ownership, co-ownership, mere claims), regardless whether the securities are foreign or domestic. For an overview of the nature of these rights, reference is made to the answer to Question (1). It is up to the *lex fori* to determine the legal nature and effects against

the intermediary and against third parties resulting from such credit-entry. If the *lex fori* is Netherlands law, a Netherlands court will take the law governing the underlying securities into consideration in determining the legal nature of a credit-entry.

40.18. Austria

General Business Conditions of Austrian securities account providers contain special rules for securities which are held abroad. In case the customer is credited a claim for delivery of securities ("Wertpapierrechnung" see above answer to question (15) para 2) the claim of the customer against the account provider corresponds to the share which is held by the account provider for the client in respect of the total covering holding abroad (for all of its clients and itself) held in accordance with the respective foreign laws and practice (e.g. no. 67 of the GBC of the largest Austrian bank). Securities of the same category, held abroad and credited in "Wertpapierrechnung" (securities accounting) form the covering holding and include securities held by the account provider for its own account. All account holders who received credits in "Wertpapierrechnung" bear proportionally all economic and legal prejudices and damages which affect the entire cover holding by measures, events or attachments of third parties for which the credit institution is not responsible. The crediting in "Wertpapierrechnung" means that the customer has an obligatory claim for delivery of securities held abroad, whereas an investor in domestic securities becomes the owner of the securities and obtains an absolute right against anybody ("in rem").

40.19. Poland

No such rules exist.

40.20. Portugal

There are no rules specifically defining the investor's rights to foreign securities credited to a domestic account.

The contents of those rights will be defined by law governing the issuer, unless in case of bonds or other debt securities, the register of the issue states that another law is applicable.

As regards the transfer of such rights or the granting of security rights over such securities, the applicable law is the following:

a) In relation to securities integrated into a centralised system, the law of the State where the management entity of such system is located;

b) In relation to securities registered or deposited and not integrated in a centralised system, the law of the State in which the entity where the securities are registered or deposited is located;

c) In relation to securities not included in the previous sub-paragraphs, the individual law of the issuer.

40.21. Slovenia

No.

Art. 11 of ZNVP that determines conditions and procedure of the issue of dematerialised securities (see answer to Q39) does not differentiate issuers nor classifies them in sub-groups (e. g. domestic or foreign).

Par. 1 of Art. 90 of ZNVP provides that KDD shall keep a record of issued securities on the basis of the central register (*registry*) data. All securities that are issued in compliance with Art. 11 of ZNVP are entered in register (*registry*) of issued securities. Given valid legal basis (legal transaction, law or court decision) domestic (as well as foreign) investor can obtain (have credited to his account) any securities entered in the registry kept by KDD. Substance of rights that are derived from dematerialised securities by their holder do not vary with regard to issuer's origin.

40.22. Slovakia

At the moment, foreign securities cannot be credited to securities account opened in registration of CDCP member. Intermediaries make their own arrangements with regards to safekeeping of foreign securities. Relationship between investor and intermediary is subject to provisions of the Act.

40.23. Finland

If the foreign security has been incorporated in the book-entry system the domestic investor's right pertaining to the foreign security is defined in Section 26b, Subsection 2 cited above, as a right that the respective foreign law applicable to the holding in foreign securities vests in the holding. The government proposal (nr. 127/1998) concerning the cited provision notes that the rights pertaining to the foreign book-entry may be exercised through APK in accordance with the foreign law. Thus, the foreign book-entry includes e.g. separation rights, administration rights and dividend rights as provided under the foreign law applicable to the underlying holding in foreign securities. Furthermore, the holder of foreign book-entry securities is not (and nor are his successors or creditors) entitled to direct claims to the foreign central securities depository or to the foreign issuer (i.e. no upper-tier attachment). This differs from the rights that the investor has in respect of the domestic book-entry securities. As explained under question 7, an investor is considered to have a direct and traceable ownership right of an individual Finnish book-entry security registered in his account.

Outside the book-entry system, the situation is less clear as explained in the answers provided to questions 7 and 12. Under the traditional Finnish property law, a person can hold property on behalf of another person. The property is not considered to be owned by the person holding the property and the owner has an enforceable right against a third party (e.g. successor and creditor), if the property is sufficiently segregated from the assets of the person holding the property. However, there are no written rules to underpin the nature of the right of the investor.

40.24. Sweden

As stated above (see question 15) there are different rules regarding CSD Accounts and other accounts. Those rules make no distinction between foreign and domestic securities.

40.25. United Kingdom

There are no such rules in relation to non-CREST securities. In CREST, special arrangements are in place to permit interests in foreign securities to be credited to participants' accounts. In general and broadly, these interests are known as CREST Depository Interests or CDIs, and are akin to interests under DR program. The CREST nominee or its sub-custodian participants in a foreign settlement system and has foreign securities credit to its account there. It holds this asset on trust for CREST Depositary Limited, which in turn holds its interest under an English law trust. The trust is in favour of holders of CDIs. It issues CDIs under the terms of an English Law deed poll. The CDIs are credited to the CREST accounts of participants.

41. QUESTION NO. 41: DOES THE PROTECTION OF A DOMESTIC INVESTOR DIFFER IN RELATION TO THE HOLDING OF FOREIGN SECURITIES (I) WITH A DOMESTIC INTERMEDIARY OR (II) WITH A FOREIGN INTERMEDIARY, E.G. IN CASE OF THE INSOLVENCY OF THE INTERMEDIARY?

41.1. Belgium

No, the protections are identical if Belgian law is the applicable law.

41.2. Czech Republic

Foreign securities held on behalf of customers by a domestic investment firm are (irrespective of the ambiguous question of ownership mentioned in answer 40) protected from the effect of insolvency proceedings against the investment firm and must be distributed to the customers (section 132 of Capital Market Undertaking Act). In case of insolvency proceedings against foreign intermediary providing investment services in the Czech Republic on the ground of EU-passport or license granted to branch of non-EU entity by the Czech Securities Commission, similar protection of client's assets doesn't apply. The ownership right conferred to the holder of owner account, which is regular in case of central securities depository or registers operated by the domestic investment firms (but see answer 40), is also not applicable to the securities held by foreign intermediaries, as far as the foreign intermediaries may but are not required to operate securities registers pursuant to Capital Market Undertaking Act.

41.3. Denmark

No, the substantive rules on protection of the investor are the same whether the intermediary is domestic or foreign. See answer to Question no. 15. However, the Danish substantive rules on investor protection will only apply, if either the intermediaries´ omnibus account is maintained in Denmark or the intermediary is subject to Danish insolvency proceedings.

41.4. Germany

In general, the *lex concursus* of the country where the defaulting intermediary has its legal seat applies. Within the EU/EEA, the principles of Dir. No 2001/24 apply according to which the insolvency proceedings are strictly governed by the home jurisdiction, subject to certain derogations in Arts. 21 et seq. Conflict of law rules follow almost identical principles as with the EU/EEA (sect. 335 et seq. InsOCode).

So it is most likely that the protection of a domestic investor in case of insolvency of a foreign custodian bank will be governed by the laws of the foreign jurisdiction. Such jurisdiction is relevant as to whether, and under what conditions, the investor's assets may be segregated from such intermediary's insolvent estate.

With respect to foreign securities held in collective safe custody the German CSD is required by Section 5 para 4 the Securities Deposit Act to obtain (and regularly renew) legal opinions on the legal protection of customer securities held in a joint collective safe custody pool with the foreign CSD it has a qualified Link with (Sect. 5 (4) of the Act). The main object of such legal opinion is, inter alia, to make sure that the investor enjoys a legal protection under the foreign jurisdiction comparable to that under German law. Furthermore, section 4 para 1 Securities Deposit Act states that, in principle, all securities held with a domestic intermediary or a CSD

are deemed to be customers' securities unless explicitly declared otherwise. Consequently, the domestic investor has a right of separation of his intermediated securities in case of insolvency of the domestic intermediary pursuant to section 47 German Insolvency Code. This applies also in case the securities are (wholly or partly) held via the a.m. CSD Link with a foreign CSD.

Regarding securities held in WR-Credit, the last intermediary in the custody chain which is located in Germany has to obtain a so called Three Points Declaration (*Drei-Punkte-Erklärung*) of the foreign intermediary. Therein, the foreign intermediary declares that (1) it acknowledges the security holdings of the last intermediary located in Germany as customer assets and will separate these securities from proprietary assets of the last intermediary located in Germany and (2) that it will not assert liens or rights of retention with respect to these separated customer holdings except for their purchase price and administration (i.e. mainly safe custody) fees and (3) that the securities will be safe-kept within the country specified in such declaration and by the foreign intermediary itself unless otherwise authorized by the German intermediary.

41.5. Estonia

Yes, the level of protection may differ given that rules of a respective jurisdiction (especially provisions of insolvency law) applicable to foreign intermediaries may differ from those that apply in the similar situation for domestic intermediaries.

The protection provided by Estonian law applies only to service providers incorporated in Estonia (i.e. in situations where foreign securities are credited to an account maintained by a domestic intermediary).

Further, under § 23 (1) of the Private International Law Act when a foreign intermediary maintains records regarding the investors in a state other than the Republic of Estonia, the (i) nature of rights arising out of the credit entry and (ii) rights and obligations of the intermediary in respect of securities held with that intermediary shall be governed by the law of the state in which the records are held. This may have relevance when assessing the level of protection available to investors.

41.6. Greece

In case of the insolvency of a domestic intermediary (account provider), Greek law expressly provides for the protection of the investors' rights (see questions 1.2. and 40 above), without differentiating between domestic and foreign investors or domestic and foreign securities. If the intermediary (account provider) is a foreign one, lex fori concursus applies.

Concerning the cases where the intermediary (account provider) acts as an account operator within the DSS or as participant within the BoGS (see questions 2.3. and 3.1. above), please note the following: a) Regarding the DSS, if the intermediary (accounts' operator) holds the securities in sub-accounts in the name of each investor (option provided by DSS, see above under 5), full protection of the investors' rights is provided, irrespective of whether the intermediary (account provider) is domestic or foreign. If, however, the intermediary (account provider) holds the securities in an omnibus account, in its own name, lex fori concursus applies. b) With regard to BoGS, Art. 8 para 3 of Law 2198/1994 provides for the protection of the investors' rights (see above under 15.b.). The said provision does

not differentiate between domestic and foreign participants. In this respect, however articles 24 and 31 of EU Directive 2001/24 on the reorganisation and winding up of credit institutions must be taken into account. It is noted that there is a legislative lacuna in respect of investment firms at the EU level, since they are not regulated by an EU Directive or relevant Council Regulation 1346/2000 on Insolvency Proceedings. Therefore, in such cases lex fori concursus could be of importance.

41.7. Spain

Should both intermediaries be participants in IBERCLEAR, no difference is made between holding the securities with a domestic or foreign intermediary. If the holding would be an "indirect holding", as stated in question [ ] above, there are no applicable rules, as Spanish law does not expressly recognise such type of holding.

41.8. France

Protection of a domestic investor in relation to the holding of foreign securities with a domestic intermediary

French conflict of law rules refer to the law of the place where the account is located in order to assert rights over financial instruments. Where the account is maintained in France by a domestic intermediary, those rights are protected in the same manner in respect of domestic or foreign securities.

Article L. 613-31-5,5° of the M&FC (which is among the C&MF provisions implementing Directive 2001/24/EC of the European Parliament and of the Council of April 4, 2001 on the Reorganisation and Winding-up of Credit Institutions – the "**Winding-up Directive**") provides that rights over financial instruments implying recording on a register, in an account, or with a central depositary held or located in a Member State are governed exclusively by the law of that Member State.

The AMF General Rules contain rules governing the duties of a securities custodian.

Among the duties of a custodian *vis-à-vis* its clients, the custodian is *inter alia* under the duty:

- **to maintain and preserve the securities under its custody;**
- **not to use securities recorded in its books in the name of its customer without the consent of such customer;**
- **not to transfer ownership over such securities without accountholder's consent;**
- **to redeliver those securities, if need be.**

The custodian is also under the duty, *inter alia*, to:

- maintain and ensure an appropriate level of human resources;

- maintain and ensure appropriate computer technology resources;

- comply with accounting rules (e.g. segregation rules, double accounting…);

- facilitate the exercise of the rights related to the securities.

Those duties apply without distinction to both domestic and foreign securities.

Article L. 211-6 of the M&FC (formerly Article L 431-6 of the M&FC) provides that in case of bankruptcy of the financial intermediary maintaining the securities account, securities held through such intermediary may be transferred to another financial intermediary (in this respect, see also question 15). As Article L. 211-6 of the M&FC does not distinguish between domestic securities and foreign securities, such protection also applies to foreign securities.

- **Protection of a domestic investor in relation to the holding of foreign securities with a foreign intermediary (being a custodian carrying its custody operations outside of France)**

Pursuant to Article L. 613-31-5 of the M&FC, this matter would be addressed by the law of the Member State where the securities account is maintained (see above). Although not addressed by Article L 613-31-5 of the M&FC, the same rule would apply when the securities account is maintained in a country outside of the EU. Further reference is also made to questions 42 and 43.

It should further be noted that, pursuant to the rules set in Article 31 of the Winding-up Directive, the administration or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution including branches established in other Member States.

41.9. Ireland

This will depend upon the terms and conditions of the contract between the investor and the intermediary and the applicable conflicts of law rules. Where the securities in a securities account is governed as to proprietary issues[141] by Irish law and such securities or interests in securities are held by the intermediary on trust for the account holder/investor, such securities accounts will be owned beneficially by the account holder/investor and not by the intermediary. If proprietary issues are governed by Irish law, the position should be the same regardless of whether the intermediary is incorporated or organised in Ireland or is a foreign entity.

---

[141] Issues of the kind specified in article 2(1) of the Hague Securities Convention and article 9 of the Financial Collateral Directive

The EU Directive on the reorganisation and winding-up of credit institutions[142] provides for a single set of winding-up proceedings or reorganisation measures, to be commenced in the Member State in which an EU credit institution has its head office and to be carried out under the laws of that "home" Member State. Special rules are provided for in Article 24 of that Directive, and in Regulation 29 of the Irish implementing regulations - the European Communities (Reorganisation and Winding-up of Credit Institutions) Regulations 2004, in relation to property rights in registered or book entry instruments and pre-existing proprietary rights are generally recognised (Article 21/Regulation 26). Article 9(2) of the Settlement Finality Directive, as implemented by Regulation 7(2) of the Settlement Finality Regulations, provides that enforcement of proprietary rights in financial instruments recorded in a register, account or central deposit system and provided as collateral security for the purposes thereof, shall be governed by the law of the country where the relevant register is maintained.

Irish law generally recognises that, on any insolvency of an intermediary that is a trustee, property held in trust by that intermediary as trustee belongs to the beneficiaries of the relevant trust and is not available for distribution among creditors of the insolvent intermediary, acting other than in its capacity as trustee of the relevant trust. Subject, therefore, to the trust and the resulting proprietary rights of the beneficiaries to the trust assets, in respect of the trust assets being validly constituted as a matter of all applicable laws and the relevant arrangements between the trustee and the beneficiary not constituting a preference, a transaction at an undervalue or a transaction defrauding creditors , those trust assets would not be available for distribution among the creditors of the insolvent intermediary, other than those creditors of the intermediary trustee acting in its capacity as such.

41.10. Italy

Any investor holding securities with a domestic intermediary or a domestic branch of a foreign intermediary is protected by the Italian segregation rules, whereby such investor's securities may not be commingled with the intermediary's own securities or the securities owned by other clients of such intermediary.

Under the European Directive on the Reorganisation and Winding up of Credit Institutions, the enforcement of proprietary rights in instruments or other rights in registered or book entry instruments shall be governed by the law of the Member State where the register, account, or centralised deposit system in which those rights are recorded is held or located. Accordingly, the Italian segregation rules are preserved in the event of insolvency of domestic or foreign intermediaries. However, a question may arise if the insolvent intermediary has breached such rules and hence commingled the deposited securities. If the investors' securities are collectively segregated from the intermediary's own securities, but commingled among themselves (and, possibly, they also result to be insufficient to satisfy the investors' proprietary restitution rights), the investors have the right to claim title to, and obtain restitution of, a pro-rata share of such commingled assets which remain separated from the remaining bankruptcy estate of the intermediary; if, however, the investors' securities are not even segregated from the intermediary's own securities, the investors do not have a proprietary right, but only an unsecured claim against the bankruptcy estate ranking pari-passu with the other unsecured

[142] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001

claims. In all the above cases the intermediary's representatives responsible for the breach of the segregation rules are sanctioned with criminal charges.

Sources of Law:

Article 22 and 168 of the FLCA;

Articles 86(6) and 91 of Legislative Decree No. 385 of 1993 (BLCA);

Articles 28 ff. of the Euro Decree;

Article 40 of the Markets Regulation;

Article 24 of the Directive No. 2001/24/CE on the Reorganisation and Winding up of Credit Institutions.

Sources of Doctrine:

BRIOLINI, (Question 24), pp. 192-193.

FORTUNATO, *Articolo 91*, in *Commentario al Testo Unico delle leggi in materia bancaria e creditizia*, directed by Capriglione, Padova, 2001, p. 717.

41.11. Cyprus

I will assume that the conflict of law rules point to Cyprus law as regards issues of ownership of the securities in question. If the intermediary is acting as a trustee for the ultimate owner/ investor then such an investor is deemed to be the beneficial owner of the security and would not be affected by a possible insolvency of the intermediary. Relevant provisions, however, permitting the setting up of trustee or custodian accounts have not been activated as yet pending promulgation of the relevant regulations. Of course issues of segregation and identifiability of the assets will be of importance in deciding whether specific assets are subject to a trust and would thus be protected in case of insolvency of an intermediary.

41.12. Latvia

The level of protection may differ taking into account that the insolvency issues are regulated by intermediary's home - country legislation. According to the FIML, financial instruments belonging to a customer of an intermediary are kept segregate from intermediary's own assets, and shall not be used by the intermediary to settle the claims of its creditors. This requirement shall also apply to cases when an intermediary is recognized insolvent in due course of law.

According to the FIML, a foreign intermediary may start to provide investment services in Latvia if the supervisory authority of Latvia (Financial and Capital Market Commission,) apart from other information required by FIML, has received the information on the investor's protection system in which the respective intermediary participates.

41.13. Lithuania

Lithuanian law shall be applicable to the insolvency proceedings of the intermediary incorporated in Lithuania, whereas in respect of the foreign intermediary the protection of the investor depends on the insolvency law of his home country.

Regarding the protection of investor's rights to securities it depends on the nature of such rights conferred to investor by the applicable law. Following private international law rules (Art. 1.56(2) of the Civil Code) in respect of securities the law of place of issue of securities has to be applied, except for PRIMA provisions regarding financial collaterals enacted due to transposition of the Financial Collateral Arrangements Directive and Settlement Finality Directive.

41.14. Luxembourg

The protection offered to a domestic investor is identical in respect of domestic or foreign securities held with a domestic intermediary.

However, if the domestic investor directly holds securities with a foreign intermediary the laws of the latter determine the level of protection granted to the investor.

41.15. Hungary

The protection provided by Hungarian law (see 15) applies only if the foreign securities are credited to an account maintained by a domestic intermediary.

41.16. Malta

The foreign intermediary may not be subject to Maltese law and accordingly one would have to determine the domestic investor's right on the basis of the foreign intermediary's insolvency laws.

41.17. Netherlands

Netherlands segregation requirements – which are aimed at the protection of investors against the risk of the intermediary's insolvency – following from the Further Regulation Conduct Supervision Securities Trade (in Dutch "Nadere Regeling Gedragstoezicht Effectenverkeer"), oblige investment firms – including credit institutions which provide investment services – to make adequate arrangements for instruments belonging to investors with a view to safeguarding the latter's ownership rights, especially in the event of the investment firm's insolvency. The arrangements to be made may differ depending on the regulatory status of the relevant institution. As regards investment firms which are not also credit institutions, it is required that investor's securities be maintained in a securities account with a credit institution. As regards credit institutions the following protective measures may be regarded as providing adequate protection: (1) if the securities are designated as securities within the meaning of the Netherlands Giro Securities Transfer and Administration Act and the credit institution has been admitted as a affiliated institution ("aangesloten instelling") by Euroclear Netherlands, insofar as the relevant securities are held, administered and transferred pursuant to the Netherlands Giro Securities Transfer and Administration Act; and/or (2) if the securities are held in custody for clients of the credit institution by a depositary company which is independent of the credit institution and does not engage in any activities which are not directly related to the business of safekeeping securities (and therefore does not assume any additional commercial risk). Furthermore, other arrangements may satisfy the Netherlands segregation requirements if such other arrangements in the opinion of the Netherlands Securities Supervisory Authority, the AFM, offer sufficient safeguards.

The segregation requirements are applicable to investment firms - including credit institutions which provide investment services - established in the Netherlands. They are also applicable to investment firms and credit institutions which are not established in the Netherlands but which are licensed or required to be licensed in the Netherlands. These rules are however NOT applicable to investment firms or credit institutions performing investment services which are not established in the Netherlands, but in another EU/EEA Member State and which have been passported into the Netherlands to provide their services in this country, either on a cross-border basis or through a branch. These institutions need to comply with the segregation requirements, if any, of their home country.

A domestic intermediary will generally hold its foreign securities via a subcustodian, in most cases through an omnibus account held at such subcustodian in the name of the domestic intermediary. Therefore, in case of holding foreign securities with a domestic intermediary, the investor runs two insolvency risks; the first pertaining to the domestic intermediary, and the second pertaining to the subcustodian. There will consequently be two applicable insolvency laws. In case of insolvency of the domestic intermediary, which in fact holds the foreign securities via a subcustodian, Netherlands law will be applicable, whereas with respect to the insolvency of the foreign intermediary the law of the country of incorporation of the foreign intermediary will apply. This is the case both as a matter of general Netherlands international private law and pursuant to the legislation implementing EU Directive 2001/24/EC on the reorganisation and winding up of credit institutions into national law.

41.18. Austria

According to the answers to question (40) above the holding of foreign securities by a domestic account provider means an obligatory claim against the account provider for delivery of securities whereas the holding of the foreign securities with a foreign intermediary may mean that the investor became owner of the securities. Whether this is true will depend on the law applicable to the securities as well as on the applicable laws and regulations in respect of the account provider. In case of insolvency of the domestic account provider the securities held by him in "Wertpapierrechnung" for his clients will be separated from those held in the account provider's own name and will be transferred to the respective account holders in accordance with their instructions (see also answers to question (15), second para).

41.19. Poland

The level of protection may differ depending on the location of the intermediaries through which the securities are held, and on which CDS (there may be different levels of risk related to operations of the various CSDs) and which investor compensation scheme they use. The domestic intermediary participates in the obligatory investor compensation scheme. In case the investor account protection under this scheme is not the same as the level of protection under the investor compensation scheme the foreign intermediary participates in, then there will be a difference in the level of investor protection in case of the insolvency of the intermediary. In case the Polish standards are higher than those of the foreign investor protection scheme, then Polish law provides for an opportunity for the foreign intermediary to join the Polish Obligatory Investor Compensation Scheme to eliminate the existing difference in the level of investor protection.

41.20. Portugal

The rules and level of protection are identical in case of foreign securities hold with a domestic intermediary or with a foreign intermediary acting in Portugal.

Both intermediaries are subject to the same rules and duties, including segregation of assets.

Naturally, the rules of the European Winding Up Directive for Credit Institutions are applicable.

41.21. Slovenia

No.

The holder of dematerialised securities account is at the same time legal (and beneficial) holder ("owner") of dematerialised securities entered in this account. "Intermediary" (registry member) that manages the holder's account is not holder's fiduciary, depository nor custodian. Therefore an investor (domestic or foreign) is secured from consequences of "intermediary's" insolvency by legal "ownership" itself.

As far as monetary claims of an individual or legal entity (regardless of its origin) on a stock broking company arising from a stock broking agreement, an agreement on keeping accounts of dematerialised securities, an agreement on the safekeeping of securities issued as written documents or an agreement on securities management are concerned, they are subject to the system of guarantees with regard to investors' claims (Chapter 16. of ZTVP-1), which equalizes their protection in both positions (stock broking company being domestic or foreign) in the manner that is presented below.

Pursuant Par. 1 of Art. 281 of ZTVP-1 stock broking companies with head offices in the Republic of Slovenia shall guarantee for the payment of guaranteed claims at a stock broking company against which the bankruptcy procedure was initiated to the extent and according to the procedure stipulated in ZTVP-1.

Art. 282 of ZTVP-1 furthermore provides:

1. A branch of a foreign stock broking company shall be included in system of guarantees for investors' claims in the country in which the foreign stock broking company concerned has its head office.

2. The level and extent of guarantees for investors' claims at the branch must not exceed the level and the extent laid down in ZTVP-1.

3. If a system of guarantees for investors' claims in the country in which the foreign stock broking company concerned has its head office does not exist and/or if the extent of the guarantee for investors' claims is below that in the Republic of Slovenia, the branch of the foreign stock broking company shall be obliged to participate in the system of guarantees for investors' claims in the Republic of Slovenia. The method and extent of inclusion of the branch of the foreign stock broking company in the system of guarantees for investors' claims in the Republic of Slovenia shall be laid down by the [S.M] Agency when granting the authorization to establish a branch.

4. In the event referred to in the third paragraph hereunder, the provisions of this chapter shall also apply to branches of foreign stock broking companies.

41.22. Slovakia

Respective Slovak legislation is applicable to both domestic and foreign intermediaries when providing services in the Slovak Republic. Domestic investor is protected in the same way if he holds securities (including foreign securities) with domestic or foreign intermediary, provided that foreign intermediary operates in the Slovak Republic. Even though foreign securities cannot be credited to securities account opened in the Slovak CSD and intermediary has to open securities account with foreign CSD or foreign intermediary, any relations with their clients must comply with the Slovak legislation.

41.23. Finland

In the book-entry system, the protection does not differ between domestic and foreign intermediary, since the account operator providing services to the investor is not considered to have rights in respect of the securities credited in the accounts that it operates (unless, of course, it is a proprietary account of the account operator or if the right of the account operator is duly registered in the account).

Outside the book-entry system, the protection of the investor may differ depending on the insolvency law applicable to the intermediary as is customary for the insolvency law provisions worldwide.

The Finnish law shall be applied to the insolvency proceeding of a Finnish intermediary. Chapter 5, Section 6 of the Bankruptcy Act provides that assets held by the bankrupt debtor belonging to a third party that can be separated from the assets of the debtor, shall not belong to the bankruptcy estate. Such property shall be submitted to the owner or to a person designated by the owner in accordance with such terms and conditions that the bankruptcy estate is entitled to claim.

In case of a foreign intermediary, protection of the investor depends on the operation of the foreign insolvency law.

41.24. Sweden

No, the protections are identical if Swedish law is the applicable law. However Swedish rules on investor protection will only apply if the intermediary's account is maintained in Sweden or the intermediary is subject to Swedish insolvency proceedings.

41.25. United Kingdom

The basic position with respect to the protection of an investor holding securities in a securities account which is governed as to proprietary issues143 by English law and is constituted under normal arrangements such as are described in the answer to question 3 is that the securities or interests in securities held by the intermediary in segregated omnibus accounts designated as customer securities accounts are owned

[143] We use the expression "proprietary issues" as a general terms to refer to issues of the kind specified in article 2(1) of the Hague Securities Convention and article 9 of the Financial Collateral Directive.

beneficially by the account holders and not by the intermediary. This applies regardless of whether the intermediary is formed or incorporated in England or is a branch of a foreign entity.

In principle, mandatory rules of applicable insolvency law may determine that even property which as a matter of general law does not belong to the insolvent is to be realized for the benefit of the creditors of the insolvent in specified circumstances. Under the European Winding Up Directive for Credit Institutions,144 the insolvency law of the home state of an institution generally applies in relation to the reorganisation145 and winding up146 of an EU credit institution.147 However, there are special rules inter alia in relation to property rights in registered or book entry instruments.148 Pre-existing third party property rights are generally respected.149

In insolvency proceedings governed by English law, property beneficially owned by account holders of an insolvent intermediary would not be made available for realization for the benefit of creditors of the intermediary unless it were determined that the creation of the relationship between the intermediary and the relevant account holders and the connected arrangements for the segregation of customer securities accounts amounted to a preference, a transaction at an undervalue or a transaction defrauding creditors. In the absence of highly exceptional circumstances, such a determination is very unlikely.

---

144 2001/24/EC.

145 Article 3(1).

146 Article 9(1).

147 Articles 3(2) and 10(1).

148 Under article 24 these are generally determined by the law of the law of the member state where the register, account or centralised deposit system is held.

149 Article 21.

42. QUESTION NO. 42: ARE FOREIGN INTERMEDIARIES (WHERE (I) THE HEADQUARTER, (II) A BRANCH OR (III) AN OFFICE IS IN A FOREIGN JURISDICTION) TREATED DIFFERENTLY FROM DOMESTIC ONES? DOES THE ANSWER DEPEND ON WHICH COUNTRY THE FOREIGN INTERMEDIARIES ARE RELATED TO?

42.1. Belgium

As a rule, foreign intermediaries are not treated differently from Belgian intermediaries with respect to the holding of book-entry securities under Royal Decree n° 62: EU and non-EU institutions may hold as affiliate book-entry securities with a settlement institution and may hold in turn such securities under the same regime for their own clients. There is one restriction regarding the holding of dematerialised securities (as governed by the law of January 2, 1991 on public debt instruments) to the extent that only financial institutions having at least a branch in Belgium can be designated as account keeper ("teneur de compte") by the Banking, Finance and Insurance Commission (see article 3§2 new of the Law of January 2, 2001 as amended by the Law of December 15, 2004 relating to Financial Collateral).

42.2. Czech Republic

In case of domestic dematerialized securities held in central securities depository, foreign intermediaries are required to operate securities register with owner accounts in accordance with operating rules of central securities depository (section 110 of Capital Market Undertakings Act). Right of foreign intermediary's customers to the securities is recognized as ownership (co-ownership to pooled securities). When leaving aside difference in case of insolvency proceedings (see question 42) the treatment of foreign intermediaries in respect of domestic securities is equal to domestic investment firms. In case of foreign securities held by foreign intermediaries legal status depends on the operation of securities registers under provision of Capital Market Undertaking Act. Foreign intermediaries entitled to provide investment services in the Czech Republic may operate separate registry of securities pursuant to section of 93 of Capital Market Undertaking Act. If the foreign intermediary operate separate registry of securities, it is treated as same as domestic investment firm. Process by which foreign intermediary opt for operation of separate securities registry is not clear from law, but preferably it should encompass notification to the Czech Securities Commission and contractual obligation to customers, who would hold their securities in accounts in intermediaries register.

42.3. Denmark

Generally, no, but the conflict of law rules may, depending the issue in question, sometimes lead to the application of foreign law, if the intermediary is foreign. With respect to authorization to act as intermediary, see answer to Question No. 44.

42.4. Germany

According to sect. 53 b of the German Banking Act, a credit institution that is domiciled in another country of the EEA may conduct banking business in Germany without the need to obtain a banking license under German law (so-called European passport). Exceptions to this general rule are undertakings that offer either investment services pursuant to sect. 7 (2) of the Investment Act ("*Investmentgesetz*") or financial services within the meaning of sect. 1 (1 a) of the

German Banking Act. Nevertheless, there are some requirements of the German Banking Act that such institution does have to comply with. However, these requirements are applicable to all banks and foreign institutions are therefore not treated differently.

The same holds true for other foreign intermediaries. They are as a rule required to obtain a banking license in Germany (unless covered by sect. 53 c of the German Banking Act) pursuant to sect. 53 and 32 German Banking Act. They are therefore subject to the German Banking Act and its requirements although some of its rules apply slightly differently given their foreign status (for example, they are required to do their accounting as if they were a separate legal entity, sect. 53 para. 2 No. 1 of the German Banking Act) but – all in all – they cannot be deemed to be "treated differently" than domestic institutions.

In case of insolvency of foreign intermediary, it could make a difference in terms of conflict of laws whether the custody account was carried within the home jurisdiction or (via a branch) within another jurisdiction, cf. Art 24 of Dir. 2001/24. In the latter case, the insolvency rules of the host jurisdiction (governing the segregation of customer securities from the insolvent estate) might apply

42.5. Estonia

The following requirements are imposed on Foreign Service providers based on (1) § 6 of the ECRSA with regard to the right to open a nominee account:

According to the law applicable to the service provider in question, it has the right to hold securities in its own name and on behalf of another person.

Share capital must be equivalent to at least 730 000 euro on the basis of the exchange rate of the Bank of Estonia (i.e. 1 euro = 15,6466 Eek).

With regard to domestic service providers, only professional participants in the Estonian securities market (i.e. investment firms and credit institutions authorised by the Estonian Financial Supervisory Authority) are entitled to maintain nominee accounts.

Foreign Service providers are generally subject to the business conduct rules of their home state when providing services to their domestic investors in their home state.

Further, pursuant to § 23 (1) of the Private International Law Act, where the owner of a nominee account maintains records regarding investors in a state other than the Republic of Estonia, the following aspects shall be governed under the law of the state in which the records are held:

i. the nature of the rights arising out of the credit made to the account within the internal records;

ii. content of the proprietary rights in relation to securities, including their perfection and termination;

iii. in the case of disposition of securities - consequences to the rights attached to securities;

iv. preconditions applicable in exercising the rights attached to securities;

v. providing securities as a collateral;

vi. priority of the rights encumbering securities;

vii. rights and obligations of the intermediary in respect of securities held with that intermediary.

42.6. Greece

Greek law does not differentiate between domestic and foreign intermediaries acting as account operators or participants within the DSS and the BoGS, respectively.

Regarding the DSS, end-investor property rights regarding dematerialized securities issued by a domestic (Greek) issuer and held by the intermediary (as an account operator) in segregated sub-accounts in the name of the end-investors within the DSS, are safeguarded by Greek Law, not differentiating between domestic and foreign intermediaries. The same applies with respect to the BoGS, in case of the intermediary's insolvency, as explained above, in the answer to question 41.

Rules of different jurisdictions could apply regarding omnibus accounts held by intermediaries within a) the DSS or b) another intermediary, according to the rule of lex fori concursus. Article 24 of EU Directive 2001/24/EC seems not to have an impact on such matters, which could lead to the application of the rules of a jurisdiction other than the lex fori concursus since the applicable law will be the law of the intermediary (account provider) within which the relevant accounts are held and not the domestic (Greek) law governing the DSS). However, the DSS does not provide for investors' protection regarding omnibus accounts held by account holders, unless the latter act as account operators of the DSS and segregate their assets in sub-accounts in the name of their clients (see 2.2., 3.1.b. and 6.1. above). Concerning Greek investment firms and credit institutions complying with the segregation rule which applies as a prudential rule according to Article 6 of Law 2396/1996, their clients' rights are protected, as explained above under (40).

42.7. Spain

No. Equal treatment is provided by the Spanish law to EU intermediaries that become participants to the book-entry holding system, provided that they comply with the prior requirements of communications between home and guest supervisors, as provided in the EU Directives. Generally, foreign intermediaries become participant in IBERCLEAR (or Barcelona, Bilbao and Valencia's CSDs) through a Spanish branch or affiliate.

Non-EU participants are required to obtain the authorisation to operate in Spain, the granting of which may subject to a reciprocity rule.

42.8. France

French rules applying to foreign intermediaries exercising securities custody activities in France purport to establish a level playing field with domestic intermediaries.

Under French law, the exercise of the activity of securities account-keeping is a regulated industry. Article L. 542-1 of the M&FC defines the entities which are authorised to exercise the activity of securities custody account-keeping (*tenue de compte conservateur*).

Article L. 542-1 of the M&FC[150] provides, *inter alia*, that:

"May only carry out the activity of custody – account keeping of financial instruments:

[…]

*7° **Under the conditions provided for in the AMF General Rules**, credit institutions, investment firms and legal entities not established in France whose only or principal purpose is to maintain securities accounts.*

[…]

The entities mentioned in 7° must be submitted in their home country to operating and supervisory rules in respect of custody and administration of financial instruments equivalent to those applicable in France. […]"

Moreover, Article L. 542-1 of the M&FC provides that these entities are subject to the control powers of the AMF which may also impose sanctions. However, Article L. 542-1 further provides that the AMF takes into account the supervision exercised by supervisory authorities in the Home State.

The activity of custody account-keeping is indeed a service which is ancillary to investment services contemplated under Article L. 321-1 of the M&FC. As such, it is not eligible to the European passport (i.e. right of establishment and freedom to provide services) except where such activity is carried out in conjunction with an investment service or activity.

Articles L. 532-18 and following of the M&FC set forth the rules under which investment services and ancillary services may be carried out in France under the EU passport.

Under Article L. 532-18 of the M&FC, the entities benefiting from the European passport are **treated in France as investment services providers** for the purpose of complying with certain obligations to which investment services providers are subject. They have to comply, *inter alia,* with the following rules aiming at protecting investors' rights:

---

[150] See question 3 where entities allowed to maintain securities accounts other than foreign entities are listed.

(i) investment services providers have to be members of a securities guarantee mechanism;

(ii) investment services providers have to protect the investors' proprietary rights related to financial instruments under the custody of such investment services providers. They cannot use those financial instruments for their own account without the investor's consent;

(iii) investment firms cannot under any circumstances use for their own account the funds deposited with them by their clients;

(iv) investment services providers are required to comply with conduct of business rules.

Article L. 532-18 of the M&FC further provides that investment services carried out under the European passport are so carried out within the conditions set out by the AMF, including, *inter alia*, in respect of protection of clients funds.

As a matter of principle, domestic intermediaries and foreign intermediaries have to comply with the same rules when carrying out their activity in France.

Furthermore, pursuant to Article 321-4 of the AMF General Rules, once the CECEI[151] has transmitted to the AMF the notification of the relevant investment services provider wishing to engage in the activity of custody – account keeping in France under the EU passport, the AMF informs such investment services provider of the conduct of business rules and other provisions of general interest that must be observed.

Those rules purport to establish a level playing field among EU investment services providers and investment services providers exercising in France the activity of securities custody account-keeping.

Investment services providers or credit institutions from outside the EU need to receive a license to conduct business in France as an investment firm. Entities wishing to engage in the activity of custody are subject to the same license requirements.

Further reference is also made to questions 41 and 44.

42.9. Ireland

The same general rules apply but different laws and rules of jurisdiction may be applied. For example, proprietary issues relating to assets credited to an account with an intermediary that is maintained at an office located outside of Ireland of the intermediary may not be governed by Irish law. See further the responses to questions (39) and (41) above.

---

151 *Comité des Etablissements de Crédit et des Entreprises d'Investissement*, which is the authority vested with the power to deliver the authorisation to carry out investment services in France.

42.10. Italy

As long as they are licensed in Italy to carry out banking or investment services (through a passport or a specific authorisation), foreign intermediaries are not treated differently from domestic ones in the exercise of the services except that certain Bank of Italy supervisory rules, including specific regulatory capital provisions, do not apply to foreign intermediaries.

Sources of Law:

Articles 1(1)(s) and 28 of the FLCA;

Article 16(5) of BLCA.

Sources of Doctrine:

Fortunato, *Articolo 28*, in *Commentario al Testo Unico della Finanza*, directed by Campobasso, Torino, 2002, p. 256*ff*.

42.11. Cyprus

In principle, once governing law is Cyprus law, the same legal rules apply to both local and foreign intermediaries.

42.12. Latvia

Foreign intermediaries will be treated differently in respect of **supervisory provisions**. The answer will depend on the home country being within the European Economic Area or in a third country. If the foreign intermediary's home country is not an EEA member state, the intermediary should be registered by FCMC prior to start to providing investment services in Latvia.

42.13. Lithuania

It depends on the country the foreign intermediaries are related to. The intermediaries licensed in the EU/EEA Member State, may render investment services in Lithuania through the established branch or with no establishment with no additional licensing as soon as particular coordination actions between the supervisory authorities are completed. In other cases, the foreign intermediary intending to engage in investment services activities in Lithuania has to be licensed under Lithuanian law.

In respect of rights to securities, location of intermediary is not important since the general conflict of law rule suggests the applicable law to the securities being the law of issue thereof. Exceptions are provided in respect of financial collaterals enacted due to transposition of the Financial Collateral Arrangements Directive and Settlement Finality Directive (PRIMA principle).

42.14. Luxembourg

A foreign intermediary which is established in an EU or EEA member state may carry out business in Luxembourg by the establishment of a branch or by way of free provision of services. The authorities tend to accept that foreign non EU or EEA intermediaries provide services into Luxembourg without further authorisation or notification. An authorisation is required where any such intermediary establishes a place of business in Luxembourg in accordance with the same authorisation rules applicable to domestic ones.

Once a foreign intermediary is duly authorised to carry out business in Luxembourg, the Securities Act is fully applicable (Art. 2 of the Securities Act).

42.15. Hungary

Foreign intermediaries can offer investment services in Hungary through a branch or investment service providers seated in a member state can offer their services directly. Capital requirements differ on the basis of the state of the headquarters (EU/not EU).

42.16. Malta

Assuming the foreign intermediaries have no presence in Malta and do not carry out any activities in Malta, such foreign intermediaries would not be subject to Maltese law and would therefore not be 'subject persons' for the control of assets regulations. The protection afforded to investors may therefore not be achieved in the same manner.

Maltese law recognises all trusts regulated by a foreign proper law and to the extent an intermediary holds assets under foreign law having trusts, then the investor will benefit from such protections even in Malta.

42.17. Netherlands

Generally speaking, foreign intermediaries are treated the same as domestic intermediaries, albeit that the regulatory requirements, if any, to which they may be subject may differ depending on whether the intermediary is licensed or required to be licensed in the Netherlands, or acts on the basis of a European passport and is, as such, subject to home-country control and exempted from the Netherlands licence requirements. Although the mere providing of custody services is an unregulated activity under Netherlands law, it is virtually impossible to provide custody services, without also attracting monies from the public, or performing the activities of a securities broker. Therefore, securities intermediaries are either required to be licensed in the Netherlands, be it as a credit institution or as a securities broker, or required to obtain a passport from an EU/EEA Member State. Reference is made to the answers to Questions (38), (39) and (41).

42.18. Austria

Foreign account providers will be treated differently in respect of **supervisory provisions**. The answer will depend on the home country being within the European Economic Area or in a third country. The holding of securities by a foreign account holder in Austria will be subjected to the same rules as domestic account providers (section 9 para 7 and section 69 Banking Act, see attachments).

42.19. Poland

Yes. There may be additional requirements imposed by the PSEC (Polish SEC) in its permission to operate in Poland; in terms of the exercise of the activities, there is no difference. The foreign intermediaries are not obliged to participate in the Polish National Depository for Securities nor in the Obligatory Investor Compensation Scheme.

42.20. Portugal

Foreign intermediaries are not treated differently from domestic ones, except for the procedure relating to its establishment in Portugal which is different in relation to intermediaries with its head office in another member country of the European Community (no authorisation being required).

42.21. Slovenia

Intermediaries in the meaning of a legal person holding dematerialised securities on behalf of another person do not occur (see answer to Q1).

As far as KDD registry members are concerned, they are equal in their rights and obligations once they accede to the system of dematerialised securities account maintenance. Only the accession conditions vary with regard to member's origin (see answer to Q1, where terms of accession are indicated).

42.22. Slovakia

If foreign intermediaries have their seat in a Member State, they can operate in the Slovak Republic after written consent of their domestic regulator has been delivered to the FMA and after foreign intermediaries announced their intention to the FMA. Other intermediaries must apply with the FMA for licence to operate as a stock broker through a branch. Foreign intermediaries with their seat in Member State can be supervised by supervisory body of their Member State as long as there is an agreement in place between foreign supervisor and the FMA.

42.23. Finland

Self-evidently, the EU law on banking and investment firms (and, ultimately, the MiFID –directive) calls for level playing field and equal treatment of domestic Finnish intermediaries and of foreign EU/EEA intermediaries. The treatment may differ to the extent that the intermediary is established outside the EU/EEA area or to the extent it has not been licensed as a credit institution or an investment firm with the European passport.

Finland has implemented choice of law provisions of the Settlement Finality Directive Art 9(2) and of the Collateral Directive Art 9 broadly. Section 12, Subsection 3 of the Act on Certain Conditions of Securities and Currency Trading as well as Settlement Systems (No. 1084/1999, Netting Act) provides that:

"If no certificate has been issued for a security or if it has been deposited with a deposit system, a pledge or other right on the security shall be governed by the laws of the State in which the security has been entered in a register or in an account."

This provision implements the so called PRIMA –principle in Finland.

42.24. Sweden

Swedish intermediaries and foreign EU/EEA intermediaries are of course treated according to the relevant EU laws, which means level playing field and equal treatment. For foreign intermediaries from countries outside EU/EEA there generally is a requirement that such intermediary must be subject to satisfactory supervision in their home country by a governmental authority or other competent body.

Regarding the role as account operator in a Swedish CSD see chapter 3, section 1 – 3 in the Financial Instruments Accounts Act.

Section 1. A central securities depository may engage as an account operator the Central Bank of Sweden and the Swedish National Debt Office and legal persons possessing sufficient financial strength and technical and legal expertise and which are otherwise suitable to carry out registration measures in Swedish CSD registers at the central securities depository.

Section 2. An account operator may undertake registration measures on its own behalf.

A central securities depository may authorize the following legal persons to undertake, as account operators, registration measures on behalf of third parties:

1. the Central Bank of Sweden and other central banks;

2. Swedish and foreign clearing organisations;

3. central securities depositories and foreign undertakings which are authorised in their home countries to conduct operations which are comparable to central book-entry systems; and

4. securities institutions and foreign undertakings which are authorised in their home countries to conduct securities operations.

The foreign undertakings referred to in the second paragraph, subsections 2-4 must be subject to satisfactory supervision in their home country by a governmental authority or other competent body.

Section 3. Where the central securities depository approves an account operator, the securities depository shall apply the following principles:

free access, pursuant to which each and every person who fulfils the requirements imposed by this Act and the central securities depository shall be approved as an account operator; and

neutrality, pursuant to which the rules imposed by the central securities depository are formulated and applied in a uniform manner.

42.25. United Kingdom

The same general principles of domestic law apply alike to both local and foreign intermediaries. However, different rules of jurisdiction and choice of law may apply; in particular, an account maintained at an office of an intermediary outside England may not be governed by English law with respect to proprietary issues. Please see the answers to questions 39 and 41 above.

43. QUESTION NO. 43: HOW IS FINALITY (IN THE MEANING OF QUESTIONS 20 AND 21) ACHIEVED FOR TRANSACTIONS INVOLVING (I) FOREIGN INTERMEDIARIES OR (II) LINKS

BETWEEN MORE THAN ONE INTERMEDIARY? DOES THE ANSWER DEPEND ON THE TYPE OF INTERMEDIARY OR SECURITIES?

43.1. Belgium

There is no difference in this respect under Belgian law between "foreign" transactions (as defined in the question) settled in the books of an intermediary operating under RD n°62 (or with respect to dematerialised securities governed by the specific 1991 legislation) and "domestic" transactions as contemplated in answers to questions 19 to 21. Finality in foreign systems and foreign intermediaries' books is of course a matter of foreign law and practice.

43.2. Czech Republic

Finality of transactions with domestic dematerialized securities should not be affected by the participation of foreign intermediaries. Termination of transfer orders, completion of transfer of rights to the securities through crediting and debiting securities accounts in central securities depository or its direct participants is governed by Capital Market Undertakings Act and operating rules of central securities depository regardless of the participation of foreign intermediary.

43.3. Denmark

To the extent a transaction is settled by a foreign intermediary and the settlement is reflected merely by book entries in the system of the foreign intermediary, the finality of the transaction is governed by the (foreign) law of the intermediary. If on the other hand, the settlement of the transaction (through a link) is reflected by book entries in a domestic (Danish) CSD, the finality of the transaction is determined by Danish substantive law. See answer to Question no. 21.

43.4. Germany

From the perspective of the German CSD as operator of a designated settlement system in the meaning of the Settlement Finality Directive 98/26/EC, for all participants in the settlement process (even if they represent different customer groups such as custodian banks, CSDs or ICSDs) finality is achieved in the same way. Consequently, finality is achieved when

- the instruction to transfer cash and / or securities in order to fulfil a closed trade is entered into the settlement system before (and in certain cases – if the prerequisites of Sect. 81 para. 3 German Insolvency Code are met – even after that) the instructing party has been declared insolvent by the respective authorities and

- the instruction to transfer cash and / or securities cannot be revoked by the instructing party or by third parties (irrevocability); in case of batch processing this is the moment when the timely deadline for instructions of the upcoming settlement cycle is reached

In case of real-time settlement (RTS), the moment of finality as described above may fall together with the legal fulfilment of a securities transaction "free of payment" or "against payment" (see also answers to Questions 20 and 21)

43.5. Estonia

Under the Estonian law, the concept of finality (i.e. within the meaning of the directive on Settlement Finality) is extended only to the systems that qualify as settlement systems under the relevant provisions of the SMA.

If the owner of the nominee account maintains the internal records in a foreign state then the law of a foreign state determines the rules regarding finality.

43.6. Greece

43.6.1. There are no rules of law specifically defining the exact moment of finality of transfer orders and netting, generally applicable to all Systems (within the meaning of Article 2a of the SFD 98/26/EC) operating in Greece. Such definition is to be found in the operational rules of the systems. More particularly:

(i.) In HERMES[152], pursuant to Article VII and Annex 1 of the Monetary Policy Council Act 46/21.12.2000 as amended (the HERMES Rules of Operation) it is provided that *"the payment order becomes final and irrevocable as from the moment when the settlement account of the sending participant is debited. The settlement of the payment order cannot be revoked, reversed or annulled by the sending participant or any third party even in the case of commencement of insolvency proceedings against a participant."*

(ii.) According to paragraph 12.1.1 of the BoGS Operating Regulation, settlement of the System transactions is final and irrevocable, no matter what procedure is applied for the particular settlement. This provision must be read in combination with par.12.5.2 of the BoGS Operating Regulation, which states that "*the consequences of the credit or debit of securities in the System's accounts are effected upon the finality of the relevant registrations, according to the operating rules of the present Regulation*".

(iii.) With regard to the DSS, pursuant to Article 12 para. 4. of the DSS C&S Regulation "a*fter finality has been reached, the CSD is precluded from modifying, correcting or complementing the trades*" and pursuant to Article 19 para 6 of the DSS C&S Regulation "s*ettlement of every purchase or sale is deemed as final and irrevocable, pursuant to the stipulations of Art. 3 L. 2789/2000, in respect of the debits and credits effected in all relevant cash or securities Accounts*" (see also question 20).

In every other respect, there are no particular regulations or provisions on issues differentiating in terms of the achievement of finality for transactions involving (i) foreign intermediaries or (ii) links between more than one intermediary.

---

[152] Hellenic Real-time Money transfer Express System, e.g. the Greek RTGS (Real-Time Gross Settlement) system.

43.6.2. The answer to the question does not depend on the type of intermediary or securities.

43.7. Spain

Finality, in its both meanings – (i) effectiveness of transfer, and (ii) finality of transfer orders- is defined and ruled as to produce legal effects within the securities holding system. Therefore, the intervention of foreign intermediaries, provided they are participants to the system, does not alter such regime.

43.8. France

Reference is made to questions 20 and 21.

The Operating Rules of the RGV2 Delivery vs Payment system operated by Euroclear France specifically provide that legal entities from the European Economic Area who are authorised to provide investment services and ancillary services in France under the EU passport may participate in the RGV2 System. Under the RGV2 operating rules, Settlement Connect managed by LCH Clearnet SA and SBI (*Société de Bourse Intermédiaire*) managed by Euroclear France (all subsystems of RGV2) provide links among intermediaries, both domestic and foreign, participating in such system.

Settlement Connect settles trades executed on regulated markets among members of LCH Clearnet. SBI permits adjustment of orders executed on regulated markets among intermediaries collecting orders and market members.

The RGV2 Operating Rules generally do not make a distinction between domestic and foreign intermediaries. However, in respect of the irrevocable systems within RGV2 ("*filière irrévocable*" where settlement is irrevocable as soon as realised - i.e. real time settlement) a member which adopts the status of cash and securities settlement member (*compensateur titres et espèces*) is subject to certain eligibility requirements and the conclusion of an agreement with Banque de France regulating the cash position. Access to the securities collateral management system related thereto is reserved to settlement members having an establishment in France pursuant to a repo agreement to be concluded by Banque de France under rules set by the European Central Bank.

43.9. Ireland

(i.) As outlined above, the concept of finality is not defined as a matter of general law.

The Settlement Finality Regulations provide that the rules of the payment system will determine the point at which a "transfer order" becomes binding and are relevant to the extent that intermediaries are members of a payment system (as defined). Certain difficulties with the drafting of the Settlement Finality Regulations and the general uncertainty as to the interpretation of the EU Settlement Finality Directive result in some uncertainty regarding the ambit of the Settlement Finality Regulations and their impact on finality of settlement in circumstances in which a foreign intermediary is involved.

Article 2(1) of the Settlement Finality Regulations defines a "transfer order" as:

> a. any instruction by a member to place at the disposal of another member an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system; or
>
> b. an instruction by a member to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise.

The definitions of the terms 'member' and 'payment system' set out in the Settlement Finality Regulations, give rise to uncertainty regarding the interpretation that might be given to regulation 3(1) by an insolvency court in Ireland.

Regulation 3(1) provides that:

> "A transfer order within a payment system shall be binding, even in the event of insolvency proceedings against a member, and shall be binding on third parties, where the transfer order was entered into the payment system before the moment of opening of insolvency proceedings against the member."

A 'member', for the purposes of the Settlement Finality Regulations, is:

> ""a credit institution or financial institution, a central counterparty, a settlement agent or a clearing house **which is a member of a payment system** and nothing in these Regulations shall prevent a member acting as a central counterparty, a settlement agent or a clearing house or carrying out part or all of these tasks".

WHERE:

> "credit institution" has the meaning assigned to it by the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992[153]; and
>
> "financial institution" means an undertaking other than a credit institution providing any one or more of the financial services set out in the Schedule to the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992[154]."

The 1992 Regulations referred to above implement in Ireland EU Council Directive (EEC) 89/646 of 15 December 1989, now consolidated within Directive (EC) 2000/12 of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions.

---

[153] SI 395 of 1992

[154] SI 395 of 1992

The definition of 'payment system' in the Settlement Finality Regulations cross-refers to section 5 of the Central Bank Act 1997, which relates to certain payment/securities settlement systems established in **Ireland**. To the extent, therefore, that a foreign intermediary is involved, the Settlement Finality Regulations may not be considered to apply if such intermediary is not a member of an Irish payment system and the finality of settlement provided for by the Settlement Finality Regulations may, therefore, be inapplicable.

There is one saver to the above in that regulation 2(1), which sets out the definitions, provides that the relevant terms shall have the meanings set out therein 'save where the context otherwise requires'. It is arguable that the context of regulation 7(2) requires an interpretation of 'payment system' that goes beyond domestically established systems so as to include EU systems.

It is a long-standing and well-established principle of EU law that, in applying national law specifically introduced in order to implement the provisions of an EU directive, the national courts are required, insofar as possible, to interpret national law in the light of the purpose and wording of the EU directive. This has been recognised by the Irish courts on many occasions. Article 9(2) of the Settlement Finality Directive does not impose any jurisdictional limit on the concept of a "payment system" of the kind that Regulations 7(2) of the Settlement Finality Regulations would, absent a consideration of Regulation 2(1), appear to impose. One would, therefore, anticipate that an Irish court might interpret "payment system", for the purpose of Regulation 7(2), as encompassing non-domestic systems but, in the absence of specific authority on this issue, the matter is subject to some uncertainty.

(ii.) No rules of Irish law apply in this regard.

The response will not depend on the type of intermediary or securities.

43.10. Italy

The Italian Finality Law provides that, in the event an insolvency proceeding is opened against a participant in a system (including – we understand from secondary regulations – indirect participants where they are contemplated in the relevant system – see Question 44, last paragraph), the rights and obligations arising from, or connected with, such participation shall be subject to the law governing that system, irrespective of whether the insolvent entity is a domestic or a foreign participant.

If the insolvency proceeding is opened against an intermediary (that is, an entity which does not qualify as a participant or as an indirect participant in the system), on behalf of which a participant executes orders for transferring title to or other rights over one or more financial instruments, by means of book entries or otherwise, the relevant agreements between the participant and the intermediary shall not terminate, irrespective of whether the insolvent entity is a domestic or a foreign intermediary.

Under the Italian Finality Law, the types of intermediaries or securities are the same as those set out in the Directive 98/26/EC and do not affect finality.

Sources of Law:

Articles 1(h)(1), 1(m)(n)(o)(r)(s), 6 and 7 of the Italian Finality Law;

Articles B.1.1.1 and B.3.1.1 of Cassa di Compensazione e Garanzia Regulation.

43.11. Cyprus

1. The Law on Settlement Finality in Payment and Securities Settlement Systems 2003 does not apply to a non Cypriot designated system and there are no other finality rules applicable thereto.

2. There are no specific rules. The Law on Settlement Finality in Payment and Securities Settlement Systems 2003 applies only to systems governed by Cyprus law. So it is a prerequisite that for a system to be deemed a designated system under the above law the underlying agreement must be governed by Cyprus law. The law does not draw a distinction between types of intermediary or securities. To the extent that Cyprus law finality rules apply to a transaction their effect has been expounded in paragraphs 20 and 21 above.

43.12. Latvia

The same finality rules as described in the answers to questions 20 and 21 are applicable for foreign intermediaries and links between more than one intermediary if the intermediary makes transactions in the LCD Securities settlement system or using other settlement system that is registered by FCMC. The answer does not depend on the type of securities account provider or the type of securities.

43.13. Lithuania

The same finality rules, as specified in items 20-21 hereof, are applicable in respect of transactions (i) or (ii) settled in the SSS operated by the CSDL, since the SSS operates under Lithuanian law. However, foreign intermediaries should either have some access point to the SSS through the other participant of the SSS or become participants of the SSS (if allowed under the Law on Settlement Finality in Payment and Securities Settlement Systems).

In case a transaction is settled outside the SSS, operated under Lithuanian law by the CSDL, the finality of the transaction is governed by the law applicable to the settlement.

43.14. Luxembourg

For transactions involving a foreign intermediary qualifying as "participant" within the meaning of the Settlement Finality Directive and a Luxembourg intermediary qualifying as a "system" within the meaning of such Directive finality is achieved in accordance with the rules of such system.

For transactions involving a foreign intermediary and a Luxembourg intermediary finality is achieved in accordance with the law governing their transaction unless otherwise agreed.

43.15. Hungary

The answer depends on the CCP relevant in the clearing and settlement of that given security. If the security is settled by the Hungarian CCP, and the CCP is an

upper-tier intermediary for the foreign intermediary or for the chain of intermediaries, the concept of finality outlined in question 20 is achieved. If the settlement is managed by another CCP, the rules of the relevant jurisdiction define the concept of finality.

43.16. Malta

As we do not appear to have finality in the domestic law it is unlikely that finality will apply to foreign intermediaries with assets in Malta, however the private international law rule on transfer of securities can vary. if securities are held in a book entry system the control of assets regulations refer to the law of the country where the book entry system is maintained, both for Maltese and foreign intermediaries.

Consequently it is possible that finality can be achieved if the applicable law provides for it.

43.17. Netherlands

The answer depends on the "system" (as defined in the Settlement Finality Directive) in which the finality will take place. As long as finality will be achieved in the Euroclear Netherlands system, i.e. in the books of the Euroclear Netherlands as CSD, regardless whether foreign intermediaries – if and to the extent that such foreign intermediaries are considered affiliated institutions within that system – are involved, Netherlands law will be applicable to the finality. Reference is made to the answers to Questions (20) and (21). It should be noted, however, that in case of the insolvency of a foreign, non-Member State intermediary, which is an affiliated institution in the Euroclear Netherlands system, a court of the country where such intermediary is incorporated can apply the insolvency laws of that country, according to the lex concursus. Therefore, the intermediary as an affiliated institution should comply with the regulations set out in the answer to Question (41).

Finality in a foreign system will be governed by foreign law, i.e. the law governing the foreign system.

43.18. Austria

Finality is achieved in the same ways as described in the answers to questions (20) and (21).

The answer does not depend on the type of securities account provider or the type of securities.

The Austrian CSD has a special rule in its GBC in case the securities are not held by itself, but by another depositary/account provider ("Lagerstelle"). In that case section 8 para 5 alinea e of the GBC of the CSD provides that the CSD must check prior to execution of any respective instruction whether the other depositary/account provider ("Lagerstelle") has confirmed the execution of the instructions given by the CSD. Unless the confirmation is received, the instructions to the CSD will not be executed.

43.19. Poland

43.19.1. There is no special legal treatment. Cf. above Q20.

43.19.2. There is a specific provision in case of multiple intermediaries when the intermediary closest to the investor is a bank which provides securities account keeping services, pursuant to which in contracts for the maintenance of securities accounts, clients of a bank that maintains securities accounts on the basis of a special PSEC permit, may stipulate that transactions they have ordered will be settled against the presentation to the bank of a proof of such a transaction. Securities acquired in such a transaction will be registered in a securities account:

- of a brokerage house, of a bank conducting brokerage services or a foreign investment firm that conducts brokerage activities in the Republic of Poland - in the event the client's order has been placed with one of such entities, or

- of a foreign legal person that does not conduct brokerage services in the Republic of Poland - in the event the entity serves as an intermediary in forwarding client orders to the of a brokerage house, of a bank conducting brokerage services or a foreign investment firm which conducts brokerage activities in the Republic of Poland.

43.20. Portugal

According to article 274 CVM, transfer orders are irrevocable, produce effects between participants and are valid before third parties from the time in which they are introduced into the system, the time and the form of introduction of the orders into the system being determined in accordance with the rules of the system.

Foreign intermediaries will be subject to these same rules, provided they are participants to the system.

43.21. Slovenia

Transfer order of registry member becomes irrevocable upon entry in central registry regardless of registry member's origin (see answer to Q20 and Q21).

In "final client level" type of dematerialization which is applied by ZNVP (see answer to Q1) transfer of dematerialised securities is executed directly from client account (on types of accounts see answer to Q3) of one holder that disposes with the securities involved (transferor) to client account of another holder (transferee), without being book-entered on registry member's account in between, although the transfer order was entered in central registry by registry member. Though more registry members can be involved in legal transaction (that is legal basis for dematerialised securities transfer), only one (the above stated) transfer actually takes place.

43.22. Slovakia

Finality of settlement as defined by depository's Operational Rules is applicable to transfer orders placed by members of the Slovak depository irrespective of their seat (foreign or domestic member). In case of link between more than one intermediary, finality is recognized only for transfer orders placed by intermediary, which is at the same time member of the CSD. There is no difference in finality for various types of intermediaries or securities.

43.23. Finland

In the book-entry system, finality is achieved in accordance with the same rules as specified under questions 20 and 21) irrespective of whether the book-entry security is a domestic or foreign one and whether or not the account operator is domestic. A transaction occurs with finality by registering the transfer with a debit from the seller's book-entry securities account and a credit to the buyer's account.

If, however, the book-entry securities are credited in a custodial nominee account (omnibus account) elaborated under question 6), Section 5a Subsection 4 of the Act on Book-Entry Accounts provides a choice of law rule adhering to the PRIMA – principle and pointing to the law of the place of the relevant account:

"If the holder of a custodial nominee account or a client of the holder keeps a register or an account of the rights pertaining to book-entries in another state, the law of that state shall be applicable to the rights of a right holder, unless the registrations pertaining to the account state otherwise."

Hence, while finality of a transfer registered in a custodial nominee account will be achieved in Finland in accordance with the rules applicable to the book-entry system, the transfer is final from the ultimate recipient's point of view when his respective intermediary has taken the necessary steps to achieve finality in accordance with the foreign law applicable to the securities accounts held with the intermediary.

Outside the book-entry system, a reference shall be made to Section 12, Subsection 3 of the Netting Act cited under question 42 above. In case of a transfer involving securities held outside of the book-entry system with a foreign intermediary, the choice of law rule will point the question of rights pertaining to the security including finality to the foreign law applicable to the intermediary.

43.24. Sweden

As stated above (see question 20 and 21) there are differences between settlement in a designated settlement system and settlement outside such system. From a choice of law perspective the deciding factor is of course where the settlement takes place. However, there are no rules in Swedish law which make a distinction regarding settlement if the securities or the intermediaries are Swedish or foreign.

43.25. United Kingdom

43.25.1. Regulation 26 of the Settlement Finality Regulations 1999 (see Question 20) applies equivalent principles to a foreign designated system as apply to a system designated in the UK. Otherwise there are no rules of law which apply to finality in a foreign context.

43.25.2. There are no rules of law.

There is no distinction between types of intermediary or security, though only systems whose head office is in Great Britain and whose rules are governed by English or Scottish law are eligible for designation by the UK designating authorities.

Finality in the sense of transfer of beneficial ownership occurs at the time when securities accounts are debited and credited. Where English law determines the issue of transfer of beneficial ownership (that is, where the securities accounts in question are governed by English law with respect to the proprietary issues) this applies regardless of whether the intermediary is incorporated or formed under a foreign law and regardless of whether the relevant securities account forms a link between two intermediaries (i.e. is held by an account holder which is itself an intermediary).

Finality in the sense of revocability of instructions depends on the law applicable to the agency or other authority of the intermediary. Where this is English law, it is in general possible for instructions to be effectively revoked even where such a revocation amounts to a breach of contract as between the account holder and the intermediary. Where however the intermediary is the operator of a securities settlement system designated under the Settlement Finality Directive, this rule is overridden in the circumstances specified in the directive.

Finality in the sense of absence of vulnerability to special rules of insolvency law relating to revocation of authority or invalidation or reversal of dispositions of property is governed by the law governing the relevant insolvency proceedings. Where this law is English law and the intermediary is the operator of a securities settlement system designated under the Settlement Finality Directive, such rules are overridden in the circumstances specified in the directive.

44. QUESTION NO. 44: DO FOREIGN INTERMEDIARIES WHICH HOLD DOMESTIC SECURITIES NEED A SPECIAL AUTHORISED STATUS IN ORDER TO CONVEY RIGHTS TO ITS INVESTORS? HOW ARE FOREIGN INTERMEDIARIES RECOGNISED WHEN ENTERING INTO A LINK WITH DOMESTIC INTERMEDIARIES?

44.1. Belgium

There is a general regime for foreign financial institutions from EU Member States, acting through a local branch or under the European passport on a remote basis, or from Third Countries, when operating in Belgium (see the Law of April 6, 1995 on the secondary markets and the status of investment firms, articles 110 and following; and Royal Decree of 20 December 2005 relating to foreign investment firms). Holding as such of securities is an ancillary service to main investment services (article 46).

But the holding of securities in book-entry form under the regime of Royal Decree n° 62 (offering specific ownership rights to investors) only requires that the foreign intermediary be an affiliate of one of the recognised Belgian settlement institution (CIK, Euroclear Bank and National Bank of Belgium).

44.2. Czech Republic

Foreign intermediary may open customer account in central securities depository and operate securities registry with owner accounts pursuant to section 110 of Capital Market Undertaking Act on the condition it is (i) foreign investment firm or management company entitled to provide investment service of safekeeping in the Czech Republic, or (ii) foreign central securities depository or foreign entity entitled [in home country] to operate securities accounts. Special authorization by the Czech authorities is not required neither to convey rights to investor nor to open account in central securities depository.

44.3. Denmark

In principle, no special status is needed, as the fact that a person in the course of business holds securities on an account in its name on behalf of others is sufficient to be considered an intermediary (nevertheless a financial business needs an authorization from the Danish Financial Supervisory Authority to do business as a bank or broker in order to maintain securities on behalf of its customers; a financial business that already has an authorization from another EU member State to maintain securities on behalf of its customers generally only need to notify the Danish Financial Supervisory Authority before maintaining securities on behalf of customers in Denmark).

There is no clear distinction between intermediaries and nominees (who also can be seen as holding securities on behalf of the true owners). A person holding securities for others, but who does not do so in the course of business, is likely to be considered a nominee rather than an intermediary. This may in some cases be of importance for conflict of law purposes, but will in cases where Danish substantive law applies probably not be of importance when determining the investors´ legal position.

If a foreign intermediary wishes to establish a link to a domestic intermediary (assuming a “link” means a right for the foreign intermediary to register transfers of securities directly in the system of the domestic intermediary), an approval of the

Danish Financial Supervisory Authority is needed. Such approval may only be granted, if the foreign intermediary is a CSD (or similar entity) under regulatory supervision.

44.4. Germany

No, there are no such provisions under German Law.

How are foreign intermediaries recognised when entering into a link with domestic intermediaries?

With respect to links for custody or settlement purposes, it has to be distinguished:

(i.) Link between foreign custodian bank (or ICSD) and CSD

In case, the foreign custodian with its legal seat in the European Economic Area (EEA) is not simply acting as remote settlement participant and intends to offer custody and settlement services to customers located in Germany, it needs a respective licence and supervision from its home regulator in accordance with the EU Banking and Investment Services Directives which have been transformed into section 53 Lit. b German Banking Act (EU pass-porting). If the foreign custodian bank is not located within the EEA and wants to offer the aforementioned services it needs an approval of the Federal Banking Supervisory Authority (see also answer to Question 42).

The General Terms and Conditions of CBF as German CSD state that settlement participants have to be licensed and regulated credit or financial service institutions due to reasons of risk management and market stability.

(ii.) Link between foreign custodian and domestic custodian bank

Links between custodian banks can be freely established. To secure assets of local investors held with a foreign custodian bank the domestic custodian bank will obtain a Three Point Declaration (see answer to Question 41) and legal opinions on the respective foreign securities market in general.

(iii.) Link between foreign CSD and domestic CSD

CSD links may be established under the provisions of section 5 para 4 Securities Deposit Act.

44.5. Estonia

In order to open a nominee account and enjoy the legal regime provided by § 6 of the ECRSA, the only requirements are those that were covered in response to question (42).

44.6. Greece

44.6.1. The question is understood as asking whether there are any requirements that a foreign intermediary must satisfy, in order to be enabled to become a participant or operator in the BoGS or the DSS

respectively, meaning that it will have the right to keep and administrate accounts within each Securities Registry System.

The BoGS Operating Regulation (par. 3.1.) provides that the capacity of the participant (see question 1.1.c.) can be carried but by a) credit institutions, b) investment firms established in Greece or authorized to provide cross-border services of reception and execution of orders as well as of safekeeping and administration of securities in Greece, c) the ACSD, d) central securities depositories and Securities Settlement Systems operating in EU-countries, which have been accepted by ESCB for the participation in its credit operations, d) international central securities depositories, as specified by Acts of the Governor of the BoG and e) other bodies, which may be determined by an Act of the Governor of the BoG, or which are individually approved by such Acts, provided that they fulfill the set-up requirements. Respectively, it is taken into account whether these bodies are subject to a specific legal or regulating regime for set-up and operation, whether they are subject to specific supervision, etc.

Article 1 of the DSS Operation's Regulation determines that only

members of the ATHEX (i.e. credit institutions or investment firms trading in the ATHEX), and

any credit institution, which may legally provide the service of safekeeping and administration of securities in Greece, acting as custodian,

are entitled to become account operators.

44.6.2. There are no restrictions imposed on the ability of foreign intermediaries to hold domestic securities on behalf of their clients via another participant of the BoGS or an account operator of the DSS, i.e. through omnibus accounts which they hold with the BoGS participant or the DSS account operator. However, domestic participants or operators, which provide services to these foreign intermediaries, have the duty to ensure that the said foreign intermediaries are entitled to act as custodians according to their jurisdiction. This will take place through the "know your customer" assessment of the foreign intermediary by the BoGS participant or the DSS account operator, as a client who is being rendered services that are subject to Business Conduct Rules of Investment Firms (including credit institutions). Accordingly, it must be noted that the foreign intermediary must state that it acts on behalf of its clients. The capacity of the foreign intermediary as an investment firm or a credit institution simplifies the whole collaboration between the BoGS participant or the DSS account operator and the foreign intermediary (see also article 20 of Directive 2004/39/EC, MIFID).

44.6.3. Regarding links between foreign intermediaries and the BoGS or the DSS, the foreign intermediary has to acquire the capacity of BoGS participant or DSS account operator, according to the relevant Regulations of each system (see paragraph a above). Links between

domestic intermediaries and foreign intermediaries can be freely established (see also question 46)

44.7. Spain

Only foreign or domestic intermediaries that participate in IBERCLEAR are granted the capacity to hold book-entry securities with full legal effects.

Foreign intermediaries may act as participants in the Spanish systems in the same way as regular domestic participants.

Foreign intermediaries that do not become participant in the CSD, but access the Spanish market through a sub-custodian that has the participant status, are as a general rule treated by the law as any other client of such participant.

44.8. France

Reference is made to questions 3, 6, 17 and 42.

Subject to satisfying the requirements described below under paragraph (b), no special authorised status is required for a foreign intermediary who holds domestic securities in order to convey rights to its investors.

a) <u>Rules in respect of securities custody activity carried out in France</u>

As described in the answer to question 42, the activity of securities account keeping is a regulated industry. Securities custody services are ancillary to investment services.

Under Article L. 542-1 of the M&FC, such services may be provided by credit institutions, investment firms and legal entities not established in France whose only or principal purpose is to maintain securities accounts.

Such entities:

- must be subject to operating and supervisory rules equivalent to those applicable in France;

- are subject to the control and sanction power of the AMF which takes into account the supervision exercised by supervisory authorities in the Home State.

The above principles apply when a custodian operates pursuant to the freedom of establishment pursuant to Article L. 532-18 of the M&FC.

(b) <u>Recognition of foreign intermediaries entering into a link with a domestic intermediary</u>

The Euroclear France Operation Rules do contemplate that foreign CSD's or foreign intermediaries whose activities are comparable to domestic members of Euroclear France may become member of Euroclear France.

In addition, when a foreign entity operates on the basis of the freedom to provide services pursuant to Article L. 532-18 of the M&FC or otherwise, the following considerations need to be taken into account:

(i) Registered shares (*titres nominatifs*):

Reference is made to question 17-2. In case of transfer of registered shares, the authorised intermediary maintaining the securities account issues a BRN (*Bordereau de Références Nominatives*). Such BRN circulates on an electronic basis among the authorised financial intermediary, the CSD and the issuer in accordance with the AMF general rules. Compliance with such requirement implies that the relevant foreign intermediary:

- is a member of the French CSD on a remote basis;
- is linked with the French CSD computer technology in order to process the BRN;

(ii) Registered intermediary (*intermédiaire inscrit*)

French residents may not benefit from the registered intermediary status.

Reference is made to question 6. As a matter of principle, securities are evidenced by a book entry in the name of their owner. Article L. 228-1 of the French Commercial Code provides an exception to that principle insofar as equity securities (i) listed on a regular market and (ii) whose owner **is not domiciled** in France may be recorded in the name of a registered intermediary. Such registered intermediary must report its status as a registered intermediary upon opening of its account either with the issuer or with an authorised financial intermediary.

(iii) Voting:

Pursuant to Article 136 of Decree n° 67-236 of March 23, 1967, the right of a shareholder to participate in general shareholders' meetings may be subject:

(a) to the recording of the shareholders or of the registered intermediary (*intermédiaire inscrit*) on the register of registered shares (*titres nominatifs*) maintained by the issuer when such securities are registered securities (*titres nominatifs*); or

(b) to the transfer of a certificate to such place as shall be designated in the notice of a shareholder meeting, such certificate to be delivered by the relevant custodian purporting to acknowledge the unavailability of bearer shares (*titres au porteur*) recorded until the date of such shareholders' meeting. In respect of bearer securities (*titres au porteur*), the custodian authorised by the AMF (*i.e.* a *teneur de compte conservateur*) having that capacity must, upon request from a shareholder or a registered intermediary who has declared to act in such capacity, certify the capacity of a shareholder on the remote voting form (*formulaire de vote à distance*) or on the proxy in the name of such shareholder or for the account of the registered intermediary or on a separate document established for this sole purpose which shall be annexed to such voting form.

(iv) Taxes:

Payment of securities income to a non-resident requires the designation of a paying agent (*agent payeur*). Any person qualifying as a paying agent is expected to comply with specific formalities purporting to declare to French tax authorities the beneficiaries of the income or the intermediaries, such declaration being made annually by filing a tax return (IFU) subject to a number of exemptions.

A paying agent would be required to withhold payments when required. The last paying agent established in France who participates in the payment of income to non-residents acts as withholding agent.

44.9. Ireland

A foreign intermediary which offers services in Ireland, other than in exercise of its EU "passport" rights under EU banking or investment services law, will generally require an authorisation under the IIA[155] but failure to hold such an authorisation should not, subject to the below, affect the validity of transfers of securities, even if an offence is committed by the intermediary.

Pursuant to section 23 of the IIA, if an intermediary that does not hold an appropriate IIA and is not otherwise exempted from the requirement to hold such an authorisation, or is acting in contravention of a direction from the Financial Regulator under section 23:

a. advertises, supplies or offers to supply investment business services or investment advice, each within the meaning of the IIA, or makes any other solicitation in respect of them or holds itself out as an entity carrying on business that would require it to hold an IIA authorisation; and

b. issues, or causes to be issued, an advertisement inviting persons (referred to in the context of this response as investors):

(i.) to enter or offer to enter into an investment agreement, or containing information calculated to lead directly or indirectly to the investors doing so; or

---

[155] There are various other exceptions to this requirement and so it must be considered on a case by case basis.

(ii.) to exercise any rights conferred by an investment or containing information calculated to lead directly or indirectly to the investors doing so,

then the intermediary is not entitled to enforce:

(A) in the case of (b)(i) above, any agreement to which the advertisement related and which was entered into after the issue of the advertisement; or

(B) any obligation to which an investor is subject as a result of any exercise by the intermediary after the issue of the advertisement of any rights to which the advertisement related,

and the investor is entitled to recover any money or other assets paid or transferred by it under the agreement or obligation, as the case may be,, together with compensation for any loss sustained by it (such compensation to be as agreed between the parties or determined by the courts).

Where an investor elects not to perform an agreement or an obligation, or recovers money paid or assets transferred by it, in reliance on the above, the investor is obliged to repay any money and return any assets received by him under the agreement or, as the case may be, as a result of exercising the rights in question.

The IIA provides that references to any assets transferred under an agreement shall, where they have passed to a third party, be construed as references to their value at the time of its transfer under the agreement or obligation.

The courts may allow any agreement or obligation referred to as is mentioned at (A) or (B) above to be enforced, or money or property or investment instruments paid or transferred under it to be retained, if it is satisfied that:

- in making a decision to enter into the agreement or to exercise the rights referred to at (b)(i) and (ii), respectively, reliance was not placed on the advertisement to any material extent; or

- the advertisement was not misleading as to the nature of the investment, the terms of the agreement or, as the case may be, the consequences of exercising the rights in question and fairly stated any risks involved in those matters.

Section 24 of the IIA permits the Financial Regulator to exempt certain classes of advertisement from the ambit of section 23, subject to such conditions as it sees fit.

There are no specific rules of Irish law relating to "links" between Irish and foreign intermediaries. Generally such links are established through contractual sub-custodial arrangements that will be subject to all generally applicable law. Obviously, intermediaries may have limited their freedom regarding the appointment of sub-custodians in the contract with the investor and may be subject to additional limitations in the case of certain regulated investors.

44.10. Italy

In order to offer custody services in Italy, both foreign intermediaries and domestic intermediaries must apply for the authorisation under the FLCA or BLCA.

Providing investment services without the required authorisation is sanctioned with imprisonment and pecuniary sanctions, but does not preclude the intermediary from validly conveying rights to investors.

Foreign intermediaries may participate in the Italian CSD system or hold securities through securities accounts held with other domestic or foreign intermediaries that participate in the Italian CSD system.

Under the Italian Finality Law an EU bank or an undertaking listed in Article 2(3) of Directive 2000/12/EC, which participates in a system by assuming the obligations arising from transfer orders within that system and enters into a link with domestic intermediaries, qualifies as an "indirect participant". An indirect participant is an institution known to the system as contemplated by the rules of such system whose transfer orders for placing at the disposal of a recipient an amount of money by means of a book entry in the accounts of a bank (Italian or EU), a central bank or a settlement agent, or which determines the assumption or discharge of a payment obligation under the rules of the system within the same system, are executed by a participant in its own name on the basis of a contract.

Sources of Law:

Articles 18 and 166 of the FLCA;

Article 7ff of Consob Regulation No. 11522 of 1st July 1998 (Intermediaries Regulation);

Articles 14 and 130ff of the BLCA;

Article 1(1)(o) of the Italian Finality Law.

44.11. Cyprus

According to the Investment Firms Law 2002-2004 a foreign intermediary offering services in Cyprus not licensed in another EU member state will require licensing under the relevant provisions (Arts 29-30) for the purpose of either establishing a branch in Cyprus or for offering cross border services in Cyprus. Breach of these provisions attracts penal and civil penalties. It is not clear what is the effect on any transaction carried out by a non licensed entity in Cyprus. In all probability the rights and obligations of an investor under such a transaction will not be affected.

44.12. Latvia

Foreign intermediaries do not need a special authorised status in order to convey rights in respect of domestic securities (securities registered by LCD) to its investors. According to the FIML, securities shall belong to their acquirer as of the moment book entries in respect of those financial instruments are made in the securities account of the acquirer except if the securities are transferred to a nominee account. Where a nominee account is opened, the account identification shall disclose information to the effect that the account is a nominee account and that financial instruments in the account do not belong to the person who opened the account.

44.13. Lithuania

Foreign intermediaries, having all authorizations for engagement in investment services in Lithuania pursuant to the applicable legal requirements, do not need any other special authorization in order to convey rights to their investors.

Foreign intermediaries when entering into a link with domestic intermediaries are recognized as foreign intermediaries acting in their name, however for their clients, if they hold the securities for their clients.

44.14. Luxembourg

Foreign intermediaries holding domestic securities do not need any special authorised status in order to convey rights to their investor. There is no need for any specific procedure required by law to be linked-up with domestic intermediaries.

44.15. Hungary

No.

How are foreign intermediaries recognised when entering into a link with domestic intermediaries?

Foreign intermediaries can offer investment services in Hungary through a branch or investment service providers seated in a member state can offer their services directly. In these cases they can trade in their own name. It is also possible that they use a domestic intermediary, for which there are no special rules, since domestic intermediaries are permitted by law to offer their services to foreign intermediaries.

44.16. Malta

There are no special rules about foreign intermediaries however there are some rules disallowing unauthorised persons from holding shares in Maltese companies. These nominees or trustees need to be authorised by the MFSA or must have an authorised person accepting to be responsible for their compliance with Maltese law if they are not authorised.

There are rules which allow fast track authorisation for foreign intermediaries acting as trustees and other exemptions so as to ensure that institutions not acting within Malta are not subjected to unnecessary compliance.

44.17. Netherlands

Foreign intermediaries do not need a special authorised status in order to convey rights to their investors. Of course, the relevant intermediary must comply with Netherlands regulatory law (i.e. be licensed or passported, if necessary). Reference is made to the answers to Questions (38), (39) and (41). Membership of Euroclear Netherlands is open to domestic and foreign intermediaries alike provided that they meet certain standards, imposed by Euroclear Netherlands.

44.18. Austria

Foreign securities account providers do not need a special authorised status in order to convey rights in respect of "domestic securities" to its investors. We are unclear about the meaning of "**domestic**" securities. We would assume that securities are meant which are held by the Austrian CSD. Otherwise "domestic" could mean that the securities were issued by an Austrian issuer or that they are construed under

Austrian law. Irrespective of what the precise meaning of "domestic" securities is, the answer is the same. As described in the answer to question (11) the understanding under Austrian law of "to convey rights" would be, that ownership of the security is transferred.

The Austrian CSD maintains a network of links with foreign and International CSDs. The links and their structure (DvP or deliveries only) are chosen to satisfy demand, i.e. selected according to economic needs. Identification of account providers is made by respective codes/names. Other Austrian securities account providers (banks) may have their own links to foreign securities account providers/CSDs or International CSDs.

44.19. Poland

No special type of permit for a foreign entity is required, but a permit from the PSEC is universally required authorization of all intermediary operations, both by domestic and foreign intermediaries, except intermediaries already licensed in a EU Member State (see answer to Q49). For foreign intermediaries, certain differences in obtaining of the permit apply (some additional requirements related to the need to check whether the intermediary has a permit in another country-member of WTO/OECD).

44.20. Portugal

Foreign intermediaries which hold domestic securities do not need a special status in order to convey rights to its investors. If they qualify as financial intermediaries they will have the same capabilities as domestic intermediaries.

If foreign intermediaries are participants to a centralised securities system, they will be treated and recognised as any other domestic participant. If not, they will have to use the services of such a participant as its customers.

44.21. Slovenia

Pursuant Art. 15 of ZNVP liability (*obligation*) of the issuer of dematerialised securities arises when KDD issues dematerialised securities by entering in the central register (*registry*) the information about essential components of dematerialised securities and by crediting dematerialised securities to the accounts of their holders on the basis of the issuing order.

Pursuant Par. 1 of Art. 35 of ZNVP the rights of current holder of dematerialised securities are transferred by transferring dematerialised securities to the account of a new holder.

In “final client level” type of dematerialization which is applied by ZNVP (see answer to Q1), where “intermediary” is neither holder’s fiduciary, depository nor custodian, “intermediary” cannot convey the rights that it does not have to its investors. Conveyance of rights to acquirer (transferee) is firsthand.

Pursuant Art. 9 of KDD Rules a person (or legal entity) acquires member position when KDD admits it and when it accedes to the system of dematerialised securities account maintenance. Pursuant Par. 1 of Art. 34 of KDD Rules the system of dematerialised securities account maintenance consists of legal relations among registry members and KDD whose contents are their mutual rights and obligations

with regard to dematerialised securities account maintenance. There are no origin-based distinctions regarding the stated rights and obligations of registry members.

44.22. Slovakia

If foreign intermediary becomes the member of the Slovak CSD he keeps segregated accounts for his own holdings and for holdings of his clients, therefore intermediary does not need any additional documents in order to convey rights to investors.

From depository's point of view, if the foreign intermediary enters into link with domestic one, which is member of depository, foreign intermediary can open a securities account with domestic intermediary only in its own name. Any other arrangements between domestic and foreign intermediaries are subject to bilateral agreement.

44.23. Finland

In the book-entry system, the access rules for foreign and domestic intermediaries are basically the same:

a) To ***open a proprietary book-entry account*** in the book-entry system, no license is needed.

b) To ***open an omnibus account*** for client assets, the intermediary shall fulfill the requirements specified in Section 5a of the Act on Book-Entry Accounts. If the intermediary is not entitled to open the omnibus account directly pursuant to the Act, it shall apply for authorization from APK. The applicant shall be subject to sufficient public supervision and its economic operating conditions and administration shall fulfill the requirements set on the reliable attendance to the duties of an omnibus account holder. Based on the authorization, an account operator is entitled to open an omnibus account for the foreign intermediary.

c) To operate as a ***nominee registration custodian*** to be entered in the shareholder lists, the intermediary shall fulfill the requirements specified in Section 28 of the Act on the Book-Entry System. If the intermediary is not entitled to act as nominee directly pursuant to the Act, it shall apply for authorization from APK.

d) To enter registrations in the book-entry system and to operate as an ***account operator or as an agent of an account operator***, the intermediary shall fulfill the requirements set out in Section 7 or Section 7a, respectively, of the Act on the Book-Entry System and in APK's Rules, and apply for the rights to be granted by APK in accordance with the Act.

In terms of book-entry securities, foreign intermediaries are most often recognized as holders of custodial nominee accounts. A small number of intermediaries have applied for the rights of an account operator or of an agent.

Outside the book-entry system, there is no statutory recognition mechanism or status for links between intermediaries except the general money laundering and know-your-customer rules.

44.24. Sweden

In the Swedish book-entry system the access right for foreign and domestic intermediaries are basically the same. No licence is required to open an account and there are no special legal requirements for an intermediary to undertake registration measures as an account-operator on its own behalf in the Financial Instruments Accounts Ac)see question 42 and chapter 3, section 1–3 in the Act). The CSD could authorise certain legal persons to undertake as account operators registration measures on behalf of third parties. Furthermore a CSD could grant certain legal persons the right to be registered as nominees of financial instruments. Regarding the rules see the answer on question 48. The legal effects of a registration by an account-operator or a notification of a nominee are found in the Act.

44.25. United Kingdom

Foreign and domestic intermediaries alike offering custody services in the UK generally require authorisation for the purposes of the Financial Services and Markets Act 2000. Breach of this requirement attracts criminal and civil penalties, but does not prevent the intermediary from conveying rights to investors.

There is no general restriction on foreign intermediaries participating in CREST or holding interests in securities through securities accounts with other intermediaries in England.

Links between CREST and foreign settlement systems are as discussed in the response to Question 41 above.

45. QUESTION NO. 45: UNDER WHAT RULES MAY DOMESTIC INVESTORS ACQUIRE FOREIGN SECURITIES?

45.1. Belgium

There are no specific acquisition rules. Such foreign securities may be held and maintained under general Royal Decree n° 62 regime.

45.2. Czech Republic

The acquisition of foreign securities is not restricted nor made subject to any specific legal regulation.

45.3. Denmark

There are no restrictions on domestic investors´ purchase of foreign securities.

45.4. Germany

An investor is allowed to purchase foreign securities without limitation. With regard to the intermediary, Section 11 and 12 SCSD describe the responsibilities of the account provider with respect to the place of acquisition and the delivery as act of fulfilment vis-à-vis the end investor. See also the answer to Question 40.

45.5. Estonia

There are no restrictions imposed on domestic investors to purchase foreign securities.

45.6. Greece

There are no rules restricting domestic investors to acquire foreign securities.

45.7. Spain

Under foreign investment regulations (in particular, Royal Decree 664/1999, 23rd April) foreign investments made by a Spanish resident in securities are free, although they must be notified to the Registro de Inversiones del Ministerio de Economía after the investment has been made. This notification has to be made by the financial entity resident in Spain through which the investors is acting, or directly by the investor in other cases.

45.8. France

With respect to the transfer of ownership, Article L. 431-2 of the M&FC, as modified by Ordinance n° 2005-303 of 31 March 2005 and Law 2005-811 of July 20, 2005, contemplates that:

"*The **transfer of ownership** in respect of financial instruments referred to in paragraph 1, 2 and 3 of Article L. 211-1-I and any **similar financial instrument issued under foreign law,** when admitted to the operations of a central depositary or settled through a securities settlement system referred to in Article 330-1 of the MFC results **from book entry in the account of the buyer on the date and under the conditions defined by the AMF General Rules**."*

It should be further noted that Directive 2003/71 of November 4, 2003 on the prospectus to be published when securities are offered to the public or admitted to trading was implemented under French law by Law n° 2005-842 of July 26, 2005. The conditions under which a foreign issuer may propose to the French public or apply for the admission to trading in France of its own securities are codified in Articles L. 412-1 and following of the M&FC.

45.9. Ireland

There are no rules of general law governing or restricting the ability of domestic investors from acquiring foreign securities. The following may, however, be relevant:

a. such an acquisition may have taxation consequences under Irish and foreign tax laws;

b. investment restrictions (contractual or regulatory) may affect the ability of an institutional intermediary to so acquire;

c. restrictions on financial transfers may be relevant (see our response to question (54) below)).

Irish regulatory issues may arise for the foreign issuer of such securities in connection with any such issue or its marketing/promotion. The potential application of the Prospectus Directive/Market Abuse Directive must also be considered.

As regards the laws that would apply, this must be addressed on a case by case basis. The contractual terms of the acquisition will be determined in accordance with the governing law of the relevant contract, assuming that the choice of law is a valid and proper choice of law. Issues relating to the acquisition of a proprietary interest in an asset will, as a matter of Irish law, be governed by the law of the lex situs although, if this is different from law under which the asset is created, then that governing law will also be considered. This raises the question, however, of what the lex situs means in this context.

It is possible that the Irish courts would 'look through' the account with the intermediary to the underlying securities and look to determine the lex situs in respect of each thereof under the conflicts of law rules applicable to each thereof and, if this is different from the governing law of the security, also look to that governing law. There is no Irish authority on the issue of lex situs of indirectly held securities. The "place of the relevant intermediary approach" ("PRIMA") is a practical approach, recognising the uncertainties that would be created by instead opting for the actual physical location of each security credited to the investor's account with the intermediary. There is, however, no Irish judicial authority for PRIMA. Certain English authorities, and the views of English academic commentators, may be considered by the Irish courts to be of persuasive support for a PRIMA approach. PRIMA would also be supported by an analysis that viewed the account with the intermediary as a form of register so that, as is generally accepted to be the case with registered securities, the location of the account is the location of the securities. In the absence of authority, the approach that may be taken by the courts is unclear.

Where the Settlement Finality Directive/Settlement Finality Regulations apply, the applicable rule is that set out in Article 9/Regulation 7 thereof. Where the Collateral Directive[156]/the Irish Collateral Regulations[157] apply, the applicable rule is that set out in Article 9/Regulation 18 thereof.

45.10. Italy

No rules restrict the ability of domestic investors to purchase foreign securities (except for certain specific tax disclosure rules); however, certain offering rules are imposed under the FLCA and BLCA with respect to the offer and promotion of securities in Italy.

Sources of Law:

Articles 51*ff.* and 129 of the BLCA;

Articles 94*ff* of the FLCA;

Italian Banking Supervisory Regulations.

45.11. Cyprus

There are no legal rules regulating the acquiring of foreign securities by domestic investors.

45.12. Latvia

It is assumed that foreign securities will be acquired through domestic intermediaries (banks and investment brokerage companies).

There are no specific rules applying to domestic investors wishing to acquire foreign securities.

45.13. Lithuania

There are no specific provisions applicable to domestic investors' regarding acquisition of foreign securities.

45.14. Luxembourg

Pursuant to Luxembourg law, there are no rules or restrictions imposed upon domestic investors for the acquisition of foreign securities.

45.15. Hungary

Acquiring foreign securities through the Hungarian CSD is possible only if the systems of the CSD handle that security. If not, that the use of a foreign intermediary is necessary.

---

156 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

157 European Communities (Financial Collateral Arrangements) Regulations 2004, as amended by the European Communities (Financial Collateral Arrangements) (Amendment) Regulations 2004.

45.16. Malta

There are no restrictions in this regard and investors are free to acquire foreign securities as they wish, subject to the filling in of necessary forms to be sent to the central bank of Malta for statistical purposes.

45.17. Netherlands

As a matter of Netherlands law, there are no specific rules on acquisition of foreign securities by domestic investors. Note that there may be foreign rules which could prevent a Netherlands investor from acquiring securities from that specific country.

If the foreign securities are offered in the Netherlands, the offering should comply with Netherlands regulatory law, reference is made to the answers to Questions (38), (41) and (42).

45.18. Austria

It is assumed that the foreign securities will be acquired through a domestic securities account provider.

Presently there are no specific statutory rules applying to Austrian investors wishing to acquire foreign securities (Austrian foreign exchange regulations as presently in force do not require consents).

45.19. Poland

Restrictions on acquiring foreign securities by Polish investors are imposed only under the provisions of the [Polish] Act of July 27, 2002 - Foreign exchange law [*Ustawa z dnia 27 lipca 2002 r. – Prawo dewizowe*]. What follows from the provisions of the said Act is that foreign exchange authorisation is required if a Polish investor acquires (directly or through the agency of other persons) shares or stocks in companies based in non-EU countries, participation units issued by collective investment funds based in non-EU countries or debt securities issued or released by any persons based outside the EU. The said restrictions do not apply to banks and other financial institutions supervised by financial market regulators. The Regulation of the [Polish] Minister of Finance on general foreign exchange authorisations of September 3, 2002 *[Rozporządzenie Ministra Finansów w sprawie ogólnych zezwoleń dewizowych z dnia 3 września 2002r.*] has liberalised the above-mentioned restrictions by allowing domestic investors to acquire shares or stocks, participation units or debt securities of one-year or longer maturity where they were issued or released by persons based in the countries with which the Republic of Poland has entered into agreements on the reciprocal promotion and protection of investments.

Any other existing restrictions are common for both domestic and foreign securities. Any possible restrictions in this respect may result from the applicable provisions of foreign law.

45.20. Portugal

There are no restrictions on the acquisition of foreign securities by domestic investors.

45.21. Slovenia

Under general rules of acquiring securities (see answers to Q17 and Q43).

45.22. Slovakia

There are no specific rules for domestic investors applicable to procurement of foreign securities. However, foreign securities acquired by domestic entity must be reported to the NBS.

45.23. Finland

Investment restrictions applicable to Finnish investors in respect of foreign securities have been abolished in accordance with EU law and with binding international instruments (such as WTO).

Regarding Finnish tax residents, Finnish tax laws require reporting of foreign investments and income thereof the same way as for domestic investments.

As explained under question 12, the proprietary law aspects of investments in foreign securities held outside of the book-entry system are not covered by express Finnish law.

45.24. Sweden

There are no restrictions.

45.25. United Kingdom

There are no rules of general law restricting the ability of investors in England and Wales to acquire foreign securities. Various restrictions are imposed under the Financial Services and Markets Act on offerings of securities and the promotion of securities in the UK. The taxation consequences of an investor acquiring foreign securities will be governed by applicable UK and foreign tax laws.

Institutional investors may be subject to investment restrictions, imposed by regulation of the terms of their investment authority that inhibit their ability to acquire foreign investments.

There are no exchange controls in the UK.

Under the general principles of English conflict of laws rules, the acquisition of property rights in foreign securities is governed by lex situs. While there is no direct authority on the application of this principle to securities held with an intermediary, it is generally thought that "PRIMA" (the place of the relevant intermediary approach) would be applied, with the result that the applicable law would be that of the jurisdiction in which the intermediary maintains the securities account in question. Where the Settlement Finality or Collateral Directive applies, the applicable rule is that set out in article 9 of the respective directive.

46. QUESTION NO. 46: UNDER WHAT RULES MAY DOMESTIC INVESTORS USE FOREIGN INTERMEDIARIES?

46.1. Belgium

There are no specific rules or restrictions.

46.2. Czech Republic

The use of foreign intermediaries is not restricted nor made subject to specific legal regulation. The provision of investment services in the territory of the Czech Republic is subject to license by the Czech Securities Commission, or in case of investment firms or banks from EU countries, to EU passport procedures.

46.3. Denmark

There are no restrictions on the use of foreign intermediaries.

46.4. Germany

Domestic investors are free to choose foreign account providers.

46.5. Estonia

There are no restrictions imposed on domestic investors to use services of foreign intermediary.

46.6. Greece

There are no relevant restrictions, provided of course that the rules concerning the conditions for the provision of investment services in Greece are met. It must be noted, that the keeping and administration of securities does not constitute a core investment service and, as a result, it is not restricted to specifically supervised firms according to the ISD (Investment Services Directive 93/22/EEC) as well as to Greek Law. However, the said non-core service is usually linked to the provision of investment services or the execution of banking business and as such the issue of the execution of the intermediary's activities in Greece by an entity who is not a credit institution, investment firm or a specifically regulated CSD has never been raised.

Further, both the BoGS Operating Regulation (par. 3.1.) and the DSS Operation's Regulation (article 1) include provisions, from which it is derived that entities which are not credit institutions, investment firms or specifically regulated CSDs cannot carry the capacity of a participant / operator of accounts held with the said systems, i.e.. the BoGS and the DSS (see question 44 above).

46.7. Spain

There are no special rules.

46.8. France

As a principle, no rule prevents a domestic investor from using foreign intermediaries (being an intermediary operating from outside of France).

Reference is however made to the requirements described in question 44 which further cross-refers to questions 3, 6, 17 and 42.

However, a foreign intermediary is not entitled to carry out its activities in France unless being authorised (subject to EU passport requirements) (see question 44).

Moreover, with respect to custody account keeping, Article L. 211-4 of the M&FC provides that all securities issued in France and subject to French law are required to be registered in an account by way of book entry maintained by the issuer of the securities or by an authorised financial intermediary.

As mentioned in question 44, to the extent the transactions of a foreign intermediary involve investment services provided from a EU Member State, such foreign intermediary may act under the EU passport either under the right of establishment or under the freedom to provide services (see in this respect question 44). However, a French resident may not hold French equity securities through a registered intermediary acting as nominee (see question 44).

46.9. Ireland

No restrictions are imposed under rules of general law. Individual investors may be subject to regulatory or other limitations that may have a practical impact on their ability to use such custodians.

46.10. Italy

There are no general rules of law restricting the ability of domestic investors' ability to use foreign intermediaries. However, it is still debated whether, and to what extent, Italian law allows the creation of trusts and Italian investors' use of foreign intermediaries to create foreign law trusts would be upheld in Italy under the relevant Hague Convention.

Sources of Law:

Articles 11*ff* of the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1st July 1985.

46.11. Cyprus

There are no legal rules regulating the use of foreign intermediaries by domestic investors.

46.12. Latvia

There are no specific rules for Latvian investors for using foreign intermediaries.

46.13. Lithuania

There are no specific provisions applicable to domestic investors' regarding acquisition of foreign securities.

46.14. Luxembourg

Pursuant to Luxembourg law, there are no rules or restrictions imposed upon domestic investors concerning the use of foreign intermediaries. Luxembourg

regulated investment funds need for regulatory and investor protection reasons to involve a domestic depository.

46.15. Hungary

There are no special rules.

46.16. Malta

There are no restrictions in this regard.

46.17. Netherlands

In general there are no specific rules, provided that the foreign intermediaries comply with Netherlands regulatory law, if so required.

In this connection, it is important to establish whether the foreign intermediaries are soliciting business in the Netherlands, or whether the domestic investor has approached the foreign intermediary on its own initiative. In the first case, the foreign intermediary should comply with the rules set out in the answers to Questions (38), (39) and (41). In the latter case, the intermediary is subject to the regulatory law of the foreign country.

46.18. Austria

There are no specific rules for Austrian investors for using foreign securities account providers.

46.19. Poland

No restrictions are imposed on investors under the Polish law in this respect. The Polish law provides for the terms and conditions on which foreign intermediaries may operate in Poland.

The only limitations of the investors' freedom to use the services of foreign intermediaries are imposed under the provisions of the Act of July 27, 2002 - Foreign exchange law. Alongside the restrictions specified in section (45) above, the Act also requires that a foreign exchange authorisation must be obtained, without limitation:

- for the acquiring by Polish investors, both directly and through the agency of other persons, of claims and other rights exercisable by way of monetary settlements, alienated by foreign persons and organisations based in non-EU countries;

46.19.1. for the alienating by Polish investors, both directly and through the agency of other persons, in non-EU countries, of:

- securities and participation units of collective investment funds, save for those which were purchased in these countries under foreign exchange authorisations;
- claims and other rights exercisable by way of monetary settlement, save for those which were purchased in these countries under foreign exchange authorisations and save for those which arose as a consequence of regular trading with persons and organisations based

in these countries, to the extent to which no such authorisation is required;

46.19.2. for the opening by domestic investors, both directly and through the agency of other persons, of accounts with banks and branches thereof based in non-EU countries (with some exceptions.)

The Regulation of the [Polish] Minister of Finance on general foreign exchange authorisations of September 3,2002 has liberalised the above-mentioned restrictions by allowing domestic investors to:

- alienate in non-EU countries securities representing interests in corporations, securities of one-year or longer maturity and participation units of collective investment funds;

- acquire shares or stocks, participation units or debt securities of one-year or longer maturity where they were issued or released by persons and organisations based in the countries with which the Republic of Poland has entered into agreements on the reciprocal promotion and protection of investments; and

- open accounts with banks and branches thereof based: in the countries with which the Republic of Poland has entered into agreements on the reciprocal promotion and protection of investment (in connection with transactions referred to in point 2/); in third countries (in connections with transactions referred to in point 1/.)

46.20. Portugal

No specific rules or restrictions exist in relation to the use of a foreign intermediary by a domestic investor.

46.21. Slovenia

The relevant criteria for the admissibility of use of "intermediaries" are not their origin but their membership in KDD system of dematerialised securities account maintenance (see answer to Q1).

46.22. Slovakia

Operations of foreign intermediaries in Slovakia are covered by the Act on Securities and Investment Services. Foreign intermediaries with their seat in Member State may provide services through a branch or without the branch. In this respect relations between foreign intermediaries and domestic investors are ruled by the same regulations as those between domestic intermediaries and investors.

46.23. Finland

In accordance with EU law and binding international treaties on commerce a domestic Finnish investor may choose to use a foreign intermediary. This choice does not relieve the Finnish investor from requisite tax reporting to Finnish authorities, however. Unless the foreign intermediary provides such reporting services the same way as the domestic intermediaries, the Finnish investor must itself attend to the reporting.

46.24. Sweden

There are no specific rules or restrictions.

46.25. United Kingdom

There are no rules of general law restricting the ability of investors in England and Wales to use foreign intermediaries. Institutional investors are in many cases subject to duties of care and prudential restrictions in selecting and appointing custodians in relation to their assets. This may inhibit their use of foreign intermediaries, particularly if local regulatory standards are not equivalent to those in the UK.

47. QUESTION NO. 47: ARE THERE ANY REGULATORY OR OTHER RESTRICTIONS AFFECTING FOREIGN INVESTORS EXERCISING SHAREHOLDERS' RIGHTS IN DOMESTIC SECURITIES, OR INHIBITING DOMESTIC INVESTORS FROM EXERCISING FOREIGN RIGHTS

47.1. Belgium

There are no restrictions preventing foreign investors from exercising their shareholders' rights in domestic securities other than the prohibition to vote through nominee in general assembly (Companies Code, Articles 651, 1° and 2°; Articles 349, 1° et 2° and 389, 1° and 2°). This last prohibition should be removed soon through the recent draft bill adopted by the Government on forced dematerialization that should be adopted by the Parliament before the end of the year 2005.

Regarding restrictions inhibiting domestic investors from exercising foreign rights, there are no such restrictions under Belgian law and regulations but there may be some restrictions under foreign legislation and practices (see our paper of 22 September 2004 to DG Internal Market "Preparatory information regarding European Legal Harmonisation" distributed to LCG, point 3).

47.2. Czech Republic

There are no regulatory or other restrictions affecting cross-border exercise of shareholders' rights.

47.3. Denmark

Whether an investor is domestic or foreign (however that distinction is defined) does not matter in relation to exercise of shareholder´s rights. In principle, generally shareholders are entitled to exercise their corporate rights without restrictions. In practice, cross-border holdings are often intermediated, which may cause practical problems in relation to the exercise of corporate rights (as the identity of the ultimate investor is most often not recorded by the issuer). As this problem in principle relates to the intermediated structure rather than whether the securities are domestic or foreign it will be dealt with in answers to Section II.

47.4. Germany

No, there are no such rules in German law.

47.5. Estonia

There are no regulatory or other restrictions affecting foreign investors exercising shareholders rights in Estonian securities. It is however worth noting that from time to time there are practical difficulties that arise in the course of verifying identification documents issued in other states by local notaries.

The same (there are no regulatory restrictions) applies to Estonian investors exercising rights in foreign securities, at least as far as the rules of Estonian law are concerned.

47.6. Greece

No, there are no such restrictions in Greek law.

47.7. Spain

Pursuant to Royal Decree 664/1999, 23rd April, no prior authorisation is required for foreign investments to be made in Spain. However, with regards to investment in securities, there is an obligation to notify to the Registro de Inversiones del Ministerio de Economía the investment and disinvestment in the relevant securites. Exceptionally, if the investor is resident in a tax haven (as defined under Spanish legislation) such notification has to be made in advance, unless the relevant securities are listed in an organised market or have been publicly offered.

In addition, certain highly regulated sectors or industries have special provisions restricting the acquisition of shares and exercise of shareholding rights by non-resident investors.

47.8. France

French law does not contain such restrictions subject to the comments made in the answer to question 44.

47.9. Ireland

With the exception of provisions of Irish company law or the applicable company law of the foreign issuer, no restrictions apply.

47.10. Italy

There are no such general restrictions under Italian law. However, certain foreign investors have experienced difficulties in obtaining the certificates of participation required for participation in the issuer's shareholders' meetings in those cases where they did not hold an account with an intermediary directly participating in the Italian CSD system. In such cases, participating intermediaries are sometimes reluctant to issue the certificate of participation in the name of the investor claiming that all they can certify is that their own direct depositor holds financial instruments on behalf of one or more undisclosed third parties. To this purpose, the participating intermediary requires the non-participating intermediary to provide written instructions specifying the details of the required certificate and information relating to its own depositor. If the depositor is a custodian holding the financial instruments on behalf of a third party, the participating intermediary requires a series of instructions which can be traced back to the ultimate holder. If the ultimate holder is only a legal holder, but the beneficial holder is a third part, the situation can become even more complicated and the issuance of a certificate may require several days' advance notice.

This situation becomes problematic when the ultimate investor obtains delivery of the securities on record date or on a day immediately preceding such day. In such event there is the risk that there will be insufficient time to ensure that the participating intermediary receives an appropriate series of instructions allowing the participating intermediary to verify that the certificate is being issued to the ultimate holder.

Sources of Law:

Article 2370 of the Civil Code;

Articles 33 *ff.* of the Markets Regulation.

47.11. Cyprus

There are no such legal rules.

47.12. Latvia

There are no regulatory restrictions affecting foreign investors exercising shareholders rights in Latvian securities or inhibiting Latvian investors from exercising "foreign rights". Practically the exercising of “cross-border” shareholder’s rights by shareholder itself may meet some difficulties as it is concerned with identification of the beneficial owner whose securities are hold by an intermediary.

47.13. Lithuania

Regarding foreign investors, there are no restrictions in as much as shareholder’s rights are exercised under Lithuanian law. There are no restrictions in respect of exercising domestic investor’s shareholder’s rights in respect of foreign securities in as much as foreign law applicable to exercising of shareholder’ does not provide any restrictions.

In practice, if securities are credited in omnibus nominee accounts maintained by the domestic intermediary for the foreign intermediary, the shareholder’s rights generally are exercised by the foreign intermediary, i.e. the connection between the final investor and the issuer is indirect.

47.14. Luxembourg

There are no regulatory or other restrictions affecting foreign investors exercising shareholders’ rights in domestic securities, except where the articles of incorporation or offer prospectus of the issuer so provide (e.g. exclusion of US placement to avoid SEC registration).

Luxembourg law does not impose restrictions on domestic investors exercising foreign rights.

47.15. Hungary

No.

47.16. Malta

There are no restrictions in this regard.

47.17. Netherlands

As a matter of Netherlands law, there are no regulatory or other restrictions affecting the foreign investors ability to exercise its shareholders' rights, or *vice versa*. Corporate law of the country where the company is incorporated, however, may prevent a domestic shareholder from exercising its rights. It should also be noted that, as mentioned under Question (39), if the shares are held with a foreign sub-custodian, the multi-tier character of the holding of securities might complicate the exercise of shareholders' rights.

47.18. Austria

There are no regulatory or other restrictions affecting foreign investors exercising shareholders rights in Austrian securities or inhibiting Austrian investors from

exercising "foreign rights" (i.e. probably shareholders rights in securities issued by foreign issuers).

47.19. Poland

There are no restrictions imposed under the Polish law on exercising by domestic investors of the rights in foreign securities, however, in some cases a foreign exchange authorisation is required for domestic investors to acquire foreign securities (see sections 45 and 46 above).

The Act of July 27, 2002 - Foreign exchange law requires that a foreign exchange authorisation is obtained for the acquiring in Poland by an investor based in a non-EU country, both directly and through the agency of other persons, of securities, participation units in collective investment funds, as well as claims and other rights exercisable by way of monetary settlement. However, under the provisions of the Regulation of the [Polish] Minister of Finance on general foreign exchange authorisations of September 3, 2002, such investors are allowed to acquire securities representing interests in corporations and debt securities of one-year or longer maturity, participation units in collective investment funds, as well as property rights and debt securities of maturity less than one year traded on the Warsaw Stock Exchange or on the regulated OTC market operated by the Central Table of Offers (*Centralna Tabela Ofert S.A.*).

Other restrictions applicable to foreign investors have been imposed by the provisions of the [Polish] Act of March 24, 1920 on the acquisition of real estate by foreigners [*Ustawa z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców.*] Pursuant to the provisions of the said Act, a permit is required for acquiring or taking up shares in a commercial company based in Poland which is the owner or perpetual usufructor of a real estate located in Poland, if, as a result of any such acquisition, such company would become controlled by foreigners. If the company was controlled by foreigners prior to the acquisition, a permit is required for the acquiring of shares by a foreigner who was not a shareholder in the company prior to the acquisition. The requirement to obtain a permit does not apply to acquiring shares admitted to public trading in Poland and to acquiring shares by foreigners who are nationals of the European Economic Area member states, with some exceptions (the exceptions being the acquisition of shares in companies which are the owners or perpetual usufructors of agricultural land and forests and real estate located in the border zone.)

The above restrictions are important because an acquisition by a foreigner of securities without having obtained an appropriate permit may be found null and void by operation of law, which prevents the foreign shareholder from exercising any rights in such securities.

Other restrictions on exercising rights in shares imposed by the Polish law are equally binding for Polish and foreign investors, e.g. where shares are acquired in violation of the provisions regulating acquisitions of large blocks of shares, the voting right attached to the shares so acquired is ineffective.)

47.20. Portugal

There are no such rules in Portugal.

47.21. Slovenia

Pursuant Par. 1 of Art. 16 of ZNVP the rights arising from dematerialised securities may be exercised only by their legal holders. Pursuant Par. 2 of Art. 16 of ZNVP legal holders of dematerialised securities are persons, on whose behalf dematerialised securities are entered in the central register (*registry*) unless the entry of dematerialised securities on behalf of such persons is carried out without an order given by the issuer, the previous holders or without any other legal instrument.

Regarding the quoted provisions there are no origin-based restrictions that would inhibit domestic investors form exercising foreign rights (i.e. rights arising form foreign securities).

47.22. Slovakia

No, there are no regulatory or other restrictions affecting foreign investors exercising their rights in domestic securities or inhibiting domestic investors from exercising foreign rights.

47.23. Finland

There are no regulatory or other restrictions affecting foreign investors exercising shareholders rights in Finnish securities. The same applies to Finnish investors exercising rights in foreign securities, at least regarding the Finnish law.

In accordance with Section 28 of the Act on the Book-Entry System, the Ministry of Finance may restrict the rights of nominee registration of equity-rated book entry securities, which are not subject to public trade abroad. Such restriction does not, however inhibit foreign investment in a company subject to the restriction, but only requires a foreign investor to be registered directly in the shareholder list equal to Finnish shareholders. The possibility of restriction has never been used in practice.

47.24. Sweden

Whether an investor is domestic or foreign does not matter in relation to exercise of shareholder's right.

47.25. United Kingdom

There are no such general restrictions under English law.

V. PUBLIC LAW AND REGULATORY CONTEXT

48. QUESTION NO. 48: WHAT RULES ARE APPLICABLE TO THE EXISTENCE, ESTABLISHMENT AND OPERATION OF INTERMEDIARIES (AND WHERE RELEVANT FOR CO-OPERATION BETWEEN PARTICULAR INTERMEDIARIES)?

48.1. Belgium

Besides Royal Decree n° 62 for the holding of book-entry securities by intermediaries, it is namely the Law of March 22, 1993 on the status of banking institutions, the Law of April 6, 1995 on investment firms and the Law of August, 2, 2002 on the supervision of financial markets which are establishing rules on the establishment and operation of intermediaries at large, with due implementation of corresponding banking and ISD directives. Such laws are available in English on Banking, Financial and Insurance Commission website: http://www.cbfa.be/eng/index.asp.

48.2. Czech Republic [to be completed]

48.3. Denmark

Establishment and existence: Securities Trading Act, Part 3 (Common provisions) establish VP acting as a CSD and Clearing Centre and the same Act Art. 62 establish financial institutions to act as account managers and effect registration with VP and on its behalf.

Operation: Securities Trading Act, Section III gives the rules of operation for VP' clearing business and Section IV gives the rules of operation for VP's Registration business in co-operation with the account managers. The later is in more details regulated in an Executive order.

An account manager is not considered an intermediary.

48.4. Germany

In Germany, professional safe-keeping and administration of securities for third parties is regarded as regulated banking business. Thus, intermediaries offering such services need to obtain a license to do so pursuant to sections 1 para 1 No. 5 and 32 of the German Banking Act (*Kreditwesengesetz - KWG*). With regard to clearing, settlement and safe-keeping of securities, responsibilities of the intermediary are mainly found in the German Securities Deposit Act (*Depotgesetz - DepotG*) detailed by regulations of BaFin as Federal Banking Supervisory Authority and reporting standards set by Deutsche Bundesbank.

With regard to the responsibilities of the intermediary when trading with securities, these can be found in the German Securities Trading Act (*Wertpapierhandelsgesetz - WpHG*).

With regard to services usually rendered in connection with the maintenance of securities accounts (see below) the Consolidated Banking Directive (2000/12/EC as amended by Directive 2000/28/EC) and the Directive on markets in financial instruments (2004/39/EC) are also applicable.

48.5. Estonia

When including under the term "intermediary" (i) investment firms and (ii) credit institutions, the respective provisions of (i) the SMA and (for investment firms) (ii) the Credit Institutions Act (for credit institutions) apply.

48.6. Greece

As already mentioned under 46, keeping and administration of securities (as a non core investment service, ancillary to the investment services, according to Annex I, Section B, (1) of the MifiD) is not restricted by Greek Law to specifically supervised undertakings, such as credit institutions or investment firms. However, the said non-core service is usually linked to the provision of investment services or the execution of banking business and as such the issue of the execution of the intermediary's (account provider) activities in Greece by an entity who is not a credit institution, investment firm or a specifically regulated CSD has never been raised.

48.7. Spain

The activity of "custody and administration of securities and financial instruments, including the holding of securities represented in book-entry form" is considered to be an "auxiliary investment service" reserved to investment firms that obtain the relevant authorisation of the Ministry of Economy, at the proposal of the CNMV (Comisión Nacional del Mercado de Valores, the Spanish supervisor) (articles 63, 64 and 66 of the Securities Market Act).

Credit entities are also allowed to conduct this activity if their legal regime, their by-laws, and the specific administrative authorisation (i.e. its banking licence) able them to do so (article 65 of the Securities Market Act).

The establishment in Spain of other CSDs different from IBERCLEAR is also provided for in article 44bis of the Securities Market Act, subject to the authorisation of the Spanish Government.

48.8. France

48.8.1. <u>Investment services providers</u>

As a matter of principle, intermediaries offering investment services (see in this respect the answer to question 1 above) are required to be licensed under the M&FC.

Such license is delivered by the *Comité des Etablissements de Crédit et des Entreprises d'Investissement*. However, investment services providers whose principal purpose is to provide the service of portfolio management are required to apply to the AMF for an authorization.

As an exception to the above principle, the entities referred to in Article L. 531-2 of the M&FC may carry out investment services without being under the duty to obtain a licence. However, such entities may not benefit from the European passport.

Once authorized, such intermediaries are required to comply with various regulatory requirements, in particular those set out in the AMF General Rules (e.g. rules of conduct).

Moreover, such intermediaries are subject to the supervision of the *Commission Bancaire* (Banking Commission) and the AMF which may also impose sanctions.

48.8.2. Central Securities depositories (CSDs)

Pursuant to Article L. 621-7-VI of the M&FC, the AMF General Rules do determine the conditions under which CSDs are authorised to operate by the AMF (*conditions d'habilitation*) and the conditions under which the AMF approves their operating rules.

CSDs are subject to the supervision of the AMF which may also impose sanctions.

48.8.3. Clearing houses

Pursuant to Article L. 621-7-IV-7° of the M&FC, the AMF General Rules do determine the conditions under which the AMF approves the clearing houses operating rules.

Clearing houses are subject to the supervision of the AMF which may also impose sanctions.

The *Banque de France* is also responsible for monitoring the security of clearing and DvP systems (Article 141-4 of the M&FC).

Clearing Houses are required to have the status of a credit institution (*établissement de credit*) (Article L. 442-1 M&FC). Such status requires a license from the *Comité des Etablissements de Crédit et des Entreprises d'Investissement*.

48.8.4. Maintenance and custody of securities

See the answer to question 49 below.

48.9. Ireland

As indicated in our response to question (44), intermediaries operating in Ireland will typically require an authorisation under the IIA or possibly the Stock Exchange Act 1995, as amended (unless subject to an exception from the requirement to hold such an authorisation). Holders of such authorisations (and credit institutions carrying on such activity) must comply with various regulatory requirements imposed pursuant to that legislation including those set out in various codes of conduct and other requirements. See those set out in respect of credit institutions, investment firms, stock exchange member firms, intermediaries (which term does not, in this context, have the general meaning used in this paper) set out at the Financial Regulator's website at *www.ifsra.ie/frame_main.asp?pg=%2Findustry%2Fin%5Fcar%5Fintr%2Easp&nav=%2Findustry%2Fin_nav.asp*). As indicated in our response to question (44), certain intermediaries may be exempt from the requirements to obtain an authorisation in specified circumstances or may be able to exercise passport rights to provide such services into Ireland either on a cross border basis into Ireland or by establishing a branch in Ireland. Intermediaries exercising passport rights may be subject to certain domestic regulatory requirements.

48.10. Italy

Intermediaries carrying out investment services are governed by the provisions of the Financial Law Consolidated Act which implements regulations as to their existence, establishment and operation. Banks are governed by the provisions of the Banking Law Consolidated Act (Legislative Decree no. 385 of 1993) and are also subject to the FLCA in the provision of investment services.

48.11. Cyprus

Intermediaries acting as such in Cyprus must be licensed under the Investments Firms Law 2002-2004. Licensees there under may offer financial services as intermediaries in Cyprus subject to the regulatory regime and the Code of Conduct established under the said law. Pursuant to articles 24 - 26 of the Investments Firms Law 2002-2004 and by way of exception to the existing licensing regime an intermediary may do business in Cyprus cross border once he is licensed in another member state for the services in question. Furthermore such a cross border activity may be carried out through a branch established in Cyprus for this reason. Intermediaries acting in Cyprus under articles 24 - 26 of the Investments Firms Law 2002-2004 are obligated to comply with certain legal requirements including the relevant Code of Conduct binding on Investment Firms.

48.12. Latvia

Commercial Law, Credit Institution Law and Financial Instrument Market Law (hereinafter – FIML) of Latvia is applicable for establishment and operation of intermediaries.

48.13. Lithuania

In respect of the second-tier intermediaries, an enterprise must obtain the license in order to be engaged in the following investment services in Lithuania: (1) reception and transmission of orders in relation to securities; (2) execution of orders to acquire or transfer securities for clients'/ own account; (3) management of clients' securities portfolios according to individual orders placed by the clients; (4) underwriting on the basis of a firm commitment (guaranteeing the sale of securities) or best efforts (not giving such a guarantee); (5) custody, accounting, and administration of securities; (6) crediting the client to allow him to carry out a transaction in securities, where the creditor is involved in the transaction; (7) consulting on issues of investment into securities. Certain entities and individuals are excluded from this licensing requirement, including insurance companies, the BoL, the European Central Bank and central banks of the EU Member States and/or institutions performing management of the State debt as well as financial and business news announced to an unlimited number of persons by mass media are not treated as investment advise concerning securities. Management and custody of securities portfolios of pension funds are allowed only to entities having license issued by the LSC in accordance with the provisions of respective legal acts. Commercial banks may provide investment services according to their general banking license issued by the BoL; however, the banking license entitles to provide investment services only if the LSC gives a positive opinion on the readiness of the commercial bank to provide investment services. The Law on Securities Market also provides for cases when certain activities, although formally falling within the definition of the "investment services", are not subject to the licensing requirement.

Brokerage firms (Intermediaries) are subject to capital adequacy requirements as well.

The CSDL is a public limited company that acts under the Law of Securities and its Articles of Association. Only the Republic of Lithuania, the BoL, credit institutions, financial brokerage firms, insurance firms, investment companies, and their management enterprises, pension funds and their management enterprises, stock exchanges, and central depositories licensed in the Republic of Lithuania, a Member State of the European Union or a state which has opened official negotiations concerning its membership of the European Union may be shareholders of the CSDL. The CSDL may issue only ordinary registered shares.

48.14. Luxembourg

Under Luxembourg law almost all activities in the financial sector are regulated and subject to a specific licence.

Intermediaries may either operate as a credit institution, an investment undertaking, as a professional depository of securities or other financial instruments or as an operator of a securities settlement system. Professionals in the financial sector may be licensed for more than one category. In either case they are subject to the supervision of the *Commission de Surveillance du Sector Financier (CSSF).*

48.15. Hungary

Act 120 of 2001 on the capital market (Capital Market Act);

Act 112 of 1996 on credit institutions and financial enterprises.

[to be completed further]

48.16. Malta

The investment services act, 1994 (chap. 370 of the laws of Malta) applies to custodians and other intermediaries who hold assets while rendering an investment service.

The trusts and trustees act applies to trustees holding securities for customers.

A person authorised as a trustee not rendering an investment service does not need another isa licence.

48.17. Netherlands

As explained under the answer to Question (42), although the mere providing of custody services is an unregulated activity under Netherlands law, it is virtually impossible to provide custody services, without also attracting monies from the public, or performing the activities of a securities broker. Where securities brokers, that do not qualify as a credit institution, are not allowed to maintain securities or cash for their clients, but are required to have their clients enter into a relationship with a credit institution with a view hereto, Netherlands regulatory law seems to imply that intermediaries are to be licensed or passported as a credit institution in order to be allowed to conduct activities in the Netherlands. This seems the more so, since the segregation requirements set out in the answer to (41) in fact pertain to a credit institution involved in the custody business.

For an intermediary to qualify as a credit institution i.e. an institution which attracts funds repayable on demand from the public, it must comply with the Credit System Supervision Act (*Wet toezicht kredietwezen 1992*). According to this Act a credit institution is to be licensed by the Netherlands Central Bank, or passported by the competent supervisory authority from a Member State (reference is made to the answer to Question 42). All credit institutions which are licensed under Netherlands law or passported are registered. The Netherlands Central Bank, DNB, will supervise the compliance of licensed credit institutions with the requirements for that license. This supervision will, amongst others, include monetary, capital adequacy, liquidity, administrative organisation and structural supervision. All of these forms of supervision give rise to reporting obligations, and, in some cases, enable the Netherlands Central Bank to issue binding directives to the credit institution. With respect to structural supervision it is important to note that credit institutions are to obtain a certificate of no objection before altering the structure of the institution. A third party must also obtain a certificate of no objection if it intends to obtain a qualified shareholding (of 10%) in a credit institution.

For good orders' sake, securities brokers must comply with the Securities Trade Supervision Act (*Wet toezicht effectenverkeer 1995*), and be licensed by the Netherlands Securities Supervisory Authority, the AFM, or passported by the competent supervisory authority from a Member State. The AFM especially supervises requirements regarding market conduct such as expertise and reliability, management and information provision.

With respect to the regulations of maintaining positions regarding securities by way of book-entry (i.e. segregation requirements) reference is made to the answers under Question (41). Netherlands law segregation requirements oblige investment firms – including credit institutions which provide investment services – to make adequate arrangements for securities belonging to investors with a view to safeguarding the latter's ownership rights, especially in the event of the investment firm's insolvency. The arrangements to be made may differ depending on the regulatory status of the relevant institution. As regards investment firms which are not also credit institutions, it is required that investor's securities be maintained in a securities account with a credit institution. With respect to credit institutions the following protective measures may be regarded as providing adequate protection: (1) if the securities are designated as securities within the meaning of the Netherlands Giro Securities Transfer and Administration Act and the credit institution has been admitted as a affiliated institution ("*aangesloten instelling*") by Euroclear Netherlands, insofar as the relevant securities are held, administered and transferred pursuant to the Netherlands Giro Securities Transfer and Administration Act; and/or (2) if the securities are held in custody for clients of the credit institution by a depositary company which is independent of the credit institution and does not engage in any activities which are not directly related to the business of safekeeping securities (and therefore does not assume any additional commercial risk). Furthermore, other arrangements may satisfy the Netherlands segregation requirements if such other arrangements in the opinion of the Netherlands Securities Supervisory Authority, the AFM, offer sufficient safeguards.

48.18. Austria

Intermediaries (account providers) fall under the regulations applicable to banks, since safekeeping and administration of securities for others ("deposit business") is listed as no. 5 in section 1 para 1 Banking Act as one of the many business

activities of banks. The rules of the Banking Act for banks maintaining securities and cash accounts apply as well as the General Business Conditions of the respective bank (see attachments for an example). There are no particular rules relevant for cooperation with other account providers.

48.19. Poland

Intermediaries may operate in Poland in the area of publicly traded securities provided that they are appropriately licensed to conduct this kind of operation. The right to conduct such operation may be based on a brokerage license, or a license to keep securities account issued by the Polish Securities and Exchange Commission [*Komisja Papierów Wartościowych i Giełd, KPWiG*]. The only institutions which are not required to obtain a license issued by the Polish Securities and Exchange Commission for providing brokerage services are investment firms and credit institutions whose registered office or main office is in another EU Member State and which provide in such country or countries brokerage services on the basis of a license issued by the relevant regulatory body (the only applicable requirement is that the Commission is appropriately notified of the intention to launch this kind of operation in Poland.)

The [Polish] Act of August 21, 1997 on public trading in securities [*Ustawa z dnia 21 sierpnia 1997 r. – Prawo o publicznym obrocie papierami wartościowymi*] and its implementing provisions provide for the terms and conditions on which brokerage services may be provided in Poland and specify the responsibilities of intermediaries who provide such services. In the case of intermediaries based in Poland, the provisions stipulate their customer-service responsibilities related to providing brokerage services, keeping securities accounts and entering into transactions, obligations related to the financial, technical and organisational framework for the provision of brokerage services, the obligation to employ a sufficient number of licensed securities brokers and investment advisors, reporting requirements, etc. In addition, the provisions of the Act establish rules governing the acquisition of large blocks of shares of Polish intermediaries.

Foreign intermediaries providing brokerage services in Poland are obliged to operate in compliance with the relevant provisions of the Polish law, it being noted that some of the requirements applicable to Polish intermediaries do not apply to foreign intermediaries. Foreign intermediaries providing brokerage services on the basis of a license issued by the Polish Securities and Exchange Commission through a branch office established in Poland are subject to almost identical operational requirements as Polish intermediaries. Foreign intermediaries which provide brokerage services on the basis of a license issued by the Polish Securities and Exchange Commission but did not decide to establish a branch office are subject to slightly less rigid terms (in particular, the provisions of the Polish law establishing financial, technical and organisational framework for the provision of brokerage services do not apply to them; in this respect, they are subject to the requirements imposed by their respective jurisdictions.) Intermediaries providing brokerage services on a "single passport" basis are obliged to comply with the requirements applicable in the country of their registered office, as well as the provisions of the Polish law imposing customer-service responsibilities related to providing brokerage services, keeping securities accounts and entering into transactions, and, if they operate in Poland through a branch office, the requirement to employ a sufficient number of securities brokers and investment advisors.

A brokerage license issued by the Polish Securities and Exchange Commission may be annulled at the request of the person concerned or cancelled by the Commission in cases specified in statutory provisions (a material violation of the law by the intermediary, failure to comply with the provisions establishing the framework for providing brokerage services, etc.); a license may also expire by operation of law, in particular if winding up procedure is commenced or if the intermediary is declared bankrupt. In the case of an intermediary operating on a "single passport" basis, the Commission, having concluded that the intermediary violates provisions of the Polish law, may prohibit the intermediary from operating in Poland after having previously called on the intermediary to cease violations and after having notified the intermediary's respective regulator accordingly.

48.20. Portugal

The main rules applicable to the existence, establishment and operation of the intermediaries are the ones established by the Credit Institutions and Financial Companies Regime and by articles 295.º to 304.º of the Portuguese Securities Code.

There are no specific rules on cooperation between Financial Institutions.

48.21. Slovenia

As explained in more detail in Answer to Q1 (under heading: The basic legal concept of dematerialised securities), the concept of “final client level” type of dematerialisation has been applied by the Dematerialised securities Act (ZNVP). By that concept the holder of the securities, registered on his account of dematerialised securities (i.e. “on whose behalf dematerialised securities are entered in the central registry”), is at the same time legal (and beneficial) holder (“owner”) of those securities (Art. 16 of ZNVP). Therefore all end clients’ accounts are maintained directly in the central registry. See also answer to Q3 for further details.

Due to the concept of “final client level” dematerialisation as described above, intermediaries in the meaning of a legal person holding dematerialised securities on behalf of another person (as another person’s fiduciary, depository or custodian) do not occur.

They are being “replaced” by KDD registry members. A KDD registry member is an investment firm (in the meaning defined in Article 4 of the Directive for Markets in Financial instruments 2004/39/EC) that renders (investment) services of dematerialised securities’ account maintenance. See answer to Q49 for further details.

Investment services of dematerialised securities’ accounts maintenance are regulated by the provisions of the Securities Market Act (ZTVP-1), which in chapter 7 regulates legal relationship (rights and obligations) between a holder and an investment firm that maintains holder’s dematerialised securities accounts.

48.22. Slovakia

Operations of intermediaries – in terms of intermediaries as entities authorized to provide securities accounts - are ruled by the Act, mainly by §104 and §105 and by Operational Rules of the CSD. According to the Act §104 par.1, for members of the CSD can be accepted only entities licensed as securities dealers (including banks with such licence), both domestic and foreign, National bank of Slovakia, Debt and

Liquidity Management Agency, other depository and foreign depository. Applicants in these categories can be granted the membership in securities depository if they have fulfilled membership criteria set by the Operational Rules of the CSD.

There are no written rules on official co-operation between members of the CSD although the Act contains some provisions that constitute possibility for co-operation of CSD members.

48.23. Finland

A participant may join the APK's system as a clearing party (clearing and settlement system), as an account operator or as an agent of an account operator (book-entry system).

A clearing party has the right to clear and settle transactions in the respective system on behalf of itself or its customers, while an account operator has the right to enter registrations and execute transfers of securities in the dematerialised book-entry system. Agents of account operators have also the right to perform these tasks, but they operate at the risk of the respective account operator.

The participant shall have a valid licence in Finland regarding the investment services offered by the participant or a corresponding licence in another state belonging to the European Economic Area. In practice, the participant shall be licensed as a bank or an investment firm under the respective Directives. An applicant from outside of the European Economic Area or not licensed as a bank or an investment firm may be granted participation rights only on the specific terms and conditions prescribed case-by-case by the Ministry of Finance.

The admission criteria and process for clearing parties is governed in Chapter 4a, Section 8 of the Securities Markets Act. The admission of account operators and agents is regulated in Sections 7 and 7a of the Act on the Book-Entry System, respectively. More detailed requirements are set in APK’s Rules.

Before an application relating to the rights of a clearing party, an account operator or its agent may be accepted, the applicant shall demonstrate that the following general preconditions are met:

a. The applicant must have a valid concession that permits the operations to be carried out in the relevant system of APK.

b. Taking into account the scope of operations, the applicant must have adequate technical and financial conditions to participate in the operations referred to in the application and to meet the obligations resulting from it.

c. At least two of the persons responsible for the applicant's administration as well as two of the persons responsible for the registration and clearing operations must have adequate knowledge of the registration and clearing operations as well as of the relevant system of APK.

d. The applicant must have adequate personnel for the operations referred to in the application that has specialised in the operations of the relevant system of APK.

e. The applicant must be capable of operating in IT connection with the relevant system of APK.

f. Participation of the applicant in clearing and registration operations must not be likely to jeopardise the reliability or expediency of APK's book-entry or clearing system or other operations.

g. An organisation applying for the rights of a clearing party, an account operator or an agent must undertake to comply with APK's Rules and the Decisions issued based on the Rules.

In addition to the provisions of the Securities Markets Act and the acts relating to the book-entry system, APK's Rules govern the operations and relationship of an intermediary towards other intermediaries and towards APK.

48.24. Sweden

The main rules for securities intermediaries are in the Securities Operations Act (1991:981). Special rules for exchange and clearing memberships are found in the Securities Exchange and Clearing Operations Act (1992:543) and for account operators and nominees in chapter 3 of the Financial Instruments Accounts Act.

Chapter 3. Account Operators and Nominee Registration

Account Operators

Section 1. A central securities depository may engage as an account operator the Central Bank of Sweden and the Swedish National Debt Office and legal persons possessing sufficient financial strength and technical and legal expertise and which are otherwise suitable to carry out registration measures in Swedish CSD registers at the central securities depository.

Section 2. An account operator may undertake registration measures on its own behalf.

A central securities depository may authorise the following legal persons to undertake, as account operators, registration measures on behalf of third parties:

1. *the Central Bank of Sweden and other central banks;*

2. *Swedish and foreign clearing organisations;*

3. *central securities depositories and foreign undertakings which are authorised in their home countries to conduct operations which are comparable to central book-entry systems; and*

4. *securities institutions and foreign undertakings which are authorised in their home countries to conduct securities operations.*

The foreign undertakings referred to in the second paragraph, subsections 2-4 must be subject to satisfactory supervision in their home country by a governmental authority or other competent body.

Section 3. Where the central securities depository approves an account operator, the securities depository shall apply the following principles:

free access, pursuant to which each and every person who fulfils the requirements imposed by this Act and the central securities depository shall be approved as an account operator; and

neutrality, pursuant to which the rules imposed by the central securities depository are formulated and applied in a uniform manner.

Section 4. An account operator shall provide the central securities depository with any information required in order to fulfil its obligations pursuant to this Act or other legislation.

Section 5. Where an account operator no longer fulfils the requirements set forth in section 1, the central securities depository shall revoke such operator's entitlement to act as an account operator.

A central securities depository may also make a determination referred to in the first paragraph where an account operator, notwithstanding a demand by the central securities depository, fails to provide the information referred in section 4.

Section 6. Account operators which are not subject to the supervision of the Swedish Financial Supervisory Authority or comparable supervision in their home country are obligated, upon demand, to provide the Supervisory Authority with information concerning the operations as an account operator.

Where an account operator fails to fulfil its obligations pursuant to the first paragraph, the Swedish Financial Supervisory Authority may order the institution to provide the information demanded.

Nominee Registration

Section 7. A central securities depository may grant to such legal persons as are referred to in section 2, second paragraph the right to be registered as nominees in respect of financial instruments. In such cases, the principles set forth in section 3 shall apply.

A consent to registration as a nominee may be made subject to special conditions to ensure the interests of the public and individuals. A consent may be revoked by the central securities depository where the conditions of the consent have been disregarded and the deviation is material, or where the conditions for the consent are otherwise no longer fulfilled.

Section 8. A nominee must maintain one or more Swedish CSD book-entry accounts for the financial instruments managed by the nominee.

Section 9. A Swedish CSD book-entry account for nominee-registered financial instruments must set forth information regarding:

5. *the nominee's company name, company number or other identification number, and mailing address;*

6. *a notice that the instruments are managed on behalf of a third party;*

7. *with respect to shares, the information referred to in Chapter 4, section 18, first paragraph, subsections 1-5, and the second paragraph; and*

8. *with respect to debt instruments, the information referred to in Chapter 4, section 19.*

Section 10. The provisions of Chapter 6 shall apply to nominee-registered financial instruments.

The provisions of Chapter 6, sections 1 and 4 with respect to the party who is registered as owner on a Swedish CSD book-entry account shall, however, instead apply to the nominee.

In the event the nominee is notified that a financial instrument has been transferred or pledged, such shall have the same legal effect as if the transfer or pledge had been registered in a Swedish CSD register.

Section 11. A financial instrument which has been pledged or subject to levy of execution may not be nominee-registered without the consent of the pledgee or Swedish Debt Enforcement Service respectively.

Section 12. Upon demand by the central securities depository, a nominee shall provide information to the securities depository with respect to the shareholders whose shares are managed by him. The information shall include the shareholders' names, personal identification numbers or other identification numbers, and mailing addresses. The nominee shall, in addition thereto, state the number of shares of different classes owned by each shareholder. The information shall relate to the circumstances at the time determined by the central securities depository.

Upon request by a Swedish CSD registered company, the central securities depository shall demand the submission of such information regarding the company's shareholders as referred to in the first paragraph.

Swedish CSD registered companies are entitled to access at the central securities depository information which has been provided in respect of the company's shareholders.

Where special cause exists, the Swedish Financial Supervisory Authority may grant a nominee an exemption from the obligation to provide information pursuant to the first and second paragraphs.

Section 13. The central securities depository shall maintain in respect of each Swedish CSD registered company a list of the shareholders holding more than five hundred nominee-registered shares in the company. The list shall contain the information set forth in section 12, first paragraph. A printout of the list shall be made available to the general public at the company's headquarters and at the central securities depository. The printout may not be older than six months. Any person shall be entitled, in consideration of payment for the costs therefor, to obtain a printout of the list from the central securities depository.

48.25. United Kingdom

Intermediaries offering custody services in the UK generally require authorization under the Financial Services and Markets Act 2000. Once authorized, such intermediaries are required to comply with the rules of the FSA applicable to such services, in particular those set out in CASS. See the answer to question 4 above.

49. QUESTION NO. 49: WHO IS ENTITLED TO MAINTAIN SECURITIES ACCOUNTS? DOES THE HOLDING OR TRANSFER OF SECURITIES ON BEHALF OF OTHERS REQUIRE ANY LICENSE OR ANY OTHER AUTHORISATION FROM A PUBLIC AUTHORITY?

49.1. Belgium

Maintenance of securities account in general is not restricted to a specific class of intermediaries or subject to a specific authorisation or licence. Pursuant to article 24 of the Law of August 2, 202 on the supervision of financial markets, Belgian investors must use a qualified intermediary (banks, investment firms established in Belgium or acting under European passport) to carry out transactions involving securities issued by a Belgian issuer and traded on a regulated market . This rule would however not cover the sole maintenance of securities account as such which is unregulated. Under Royal Decree n° 62, only settlement institutions as designated by the King (CIK, Euroclear Bank, NBB clearing system) and their participants (generally financial institutions but also some "corporates") can hold securities account (see answer to question 1) . For public debt securities in dematerialised form deposited with NBB clearing system and under the future regime of dematerialised securities for private issuers (see answers above on the draft bill recently adopted by the Belgian Parliament (November 2005)), only designated account keepers (credit institutions and investment firms having their head office or a branch located in Belgium) may hold accounts for that type of securities.

49.2. Czech Republic [to be completed]

49.3. Denmark

Only an account manager (= usually a bank with a special license to manage securities accounts) is entitled to hold or transfer securities in VP on behalf of individual investors (Securities Trading Act Art 62). An account manager is not considered an intermediary.

There are no specific requirements for acting as an intermediary (other than a CSD). In principle anyone can act as intermediary between the VP and the ultimate investor (but of course the intermediary must use an account manager in relation to the omnibus account).

49.4. Germany

As already described in the answer to Q 48, maintaining and administering safe custody accounts for others in a professional manner is a banking business pursuant to Section 1 para. 1 No 5 and therefore requires a banking license. In practice, the maintenance of securities accounts is not an isolated business but is coupled with other activities that are also considered to be banking activities that also require a license, such as the purchase and sale of financial instruments according to No 4 of said provision, the extension of credit to finance such purchase according to No 2 of said provision and the carrying of accounts and the acceptance of funds according to Section 1 para. 1 No 1 of the German Banking Act.

49.5. Estonia

49.5.1. Securities accounts opened in the Central Register

Securities accounts opened in the Central Register are maintained and processed by the Estonian CSD upon:

i. Instructions (e.g. DVP instruction/ FOP delivery instruction, instruction for the registration of a pledge) forwarded to the Estonian CSD by account operators* (i.e. the Estonian CSD has no contractual relationship with the owner of the securities account); and

ii. Applications (e.g. application for the registration of additional shares) of issuers.

* The following persons may apply for the status of account operator:

a) Estonian investment firms;

b) Estonian Credit institutions;

c) The Bank of Estonia;

d) Investment firms and credit institutions registered in a Member State of the European Union;

e) Professional securities market participants registered in a country, which is not a Member State of the European Union but with which the Republic of Estonia has an agreement of mutual legal assistance.

Investment service providers and credit institutions are entitled to open nominee accounts in their name and maintain records about their clients (later is conducted by way of maintaining respective accounts for clients).

49.5.2. Accounts outside the Central Register

Safe custody services (i.e. holding securities for the client) are generally treated as non-core investment services, which may be provided as a permanent activity only by:

i. an investment firm

ii. a credit institution or a branch of a foreign credit institution

iii. a fund management company to the extent prescribed in the Investment Funds Act

iv. other persons and agencies specified in § 42 and (1) of § 47 of the SMA.

49.6. Greece

As explained under 44, both the BoGS Operating Regulation (par. 3.1.) and the DSS Operation's Regulation (article 1) include provisions, from which it is derived that entities which are not credit institutions, investment firms or specifically regulated CSDs cannot carry the capacity of a participant / operator of accounts held with the said systems, i.e. the BoGS and the DSS.

49.7. Spain

Any investment firm or credit entity that obtains the authorisation referred to in answer to question 48. This activity may be conducted by EU intermediaries under the "EU passport" regime set forth in articles 31 et seq. of Directive 39/2004/CE. Non-EU based intermediaries are required to obtained the relevant administrative authorisation.

According to article 22 of Ministerial Order of 28 May 2001, on foreign investments, non-residents acquiring securities traded in Spanish Markets have to maintain their securities accounts in entities that are participants in IBERCLEAR or the settlement system of the relevant market. If a non-resident entity wants to provide this service in Spain, it has to file a declaration and register itself in the relevant Registry for foreign investment purposes.

49.8. France

Only the entities referred to in Article L. 541-2 of the M&FC are entitled to maintain securities accounts:

1. issuers ;
2. credit institutions established in France;
3. investment firms established in France;
4. legal entities whose members or partners are indefinitely and jointly liable for their debts and commitments, provided that those members or partners are institutions or companies referred to in 2° and 3°;
5. legal entities established in France whose only or principal purpose is to maintain securities accounts (subject to licensing by the Comité des Etablissements de Crédit et des Entreprises d'Investissement);
6. the institutions referred to in Article L. 518-1 of the M&FC, i.e. the Treasury (Trésor public), Banque de France, financial services of La Poste, Caisse des Dépôts et Consignations, Overseas Monetary Institution (Institut d'Emission d'Outre-Mer) and the Monetary Institute for Overseas Departments (Institut d'Emission des Départements d'Outre-Mer) ;
7. within the limits of the AMF General Rules, credit institutions, investment firms and legal entities whose only or principal purpose is to maintain securities accounts, not established in France.

The persons referred to in 1° are subject to the supervision of the AMF which may also impose sanctions.

The persons referred to in 2° to 5° are subject to duties, control and sanctions rules similar to those applicable to investment services providers.

The persons referred to in 2° and 3° are subject, for carrying out custody activities, to a specific approval comprised in the licence they previously obtained.

The persons referred to in 5° are subject to the authorization rules applicable to investment firms.

The entities mentioned in 7° must be submitted in their country to operating and supervisory rules equivalent to those applicable in France.

These entities are subject to the supervision of the AMF which may also impose sanctions. However, the AMF takes into account the supervision exercised by supervisory authorities in each country.

Pursuant to Article L. 621-7-VI-1° of the M&FC, the AMF General Rules do determine the conditions of exercise of the operations of maintenance and custody of financial instruments.

The AMF General Rules (Art. 332-1 to 332-102) regulate (i) the conditions under which the activity of custody is exercised (e.g. rules of ethics, liability,…) and (ii) the rules to be complied with in respect of maintenance of securities accounts (accounting rules, principles of segregation, …).

49.9. Ireland

See our responses to question (48) above.

49.10. Italy

The following entities are eligible to maintain securities account with the Italian CDS:

a. banks (Italian, EU and non-EU);
b. investment firms (Italian ('SIMs'), EU and non-EU);
c. Società di Gestione del Risparmio, i.e., asset management companies authorised to provide investment management services on a collective basis (i.e., investment funds), or portfolio management services on a separate-account basis (i.e., segregated accounts);;
d. registered "agenti di cambio" (individual stock brokers);
e. issuers of financial instruments admitted to the CDS and their parent companies;
f. the Bank of Italy;
g. foreign CDS;
h. the managers of clearing, settlement and guarantee systems subject to regulated by Italian supervisors;
i. financial intermediaries enrolled in the register provided under Article 107 of the Banking Law, regarding the provision of placement services (with or without firm or standby commitments);
j. Poste Italiane S.p.A.;

k. Cassa Depositi e Prestiti;

l. the Italian Treasury;

m. the managers of foreign clearing, settlement and guarantee systems for financial instruments, provided they are deemed to be subject to an equivalent level of supervision as Italian undertakings.

With the exception of (e) above, holding and transfer activities related to the system are reserved for licensed entities.

49.11. Cyprus

The licensing regime described in answer (48) above is applicable.

49.12. Latvia

According with the FIML the holding of the securities is ancillary (non- core) investment service and execution of investors' orders regarding transactions in financial instruments for the account of investors or third parties is an investment service. As it's provided by FIML an investment brokerage firm shall not be entitled to receive the licence solely for the provision of ancillary (non-core) investment services. In the Republic of Latvia, investment services shall be provided exclusively by investment brokerage firms and credit institutions. A credit institution shall mean a bank and a branch of a foreign bank registered in the Republic of Latvia and a credit institution registered in a member state.

An investment brokerage firm shall mean an investment brokerage firm registered in the Republic of Latvia, branch of investment brokerage firm of foreign countries and investment brokerage firm registered in member states.

49.13. Lithuania

The intermediaries and the CSDL are entitled to open and manage personal securities accounts. The CSDL also is entitled to open and manage general securities accounts for the intermediaries.

The holding or transfer of securities on behalf of others is licensed (please, refer to answer to the question 48).

49.14. Luxembourg

The law regulates persons that hold securities on deposit from either the public or from professionals of the financial sector. Such persons are subject to license essentially in accordance with the law of 5 April 1993 on the financial sector, as amended.

49.15. Hungary

Investment service providers, credit institutions and financial enterprises are entitled to maintain securities accounts, who need license from the Hungarian Financial Supervisory Authority.

49.16. Malta

Persons licensed under the investment services act, 1994 are entitled to maintain securities accounts if they are authorised to hold clients' assets.

Also, credit institutions licensed under the banking act, 1994 (chap. 371 of the laws of malta) may, if their licence so permits them, maintain securities accounts.

Trustees authorised under the trusts and trustees act may hold securities for clients.

The holding or transfer of securities on behalf of others does not *per se* require any licence under recently revised company laws.

49.17. Netherlands

As may be derived from the answer to Question (48), investment firms which do not qualify as credit institutions are required to have investor's securities maintained in a securities account with a credit institution, in order to comply with segregation requirements. Assuming once again that the maintenance of a securities account is virtually impossible without the operation of a cash account, a securities account can therefore only be maintained by a credit institution. Under Netherlands law, such institution is to acquire a license or passport (reference is made to the answer to Question (39)). As for license requirements, no difference should be made between the holding or transfer of securities for itself or on behalf of others.

49.18. Austria

See answer to question (48).

Operating a bank requires a licence by the Financial Markets Authority pursuant to the Banking Act.

49.19. Poland

In principle, a license issued by the Polish Securities and Exchange Commission is required for the keeping of securities accounts in Poland. The only institutions which are not required to obtain licenses issued by the Polish Securities and Exchange Commission for the keeping of securities accounts are investment firms and credit institutions whose registered office is in another EU Member State, who hold licences to keep such accounts issued by regulatory bodies in the countries of their registered office and who keep such accounts in such countries, in which case the requirement is that the Polish Commission must be notified of the institution's intention to keep securities accounts in Poland by the relevant foreign regulatory body, it being understood that securities accounts must be kept in compliance with the Polish law.

49.20. Portugal

Under Portuguese Law, securities accounts may be maintained by credit institutions and investment firms authorised to provide financial intermediation services in Portugal. Issuers may also under certain circumstances hold securities. Credit institutions and investment firms are authorised by the Bank of Portugal and the CMVM. Only financial intermediaries are allowed to perform, on a professional basis, financial intermediation activities.

49.21. Slovenia

In order to be able to provide services of securities accounts maintenance an investment firm shall become a KDD registry member. Registry membership enables the member to maintain dematerialised securities accounts directly (by on line access) in the central registry.

Maintenance of securities accounts for clients (i. e. third parties) is considered as providing (ancillary) investment services to third parties according to the Directive

for Markets in Financial instruments 2004/39/EC. Such services may only be provided to third parties (clients) subject to prior authorisation by competent authority according to Art. 5 of

49.22. Slovakia

Securities accounts for beneficial owners are opened and maintained only by members of the central securities depository and for certain entities listed by the Act, these accounts can be opened and maintained directly by depository. Depository and its members are entitled to hold and transfer securities registered on accounts they administer what is a part of their activity stipulated by the Act. There are several categories of entities that might become the member of the CSD including securities dealers or banks with a licence of securities dealer. Licence to provision of investment services (for domestic and non-EU securities dealers) and licence to establish and operate securities depository are granted by the Financial Market Authority ("FMA"), entity that regulates the capital market in Slovakia. Securities dealer applicants for membership in depository, prior to their application, are required to obtain a previous consent of Financial Market Authority with their activities of the CSD member.

49.23. Finland

The book-entry register including all book-entry accounts is maintained by the central securities depository, i.e. APK. As explained in 48 above, APK gives rights to account operators and agents to operate the accounts and enter registrations to the accounts. APK may give the rights of an account operator to the following organisations:

- the State of Finland;
- the Bank of Finland;
- a stock exchange;
- a derivatives exchange; as well as
- a bank; and
- an investment firm.

Outside the book-entry system custody of securities is governed by the general provisions applicable to banks and investment firms. Pursuant to Section 2b of the Credit Institutions Act (1607/1993), a bank may trade in securities and provide securities services. Respectively, an investment firm may, under the conditions set in its licence, provide safekeeping and administrations services relating to securities pursuant to Section 16, Subsection 1, Paragraph 5 of the Act on Investment Firms (579/1996). These services are construed to include custody and transfer of securities on behalf of others.

49.24. Sweden

As stated before, every person, foreign or domestic, can have a CSD-account.

Regarding the rules for account operators and nominees in the book-entry system see chapter 3 of the Financial Instruments Accounts Act and question 42 and 4t. To

maintain or transfer securities on behalf of others requires normally authorisation from the Swedish Financial Supervisory Authority or if it is a foreign company active in Sweden from another member state a notification to the Financial Supervisory Authority.

49.25. United Kingdom

See the answer to question 48 above.

50. QUESTION NO. 50: IS THE ACCESS OF INVESTORS TO INTERMEDIARIES IN ANOTHER MEMBER STATE AFFECTED BY THEIR ACCESS TO CENTRAL BANK MONEY AND, IF SO, HOW?

50.1. Belgium

Access of investors to intermediaries at large is not dependent to investors' access to central bank money , nor to intermediaries' access to central bank money since the latter (for example an investment firm) can use another intermediary acting as cash clearer, including for holding and transferring (on behalf of clients) securities positions with a CSD. As a result, the lack of direct access to CeBM implies in turn a mandatory intermediation.

50.2. Czech Republic [to be completed]

50.3. Denmark

Private investors whose securities holdings are maintained by an intermediary from an another Member State are not required to have access to central bank money. As central bank money is the only settlement asset used in the VP settlement, the foreign intermediary must be able to provide access to central bank money, either directly or indirectly through a bank with direct access. The same applies for a direct participant in the clearing and settlement in VP.

50.4. Germany

A German investor is free to choose its intermediary in another Member State. Access to central bank money has no bearing on that possibility. It is a different question, whether the *foreign intermediary* or *foreign law* requires the investor to have access to central bank money. For retail investors and their (non-CSD) custodian banks, this appears to be unlikely. As regards participants of a CSD, it is conceivable that CSDs require their participants to have access to central bank money as CSDs are encouraged to settle in central bank money (e.g. in the CPSS-IOSCO Standards).

50.5. Estonia

To date, access to central bank money is not available for foreign investment firms and credit institutions. That may indirectly reduce their competitive position compared to local service providers who have the access.

50.6. Greece

Greek Law does not include provisions affecting the access of investors to central bank money and, therefore, impeding the access of these investors to intermediaries (account providers) in another Member State.

50.7. Spain

Due to ECB and Banco de España regulations, remote participants in IBERCLEAR would not have available credit facilities in Central Bank Money. Therefore they prefer to domicile their cash settlements in the cash accounts of other resident participants, i.e. credit entities established in Spain (incorporated in Spain or through a Spanish branch) that have the necessary arrangements in place with the Banco de España.

50.8. France

No.

50.9. Ireland

No.

50.10. Italy

All Euro-denominated transfers related to DVP transactions settled through DVP services are carried out in central bank money with central bank funds in the cash accounts held by participants in BI-REL, the real-time gross settlement system for funds managed by Banca d'Italia. Monte Titoli provides DVP settlement by means of a real-time straight through-processing (STP) platform linking Monte Titoli's securities accounts to Banca d'Italia's cash accounts.

In Italy, final funds transfers are made with central bank funds through the BI-REL system.

Foreign intermediaries may open either a direct account with BI-REL (thus being entitled to receive intra-day liquidity) or an indirect account (through a direct account holder). An exception to the general rule, foreign intermediaries authorised/licensed to operate in Italy under freedom of establishment and/or to provide services may open both types of accounts concurrently.

50.11. Cyprus

There is no such relationship.

50.12. Latvia

No.

50.13. Lithuania

Directly no. Access to central bank money might be triggered in case monetary funds were transferred through payment system LITAS operated by the BoL. In the latter case investor's intermediary would have maintain direct or indirect link with payment system LITAS. In case of direct link, the BoL opens current accounts for intermediaries meeting the criteria approved by the Board of the BoL. Final investors are not allowed to become participants of payment system LITAS; therefore in any case investors may have only indirect access to the central bank through their intermediary's account.

50.14. Luxembourg

No, Luxembourg law does not provide for any distinction as to investors having access to central bank money or not.

50.15. Hungary

No.

50.16. Malta

No.

50.17. Netherlands

The access of investors to intermediaries in another Member State is not affected by their access to central bank money from a Netherlands law perspective. However, foreign law may require investors to have access to central bank money.

50.18. Austria

No.

50.19. Poland

Access of a foreign intermediary to central bank money is not a legal pre-condition for its operation in Poland, including the provision of services to investors. However, due to the fact that the settlement of transactions entered into as part of public trading in securities in Poland, as well as the payment of monetary obligations resulting from securities admitted to public trading in Poland, are made through bank accounts kept with the National Bank of Poland, the regulations relevant to the National Depository for Securities acting in the capacity of an upper-tier securities depository and a clearing house impose on the participants of the depository-settlement system organised by the National Depository an obligation to specify, for the purposes stated above, a bank account kept with the National Bank of Poland.

Where a participant in the system has failed to open an account with the National Bank of Poland, it may specify another participant's bank account kept with the National Bank of Poland, provided that such other participant has consented to using the account in such a manner. This solution is an obligatory one for all domestic intermediaries, which, not being banks, do not have the capacity to open bank accounts with the National Bank of Poland.

50.20. Portugal

The access of investors to intermediaries in another Member State is affected by the situation of the intermediary, namely whether such intermediary is a member of the centralised system or not.

In what concerns the access to central bank money, please note that in order for an intermediary to be a member of the centralised system it must open a financial settlement account with the Bank of Portugal.

50.21. Slovenia

The access of investors from another Member State to KDD registry members (i.e. »intermediaries« that provide services on dematerialised securities accounts' maintenance) is not affected by their access to central bank money.

50.22. Slovakia

Domestic and foreign investors can use in Slovakia commercial bank money in order to settle their financial obligations they might have from securities trading or custody.

50.23. Finland

The access of the Finnish investors to foreign intermediaries is not legally affected by the intermediaries' access to central bank money. Intermediaries who wish to

operate as clearing parties in APK's system shall notify APK of a monetary account in the TARGET system of the European Central Bank in which the payments to the clearing party are to be made. If a clearing party does not have its own account in the TARGET system, it must arrange payment transactions with a party whose account the clearing party notifies to APK. This requirement is applied to all clearing parties irrespective of their location.

50.24. Sweden

No.

50.25. United Kingdom

No.

51. QUESTION NO. 51: DOES AN ACCOUNT AGREEMENT HAVE TO COMPLY WITH ANY REQUIREMENTS AS TO FORM OR CONTENT?

51.1. Belgium

No but in practice, also for evidence purposes, all securities agreement are in written form and do contain usual provisions for this type of agreement, in particular the submission to the fungibility regime and the application of Royal Decree n° 62.

51.2. Czech Republic [to be completed]

51.3. Denmark

In accordance with Art. 60 of the Securities Trading Act, VP shall lay down rules which ensure that all parties involved are treated equally. Thus the participation agreements between the account managers and VP are standard agreements varying only with the account managers choice of functionality, link-up and etc.

As the account manger is not considered an intermediary, the actual account relationship is between the VP and the account holder. The agreement between these parties does not have to meet any specific requirement (as the account holder instructs the VP through the account manager it could even be argued that there is no agreement between the VP and the account holder but merely an account relationship).

51.4. Germany

As regards to form, no specific form is required by law, but in practice, all account agreements are entered into in written form. As to substance, account agreements, like all other contractual agreements are subject to the rules on general terms and conditions as contained in Section 305 seq. of the German Civil Code, as custodian banks will (as a rule) use pre-formulated contracts. Certain instructions of the (retail) investor require a written instruction to the intermediary (such as the authorisation of the intermediary to use customer assets for certain defined collateral purposes), Section 12 to 13 of the Securities Deposit Act.

51.5. Estonia

51.5.1. "Internal accounts" maintained by the owner of a nominee account

Yes, pursuant to (8) of § 6 of the ECRSA, the owner of a nominee account is required to enter into written agreements with clients on whose behalf the owner of the nominee account holds securities.

Agreements with a client shall, inter alia, require the client to give notice if a holding in a company exceeds a threshold prescribed by law or to obtain the permission of the competent body for a holding to exceed a threshold in accordance with the procedures provided under Estonian law.

Furthermore, mandatory provisions of the LOA regarding a settlement contract apply (the legal basis for debiting and crediting the account, obligations of the account manager to maintain records

on debit and credit entries, account manager's notification obligations, etc.).

51.5.2. Other account agreements

Mandatory provisions of the LOA regarding a settlement contract apply (legal basis for debiting and crediting the account, obligations of the account manager to maintain records on debit and credit entries, account manager's notification obligations, etc.).

51.6. Greece

Since DSS operates as an end-investor scheme and, therefore, those recorded in the DSS accounts are the end-investors (shareholders), DSS determines the minimum data required for the opening of an account therein, which are linked to the need for identification of the account holder. As for the relationship between the account holder and the intermediary, i.e. the operator of accounts (credit institution or investment firm, member of the DSS), with whom the account of the account holder is held in the DSS, the Business Conduct Rules apply (Decision 12263/B.500 of the Ministry of National Economy on the Rules of Business Conduct Code of Investment Firms).

51.7. Spain

According to article 8 of Ministerial Order of 25 October 1995, on business conduct rules, further developed by Circular 1/1996 CNMV, account opened to retail investors need to be documented in a model-agreement that has to be filed with the CNMV. The minimum content of these model-agreements is the following:

a) Parties to the agreement. b) Obligations of each of the party, and specifically the exact content of the obligations of the depositary. c) Fees. d) Information to be forwarded to the client, including its periodicity and the means of transmission to the client. e) Clauses relating to amendments and termination of the contract. The depositary may not terminate the agreement without a prior notice of at least 15 days. f) Clauses relating to responsibility and indemnities in case of breach of the agreement by either party. g) The obligation of the parties to fulfil business conduct regulations and obligations relating to mandatory information to be provided by the client and the depositary.

No additional requirements of form or content have to be complied with, different from general rules directed to consumer protection. Any provision of the account agreement contrary to law in force would be considered null by a court.

51.8. France

Pursuant to Article 321-69 of the AMF General Rules, the execution of an account agreement is mandatory.

Under Article 332-2 of the AMF General Rules, the account agreement specifies the rights and duties of the parties. The agreement must contain the terms and conditions under which the custodian sends to the client a statement specifying the nature and the number of financial instruments credited to the securities account.

Any account agreement must specify (Article 321-71, 321-74 and 321-75 of the AMF General Rules):

- the identity of the client,
- the purpose of the agreement,
- the financial instruments comprised in the purpose of the agreement,
- the fees owed to the intermediary,
- the term of the agreement,
- the professional secrecy to be complied with by the intermediary,
- with respect to transactions relating to forward financial instruments, the terms and conditions of the cover and margin calls,
- the terms and conditions under which the intermediary may liquidate the positions and sell the financial instruments comprised in the cover,
- the terms and conditions under which the client is informed of the transfers (mouvements) of financial instruments and cash credited to or from the account,

the duties of the intermediary in respect of money laundering and financing of terrorism.

51.9. Ireland

No such requirements are imposed as a matter of general law, however certain regulatory codes of conduct, where applicable, impose requirements in relation to the provision of terms of business to clients, advertising requirements, provision of contract/ confirmation notes. The extent to which the requirements of those codes will apply, will depend on the range of services undertaken by the intermediary. In addition, a draft Consumer Protection Code has been published by the Financial Regulator which, if published, will impose additional requirements on intermediaries.

51.10. Italy

Although the legal basis that requires the execution of account agreements to be in writing is not clearly defined, one could conclude that all account agreements must be in writing.

Specific transparency requirements apply to account agreements executed by banks.

Additionally, the provisions of deposit agreements executed with participants in the CDS authorising the custodian to sub-deposit the financial instruments with a CDS must be approved in writing [Article 85, paragraph 2, of the FLCA].

51.11. Cyprus

There is no relevant legal requirement. However, since such an account agreement is entered into in the context of provision of investment services the relevant Code

of Conduct is applicable depending on the extent and nature of business of the intermediary.

51.12. Latvia

According with the FIML prior to starting the provision of investment services and ancillary (non-core) investment services, an investment brokerage firm and a credit institution shall sign a written contract with a customer for the provision of investment services and ancillary (non-core) investment services. An electronic contract shall be signed only provided that there is a prior written contract signed by an investment brokerage firm and a credit institution and a customer whereby that investment brokerage firm and that credit institution are entitled to sign electronic contracts with customers and a customer identification procedure is established.

51.13. Lithuania

Following the Law on Securities, the agreement between the intermediary and the investor has to be executed in written form. The intermediary, in the manner and form agreed by the parties, has to inform the investor of the peculiarities and risks related to acquisition, accounting and realization of the rights of ownership attaching to securities not registered with the LSC, as well as about any other peculiarities or increased risk which is generally not characteristic of services provided previously, transactions, or securities. In addition, the agreement of securities portfolio management has to provide for the following:

- initial composition of the securities portfolio,
- objectives which the client pursues,
- rights and duties of the intermediary stemming from the management of the portfolio,
- filing procedure and the contents of the securities portfolio management reports.

51.14. Luxembourg

No, there are no specific legal requirements as to form or content of account agreements except for some aspects which intermediaries need to comply with pursuant to CSSF circulars (*e.g.* rules of conduct).

51.15. Hungary

The Capital Market Act defines the minimal requirements regarding the account agreement and it also states, that in the account agreement the investment service provider takes an obligation to keep a record on the securities owned by the investor, to execute the transfer orders and to inform the investor about the movements on the account. The Act also states that the account creates with the account agreement, i.e. it has to be in written form.

51.16. Malta

No. However if the activity is licensable, certain conduct of business rules may apply, depending on the activity and these rules do define the contents of the customer agreemen when the customer is a private client.

51.17. Netherlands

A distinction should be made between a professional investor on the one hand and a non professional investor on the other hand. An account agreement with a professional investor is not subject to any requirements as to form or content. Professional investors may be defined as natural or legal persons which invest in securities in the course of their profession or business. Article 43 of the Further Regulation Conduct Supervision Securities Trade provides for an exhaustive enumeration of the types of institutions which qualify as a professional investor, such as securities brokers, central governments, pension funds etc..

In case of a non-professional investor, a credit institution or securities broker must enter into a written contract with the investor. This contract must, amongst others, contain; the rights and obligations of the parties, the services the intermediary will provide, a specification with regard to restrictions of the markets on which transactions on behalf of the investors may be entered into, the manner in which monies or securities will be administered, etc.. For practical reasons, most account agreements in which professional investors are involved comply with the above-mentioned requirements too.

51.18. Austria

No.

Almost all account agreements of investors with their account providers will be standardised forms based on the GBC of the respective bank and will not have any specific stipulations. The same is true for account providers and their agreements with upper tier account providers (the Austrian CSD as a rule).

The request by a future customer to open a securities account in his name will be a simple form provided by the account provider in which the application of the General Business Conditions of the account provider (see attached examples of Austria's largest bank and of the Austrian CSD) will be part of the application and of the acceptance by the account provider.

51.19. Poland

There are no specific requirements in the Polish law as to form in which a securities account agreement should be executed. The only requirement is that securities sale / purchase authorisation contracts entered into between the institution keeping the securities account and the account holder (the client) must be made in writing, otherwise being null and void. Executing such contracts electronically is deemed equivalent to making them in writing, provided that the authorisation given by the client bears the so called "secured digital signature" verified by a qualified certificate (a certificate issued by an institution granted by the relevant minister a certification clearance and entered in the official register of qualified certification providers.)

The keeping of securities accounts is subject to contractual provisions and the provisions of account terms and conditions, with the content of the latter being specifically provided for in the biding legal provisions.

51.20. Portugal

Yes, any contracts for the registration or deposit of securities must be in written form and, in normal circumstances, should be executed based on general contractual clauses registered with the CMVM.

51.21. Slovenia

The agreement on dematerialised securities account maintenance is defined in Par. 1 of Art. 154 of ZTVP-1 as an agreement by which the investment firm undertakes to open client's dematerialised securities account (directly) in the central registry (i.e. in the name and on behalf of the client) and to maintain this account by entries of client's orders to dispose with dematerialised securities, registered in this account and the client undertakes to reimburse the investment firm for this services.

Pursuant Par. 2 of Art. 154 of ZTVP-1 the agreement on (client's) dematerialised securities account maintenance shall be executed in writing.

51.22. Slovakia

There are no explicit requirements on form and contents of account agreement between member of the CSD and its client. However, legal relations between member and owner of securities account are ruled by the Act on Securities and Investment services and by Commercial Code, whereas contents and some other particulars of securities owner's account are set by §105 of the Act.

51.23. Finland

Guideline 201.9 Guideline on agreements for safekeeping and administration of securities (including safe custody), book-entry accounts and portfolio management issued by the Finnish Financial Supervision Authority provides general instructions in respect of the agreement between a custodian and an investor. This guideline applies to Finnish investment firms, credit institutions and account operators, as well as the branch offices of foreign investment firms and the Finnish branch offices of foreign credit institutions.

The Guideline is a recommendation with which the intermediaries may comply as a best practice. The Guideline provides the minimum content of a custody agreement.

It shall be noted that the Commission will issue level 2 rules pursuant to Article 19(3) of the MiFID in respect of safeguarding of customer assets. These rules are likely to have an effect on the account agreements.

51.24. Sweden

Generally speaking no. There are certain requirements on written form where an undertaking, which is subject to supervision, wishes to conclude an agreement with the owner (In principal a private investor) of financial instrument to use those instruments and also regarding re-pledging, see chapter 3 in Financial Instruments Trading Act (1991:980).

51.25. United Kingdom

No such requirements are imposed by the general law. As indicated in the answer to section 48, intermediaries offering custody services in the UK generally require authorisation under the Financial Services and Markets Act 2000, and once authorised, such intermediaries are required to comply with FSA rules including

those set out in CASS. Section 2.3 of CASS generally requires the intermediary to notify the investor as to appropriate terms and conditions applicable to its safe custody service, including those relating to (broadly): registration arrangements, liability for sub-custodian default, realisation of collateral, dividends and other investor entitlements, corporate actions, distribution of entitlements in respect of pooled client accounts, statements of custody assets, fees and costs, and pooling. Arrangements for giving client instructions and (generally) intermediary security must be notified to the investor. Risk disclosures are required in respect of overseas custody arrangements, registration or recording of legal title in the name of the intermediary, non standard registration arrangements instructed by the client and non standard arrangements for the possession of documents of title instructed by the client. There are detailed rules relating to the production, despatch and contents of client statements. Additional requirements are imposed under section 2.3 of CASS in relation to private customers.

52. QUESTION NO. 52: ARE THERE ANY DISCLOSURE REQUIREMENTS ON THE INTERMEDIARY REGARDING SECURITIES CREDITED TO SECURITIES ACCOUNTS (RELATING TO (I) TAXATION, (II) COMPANY LAW, (III) TAKEOVER REGULATION, (IV) MONEY LAUNDERING, (V) CONTROL OF REGULATED ENTITIES OR (VI) ANY OTHER MATTER). IS THERE ANY REQUIREMENT TO ASCERTAIN AND/OR DISCLOSE DETAILS OF FINAL INVESTORS (E.G. BENEFICIAL OWNERS) OF SECURITIES HELD WITH THE INTERMEDIARY?

52.1. Belgium

Under Belgian law, there are disclosure requirements on the intermediary in case of suspicion of money laundering and some in relation to tax regime (but those will not be addressed here and should be answered by FISCO WG). Holding of foreign securities may be subject to more disclosure requirements for the intermediary as holder of securities on behalf of clients or as nominee, in relation e.g. to take-over thresholds or disclosure towards the issuer in general.

52.2. Czech Republic [to be completed]

52.3. Denmark

In January the account managers and VP are obliged by tax regulations to report the status end of year for each securities account including interest etc of the year to the tax authorities. In case of opening of insider trading investigation the Danish FSA may require information from VP on involved securities accounts. Outside these two situations, according to domestic data protection law VP may not impart information concerning securities accounts (Art. 60 in the Securities Trading Act). However, an account manager and probably also the VP are obliged to follow a court order containing a request for information about whether a person has an account and which securities are credited to the account. Such a court order may be issued during a proceeding initiated by a creditor against the account holder. An insolvency administrator of the account holder is entitled to register on the VP account the court order to open insolvency proceedings and obtains by way of such registration the right to dispose over the debtors account.

52.4. Germany

According to No. 2 para 1 of the General Business Conditions of the Private and Cooperative Banks (*Allgemeine Geschäftsbedingungen der privaten Banken und Genossenschaftsbanken – AGB Banken*) or – if a savings bank – according to No 1 of the General Business Conditions of the Savings Banks (*Allgemeine Geschäfts-bedingungen der Sparkassen – AGB Sparkassen)* a German custodian bank must not disclose any fact relating to its customers unless required by law or with the consent of the customer.

Tax law, money laundering law and other criminal law do require that, under certain circumstances, a bank discloses details of a securities transaction or of securities holdings to the competent authorities.

Company law does not require a custodian bank or CSD to disclose the identity of its customers holding shares of a German company. If in case of registered shares the customer refuses to be registered in the share register, the custodian bank has to be registered as set forth in the just recently enacted Sentence 2 of Section 67 para 2 Stock Corporation Act. With respect to foreign stock corporations which may be

entitled under applicable foreign law to request disclosure of the beneficial owner of their shares from the registered (legal) owner, No. 20 of the Special Conditions for Securities Dealings authorizes the German custodian bank to disclose the identity of its customers. It will, however, inform its customers of such request before disclosing the identity.

52.5. Estonia

General legal regime regarding the access to

"internal accounts" maintained by nominee account owners

The following persons and agencies are entitled to access information regarding internal records of the nominee account owner for purposes of performing obligations imposed by law and in the event of legitimate interest:

- Agencies exercising state supervision pursuant to law (e.g. Financial Supervisory Authority and Tax and Customs Board)
- courts during proceedings of matters
- bailiffs, in order to enforce a court judgement or secure an action
- agencies conducting preliminary investigation in criminal matters
- notaries in connection with the performance of notarial acts
- trustees in bankruptcy proceedings in order to perform duties arising from law
- an operator of a regulated market in the exercise of supervision within the limits of its competence.

52.5.1. Taxation

Yes, indirectly: Pursuant to (7) of § 6, separate nominee accounts should be maintained for securities held on behalf of:

- Estonian legal persons
- Estonian natural persons
- Foreign legal persons
- Foreign natural persons.

There were tax considerations behind this requirement.

52.5.2. Company law / Takeover regulation / Control of regulated entities/ other matter

Yes, pursuant to (5) of § 42 of the ECRSA, the owner of a nominee account is required to notify the account operator and the Financial Supervisory Authority if a holding in the share capital of the issuer of securities, arising from the securities held in the nominee account for the client, exceeds or falls below a threshold provided by legislation,

resulting in the obligation to give notice of such circumstances, the obligation to apply for corresponding permission therefore or the obligation to perform certain acts (e.g. mandatory takeover bid).

52.5.3. Money laundering

No exemptions are available for the owners of nominee accounts regarding obligations under the general Money laundering regime.

52.6. Greece

Firstly, it must be noted that confidentiality and professional secrecy, governing principally the operation of intermediaries, are not applicable against the supervisory authorities which exercise prudential supervision or supervision in relation to provisions of market abuse nor against the tax authorities and the competent authority for the prevention of legalization of proceeds from legal acts. The above applies even regarding the disclosure of the identity of the end (final) investors, where these are known to the intermediaries (account providers). As to when the intermediaries are obliged to know the end investors, please see below, as well as under (56).

Further, the obligations of the intermediaries as account operators within the DSS towards the shareholders as account holders must be mentioned. These obligations are basically related to a) the exercise of the shareholders' rights in the General Meetings of the companies and b) the payment of dividends especially upon shares in bearer form. In the case of bearer form shares, the issuer is not aware of the shareholder's identity, but only of identity of the account operator with whom the bearer form shares are being held. The account holder's identity is known only to the DSS and the intermediary (account operator). Thus, it is required that all of the abovementioned parties act jointly for the satisfaction of the shareholders' rights, an obligation steaming from the DSS Operation's Regulation (articles 39 and 42).

Regarding the issue of the ascertainment and/or disclosure of details of end investors (e.g. beneficial owners) of securities held with the intermediary (account provider), the following are applicable: Within the framework of the obligation of the intermediaries to know their customers, emanating from the business conduct rules applying in the case of investment services provision through intermediaries, the latter must know the true beneficiary of the securities held with an account of themselves or with an upper tier intermediary (such as the DSS) of which they constitute account operators. However, this obligation does not apply where the customer of the intermediary is another professional intermediary (e.g. credit institution or investment firm), in which case the obligation to know the "end beneficiary" is forwarded to the said professional intermediary, which keeps an omnibus account with the first intermediary (account provider). The professional intermediary keeping an omnibus account with the intermediary (account provider) is obliged, of course, to follow both the segregation rules and the rules for the prevention of legalization of proceeds from illegal acts. As to the latter issue (money laundering) some problems could be raised, as there are no explicit provisions excluding the liability of the account provider in the case where he/she transacts with an intermediary acting for his customers and keeping an omnibus account with the account provider.

It must be also noted that, according to the practice applied in transactions realized in the ATHEX on securities held within the DSS, Greek intermediaries do not use

omnibus accounts with an account operator of the DSS, which however is not prohibited for foreign intermediaries, who are account holders with an account operator. Such a practice does not impede cross border transactions and could only give rise to legal interest in terms of reverse discrimination.

52.7. Spain

i. **taxation:** Yes. Every transaction has to be disclosed by intermediaries resident in Spain to the Spanish tax authorities at least annually.

ii. **company law:** Yes. For "registered shares", intermediaries have to communicate to the issuer every transaction, through the electronic means established by IBERCLEAR, in order for the issuers to be able to maintain the registry of shareholders. For "bearer shares", issuers may ask IBERCLEAR and their participants to send the list of investors to them when they call a GSM in order to form the list of shareholders with the right to attend the meeting.

iii. **takeover regulation:** No. Takeover regulations require investors to tender a mandatory takeover bid when reaching certain thresholds.

iv. **money laundering:** Yes. Any transaction that may somehow evidence relationship with money laundering transactions (as defined by the anti-money laundering regulations in force) has to be notified by the intermediary to the anti-money laundering authority (Servicio Ejecutivo). In addition, the following transactions must be also notified: (i) transactions involving cash movements over 30,000 € where no credit or debit is to be made in an account opened in the name of the client; (ii) transaction with counterparties based in tax haven amounting over 30,000 €; (iii) any other transactions that the anti-money laundering authority may determine.

v. **control of regulated entities: (to be completed)**

vi. **any other matter:** "Significant holdings in listed companies". According to Royal Decree 377/1991, any intermediary that, in its own name but on behalf of others acquires a "significant holding" (i.e. 5 per 100 or its multiples, or 1 per cent in certain cases) in a listed company, is obliged to disclose this holding and the name of those on whose behalf is acting to the CNMV.

52.8. France

52.8.1. Disclosure requirements

i. Tax law

Disclosure requirements relating to the opening or the closing of a securities account:

Pursuant to the French Tax Code, any individual, company, public body or institution whose activity is to receive securities, instruments or cash as a depositary, is under the duty to disclose to tax authorities the opening or the closing of any deposit account (Article 1649 A of the French Tax Code).

Disclosure requirements relating to movable income:

Each year, a tax return has to be filed by the entities which have been responsible for the payment of movable income (dividends…), whether as a debtor or as an intermediary. These entities are under the duty to disclose, *inter alia*, the name and the address of each beneficiary of such movable income. (Article 242 ter, 1 of the French Tax Code).

ii. Company law

Disclosure requirements relating to securities in bearer form:

As to the identification of the owner of securities in bearer form, the articles of association of the issuing company may require at any time the entity in charge of securities clearing (i.e. EUROCLEAR FRANCE S.A.) to provide it with the following information regarding holders of securities: name or corporate name; nationality; year of birth or of incorporation; address; number of securities held by each of them and conferring, immediately or in the future, votes at general meetings; if relevant, any restrictions affecting the securities (Article 228-2 of the French Commercial Code). The above information will be provided for by the CSD members (i.e. custodians)

Disclosure requirements on the registered intermediary (See the answer to question 6):

As far as equity securities (i) listed on a regulated market and (ii) whose owner is not domiciled on French territory, are concerned, Article L. 228-1 of the French Commercial Code contemplates the creation of a book entry in the name of a registered intermediary ("*intermédiaire inscrit*"). The registered intermediary must report its status as a registered intermediary upon opening of its account either with the issuing company or a an authorised intermediary licensed by the AMF whether such intermediary is a custodian ("*teneur de compte conservateur*") or a CSD.

Pursuant to Article L. 228-3 of the French Commercial Code and of Article 151-5 of Decree n°67-236 of March 23, 1967, any intermediary registered as such in accordance with Article L. 228-1 of the French Commercial Code shall be required to reveal the identity of the owners of securities in a registered form or giving access immediately or on a deferred basis (*à terme*) to the equity capital of the issuer within 10 working days following a request of the issuing company or of its agent.

Article L. 228-3-2 of the French Commercial Code provides that before dispatching proxies or votes for purposes of the general meeting the registered intermediary is required at the request of the issuing company or of its agent to provide the list of non resident owners of the securities to which such voting rights relate.

iii. Takeover regulation

French law provides for extensive disclosure requirements on issuers and shareholders. However, intermediaries are not subject to any requirements in this respect.

iv. Money laundering

The entities specified in Article L. 562-1 of the M&FC (e.g. credit institutions, investments firms, members of regulated markets…) are required to declare (a) the sums credited to accounts opened in their books and (b) the transactions relating to sums (c) (i) which might derive from drug trafficking, from fraud against the financial interests of the European Communities, from corruption or from organised crime, or (ii) which might contribute to the financing of terrorism (Article L. 562-2 of the M&FC).

Such entities are also required to declare:

- any transaction in which the identity of the principal or the beneficiary remains dubious despite the proceeding contemplated in Article L. 563-1 (Article L. 562-2 of the M&FC) (Article L. 563-1 provides, *inter alia*, that before entering into a contractual relationship or assisting a client in the preparation or execution of a transaction, such entities are required to verify the identity of the counterparty. They likewise have to verify the identity of any occasional client);

- transactions executed by such entities for their own account or for the account of third parties with natural persons or legal entities, including their subsidiaries or establishments, acting as, or for the account of, fiduciary funds or any other asset management instrument, when the identity of the grantors or the beneficiaries is unknown (Article L. 562-2 of the M&FC).

v. Control of regulated entities

According to Article L. 542-1 of the AMF General Rules, custodians are subject to the supervision of the AMF. The AMF may carry out inspections and investigations. In this respect, professional secrecy cannot be invoked as grounds for refusing information requests from the AMF. For the purposes of the investigation, the AMF may request sight of any document.

vi. Other matters

Article L. 621-17-2 of the M&FC provides that credit institutions, investment firms and members of regulated markets are required to disclose to the AMF any transaction relating to financial instruments admitted to trading on a regulated market

or for which a request for admission to trading on such a market has been made, when they reasonably suspect that such transaction might constitute insider dealing or market manipulation.

52.8.2. **Is there any requirement to ascertain and/or disclose details of final investors (e.g. beneficial owners) of securities held with the intermediary**?

See above.

52.9. Ireland

52.9.1. Taxation - A detailed consideration of the disclosure requirements applicable to an Irish intermediary is beyond the scope of the Questionnaire. Generally, however, an Irish intermediary may have a range of obligations imposed on it to account for encashment tax and dividend withholding tax to the extent that it would be classified as an authorised withholding agent or qualifying intermediary for this purpose. If it operated as an authorised withholding agent or qualifying intermediary, the intermediary would be obliged to retain a range of documents including all declarations by beneficial holders of securities which may be inspected by the Revenue Commissioners. Details may be required to be disclosed to the Revenue of all distributions received in its capacity as a qualifying intermediary and of the persons to whom such distributions were paid. Separately, various third party returns may also need to be completed by the intermediary many of which would include details of the persons who are the beneficial owners of income or gains paid to the intermediary. In addition, the Directive on Taxation of Savings income requires certain steps to be taken by intermediaries who receive certain payments for the benefit of certain third parties, to establish the identity of the beneficial owner of such payments.

52.9.2. Company law – As outlined in our responses above, section 123 of the 1963 Act provides that no notice of any trust, express, implied or constructive, shall be entered on the register of members or be receivable by the registrar. No note regarding client interests will, therefore, be noted on this register.

Section 67 of the Companies Act 1990 requires notifications to be made by persons acquiring 5% of more of the issued share capital of an Irish public limited company or of acquisitions which increase their interest above the 5% level or of any reductions which then take the interest below 5%. These notifications must be in writing and made within five days following the day on which the event giving rise to the obligation to notify occurs. It should be noted that the civil liability to notify applies to all shares held by the person who is required to notify, not just those shares which are subject to the notifications. Failure to notify punctually or properly is an offence for which penalties may be imposed by the Irish courts. Following such failure to notify (except in the case of a notification arising as a result of cessation of an interest in share capital), no right or interest in respect of the relevant securities will be enforceable by the

defaulting party by action or legal proceedings. The Irish High Court may lift the restrictions if the failure to notify was accidental or if on other grounds it considers it just and equitable to do so.

The range of notifiable interests is wide. An "interest of any kind whatsoever" in shares is potentially notifiable under the legislation, unless an exemption applies. There is no specific exemption for interests held by custodians, as there is under the equivalent UK regime, or other intermediaries. There is an exemption from notification for the interests of a bare trustee, where property is held on trust and an interest in shares is comprised in that property which exemption is potentially relevant to intermediaries' interests. Whether a custodian or other intermediary nominee, as nominal legal owner of the shares, has a notifiable interest may, in practical terms, depend upon the terms on which it holds the securities in question. If the intermediary has discretion over the securities or, for example, a right to sell securities to satisfy unpaid fees, it may be considered an active, rather than a bare, trustee, so that the notification obligations apply. Additional notification requirements are imposed on company directors or company secretaries in respect of certain interests in shares although, as an intermediary should not be acting in such a capacity, such notification obligations should not be applicable.

52.9.3. Takeover regulation – Ireland operates a statutory regime regulating the conduct of takeovers of Irish listed companies (broadly, Irish incorporated companies whose securities are quoted on any of the markets regulated by the Irish Stock Exchange or on certain other specified international markets).

The Irish Takeover Rules contain an extensive regime for the disclosure of dealings in bidder and target securities during a takeover "offer period" for an Irish listed target company. Very broadly: (a) the bidder, the target and their associates are required to disclose publicly any dealings by them in shares in the bidder or the target either for their own account or for that of discretionary or non-discretionary investment clients; and (b) any person who owns or controls 1% or more of any class of, broadly speaking, equity share capital of the bidder or the target is required to disclose all dealings by him during the offer period in securities of that company. These notification obligations are potentially relevant to intermediaries if they deal in securities during a takeover offer period when either associated with the bidder or the target or owning or controlling in excess of 1% of any class of target share capital.

52.9.4. Money Laundering: It is likely that most intermediaries will be "designated bodies"[158] for the purposes of the Criminal Justice Act 1994 (the "**CJA**") which contains a series of offences and related measures designed to counteract money laundering in Ireland. As a designated body, the intermediary would have to take certain

---

158 One category is "a person providing a service in relation to buying and selling stocks, shares and other securities".

measures to assist in the detection of money laundering (e.g., by establishing the identity of customers and by retaining copies of documents used to establish identity and records of transactions). The CJA also imposes obligations on designated bodies and their directors, employees and officers to report to the police, where they know or suspect that an offence under section 31 or section 32 of the CJA has been committed.

52.9.5. (v) Control of regulated entities – No additional disclosure requirements are imposed in respect of securities credited to the accounts of the intermediary by the regulatory codes of conduct referred to above. Disclosures/consents may be required where the issuer is a regulated entity but this is beyond the scope of this Questionnaire.

As outlined in our responses to question (6) above, generally, no legal requirement is imposed on the intermediary to disclose details of final investors (e.g. beneficial owners) of securities held with the intermediary. Depending upon the circumstances in which it is acting, the relationship sought to be established, the contractual arrangements with the intermediary and the investors and the regulatory requirements applicable to the intermediary, it may be subject to contractual or regulatory requirements in this regard.

52.10. Italy

Under Italian law, intermediaries are subject to disclosure requirements related to taxation. In particular they must notify the Anagrafe Titoli of the details of anyone who owns shares.

Secondly, pursuant to Italian corporate law provisions, custodians shall notify the issuers of the names of:

a. persons who request certifications that attest to their participation in the central system, which are necessary to exercise their voting rights in the shareholders' meeting. In accordance with Consob Regulation no. 11768 (Market Regulations), for cases where the shareholder intends to participate in shareholders' meeting, the intermediary notifies the issuer of the names of the shareholders through a direct communication in lieu of certifications;

b. persons who have been paid dividends; and

c. persons who have exercised pre-emption rights and the respective amounts of shares concerned.

Issuers shall update the shareholder register based on this information.

There are no specific disclosure requirements regarding take over regulations and control of regulated entities.

Italian intermediaries shall fulfil the identification and recording duties provided under Directive 91/308 as amended by Directive 2001/97. They are also under obligation to identify and notify any of suspicious transactions in accordance with the principles set forth by such legislation.

52.11. Cyprus

There are wide ranging disclosure requirements under all the legal areas enumerated the detail of which runs beyond the scope of the document.

52.12. Latvia

According with the FIML when providing investment services to customers, an intermediary (investment brokerage firm and a credit institution) shall have the obligation to perform as a decent and careful manager and ensure that the services are provided in a professional and careful manner in a customer's interests. An investment brokerage firm and a credit institution shall ensure that equal information is provided to all customers.

52.13. Lithuania

i. tax authorities are entitled to require to submit them with information necessary for execution of their functions;

ii. yes in respect of securities owners list

iii. no

iv. no in respect of securities crediting; yes in respect of monetary operations

v. no

vi. particular disclosure requirements might be applicable in case of criminal investigation or upon the request of Competition Council of Lithuania, the LSC or the CSDL in case of execution of administrative investigations.

Apart from other fixed parameters, the personal securities account opened to an account manager registered abroad, whenever the clients' accounts are opened in his name with an indication that he acts as an account manager, must specify the name and address of the said account manager registered abroad. On request of the Securities Commission, the data from the accounts indicated in this paragraph must be submitted to it, disclosing the clients of the account managers registered abroad, to whose benefit the securities have been acquired (unless it goes contrary to the legal acts of that foreign country).

52.14. Luxembourg

The law provides for some disclosure requirements in respect to securities credited to securities accounts in particular under the following circumstances which are to be considered as exceptions to the rules on banking secrecy:

52.14.1. Taxation

Pursuant to the banking secrecy provisions, a credit institution or an intermediary is not allowed to disclose the identity of the accountholder or the final investor to whosoever. However, in the context of the law of Law of 21 June 2005 implementing directive 2003/48/EC on taxation of savings income in the form of interest payments, non-residents may chose to have their name and securities positions disclosed to their home country tax authorities.

The scope of the banking secrecy in relation to tax matters has been defined by the Grand Ducal Regulation of 24 mars 1989 clarifying the banking

secrecy in tax matters and limiting the investigation powers of the tax authorities.

Special disclosure arrangements do also exist for US securities held by US residents.

52.14.2. Company law

Except in the context of the participation in a general meeting of shareholders or bondholders, there are no specific disclosure requirements under Luxembourg company law.

52.14.3. Takeover regulation

The law of 4 December 1992 relating to the information to published in the event of the acquisition of an important participation in a listed company, as amended, provides for certain disclosure requirements but these are only incumbent on to the holder of the participation not on the intermediary.

52.14.4. Money laundering

The law of 12 November 2004 relating to the combat against money laundering and the finance of terrorism provides that professionals (as defined by the law and which encompasses intermediaries) must cooperate with the authorities, i.e. the professional must inform the public prosecutor of any indication that a transaction may be linked to money laundering or the financing of terrorism. This law also requires that, subject to certain exemptions, intermediaries identify the "ultimate beneficial owner" of the securities held with them. Thus, information about the final investor may have to be disclosed.

52.14.5. Control of regulated entities

In the context of the supervision of regulated entities, the CSSF may gain access to information related to final investors. However, the regulator is bound to strict professional secrecy. Access to information may also, in accordance with community directives, be granted to foreign regulators.

52.14.6. Other matters

In the context of insider trading and market manipulation– the current legislation is to be replaced soon by a law implementing the EU Market Abuse Directive 2003/6 which will lead to further disclosure requirements.

52.15. Hungary

The disclosure requirement described above, basically refer to the investor and not the intermediary. Anti money laundering requirements apply to the intermediary, but it has to disclose account data to the investigating authorities only when the suspicion of money laundering emerges.

In general it can be said, that the intermediary has to disclose account date for the official inquiry of the authorities (tax autorities, investigating authorities, courts, Hungarian Financial Supervisory Authority).

A special case of disclosure when the nominee has to disclose the beneficial owner for the call of the issuer, the Hungarian Financial Supervisory Authority or a shareholder.

52.16. Malta

52.16.1. Taxation: the intermediary usually acts as a paying agent and withholds final tax for the government of Malta from its investors, but does not disclose the identity of the underlying investors. Where the savings directive provides for disclosure of investors, then there may be some disclosures which need to be made.

52.16.2. Company law: none

52.16.3. Takover regulation: none

52.16.4. Money laundering: in certain instances, the intermediary may be asked to disclose the identity of the ultimate investors.

52.16.5. Control of regulated entities: in certain instances, the intermediary may be asked to disclose the identity of the ultimate investors.

52.16.6. Trusts and trustee act: a trustee may have to disclose beneficiaries who receive income from the trust.

52.16.7. Others: not applicable.

52.17. Netherlands

Under Netherlands law there are disclosure requirements on the intermediary regarding securities credited to securities accounts relating to tax and unusual transactions (such as money laundering). With regards to disclosure requirements concerning tax following from the State Taxes Act (in Dutch: "*Algemene wet inzake rijksbelastingen*"), intermediaries are to disclose data concerning paid interests and dividends on securities. Such data must be disclosed with the Netherlands Tax Authorities.

According to the Act on the Disclosure of Unusual Transactions (in Dutch "*Wet Melding Ongebruikelijke Transacties*"), unusual transactions with securities are to be disclosed to with the Office for the Disclosure of Unusual Transactions (in Dutch "*Meldpunt Ongebruikelijke Transacties*"), affiliated with the Netherlands Central Bank. One of the requirements to comply with the Act on the Disclosure of Unusual Transactions is, amongst others, that the identity and other details of the final investor must be disclosed.

The Further Regulation Conduct Supervision Securities Trade requires intermediaries which execute transactions regarding securities, which are not listed on a regulated market in the Netherlands or the EEA, to disclose such transactions with the Netherlands Securities Supervisory Authority, the AFM. Disclosure of repo or sell and buy back transactions or issuance transactions can be withheld.

The External Financial Relations Act (in Dutch "*Wet Financiele Betrekkingen Buitenland*") obliges all persons to furnish the Netherlands Central Bank with any information which is required for the compilation of the national balance of payments. In short, persons are to disclose data on making or receiving payments

exceeding Eur 10,000 to or from non-residents to Netherlands intermediaries via which the transactions are executed. Accordingly, the intermediaries are to disclose this information to the Netherlands Central Bank.

For good orders' sake, there are many disclosure requirements for the investor regarding securities transactions. Such requirements mainly relate to company law, takeover regulation and control of regulated entities.

52.18. Austria

There is an obligation in the Banking Act (section 38 BA, banking secrecy) which provides that banks (credit institutions), if formed as a partnership, their partners, the members of organs (usually board of management and supervisory board), employees as well as persons acting for banks shall not disclose or exploit secrets which have been entrusted to them or made available exclusively because of the business relationship with customers or became known as information on loans pursuant to section 75 para 3 Banking Act.

Banking secrecy is overruled in nine cases which are listed in section 38 para 2 no. 1 to 9 BA, among them the following, to be discussed in view of the above questions

i. **taxation**: in case of pending criminal prosecution for deliberate tax misdemeanour, except for fiscal offences, towards criminal tax authorities (No. 1)

ii. **takeover regulation**: on request of the Takeover Commission a bank which is appointed as an expert in the proceedings must provide any information it has and is not bound by banking secrecy (not listed in section 38 BA)

iii. **money laundering**: banks must notify the competent authority (the Ministry of Interior) in case of reasonable suspicion of money laundering (or terrorist financing) (No. 2)

Only anti-money laundering regulations provide a **disclosure** requirement in the meaning of an obligation of a securities account provider to act. The other cases **dispense** of the obligation to **observe** banking secrecy in case questions are asked.

No disclosure requirement or dispense is provided in section 38 BA in cases **(ii)**, **company law** and **(v), control of regulated entities**. In case a person protected by banking secrecy is involved in (civil) court or administrative procedures and does not provide respective information and proof (does not renounce to the protection offered by banking secrecy), the court or administrative authority is free to evaluate this fact in its decision.

As regards **(vi), any other matter**, the rights of supervisory authorities must be mentioned which may ask for information regarding securities: a) the **stock exchange** must supervise trading and must inform the Financial Markets Authority ("FMA") in case it suspects insider dealings or the infringement of any other regulation which falls in the supervisory competence of the FMA. In respect of money laundering it must inform the Ministry of Interior. Moreover the stock exchange must generally cooperate with the FMA in every respect when it acts in its supervisory function; b) the FMA is authorized under the **Securities**

Supervisory Act (Wertpapieraufsichtsgesetz) to monitor the trading in securities and the compliance by banks with regulations protecting the interests of their customers (Securities Services Directive/Markets in Financial Instruments Directive). Any information required in this context must be given also by securities account providers.

52.19. Poland

Intermediaries have reporting and disclosure obligations in respect of trading in securities issued by the State Treasury. The information to be disclosed includes holding balance information and trading information and their purpose is to report the dynamics and structure of public debt in Treasury securities broken down by investors groups and securities categories. The disclosure of information is also supported by the institution managing the depository-settlement system, on whom certain obligations have also been imposed. Remarkably, the disclosure obligation does not apply to transaction details and data identifying particular investors. Such information must not be disclosed to third parties, unless authorised under specific provisions of the law (e.g. where information is disclosed to the Polish Securities and Exchange Commission, in connection with its inspection role; to the General Inspector of Treasury Control or persons authorised by the Inspector, in connection with the performance of its functions; to the General Inspector of Financial Information; to the President of the Supreme Chamber of Control or persons authorised by the President, where such disclosure is necessary, for the purposes of inspection proceedings, to investigate facts related to the organisation subject to inspection; to the Commission for Banking Supervision, in connection with the performance of its functions.)

It is also worth mentioning that the participants in the system may exchange information on debts owed to them by their clients, to the extent to which such exchange of information is necessary for the purposes of preventing unfair clients' practices.

Intermediaries and the National Depository (to the extent to which it keeps securities accounts) are obliged to disclose information related to transactions and assets to the General Inspector of Financial Information for the purposes of preventing the circulation of assets of illicit or unknown origin and financing of terrorism. Every transaction whose value exceeds the amount of EUR 15,000 must be recorded by the said institutions. Afterwards, the transaction record data is reported to the General Inspector of Financial Information. The data covers, without limitation, data identifying the investor / the person effecting the transaction such as the amount, currency, date and place of entering into the transaction, account number, etc.

As to tax-related disclosure obligations, intermediaries who in certain situations act in the capacity of income tax collectors (e.g. in the case of dividend payments made to individuals, interest or discount payments) are obliged to submit to the relevant authorities tax returns specifying individual securities holders and their income.

52.20. Portugal

52.20.1. Taxation

52.20.2. Company Law

A Company holding 10% or more of the share capital of another must inform, in written, the other company, of all the acquisitions and sales of shares of this company.

52.20.3. Takeover Regulation and disclosure of qualifying holdings

Yes, according to article 16.º of the Securities Code, any entity reaching or exceeding a holding of 10%, 20%, a third, a half, two thirds and 90% of the voting rights in the capital of a company whose share capital is open to public investment (as defined in article 13 of the Securities Code) or reducing its holding to a value below any of the above limits, should, within 3 days of the occurrence of such fact: (i) inform the CMVM, the investee company and the managing entities of regulated markets in which the securities issued by the said company are admitted; (ii) inform the entities described in the previous paragraph of those situations that determine the granting to the participant of voting rights inherent in securities belonging to third parties.

The entities reaching or exceeding a holding of 2% and 5% of the voting rights corresponding to the capital of a company whose share capital is open to public investment and that issues shares or other securities granting the right to their subscription or acquisition, listed on regulated markets situated or operating in Portugal, and those reducing their holding to a value below those limits, are equally subject to the obligations aforementioned.

52.20.4. Money Laundering

Regarding disclosure requirements relating to money laundering, several rules are applicable, namely: Law 11/2004, as amended by Law 27/2004 and rectified by Declaration 45/2004; Decree-Law 93/2003; Law 10/2002, as rectified by Declaration 11/2002; Law 5/2002, as rectified by Declaration 5/2002.

52.20.5. Control of regulated entities

According to the Credit Institutions and Financial Companies Law, a person wishing to purchase a qualified holding in the share capital of a credit institution must previously inform the Bank of Portugal. The increasing of a qualified holding to a percentage above 5%, 10%, 20%, 33% or 50% of the share capital or of the voting rights must also be disclosed. The Bank of Portugal must as well be informed in case the credit institution becomes a subsidiary of the acquiring company.

The facts originating a holding of more then 2% of the share capital or of the voting rights of a credit institution must be disclosed to the Bank of Portugal in a delay of 15 days.

If the holder of a qualified holding in a credit institution wishes to sell its shares and because of such sale, any of the above mentioned shareholding, it must previously inform the Bank of Portugal. These rules are applicable to investment firms as well.

52.21. Slovenia

Non applicable: the concept of ***"final client level" type of dematerialisation*** has been applied by the Dematerialised securities Act (ZNVP). By that concept the holder of the securities, registered on his account of dematerialised securities (i.e. "on whose behalf dematerialised securities are entered in the central registry"), is at the same time legal (and beneficial) holder ("owner") of those securities (Art. 16 of ZNVP). Therefore all end clients' accounts are maintained directly in the central registry. See also answer to Q3 for further details.

52.22. Slovakia

There are no disclosure requirements on the intermediary – both member of the CSD and securities depository – relating to taxation, company law, takeover regulation or control of regulated entities. Regarding money laundering, securities dealers including banks and branches of foreign banks and securities depository are stated on the list of reporting entities according to Act No.367/2000 Coll. on Protection against legalization of income from illegal activities as amended. Their duties in this respect are specified in details by mentioned special act. In addition to that, securities depository has the obligation in compliance with §110 of the Act to disclose confidential information, mainly concerning data on book-entry securities registered in issuer's registry and data on securities owners, to selected entities listed by §110 of the Act, e.g. to supervisory bodies, court of justice, National bank of Slovakia, police, tax office etc. This duty includes disclosure of beneficial owners registered in the registry maintained by members of depository (owner of securities account opened and maintained by the CSD member is deemed to be the beneficial owner of securities registered on this account).

52.23. Finland

52.23.1. Pursuant to the Act on Taxation Procedure (1558/1995), an intermediary has a responsibility to report to the Finnish tax authority the trades for which he has acted as an intermediary.

52.23.2. In accordance with Section 28 of the Act on the Book-Entry System, the intermediary acting as a nominee shall, upon request, notify the Financial Supervision Authority and the issuing company of the name of the beneficial owner of the securities, where this is known, as well as of the number of securities held by the owner. If the name of the beneficial owner is not known, the nominee shall notify of corresponding information on the representative (i.e. the next intermediary) of the owner as well as submit a written declaration to the effect that the beneficial owner of the securities is not a Finnish legal or natural person.

52.23.3. Since shareholder lists maintained in the book-entry system are public information in accordance with Chapter 3a, Section 8 of the Companies Act and since the company and the regulator have the right to request the identity of the beneficial owners as elaborated in (ii) above, there are no specific requirements for disclosure relating to

a takeover situation. An intermediary has, nevertheless, the obligation to provide the investor with sufficient information relating to the security in respect of which the intermediary provides investment services (Chapter 4, Section 4 of the Securities Markets Act).

52.23.4. Finnish money laundering rules are aligned with the European Community law. Accordingly, an intermediary is responsible to report a suspicious transaction to the Finnish Money Laundering Investigation Centre irrespective of confidentiality obligations. Correspondingly, the intermediary is relieved from liability for loss incurred based on such reporting.

52.23.5. Control of the regulated entities is normally carried out through ownership control rules requiring the shareholder of a regulated entity to disclose a qualified holding to the Financial Supervision Authority. Such disclosure requirements are set on the shareholder rather than on the intermediary acting on behalf of the shareholder.

52.23.6. The general financial reporting scheme covering financial intermediaries based on the prudential rules relating to the harmonised EU framework (Capital Adequacy Directive, Basel II rules) has an impact on the reporting of intermediaries also in respect of securities in custody. Since this is a question relating to general financial reporting, it will not be elaborated further here.

52.24. Sweden

There are regarding shares some disclosure requirements in the Financial Instruments Account Act. They can be regarded as mainly company law rules. A CSD can demand a nominee to provide information to the CSD with respect to the shareholders whose shares are managed by the nominee. That demand could be done after a request from the CSD registered company (see chapter 3 section 12). Furthermore, there are also transparency requirements in the Financial Instruments Account Act elating to shareholders holding more than five hundred shares (see chapter 3, section 13).

Section 12. Upon demand by the central securities depository, a nominee shall provide information to the securities depository with respect to the shareholders whose shares are managed by him. The information shall include the shareholders' names, personal identification numbers or other identification numbers, and mailing addresses. The nominee shall, in addition thereto, state the number of shares of different classes owned by each shareholder. The information shall relate to the circumstances at the time determined by the central securities depository.

Upon request by a Swedish CSD registered company, the central securities depository shall demand the submission of such information regarding the company's shareholders as referred to in the first paragraph.

Swedish CSD registered companies are entitled to access at the central securities depository information which has been provided in respect of the company's shareholders.

Where special cause exists, the Swedish Financial Supervisory Authority may grant a nominee an exemption from the obligation to provide information pursuant to the first and second paragraphs.

Section 13. The central securities depository shall maintain in respect of each Swedish CSD registered company a list of the shareholders holding more than five hundred nominee-registered shares in the company. The list shall contain the information set forth in section 12, first paragraph. A printout of the list shall be made available to the general public at the company's headquarters and at the central securities depository. The printout may not be older than six months. Any person shall be entitled, in consideration of payment for the costs therefor, to obtain a printout of the list from the central securities depository.

52.25. United Kingdom [to be completed]

53. QUESTION NO. 53: WHAT DATA STORAGE REQUIREMENTS ARE THERE?

53.1. Belgium

See chart in appendix

Data relating to transactions in securities and cash	Data to archive		Archiving means	Archiving period
		Legal main acts		
<u>DYNAMIC DATA</u> - Instructions - Other communications/ messages - Reporting of execution - Recording of execution	**(Particular) Agreements** **As a general rule, all data necessary for evidence.**	**Law 11 January 93 on preventing use of the financial system for purposes of laundering money and terrorism financing.** **R.D. 31 March 2003 concerning the notification of transactions regarding financial instruments and the keeping of data.** **Circular CBFA PPB 2004/8 (12 July 2005)**	**Law 11 January 93 and Circular CBFA PPB 2004/8**: all data (registrations, statements and documents) that allow reconstructing precisely the transaction and all accurate and useful data concerning client-mandatory of transfers of cash and securities. **R.D. 31 March 2003**: - the name of the enterprise; - the nature of the transaction; - the regulated market, or not, on which the transaction has been conducted, or any other way of execution of this transaction; - depending upon its nature, the ISIN code or the contractual specifications of the financial instrument;	**Law 11 January 93:** 5 years from the time the transactions were conducted **R.D. 31 March 2003**: 5 years as from the execution. **Accounting law of 17 July 1975 and implementing Royal Decree dated 12 September 1983 (art. 9)**: books should be kept 10 years **Art. 2262b s Civil Code**: 10 years after the end of the relationship except if differently provided for in the agreement.

			- depending upon the nature of the financial instrument, the volume in nominal value or the number of financial instruments subject of the transaction or the number of negotiated contracts relating to the financial instruments which are subject of the transaction; - the price or rate of the transaction; - the date of transaction; - the identity of the client; - the date of settlement of the transaction; - the identity of the other contracting party; - the quality in which the enterprise has acted. **Circular CBFA PPB 2004/8:** Archiving means allowing access and reproduction of the archived data within 3 days (for a request from a competent authority) or "immediately" (for a request from a judicial authority). **Proposal for Directive AML:** archiving means allowing access and reproduction "directly", "promptly" and "rapidly".	

53.2. Czech Republic [to be completed]

53.3. Denmark

An account manager shall keep documentation behind every transaction reported to VP for 5 years (the Executive order). VP therefore on an on-going basis store information of all securities transactions and images of all securities accounts for the last 2200 days.

53.4. Germany

Data storage requirements are contained in the German Commercial Code. As the record book (Verwahrungsbuch, Section 14 of the Securities Deposit Act) of the custodian is a special form of the regular commercial book of a merchant, the regular time limits for data storage are applicable. For commercial books, the time limit is 10 years pursuant to Section 257 para. 4 of the German Commercial Code. According to Section 197 (1) No 1 of the German Civil Code, however, claims resulting from property only become statue-barred after 30 years. Therefore, credit institution will store certain account information beyond the statutory requirement of 10 years.

There are further storage requirements for supervisory reasons. According to Section 27 c of the German Banking Act, a credit institution has to immediately store data concerning the account number of a securities account that is subject Section 154 para. 2 Tax Code (Abgabenordnung, AO). Pursuant to that provision, anyone maintaining accounts or keeping (inter alia) securities in safe custody has to ascertain the identity and the address of the account holder or such a person that is authorised to dispose over the assets maintained on such accounts. Further, Section 27 of the German Banking Act prescribes that in addition the date of birth of the account holder has to be recorded. Even further, if the "commercial owner" of the assets is different from the account holder, the above mentioned data has to be recorded for the "commercial owner" as well. This data has to be deleted three years after the account was closed, Section 24 c para. 2 of the German Banking Act.

53.5. Estonia

7 years pursuant to § 90 of the SMA, which provides general registration and storage requirements applicable to investment firms in connection with the provision of investment services.

53.6. Greece

i. The DSS C&S Regulation and the BoGS Operating Regulation include provisions regarding the storage by them of the data relating to the transactions executed through each System and the accounts held with them by the account operators/account holders (DSS) and the participants (BoGS).

ii. Art. 5 of the DSS C&S Regulation provides that ACSD, apart from the DSS, shall keep back up records, through electronic or other means of

its choice, including all registrations and transactions on dematerialised securities recorded on the DSS for a period of six years from the end of the year in which these took place.

iii. BoGS keeps back up records of all transactions and registrations in participants accounts made therein. Furthermore, the BoG keeps an additional back up of the above, according to its internal procedures. These back up records are kept for 20 years.

iv. Regarding the Participants within the BoGS, Article 6.4.2 of the BoGS Operating Regulation states that "every participant of the System shall at any time ensure that the securities which are registered in its investors' account in the System correspond to the securities of its beneficiaries-clients, which it shall at any time reflect in its books, according to article 6 par. 2 of law 2396/1996, provided that all other relevant provisions of the law are complied with. For this purpose, for each investor's account held with the participant in the System concerning each type of securities, the participant shall reflect in its books the investors-beneficiaries of these securities, with a precise reference to the quantity of securities, of which each investor is beneficiary."

v. Apart from the above, regarding the obligations in general of the intermediaries holding accounts themselves for the account of their customers, articles 6 par. 4 and 21 par. 3 of law 2396/1996 authorize the HCMC and the BoG respectively to establish rules of administrative and accounting set-up and control and safety mechanisms to be applied by the investment firms and credit institutions respectively which keep securities of their customers as custodians.

Up until now, neither the HCMC nor the BoG have made use of the authorization provided to them by law to regulate specifically on the issues for which they are given power by the particular law in terms of custodians. However, issues of provision of custody services are indirectly regulated within the framework of core investment services regulations. In that respect, HCMC Decision no. 16/262/6.2.2003, regulating aspects of the provision of investment portfolio management services by investment firms, determines the obligations of the investment firms as to the manner in which the latter must keep the managed items of their customers in the investment firms' accounts. ("The accounts, in which the managed items are held, must be kept in detail per customer, security and financial instrument in such a way that it will be possible to accrue daily the acquisition cost and the current portfolio value). The said decision also imposes obligations for the provision of information to the customers. Further, according to article 5 par. 1 of HCMC Decision no. 3/356/26.10.2005 investment firms providing the services of

a) receipt and transmission of customers' orders;

b) receipt and execution of customers' orders; or

c) transmission or execution of orders in the framework of customers' portfolio management, for the provision of which service the investment firms keep or handle money or financial instruments of customers or have the power to invest these,

must keep a Customer Share Book (Book of Money and Book of Financial Instruments).

53.7. Spain

Entities that open and maintain securities account have to preserve the data for at least five years.

53.8. France

Articles 321-78 to 321-84 of the AMF General Rules provide for the conditions under which data relating to transactions and telephone conversations may be recorded and maintained.

The following rules apply to transactions relating to financial instruments admitted to trading on a regulated market, notwithstanding such transactions are not carried out on a regulated market:

- the authorised intermediary (intermédiaire habilité) executing an order for its own account or for the account of a client maintains the data relating to the transaction (e.g. quotation, quantity, date, etc) for a period of 5 years. However, when an order is carried out on a regulated market, the operating rules of the regulated market may provide for a period of maintenance superior to 5 years;

- the authorised intermediary receiving an order to be executed or to be transmitted for execution to another authorised intermediary maintains the record of such order (or the copy of such order) for a period of 6 months;

- the authorised intermediary transmitting an order for its own account or for the account of a client to another authorised intermediary or executing an order outside a regulated market maintains the record of such order (or the copy of such order) for a period of 6 months;

- the authorised intermediary which is a member of a regulated market and issuing an order in the market maintains the data relating to such order under the conditions provided for by the operating rules of the regulated market and at least for a period of 6 months;

- the authorised intermediary which is under the duty to make a report to a client or another authorised intermediary on the conditions under which the order has been executed maintains a copy of the written report for a period of 5 years. Until such written report is issued, and within a period which cannot be superior to 5 years, such authorised intermediary maintains the record of the report made by telephone or by e-mail.

The period of maintenance of telephone conversations cannot be superior to 5 years.

53.9. Ireland

It is difficult to respond to this question without ascertaining the type of data that is referenced. The following are relevant but may not be exhaustive. Obviously it may be advisable to retain data even where there are no specific legislative requirements to do so.

The Irish Data Protection Acts 1988 and 2003 (the **"DPA"**) apply to the processing of personal data, i.e. any data in relation to living individuals and, to the extent that it could be considered to process any such data, the DPA will apply. Appropriate security measures must be taken against unauthorised access to, or alteration, disclosure or destruction of personal data.

Regulated intermediaries will be subject to regulatory requirements regarding procedures for the maintenance, security, privacy and preservation of various records.

The Taxes Consolidation Act 1997, as amended, sets out obligations in relation to keeping records relating to taxation.

Companies legislation imposes requirements regarding the maintenance of, among other matters, books of accounts and certain contracts in relation to purchases of its own shares.

The CJA imposes a legal requirement on designated bodies, which is likely to include most intermediaries, to "know their client", take "reasonable measures" to establish and verify the identity of a new client and to maintain copies of materials used to identify customers and certain documents in respect of transactions for prescribed periods.

An analysis of the detailed record retention requirements is beyond the scope of this Questionnaire.

53.10. Italy

Intermediaries must keep all confirmation notices and magnetic recordings of orders and authorizations communicated by telephone for at least two years. The contracts, correspondence and documents related to the activities of the intermediaries must be kept for at least five years from the termination date of the investor relationships. Any other records provided for by Consob Regulations no. 11522 shall be kept for at least eight years.

53.11. Cyprus

The question is too wide to afford a precise response. There are requirements under the relevant Processing of Personal Data (Protection of the Individual) Law of 2001, the relevant tax legislation and under the Companies Law Cap 113 which imposes obligations to the company to keep books of accounts and other documentation. Furthermore the are certain obligations arising from the money laundering legislation. A detailed account runs beyond the scope of this document.

53.12. Latvia

FIML provides that pursuant to a mutual contract that governs the holding of a customer's financial instruments and upon a customer's request, an intermediary (investment brokerage firm and a credit institution) shall issue a statement of the financial instruments account to the customer that discloses the following:

a. transactions in one, several or all financial instruments made during a definite period of time;

b. transactions in one, several or all financial instruments made during the existence of the account;

c. any particular transaction in financial instruments;

d. financial instruments belonging to a customer for which book entries are made in the account.

A statement of account shall disclose the data identifying an intermediary and a customer, the account number, the time period during which transactions are disclosed, the date of issuing the statement of account, the data identifying financial instruments (name, ISIN code), the opening and closing balance of the account, the date on which book entries in respect of financial instruments were made in the account, the total number and price (if known) of the financial instruments for which book entries were made as a result of each transaction in financial instruments, the total number of the financial instruments credited to or debited from the account during the time period for which the statement of account is issued.

53.13. Lithuania

In the context of criminal and administrative investigation procedures any data related to investors assets hold by intermediaries might be required for submission in as much as it is necessary for the investigation.

Regarding securities owners list, the Law on Securities provides only the obligation in respect of the intermediaries to present the issuers upon their request with the list of the owners of the issued securities. No other parameters are established.

53.14. Luxembourg

The CSSF has imposed in various circulars on intermediaries to have adequate data storage facilities, data recovery systems and back-up facilities in the disaster scenario.

The law of 2 August 2002 on data protection enacting Directive 95/46 of 24 October 1995 is applicable to intermediaries.

53.15. Hungary

The security regulations are outlined in detail in a government regulation; the (shortest) time requirement is 8 years, if not defined in other provision of law otherwise.

53.16. Malta

There are no specific guidelines on this matter. However as a general rule, the intermediary must maintain sufficient data to be able to identify its clients, including for prevention of money laundering purposes.

53.17. Netherlands

Under Netherlands law there are several data storage requirements, such as rules on tax, notarial deeds, personal data protection, etc.). According to the Securities Trade Supervision Decree (Besluit toezicht effectenverkeer 1995) an intermediary shall retain, for a period of at least five years, all the information relating to its

operations, including the information relating to transactions it has effected involving securities admitted to the official listing of a securities exchange. Pursuant to securities regulations investment firms – including banks providing securities services – are obliged to retain – inter alia – documents containing:

- systematic descriptions of the company's administrative organization and its system of internal control,
- information on the purpose and nature of securities transactions carried out for the company's own account,
- information on the limits the company sets for entering into transactions for its own account and for the account of clients for the purpose of risk monitoring,
- information on the nature and purpose of suspense accounts in the event suspense accounts are used for securities transactions,
- information about complaints,
- information on clients,
- information on clients orders,
- descriptions of the processing of orders,
- information on securities transactions and securities settlements, information on clients position,
- information on issuance of shares,
- information which the company obtained for the purpose of forming an opinion about the expertise and professionalism of future staff members,
- information on unusual transactions,
- information on securities custody, and
- information on incidents constituting a serious threat to the integrity of the securities institution's business operations, positions in financial instruments and outstanding loans.

Please note that this enumeration is by no means exhaustive.

Intermediaries must also comply with company law rules regarding legal entities in general. According to article 10 of Book 2 of the Netherlands Civil Code (in Dutch: "Burgerlijk Wetboek", hereinafter: "NCC") the management of legal entities are under the obligation to administer the financial condition of the legal entity and everything relating to its activities as such activities may require and keep the "Books, records and other data carriers pertaining thereto", which form part of a company's "administration", in such a manner that its rights and obligations can be ascertained at any time. Article 10 paragraph 3 of Book 2 NCC requires these books, records and other data to be retained by the management for a period of seven years.

Dutch law does not provide in a limitative enumeration of the documents from which the rights and obligations of a company can be ascertained and are thus to be kept. It is therefore the intermediaries' own responsibility to determine which documents it considers relevant to retain in view of the above definition. However, practice has shown that the provision of article 10 of Book 2 NCC is to be interpreted broadly.

Intermediaries are also to comply with tax regulations. Pursuant to article 52 of the State Taxes Act companies are obliged to keep data, records and other information carriers that can provide an insight into the rights and obligations of the company and, furthermore, all other information that could in some way be relevant for the levying of taxes for 7 years.

53.18. Austria

The **Securities Supervisory Act** (Wertpapieraufsichtsgesetz) provides in its section 17 that undertakings which offer securities and other investment services must record orders and instructions connected therewith as well as: the execution of the order, the name of the person who had direct contact with the customer, the person that accepted the order by the customer as well as the time of the order and the execution time (other information must also be recorded, but is irrelevant in this context). These records must be stored for at least six years.

Under the **accounting rules** storage – amongst others – of the documents that are the basis of entries into the books to be maintained pursuant to section 189 para 1 Commercial Code must be stored for seven years. The period is extended in case there are pending administrative or court cases in which these documents might be relevant (section 212 para 1 Commercial Code). The term runs from the end of the calendar year in which the last entry in the books was made or the yearly accounts were drawn up or correspondence was received or sent (compare answers to question (3)).

The same term of seven years and the same rules as for accounting apply pursuant to section 132 **Federal Tax Act** for taxation purposes.

53.19. Poland

For the purposes of preventing the circulation of assets of illicit or unknown origin and financing of terrorism, the National Depository (to the extent to which it keeps securities accounts) and intermediaries are obliged to record all transactions whose value exceeds the amount of EUR 15,000. The data to be recorded covers, without limitation, data identifying the investor / person effecting the transaction and transaction-related information such as the amount, currency, date and place of entering into the transaction, account number, etc.

In addition, where the National Depository and intermediaries collect and process investors' personal data, they are obliged to report the collection of data to the register kept by the General Inspector for Personal Data Protection and to take technical and organisational measures to assure that the protection of the personal data processed corresponds to risk levels and category of the protected data, which includes, without limitation, the obligation to protect the data from disclosure to unauthorised persons, appropriation by unauthorised persons, unauthorised processing and alteration, loss, damage or destruction thereof.

53.20. Portugal

The financial intermediary must keep a daily register of the operations carried out by itself, on own account and for the account of each of its clients.

Without prejudice to more restrictive legal or regulatory requirements, financial intermediaries must keep record of the documents and registers relating to securities operations undertaken within or out of the market, for at least five years.

53.21. Slovenia

Pursuant Art. 20 of ZNVP in central registry (i. e. information system for central registry maintenance, operated by KDD) all data on securities accounts (positions and holders) and on transactions (e. g. transfers of securities, entries with respect to third party rights) shall be maintained (i. e. recorded and stored).

53.22. Slovakia

Based on law, members of the CSD must utilize technical means of the CSD for keeping their registration of securities that means data maintained by CSD members are stored by the CSD itself. Depository stores data in computer files for an unlimited time period. Archive backup files are stored on magnetic tapes

53.23. Finland

In principle, the data in the book-entry system shall be stored by APK indefinitely since ownership rights do not expire. The intermediaries' liability to store information is regulated by accounting law, taxation law and prudential rules that are applied to banking and investment firm activities in general.

53.24. Sweden

See question 52 and the Financial Instruments Accounts Act, chapter 3 section 12 and 13. There are also general rules in the regulation from Finansinspektionen.

53.25. United Kingdom - [to be completed]

54. QUESTION NO. 54: ARE THERE ANY TRANSFER RESTRICTIONS APPLICABLE TO SECURITIES (E.G. ARE TRANSFERS RESTRICTED TO CERTAIN TYPES OF INVESTORS OR INTERMEDIARIES, IS THERE A NEED FOR NOTIFICATIONS OR CERTIFICATIONS, CAN DELIVERY ONLY OCCUR AGAINST PAYMENT, IS THERE A PROHIBITION OF OVER-THE-COUNTER TRANSACTIONS, ETC.)? WHAT IS THE EFFECT OF A BREACH SUCH RESTRICTIONS?

54.1. Belgium

As a rule there is no restrictions on transfers as such (we are not addressing here in the answers to this questionnaire any tax issues which should be addressed by the FISCO WG). Of course depending on the securities framework, as developed earlier, certain types of transfers could only take place between certain types of intermediaries as organised by the applicable legislation: designated account keepers ("teneurs de compte") for dematerialised securities, CIK or EB participants (and between the latter and their own clients if acting under the same legal framework) for transfers of immobilised book-entry securities held under Royal Decree n° 62. We do not see the relevance from a clearing or settlement perspective of questions relating to the regime of OTC transactions as such but it is worth noting that such transactions are subject to restrictions (need to get explicit client's consent, duty of the intermediary to comply with certain prudential or deontological rules when acting as counterpart for clients' transactions, obligation to settle in book-entry form transactions on fungible securities trade on a regulated market, etc) laid down in the law of April 6, 1995 on the investment services (implementing the ISD), replaced by the law of August 2, 2002 on the supervision of financial markets (see in particular article 26, not yet entirely in force) and in the Royal Decree dated May 13, 1996 determining the conditions under which OTC transactions may be carried out (see also the Royal Decree of May 16, 2003 on the OTC market of public debt securities (OLOs and Treasury certificates).

54.2. Czech Republic [to be completed]

54.3. Denmark

There are no mandatory transfer restrictions applicable to securities.

54.4. Germany

As a rule, no such restrictions do exist. Until 2002 (and also *strictu sensu* not a "transfer restriction"), according to Section 53 of the German Stock Exchange Act (*Börsengesetz*), certain contracts involving a retail customer were considered to be unenforceable if it concerned futures instruments (*Finanztermingeschäfte*). However, that provision was abolished in 2002 and replaced by provisions in the German Securities Trading Act. Under Section 37 d Securities Trading Act, there is still a requirement to inform the retail investor of the specific risk of futures transactions. However, if an institution should breach that obligation, the transaction is no longer considered to be unenforceable, but the institution is liable for any damages incurred by the investor resulting from that breach.

With regard to registered shares with restricted transferability (*vinkulierte Namensaktien*), in contrast to what the name might suggest, this is also not a "transfer restriction" in the strict sense. According to Section 68 para. 2 of the German Stock Corporation Act, the transfer of ownership in these instruments requires the consent of the issuing entity. However, Section 5 para. 2 Stock

Exchange Act says that shares the acquisition of which requires the consent of the company may be admitted only, if such restriction does not disturb stock exchange trading in such shares. Consequently, such shares are only admitted, if the company undertakes to make use of the right to refuse its consent only in extraordinary situations. Of course, if the company refuses to consent, the transfer of ownership does not become effective.

With regard to DvP, there is *no statutory requirement* under German law to effect transactions on a DvP basis. DvP is a technical risk mitigation tool implemented by contractual arrangement and the general terms and conditions of clearing and settlement systems in line with international recommendations.

With regard to retail investors, custodian banks usually act as commission agents for their clients when purchasing securities. Therefore, they are entitled to an advance payment according to Section 669 German Civil Code and the investor has to maintain sufficient funds or credit facility on his account according to Section 7 of the Special Conditions for Securities Dealings (*Sonderbedingungen für Wertpapiergeschäfte*). Delivery versus payment is therefore not an issue at this stage although it is common practice of the banks executing a purchase order to debit the account of the customer only if the bank knows that the order has been executed. Should the bank fail to deliver the securities, the investor is entitled to re-claim the funds debited on the grounds contract law as well as on the grounds of undue enrichment.

However, at CSD-level, there is DvP processing. This is achieved in such a manner, that according to the rules of the settlement system provided by the CSD a securities-booking - and thus the transfer of (co-)ownership rights with respect to the securities - does not become effective (in the meaning of a performance of reciprocal obligations of the parties of the transaction) until the corresponding cash settlement batch run or in case of transactions processed in real time settlement (RTS) the corresponding cash settlement operation has been successfully completed.

54.5. Estonia

Apart from the restrictions described in question (4), no.

54.6. Greece

54.6.1. Article 81 of law 2533/1997 provides that the persons mentioned therein are prohibited from transacting in securities which are listed in the ATHEX or any other regulated market operating in Greece, unless these persons follow a procedure specially provided for by the law. The particular prohibition applies to the following persons:

a. the Members of the Board of Directors of the HCMC;

b. the Director of the Capital Market and Securities Exchange Department of the Ministry of National Economy;

c. the Members of the Board of Directors of the Athens Exchange and the companies controlled by the latter;

d. the Members of the Board of Directors of Investment Firms, Investment Portfolio Firms and Mutual Funds Management

Firms, as well as the Managerial officers of these firms (General Managers, Managing Directors and Managers);

e. the persons holding managerial posts in the HCMC, the ATHEX, the ACSD the companies controlled by the ATHEX, as well as the Members of the Board of Directors of and the persons holding managerial posts in any other body of a regulated market operating legally in Greece;

f. any other person which is occupied full-time in or employed by the ATHEX or any of its subsidiaries, the HCMC and the ACSD;

g. the members of the administration bodies of unions or other societies of persons representing members of the ATHEX, institutional investors or other securities market observers; and

h. journalists who are members of the editors' associations and any person providing journalist services to publishing firms or radio and television means of communication which provide on a regular basis information or commentaries upon issues relating to the capital market.

54.6.2. Article 15 of Law 3632/1928 contains a general prohibition of off-exchange (OTC) transactions on securities listed on the ATHEX with the exception of the following transactions which could be executed off-exchange (OTC):

a. Transactions in cash realised between a seller and a buyer as long as none of the parties provides professionally investment services and in particular trading on financial instruments (i.e. execution of orders or dealing on own account). Within this framework a provision introduced by law of 2396/1996 determines that the number of shares being the subject of off-exchange transactions must not exceed the 0,5% of the total number of shares of the same class of the issuer and that excess of the above limit will result to the non issuance of a depository document by the ACSD for the shares exceeding the 0,5% of the total number of shares of the same class of the issuer. The latter provision should be considered as relict from the period prior to the dematerialisation; however it creates some practical difficulties in the case of off-exchange transactions which do not fall under the mentioned prohibition, due to the fact that it has not been explicitly repealed. In any case, the above provisions should be interpreted in line and in conformity with Article 14.3 of the ISD (93/22/EEC).

b. Transactions on treasury notes or governmental bonds listed in the ATHEX, realised either in cash or based upon special agreements, as long as the buyer or the seller or both are banks (credit institutions).

c. Transactions on credit of the price, as long as the seller is a bank (credit institution) and the shares being sold represent a

percentage of at least 30% of the shares of the issuing company.

d. Transfers of securities in performance of obligations arising from the clearing of derivatives listed in the Derivative Market of ATHEX.

54.7. Spain

Fixed-income securities may be transferred without restrictions. Notwithstanding, members of the market are obliged to communicate each transaction to the Governing Body of the market (Banco de España for public debt, and AIAF Market for corporate debt) through the technical means provided for by IBERCLEAR.

The Spanish Stock Exchange is an order driven market and thus, sale and purchase agreements over securities listed therein should be conducted through the stock exchange trading systems. Bids and offers are settled within the market based on principles of best price and first in time when introducing the relevant order in the system. However, special transactions (block trades) may be executed on bilateral bases, provided certain quantitative and disclosure requirements are met. In addition, extraordinary transactions are foreseen in the Securities Markets Law.

54.8. France

Are there any transfer restrictions applicable to securities (e.g. are transfers restricted to certain types of investors or intermediaries, is there a need for notifications or certifications, can delivery only occur against payment, is there a prohibition of over-the-counter transactions, etc.)?

Article L. 421-6 of the M&FC provides that trading and transfers carried out on the French territory in respect of financial instruments admitted to trading on regulated markets (i.e. listed in France) may only be performed (subject to certain exceptions) by an investment services provider or, when carried out on a regulated market, by a member of such regulated market.

What is the effect of a breach of such restriction? The transfer is null and void.

Article L. 151-3 of the M&FC provides that are subject to the prior approval of the Minister of Economy foreign investments made in activities in France when such activities (i) affect the exercise of public authority or (ii) are likely to affect public order, public safety or national defence, or (iii) relate to research into, or production or trading of, arms, munitions, or explosive powders or substances.

Non compliance with the above restrictions entitles the Minister of Economy to impose a financial penalty the amount of which shall not be more than double that of the investment.

Furthermore, according to Article L. 151-4 of the M&FC, any undertaking, agreement or contractual clause which directly or indirectly carries out a foreign investment in France referred to in Article L. 151-3 of the M&FC without being approved by the Minister of Economy is null and void.

54.9. Ireland

No such specific restrictions apply to such transfers as a matter of general law other than those referred to in other responses although restrictions may, of course, be imposed pursuant to the terms thereof or by reason of the nature of the issuer. Obviously, the circumstances of a transfer may be such as to result in a breach of any one of a multitude of laws but it is not possible to address all possible circumstances in these responses.

Restrictions are imposed on financial transfers which may affect payments made for, or in respect of, securities. Exchange control no longer applies in Ireland but orders made by the Minister for Finance under the Financial Transfers Act 1992 or the European Communities Act 1972 or EU Regulations having direct effect in Ireland, may restrict financial transfers between Ireland and other countries. Orders and EU Regulations that are currently in effect impose restrictions on financial transfers involving residents of certain countries, certain named individuals and entities arising from the implementation in Ireland of United Nations and EU sanctions.

Under section 5 of the Financial Transfers Act a person is guilty of an offence if that person fails to comply with an order made under that Act. Where a person is convicted of an offence under the 1992 Act, that person is liable on summary conviction to a fine not exceeding €1,269.74 and/or imprisonment for a term not exceeding twelve months and on conviction on indictment, to a fine not exceeding €12.7 million (or twice the amount of the capital in respect of the offence committed if greater) and/or imprisonment for a term not exceeding 10 years. In the case of continuing offences following conviction, a fine of up to €126,973.81 (on conviction on indictment) or €253.95 (on summary conviction) can be imposed in respect of each day during which the offence continues.

54.10. Italy

There are no general transfer restrictions applicable to securities.

54.11. Cyprus

Exchange control restrictions have been lifted in Cyprus. Apart from restrictions set out in previous answers there do not seem to be any other.

54.12. Latvia

If the securities are the subject of FIML there should not be any restrictions for transfer of the securities, as according to the FIML, securities that are disposable without any restrictions shall be admitted to trading on regulated markets.

According to the Commercial law the articles of association may provide that the sale of registered shares shall require the consent of the board of directors, the council or a general meeting of shareholders, as well as the grounds on which such consent may be refused, and the right of first refusal of other shareholders to the share to be sold.

54.13. Lithuania

There are particular restriction related to the eligibility to be a shareholder of controlled entities, e.g. of banks. Also there are certain restrictions related to acquisition or transfer of particular quantity of shares of regulated entities, e.g. of

the banks, insurance companies, financial intermediaries. In such case it might be necessary to notify thereabout the supervisory authorities of such entities and/or obtain their approval in respect of the acquisition or the transfer. Consequences of violation of the established acquisition order depend on the type of entity. For instance, in respect of acquisition of particular quantity of shares of the financial intermediary without approval of the LSC, such shares are deemed as not conferring voting rights. In respect of acquisition of particular quantity of shares of the insurance company without approval of the Insurance Supervisory Commission, such transaction shall be deemed null and void. In respect of acquisition of particular quantity of shares of the bank without approval of the BoL, such shares are deemed as not conferring voting rights. However, there are no explicit provisions concerning the consequences of transfer of shares without required notification of the seller to the supervisory authorities.

In addition, certain restrictions are related to competition law requirements regarding notifications about concentration. Any concentration transaction inconsistent with the notification procedure shall be deemed null and void. On the other hand there are particular exceptions in respect of intermediaries related to concentration. Art.10(5) of the Law on Competition provides that a concentration shall not be deemed to arise where commercial banks, other credit institutions, intermediaries of public trading in securities, collective investment undertakings and management companies managing them, and insurance companies acquire more than 1/4 of shares in another enterprise or insurance company with a view to transferring them, provided that they do not exercise voting rights in respect of those shares and that any such disposal takes place within one year of the date of acquisition and information is submitted to the Competition Council not later than within one month after acquisition. If the financial institutions that acquired more than 1/4 of shares in another company decide not to comply with the conditions provided for above, they must submit a notification of concentration in accordance with the established general procedure.

Some transfer restrictions are related to family law concerning presenting orders to intermediary in respect of securities jointly owned by the spouses. In such case only both spouses acting jointly or one spouse presenting the intermediary with a power of attorney authorizing him/her to act also as a representative of other spouse may present the intermediary with orders related to transfer of securities. Transactions violating the aforementioned order may be declared void irrespective of the other party to the transaction being in good or bad faith except in cases where one or both of the spouses used fraud in making the transaction or made misrepresentations to any institutions or officials. In such cases the transaction may be declared void only if the other party to the transaction was in bad faith.

OTC transactions are not prohibited.

54.14. Luxembourg

No, by law there are, generally speaking, no transfer restrictions applicable to securities. Exceptions include securities in Investment Companies in Risk Capital (Sicar) which may only be transferred to “well-informed” investors. The law also allows the setting-up of “institutional” investment funds, the securities in which may only be transferred to institutional investors. The terms and conditions of the securities may provide for transfer restrictions.

54.15. Hungary

Transactions regarding securities listed on the stock exchange can be executed only on the stock exchange. Own account trading is allowed only on the stock exchange. Own account trading with client is allowed only when there is no sufficient counteroffer and the regulations of the stock exchange permit it.

54.16. Malta

No such transfer restrictions apply. However, there are some restrictions in relation to "qualifying investors' in so far as relates to banks, insurance companies and investment firms as these are subject to the prior consent of the mfsa.

54.17. Netherlands

Under Netherlands regulatory law, there are few transfer restrictions applicable to securities. The Savings Certificate Act (in Dutch "Wet inzake spaarbewijzen") prohibits transfer and acceptance, not in the conduct of profession or business, of savings certificates without intervention of a securities broker (which must be a member of the Association of Securities Trade) or the issuing company. Acting in violation of these provisions is a criminal offence. This Act is envisaged to be abolished in the near future.

Under Netherlands company law, the articles of association of a company may contain certain transfer restrictions or approval procedures for shares of that company. However stock exchange rules prohibit such limitations for obvious reasons, these limitations can be a restriction in over the counter transactions.

54.18. Austria

There are no such transfer restrictions which an account provider (of any tier) must observe. The account provider has no statutory control functions, except for notifications required under money laundering regulations. Transfer restrictions might arise under private law in case of pledge arrangements or enforcement procedures.

54.19. Poland

As a result of the general principle stating that secondary trading is effected on regulated market, a permit issued by the market regulator is required for any transactions in securities effected outside the regulated market. Permit application should be made by one of the parties to the transaction and submitted through the system participant keeping the securities account of one of the parties to the transaction. The applicant is also obliged to make the transaction's terms and conditions publicly known in the manner specified in the permit (under special circumstances, the Commission may release the applicant from this obligation.)

Where a permit application covers more than one transaction transferring securities outside the regulated market, or transactions of specific kind, the permit may be issued to a domestic person or a foreign person whose operations in an OECD Member Country involve securities brokerage services on regulated market, custodian services and securities registration.

A transaction effected outside the regulated market without a permit by the market regulator, as well as consequential entries in the depository-settlement system, should be regarded as valid and effective. However, in such a case the party to the

transaction, the system participant and the institution managing the system are subject to sanctions for non-compliance.

Remarkably, a permit issued by the market regulator is required for trading in securities on more than one regulated markets or exchanges at the same time. However, no permit is required where securities are to be simultaneously traded on another exchange or another OTC market located in any OECD Member Country other than the Republic of Poland, and if the issuer's registered office is outside Poland.

Moreover, there is a public trading-specific rule according to which securities are transferred through the agency of system participants. There are some exceptions to the rule, e.g. in the case of trading in Treasury securities.

Worth mentioning is also the rule according to which relevant entries must be made in the depository-settlement system for each public-trading transfer of securities. While public trading involves dematerialised securities, the transfer thereof without making an entry in the relevant securities account is impossible. Making such an entry is prior to transaction settlement in the depository-settlement system, which process is obligatory for both transactions effected on the regulated market and those effected outside the market on the basis of a permit issued by the regulator. The settlement is final and irrevocable from the time specified by system-specific regulations. In accordance with the said regulations, transaction settlement on the regulated market is made on a delivery-versus-payment (DVP) basis. What is allowed, however, is transferring securities in the system without cash settlement, e.g. transferring securities to another system participant or another depository-settlement system, settlement of transactions in Treasury securities outside the regulated market, etc.

Transferring securities otherwise than through the agency of system participants or without adherence to the rules specified in its regulations is not reasonably possible and remains a merely theoretical speculation. Therefore, transactions effected in violation of the system-specific rules would be valid and effective, with the system participant or the institution managing the system being subject to sanctions for non-compliance.

When it comes to transferring securities (such as shares or other securities carrying rights to acquire shares) in public trading, obligations related to large blocks of shares should be taken into account. The obligation arises upon reaching, exceeding or changing a threshold percentage of the total number of votes at a company's general meeting as a result of acquiring or alienating securities. The obligation applies both to a single transaction and to a series of transactions. The obligation may involve either an obligation to notify the market regulator, or to obtain a permit issued by the regulator. The market regulator must be notified: where an investor has reached or exceeded the threshold level of 5 % or 10 % of the total number of votes; where prior to alienating shares an investor held securities carrying at least 5 % or at least 10 % of the total number of votes and, as a result of the alienation, the investor became the holder of shares carrying not more than 5 % or not more than 10 % of the total number of votes. The obligation to notify the market regulator also applies where, as a result of acquiring or alienating securities, the shareholding of an investor is changed by at least 2 % of the total number of votes at the general meeting to exceed 10% thereof (in the case of a company

whose shares or other securities carrying the right to acquire shares are admitted to trading on the regulated exchange market) or 5% thereof (in other cases.)

The notification obligation also applies to a person or organisation which, as a result of acquiring or alienating shares, has reached or exceeded, or became the holder of shares carrying not more than, 25%, 50% or 75% of the total number of votes at the company's general meeting.

The obligation to obtain a permit issued by the market regulator applies where an investor, as a result of acquiring securities, reaches or exceeds, respectively, 25%, 33% or 50% of the total number of votes at the company's general meeting. No permit is required where only securities traded on a non-regulated OTC market are acquired or if the acquisition is effected under financial collateral arrangements.

Transferring securities in default of the notification obligation or the obligation to obtain a permit issued by the market regulator should be regarded as valid and effective. However, if this is the case, the investor may not exercise the voting right attached to the securities transferred in default.

It is also worth mentioning that acquiring on the secondary market, within a period of time shorter than 90 days, shares admitted to public trading or depository receipts issued in connection therewith carrying at least 10% of the total number of votes at the general meeting may be effected solely by way of announcing invitation for public subscription or exchange of shares.

Restrictions applicable to securities transfers may also be imposed by the provisions of foreign exchange law. Certain restrictions also apply to alienating and acquiring in the Republic of Poland by non-residents who are nationals of non-EU Member countries and by international organisations to which the Republic of Poland is not a member, whether directly or through the agency of other persons, of securities and participation units in collective investment funds. Certain restrictions also apply to alienating and acquiring by residents, whether directly or through the agency of other persons, of shares in companies whose registered office is in non-EU Member countries (including the taking up of shares in such companies), participation units in collective investment funds whose registered office is in such countries, as well as debt securities issued or released by non-residents whose registered office is in such countries.

The restrictions may be suspended by way of a general or individual foreign exchange authorisation. Such general foreign exchange authorisation is currently in place in respect of investments made in the countries with which the Republic of Poland has entered into agreements on the reciprocal promotion and protection of investment, and in respect of investments made by non-residents who are nationals of the said countries. Therefore, there are no restrictions on alienating or acquiring in the Republic of Poland by non-residents who are nationals of the said countries of securities and debt securities of one-year or longer maturity, participation units in collective investment funds, property rights and debt securities of one-year or less maturity which are traded on the Warsaw Stock Exchange, Central Table of Offers or commodity exchanges. Moreover, there are no restrictions on alienating in the Republic of Poland by non-residents who are nationals of the said countries, by way of a property liquidation transaction effected in connection with a change of their foreign exchange status, of securities, participation units in collective investment funds, claims and other rights exercisable by way of monetary

settlement, which had been acquired by such persons before they were given the non-residential status. Similarly, there are no restrictions on acquiring or alienating by residents in the said countries of shares in companies whose registered office is in one of the said countries (including the taking up of shares in such companies), participation units in collective investment funds whose registered office is in one of such countries, as well as debt securities of one-year or longer maturity issued or released by non-residents in the said countries.

54.20. Portugal

Yes, in the centralised system only intermediaries which participate in the system can operate. In what concerns deals made in the stock exchange, delivery can only occur against payment. Regarding the over the counter transactions, the delivery of securities can be made against payment (or not) depending on what has been agreed by the relevant parties. There is no prohibition of over the counter transactions. However, pursuant to article 330, paragraph 4 of the Portuguese Securities Code, the orders relating to securities traded in a certain market should be executed in that market, except for express and written indication by the entity placing the order.

54.21. Slovenia

There are no transfer restrictions applicable to securities.

54.22. Slovakia

Transfer instructions can be placed with depository only by intermediaries that are members of the CSD. According to CSD membership conditions applicable to securities dealers, membership can be granted to securities dealers with FMA´s licence to provision of the widest range of services (this licence is not needed when applicant has a seat in other Member State) and which are ready to act as CSD member in compliance with depository's Operational rules. All securities dealer applicants for membership must also obtain the previous consent of the Financial Market Authority with activities of the CSD member. Only applicants fully compliant with all membership conditions are granted the membership in the CSD.

Negotiability of securities can be restricted by their issuer what is indicated in issue conditions of a particular issue or if disposal right to securities issue or to a single security is suspended. There are no restrictions set by depository on types of investors or types of securities that might be transferred as long as it is a dematerialised security registered by depository in its registry.

However, it is requested to fill in the transfer instruction a registration number of member of the CSD and of person that represents seller or buyer. Depository shall assign such registration numbers only to its members and to any other authorized person in compliance with Operational Rules of the CSD, therefore it practically limits persons that can be included in transfer instruction acceptable by CSD for processing to those entities registered with the CSD prior to transfer.

In cases stipulated e.g. by §70 and §102 par.1 letter a) and b) of the Act on Securities and Investment Services, previous consent of Financial Market Authority must be enclosed to transfer instruction. If such document has not been submitted by instructing party, depository or member of the CSD after execution of transfer shall report this fact to the relevant authority.

There are no special sanctions imposed on depository or member of the CSD if they break this duty, but they are subject to sanctions according to §144 of the Act for breach of their duties of securities dealer or central securities depository set by the Act.

Depository can settle both delivery versus payment and free of payment instructions.

OTC transactions with securities listed on the stock exchange are not prohibited, although most securities dealers prefer to report the OTC transactions to the stock exchange and settle them as direct stock exchange trades.

54.23. Finland

There are no general transfer restrictions applicable to securities. Nevertheless, the Articles of Association of a limited liability company may provide that a transfer of shares of the company is subject to a redemption right or to consent by the company (Chapter 3 of the Companies Act).

54.24. Sweden

The securities traded in the Swedish market are with a few exceptions dematerialised and the securities should be intended for public trading, which means that they should be transferable without restrictions. There are no restrictions regarding over-the-counter transactions.

Financial instruments and traded securities are defined in the Financial Instruments Trading Act Section 1 as follows:

"Financial Instruments" means traded securities and other rights or obligations intended for trading on a securities market.

"Traded securities" means shares and bonds, as well as other equity or debt instruments which are intended for public trading, fund units, and the rights of shareholders against persons with whom share certificates in foreign companies are deposited on behalf of such persons (depositary receipts).

54.25. United Kingdom

To be completed

55. QUESTION NO. 55: HOW IS IT EFFECTED THAT TITLE TO THE SECURITIES PASSES FROM THE SELLER TO THE BUYER ONLY AT THE VERY MOMENT WHEN THE TRANSFER OF THE PURCHASE PRICE FROM THE BUYER TO THE SELLER BECOMES EFFECTIVE (DELIVERY VERSUS PAYMENT (DVP))?

55.1. Belgium

Transfer of ownership for shares may be subject to specific mandatory rules when traded on a stock exchange. They will therefore vary for the relevant counterparts depending on the stock exchange and on the intervention of a central counterpart. In the Euronext context, those rules differed from country to country and are now close to harmonisation (transfer of ownership at settlement point).

Outside stock exchange transactions, for OTC trades or for unlisted bonds for example, transfer of ownership rules may be subject to specific arrangements between the two counterparts and will depend on their contractual documentation. Subject to the above, it remains still that from a conflict of laws perspective, transfer of ownership, as any other property aspects, will generally be determined both between parties and vis-à-vis third parties, according to the lex rei sitae rule (or "lex situs") **by the law where the relevant assets are transferred**[159].

In the case of securities held on a fungible basis under Royal Decree n° 62, the relevant assets that are recorded in the accounts of participants and that are transferred by way of settlement are interests in the relevant securities (securities entitlement). Investors are indeed granted (co-) ownership rights in the fungible securities deposited on their securities accounts as a result of articles 2 and 12/13 of Belgian Royal Decree n° 62. Therefore, when interests in securities held under RD n° 62 are transferred or pledged by participants, the participants do not transfer or pledge the (underlying) securities themselves (held directly with the issuer or through one or more tiers of sub-custodians or other intermediaries (local CSD) on the records of such entities with whom their intermediary has a direct contractual relationship) but their rights and interests in the securities, as defined by Belgian Royal Decree no. 62 (meaning that what they transfer or pledge is their co-ownership rights in a pool of fungible book-entry securities held with the intermediary; see previous answers). This analysis has been expressly confirmed for SSSs by the Belgian Act of 28 April 1999 implementing the Settlement Finality Directive (in particular article 9.2) of 19 May 1998 and by the new law dated August, 2, 2002 on the supervision of the financial sector amending the Royal Decree n° 62. As a result of the analysis above, for the purposes of determining pursuant to lex rei sitae, the rules applicable to transfer of ownership to assets held with an intermediary acting under RD n° 62, one will apply Belgian law as the law applicable to the book-entry securities held with this intermediary (including its securities accounts and the correlative co-ownership rights attributed to participants holders of such accounts). More particularly, **one will apply Belgian rules for the transfer of ownership of book-entry securities that are determined by reference to general commercial legislation governing commercial sales that refer in turn to the moment when the assets' delivery is taking place to determine the relevant date for the transfer of ownership (by reference to the moment of the credit of the**

[159] We will not address here the new rules that will derive, once formally adopted and ratified by Contracting States, from the new Convention on the law applicable to certain rights in respect of securities held with an intermediary adopted on December 13, 2002 by the Nineteenth Session of the Hague Conference on Private International Law. However, even under this new regime, the analysis described in the main text should not be affected (see article 4 of the Hague Convention).

transferee's account). As a rule, there is no conditionality of the transfer of securities to the transfer of cash but parties may agree otherwise and operators of securities systems may have put in place DVP BIS model 1 (simultaneity of both transfers) in their books .

55.2. Czech Republic [to be completed]

55.3. Denmark

When a security is transferred against payment through the clearing and settlement system VP's clearing rules and clearing and settlement system secures that the securities transfer only takes place against the simultaneous transfer of payment. In other words in such cases credit to the securities account is conditional upon the payment of the agreed and reported price.

55.4. Germany

On the CSD level, DvP does take place in the manner described above, the transfer of securities and thus the transfer of title by means of book-entry credit is linked to the transfer of the respective counter value in central bank money pursuant to No 8 of the General Terms and Business Conditions of Clearstream Banking AG. In order to indicate the exact point of time when the transfer of title regarding securities and cash becomes legally effective in its settlement system (irrespective, of course, of aspects of settlement finality) and to enable further processing by lower-tier intermediaries the CSD provides a respective time-stamped declaration to the parties.

55.5. Estonia

With respect to deliveries at the level of the Central Register (i.e. accounts opened in the Central Register are debited and credited) the respective DVP transfer instruction is available for account operators as part of the standard service level. The Estonian CSD effects DVP transfer instructions (i.e. matched debit and credit instructions) only upon receipt of the Central Bank's confirmation of successful clearing of the corresponding monetary obligations. Both the ECRSA and Data Processing Rules of the Estonian CSD contain provisions that apply to the DVP settlement procedure.

There are no requirements provided under the Estonian law regarding deliveries at the level of internal records of the nominee account. Each intermediary is free to determine its own service level that it provides to its clients. Such service level may provide the opportunity to effect internal deliveries on the basis of DVP principle.

Is the effectiveness of the credit to the securities account conditional upon the payment of the purchase price?

At the level of the Central Register – the answer is "no". It means that transfer of ownership at the level of the Central Register is always unconditional.

55.6. Greece

Please refer to answers given in section I (2), (11) and (17).

Furthermore, regarding clearing and settlement of securities held with the BoGS, the BoGS Operating Regulation provides in para 12.5. the following general rules applying to the transactions' settlement: a) Every credit of securities into an

account of a BoGS' participant must correspond to a debit of equal securities of same kind in an account of another participant or in another account of the same participant. b) The consequences of the credit or debit of securities into accounts of the BoGS are effected upon finalization of the relevant registrations, according to the operation rules of the present Regulation[160].

55.7. Spain

DvP is a "settlement principle" established by RD 116/1992 as mandatory for movements of securities and cash in the accounts of the participants in IBERCLEAR.

In the SCLV platform managed by IBERCLEAR (which is a "Model-2" settlement platform, i.e., gross for securities and net for cash), no debits or credits of securities are made in the accounts of the participants until a provisional debit and the corresponding credit is made in the cash accounts opened at Banco de España for the net balance of the cash leg of the settlement process for a given settlement date. Once the Banco de España confirms that such provisional debits and credits have been made, the securities accounts in IBERCLEAR are credited and debited, and all of the debits and credits are irrevocable.

In the CADE platform (which is a "Model-1" settlement platform, i.e., gross both for securities and cash), credits and debits in cash accounts at Banco de España are considered provisional until the corresponding credit or debit is made in the relevant securities account in IBERCLEAR. At that moment all of the debits and credits are considered final.

55.8. France

How is it effected that title to the securities passes from the seller to the buyer only at the very moment when the transfer of the purchase price from the buyer to the seller becomes effective (delivery versus payment (DvP))?

Article L. 431-2 of the M&FC contemplates that:

"The transfer of ownership in respect of financial instruments referred to in paragraph 1, 2 and 3 of Article L. 211-1-I of the M&FC and any similar financial instrument issued under foreign law, when admitted to the operations of a central depositary or settled through a securities settlement system referred to in Article 330-1 of the M&FC **results from book entry in the account of the buyer on the date and under the conditions defined by the AMF General Rules**.

[…]

As an exception to the above paragraphs, where the securities settlement system provides for a continuous irrevocable settlement**, the transfer of ownership occurs under the conditions of the AMF General Rules**. Such transfer occurs for the benefit of the purchaser provided that the purchase price has been paid to the

[160] Please note that in June 2005 a second version of the BoGS Operating Regulation has been issued. Therefore references made in our answers of Section I will be adjusted soon to the new version of the BoGS Operating Regulation.

financial intermediary. Such financial intermediary remains the owner as long as the purchaser has not paid the price."

The provisions of the AMF General Rules relating to the transfer of ownership in respect of financial instruments are in the process of being published.

With respect to settlement, the French securities settlement system (i.e. "RGV2") is a designated DvP system and provides for a continuous irrevocable settlement. The settlement occurs only if cash and securities are available and credit to a securities account with resulting transfer of ownership is expected to occur following settlement only.

Article 6.32, §2 of RGV2 Operating Rules states that "As soon as the Banque de France has given Euroclear France its consent to booking the corresponding cash transfers, **the system considers delivery versus payment orders to have been finally settled**. Consequently, securities delivery transfers are booked in the participants' current accounts with Euroclear France and the cash transfers are made by Banque de France into their settlement accounts".

Are the relevant rules established by an intermediary, by market conventions or imposed by law?

The RGV2 Operating Rules are established by Euroclear France and approved by the AMF. Indeed, Article L. 621-7-VI of the M&FC provides that the AMF General Rules do determine the conditions under which the AMF approves the CSD operating rules.

Is the effectiveness of the credit to the securities account conditional upon the payment of the purchase price?

Article L. 431-2 of the M&FC contemplates that:

*"[…]where the securities settlement system provides for a continuous irrevocable settlement, the transfer of ownership occurs under the conditions of the Règlement Général of the AMF. **Such transfer occurs for the benefit of the purchaser provided that the purchase price has been paid to the financial intermediary. Such financial intermediary remains the owner as long as the purchaser has not paid the price**."*

55.9. Ireland

As a matter of general law, the manner in which title to securities passes will depend on the relevant contract, the nature of the securities and the operational payment/clearing systems which are used to effect the settlement.

The G30 Report[161] defines DVP as "the simultaneous exchange of securities (the delivery side) and cash value (payment) to settle a transaction". With DVP the giving of value on both sides should not only be simultaneous but should also, as far as possible, be final and irreversible. Although conceptually simple, the achievement of true DVP in practice can be a real challenge for legal and

[161] Clearance and Settlement Systems in the World's Securities Markets (G30, 1989), Chapter 1

operational reasons, including the highly intermediated nature of the securities and cash settlement systems.

As a matter of Irish law CREST Ireland is structured to achieve effective DVP. The system is set up so that there is no transfer of title without the creation of a corresponding bank guarantee that the necessary payment will be made. A CREST member is required to appoint at least one CREST settlement bank which will be responsible for the cash implications of transfers for that member. On settlement, the transferee's settlement bank will incur an unconditional and irrevocable obligation to pay the consideration to the transferor's settlement bank. The actual payment obligations are discharged outside CREST. The registrar is required by the CREST rules to register a transfer within two hours of the receipt of an RUR (see further the response to question (7) above). It is only in the limited circumstances outlined in our responses to question (17) above that a company can properly refuse to act on an RUR.

See our responses to question (15) above for the impact of the Settlement Finality Regulations on an insolvency of a member of CREST Ireland.

55.10. Italy

Are the relevant rules established by an intermediary, by market conventions or imposed by law? Is the effectiveness of the credit to the securities account conditional upon the payment of the purchase price?

As indicated above, title to the securities passes only with the credit of the securities in the purchaser's securities account.

For DVP transactions, the credit of the securities in the purchaser's securities account is technically possible only after the corresponding cash debit transaction has been successfully executed.

In particular, in accordance with the operating rules for settlement systems (Express II), the net settlement process activates cash settlement via electronic transmission to the BI-REL system of a specific request to transfer cash from the participants' accounts with debit positions to a technical cash account registered in the name of the settlement systems, during the hours compatible with the regulations governing the BI-REL system. After confirmation from the BI-REL system that the cash debit transactions have been successfully executed, net settlement completes the settlement process by:

a. transmitting to the BI-REL system a specific electronic request to credit cash to the participants' accounts with credit position and debiting the settlement systems' technical cash account;

b. simultaneously settling the multilateral balances of securities receivable and debiting the technical securities account for clearing to which the securities were previously transferred for clearing purposes.

Are the relevant rules established by an intermediary, by market conventions or imposed by law?

The relevant rules are established by Monte Titoli in the framework of regulations issued by the Bank of Italy, upon consultation with the Consob, as provided by the FLCA.

Is the effectiveness of the credit to the securities account conditional upon the payment of the purchase price?

When the securities settlement is performed on a DVP basis, as described above, the securities are "blocked" in a temporary account. Settlement takes place only after confirmation has been given of the cash being credited.

55.11. Cyprus

Cyprus law and jurisprudence generally provides that title to securities passes depending on the provisions of the contract. One must also take into account the operations of payment/ clearing systems. As said earlier, the only regulated market in Cyprus is the Cyprus Stock Exchange (CSE) which, as clarified earlier, is a public body whose function is regulated by laws and regulations. As the system now functions there is no transfer of title without a pre-existing arrangement through a bank guaranteeing that payment will be made. So in effect, on settlement there is an irrevocable and unconditional obligation guaranteeing payment to the transferor. So DvP requirements are satisfied. However, the DvP principle requires that not only the exchange of value is simultaneous but also it is final and irreversible. This last point is questionable as the relevant legal provisions have yet to be tested and there is uncertainty as to their effectiveness.

55.12. Latvia

The LCD shall control cash settlements, if in compliance with the order of the market organizer or an LCD participant financial instruments delivery versus payment (DVP) has to be provided.

Upon the receipt of financial instruments delivery versus payment (DVP) order, the LCD shall block the respective amount of financial instruments in the correspondent account of LCD participant with the LCD on the settlement day and on behalf and instructed by the LCD participant shall render payment order to cash settlement bank chosen by the LCD for the cash settlement of financial instruments transactions. Upon the receipt of the verification about the execution of cash settlement from the cash settlement bank, the LCD shall execute financial instruments transfers by registering them in the financial instruments accounts. The transfer of financial instruments and DVP settlement is regulated by the LCD rules.

55.13. Lithuania

Securities and funds transfer are processed in different systems. Securities are processed in the SSS and funds transferred in the payment system LITAS, operated by the BoL. Both systems are in close connection through the same messaging system. Participants of both systems can enter securities settlement instructions and payment orders through the same access point. The liaison of the systems ensures that final delivery of securities does not precede the final transfer of funds.

55.14. Luxembourg

Under Luxembourg law title to an asset usually passes upon the seller and the buyer agreeing on the object of the sale and on the price (transfer solo consensu). It is

generally held that this rule does not apply with respect to book entry securities where title only passes upon the credit of the securities to the account of the buyer.

DvP is essentially achieved by contract and/or the rules and the method of operation of the intermediary.

55.15. Hungary

The General Rules and Conditions of the CCP ensure this.

55.16. Malta

As noted above, dvp is not yet the case under maltese law. Once ln 287 of 2004 comes into force the transfer of securities becomes complete on payment of the securities.

55.17. Netherlands

Reference is also made to the answer to Question (17). With respect to securities transactions in the Euroclear Netherlands system, DVP settlement is accomplished through the Gross, Simultaneous Settlements of Securities and Funds Transfers-model. This DVP method implies the simultaneous transfer of securities and cash, item by item. The settlement of securities occurs in the Euroclear Netherlands system, whereas the settlement of cash takes place in the Netherlands Central Bank system (which is referred to as TARGET). The cash and securities transfers become final from the moment payment is made.

In accordance with article 114 Book 6 of the Netherlands Civil Code, cash payment is deemed to have been made at the time the creditor's account is credited.

Analogous to this is that the transfer of securities becomes final when Euroclear Netherlands has entered the securities by giro to the securities giro account of the party taking delivery. The parties involved are informed of this by Euroclear Netherlands on a real-time basis.

It is envisaged that in the near future Euroclear will introduce the Netherlands Cash Settlement Model. Under this system DVP settlement may, de facto, be achieved as follows:

By virtue of an agreement to be concluded between the Netherlands Central Bank ("DNB") and an intermediary (the "Account Holder), DNB sets aside, at the request of the Account Holder, part of the Account Holder's funds that are credited to his account with DNB, by transferring that part to a separate account (the "DVP Settlement Account") of the Account Holder with DNB on the administrative system that is referred to as the SSE platform. The money transferred to this account is used for the cash entries upon settlement of securities transactions to be recorded through the SSE of the Account Holders (as "Affiliated Institutions" under the Securities Giro Administration and Transfer Act) or of third parties who are Affiliated Institutions and for whom the Account Holder is acting as cash settlement agent, and will, be used during for no other purposes than for settlement within the settlement system.

The debiting of the DVP Settlement Account of an Account Holder who acts as or on behalf of a buyer in a securities transaction and the corresponding crediting of the DVP Settlement Account of the beneficiary Account Holder - and consequently

payment to the beneficiary Account Holder - shall take place on the suspensive condition that the purchased securities are actually transferred. The securities are subsequently transferred once it has been established that the conditional payment has taken place. The payment becomes unconditional once the securities have been transferred. This is how DVP settlement is achieved.

The main difference with the existing settlement system, is the creation of the DVP Settlement Accounts which will be administrated by Euroclear Netherlands.

The relevant rules with respect to DVP settlement are primarily established by market conventions between DNB and Euroclear Netherlands. The new settlement model is instigated by Euroclear.

55.18. Austria

The rules of the Austrian Central Security Depositary as well as the Clearing Rules of the Austrian CCP provide that only delivery versus payment transactions are allowed in case of sale and purchase (section 8 para 5 alinea d) and para 6 of the GBC of the CSA and section 18 of the Clearing Rules). The relevant rules are established by the CSD and the CCPA (see answers to questions (17) and (19)). In case these institutions were not involved, it would be possible to settle such transactions not DvP. Under the rules of the CSD and the CCP.A the effectiveness of the credit to the securities account may not be conditional upon the payment of the purchase price.

55.19. Poland

Pursuant to the provisions of the Polish law, an investor's rights to securities become effective as of the time when the relevant entry is made in the securities account kept for the investor. The entry may be made only after the relevant transaction has been settled in the National Depository. The manner in which transactions are settled is provided for in the regulations of the National Depository. According to the provisions of the said regulations, settlement is made on a delivery-versus-payment basis, namely, the clearing participant's cash account is credited simultaneously with the recording of the alienation of securities in the registration account kept for that participant. As a result, the settlement fails unless money transfer is completed, in which case no entry may be made on the securities account kept for the investor because any such entry may be made solely on the basis of the documents confirming the settlement of the transaction in the depository-settlement system operated by the National Depository. Thus, no conditional or contingent entries may be made; the final entry is made only after the purchase price for the securities concerned has been paid.

55.20. Portugal

The settlement of stock exchange operations is organised in accordance with the principles of efficiency, reduction of systemic risk and delivery versus payment. Stock exchange operations are settled on a daily basis, in the shortest possible time after execution. The participants make available to the settlement system, in the period indicated in the rules of the system, the securities or the money necessary for the good settlement of the operations. The non-compliance of those obligations, during the specified period, constitutes a definitive breach. Once the breach occurs, the managing entity of the system must immediately set in motion the necessary

proceedings of substitution to assure the good settlement of the operation. The procedures of substitution are described in the rules of the system, and should set out, at least, the following:

a. Lending of securities to be settled;

b. Repurchase of undelivered securities;

c. Resale of securities that have not been paid for.

The effectiveness of the credit to the securities account is conditional upon the payment of the purchase price.

This system is imposed by law - articles 278, 279 and 280 of the Portuguese Securities Code.

55.21. Slovenia

As explained in more detail in answer to QQ17−22 transfer of dematerialised securities from (debiting) transferor's dematerialised securities' account to (crediting) transferee's dematerialised securities' account becomes final upon execution of transfer in central registry. Upon transfer of securities "title to the securities" passes form transferor to transferee.

Two types of transactions are settled on DVP basis:

1. all stock exchange transactions (transactions executed on organized market) and

2. off-market transactions: where parties to the transaction agreed that the transactions is to be settled on DVP basis according to KDD Regulation on settlement of off-market transactions on DVP basis.

The cash leg of both types of transactions is settled in central bank money.

A. Settlement of stock exchange transactions

55.21.1. Basic principles of the stock exchange transactions settlement

KDD provides clearing and settlement services for all trades executed on Ljubljana Stock Exchange (hereinafter referred to as »*stock exchange transactions*«). Pursuant Article 257 of the Securities Market Act (ZTVP-1) all stock exchange transactions shall be settled through the securities settlement system, operated by KDD.

KDD Rules set forth a coherent set of provisions regulating all legal issues of the stock exchange transactions settlement. They apply, on the settlement of stock exchange transactions, to:

1. the rights and obligations of KDD and settlement members;

2. the rights and obligations of a settlement member with other settlement members; and

3. the rights among KDD, the settlement member who assumes the obligation of a stock exchange member, and the stock exchange member itself whose *obligation is assumed by the former.*

Details of the manner and time limits in which KDD and its (settlement) members shall perform the respective actions with respect to settlement of stock exchange transactions are regulated by ***KDD Regulations on settlement of stock exchange transactions.***

According to Par. 2 Art. 268 of The Securities Market Act (ZTVP-1) KDD Rules (and regulations) are enforceable against all KDD (settlement) members.

Settlement system (of stock exchange transactions) as defined in Par. 2 Art. 89 of KDD rules comprises the legal relationships between settlement members and between KDD and settlement members, whose contents are their mutual rights and obligations arising from the settlement of stock exchange transactions.

Settlement day for stock exchange transactions, executed on a respective trading day, is two business days after this trading day (T + 2). I. e. obligations arising from stock exchange transactions, executed on a particular trading date, become due on the second business day after this trading day.

KDD operates a ***BIS DVP Model 2*** (netting on the cash side, gross securities transfers) settlement system for all stock exchange transactions.

Settlement services performed by KDD for settlement members' stock exchange transactions are defined in Par. 1 Art. 90 of KDD Rules and comprise:

1. recording trading report data of stock exchange transactions;

2. with respect to the settlement of payment obligations of settlement members:

   - calculating and settling payment obligations; and

   - accepting and making payments in fulfillment of these obligations;

3. with respect to the settlement obligations of settlement members to transfer dematerialised securities:

   - ensuring the entry of orders to transfer dematerialised securities due, and of orders for allocation in the settlement information system,

   - verifying requirements for execution of orders from the previous item, and execution of these orders,

4. in case of default on an obligation or creditor obligation by a settlement member:

- performing buy-ins or sell-outs of securities; and

- performing other actions required to fulfill obligations and exercise other settlement member's rights against their respective settlement member, for a violation of its settlement obligations,

5. with respect to the liability of settlement members to fulfill the obligations of other settlement members:

   - performing actions required to fulfill obligations resulting from such liability; and

   - management of the guarantee fund;

6. communicating data through the settlement information system to settlement members regarding their rights and obligations resulting from their stock exchange transactions,

7. performing other legal deeds and other acts with respect to the settlement of stock exchange transactions, determined in accordance with KDD rules and regulations.

Upon receipt of the final trading report submitted by the stock exchange, KDD enters in the settlement system the following transaction data:

1. the price;

2. the type and quantity of securities traded;

3. the settlement members parties to a trade;

4. the code of end buyer's securities account, when entered in the stock exchange trading system, or that a sale transaction was for a joint account; and

5. the code of the end seller's securities account, when entered in the stock exchange trading system, or that the buy transaction was for a joint account.

55.21.2. Net settlement of payment obligations

The settlement of payment obligations from stock exchange transactions is performed on the basis of the ***net difference*** between the settlement member's:

– sum of payment obligations, for all its buy transactions executed on a trading day; and

– sum of all payment claims for all its sale transactions executed on that same trading day.

KDD calculates, by using the data it entered in the settlement information system:

1. the amount of the payment obligation or payment claim of each settlement member for every stock exchange transaction; and

2. the amount of the net payment obligation or the net payment claim of every settlement member.

Net settlement of payment obligations is performed in following steps:

- ***Step 1***: assumption of settlement payment obligations and transfer of settlement payment claims
- ***Step 2***: netting of payment claims and obligations
- ***Step 3:*** payment of net payment obligations and claims

Step 1: assumption of settlement payment obligations and transfer of settlement payment claims

In order to facilitate the net settlement of payment obligations:

- KDD assumes all payment obligations of every settlement member, arising from that settlement member's buy stock exchange transactions, and
- each settlement member transfers to KDD all payment claims, arising from that settlement member's sell stock exchange transactions

The legal effects of the ***assumption of settlement payment obligations*** are regulated in Art. 98 of KDD Rules:

Upon the assumption by KDD of payment obligations under Paragraph 1 of this Article, KDD:

1. becomes the new debtor of the seller settlement member who is the other contracting party to this transaction, thereby replacing the buyer settlement member whose payment obligation KDD assumes for a buy stock exchange transaction;
2. acquires a payment claim, against the buyer settlement member whose payment obligation KDD assumes for a buy stock exchange transaction, in an amount equal to the amount of the assumed payment obligation.

Upon becoming a member of the settlement system, the settlement member shall be considered:

1. when a debtor, as having transferred to KDD all payment obligations for its buy transactions, with the effects determined in Paragraph 2 of this Article; and
2. when a creditor, as having approved, in advance of executing a sale stock exchange transaction, the assumption of payment obligations under Point 1 Paragraph 2 of this Article.

The assumption of payment obligations for stock exchange transactions executed on a particular trading day becomes effective upon KDD entering data of these stock exchange transactions in the settlement information system.

The legal effects of the ***transfer of settlement payment claims*** are regulated in Art. 99 of KDD Rules:

Upon a transfer of payment obligations:

1. 1. KDD becomes the new creditor of the buyer settlement member who is the other contracting party to this transaction, thereby replacing the seller settlement member who transferred to KDD its payment claims for a stock exchange transaction,

2. 2. the seller settlement member who transferred to KDD its payment claim acquires a payment claim against KDD in an amount equal to the amount of the payment claim so transferred.

Upon becoming a member of the settlement system, the settlement member transfers to KDD all payment claims it will acquire for its sell stock exchange transactions, with the effects determined in Paragraph 2 of this Article.

The transfer of payment claims for stock exchange transactions executed on a particular trading day becomes effective upon KDD entering data of these stock exchange transactions in the settlement information system.

Step 2: netting of payment claims and obligations

The legal effects of the netting of payment claims and obligations are regulated in Art. 100 of KDD Rules: The payment claims of every settlement member against KDD are netted with payment claims of KDD against such settlement member. The netting of payment claims for stock exchange transactions executed on a particular trading day becomes effective immediately upon KDD entering data of these stock exchange transactions in the settlement information system.

Step 3: payment of net payment obligations and claims

A net debtor settlement member shall pay funds in the amount of its net payment obligation to the credit of KDD's clearing and settlement account (maintained by the Bank of Slovenia − see point 1 of this explanation) on settlement day, prior to 11 am on that day (i. e. 11 am on T + 2). Net debtor settlement member shall pay its net payment obligation by debiting its clearing account and crediting KDD's clearing settlement account.

Pursuant Par. 1 Art. 103 of KDD Rules KDD shall be liable to pay to net creditor settlement members their claims, in its name and on behalf of net debtor settlement members. KDD fulfils these obligations by remitting to a net creditor settlement member, on the settlement day prior to 1 pm (i. e. 1 pm on T + 2), the funds of its net payment claim, debiting its clearing and settlement account and crediting this settlement member's clearing account.

55.21.3. Gross settlement of securities

The settlement of the obligation to transfer securities pursuant to a stock exchange transaction is performed on a gross basis, by transferring securities from the end seller's account to the end buyer's account.

With respect to settlement of securities pursuant to stock exchange transactions, executed on a respective trading day, settlement members shall until 11 am on settlement day (i. e. until 11 am on T + 2) meet following obligations:

Seller settlement member's obligation to ensure securities transfer: According to Art 109 of KDD Rules the seller settlement member shall, for all its sale stock exchange transactions with respect to all its obligation to transfer securities from such transactions:

1. enter the code of the end seller's account, in the stock exchange trading system or, together with the allocation, in the settlement information system; and

2. ensure the end seller's account is credited with the securities required for this transfer pursuant to such transaction, free from third party rights or legal deeds, except for those that cease upon their transfer to the end buyer's account.

Upon entry of the code of the end seller's account (by seller settlement member) an order to transfer securities, debiting this account is deemed to have been entered in central registry.

Buyer settlement member obligations to enable securities transfer: According to Art 109 of KDD Rules the buyer settlement member shall, for all its buy stock exchange transactions, on settlement day and until the time determined by the regulations, ensure requirements for the settlement of obligations to transfer securities of the seller settlement member are met by entering the code of the end buyer's account in the stock exchange trading system, or, together with the allocation, in the settlement information system

In order to facilitate settlement of securities pursuant to stock exchange transactions, executed on a respective trading day, ***KDD*** begins to ***create orders for transfer of securities*** for settlement of a stock exchange transaction by debiting the end seller's account and crediting the end buyer's account on the settlement day at 11 am. KDD ***executes those orders*** immediately after the creation of all orders for transfer of securities for settlement of stock exchange transactions, due for settlement on that day.

2. Description of DVP settlement of off-market transactions

55.21.4. Basic principles of DVP settlement of off-market transactions

KDD provides settlement services for (intra day) DVP settlement of off-market transactions. All aspects of DVP settlement of off-market transactions are regulated by ***KDD Regulations on settlement of off-market transactions on DVP basis*** (hereinafter: *Regulations on DVP settlement*)

KDD facilitates DVP settlement of following off-market transactions (i. e. transactions not executed on stock exchange):

- − that are to be settled intraday (i. e. that are to be fulfilled on the day the order for DVP settlement is entered in the information system) and

- − whose object are dematerialised securities entered in the central registry not being the object of any third party right or legal deed.

55.21.5. Entry and confirmation of order for DVP settlement (matching of settlement instruction)

Matching of settlement instruction is performed by entry and confirmation of ***order for DVP settlement.***

Seller's registry member is authorised for ***entry of order for DVP settlement***. The order for DVP settlement shall comprise:

1. the designation and the quantity of securities,

2. the monetary amount of purchase price denominated in tolars,

3. the number of seller's bank account to whose credit the purchase price shall be paid,

It is considered that the order for DVP settlement comprises also the seller's authorisation to KDD to execute the transfer of securities, being the object of order, by debiting the seller's dematerialised securities account, if the buyer pays the purchase price pursuant Regulations on DVP settlement.

Rejection of entry of order for DVP settlement: KDD rejects the entry of order for DVP settlement:

1. if the prerequisites for execution of order due to insufficient securities balance on sellers account are not fulfilled,

2. if dematerialised securities, being the object of entered order, are the object of a third party right or a legal deed.

3. if the number of seller's bank account is not in accordance with the control algorithm.

KDD notifies the seller's registry member on the rejection of entry of order for DVP settlement electronically.

If no impediments exist for the execution of order for DVP settlement (i. e. if no grounds for rejection of entry of order for DVP settlement exist), a reference number (to be used in field 70 in the SWIFT msg. type MT 103+) is assigned by KDD to the transaction for the purpose of cash transfer (payment) immediately upon the seller's registry member entering the order for DVP settlement. KDD notifies the seller's registry member and the buyer's registry member on the assigned order's reference number electronically.

Confirmation of order for DVP settlement: The buyer's registry member is authorised for confirmation of order for DVP settlement. The buyer's registry member confirms the order for DVP settlement with the entry of data on confirmation of order in the information system of dematerialised securities accounts maintenance.

It is considered that with the confirmation of order for DVP settlement, the buyer's registry member confirmed the accuracy of data on off-market transaction and on the manner of its fulfilment, comprised in the entered order. If the buyer's registry member confirmed the order for DVP settlement by debiting the seller's account to whose debit the order for DVP settlement shall be executed, it is not permitted to execute any order entered in the central registry after the moment of confirmation of order for DVP settlement, if due to execution of this end order it were not possible to execute the order for DVP settlement by debiting this seller's account.

Rejection of confirmation of order for DVP settlement: The buyer's registry member rejects the confirmation of order for DVP settlement with the entry of data on rejection of confirmation of order in the information system of dematerialised securities accounts maintenance.

If the buyer's registry member rejects the confirmation of order for DVP settlement, the buyer's registry member shall immediately notify the seller's registry member on the reasons therefore electronically.

It is considered that the buyer's registry member rejected the confirmation of order for DVP settlement, if it does not confirm the order until 3.30 pm on the day the order was entered.

If the buyer's registry member rejects the confirmation of order for DVP settlement, KDD deletes the entered order from the information system of dematerialised securities accounts maintenance.

55.21.6. Execution of DVP settlement (transfer of cash payment and securities)

Deposit of purchase price: The buyer shall ensure that its bank executes through the RTGS payment system (using the SWIFT msg. type MT 103+) its payment order for monetary amount of purchase price, indicated in the order for DVP settlement, by crediting KDD's clearing and settlement account.

If on the basis of a respective payment order, a monetary amount is deposited being smaller or larger than the entire amount of purchase price, indicated in the order for DVP settlement, or if in payment order an incorrect reference number is indicated, KDD returns the remitted amount by crediting the account to whose debit the amount was paid. In case from precedent sentence, it is considered that the buyer did not fulfil the obligation to deposit purchase price.

Procedures in case the buyer does not deposit purchase price: KDD rejects the execution of the confirmed order for DVP settlement from the information system of dematerialised securities accounts maintenance, if the buyer does not deposit the purchase price until 3.30 pm on the day of entry and confirmation of order for DVP settlement. KDD shall notify the seller's registry member on the rejection of execution of confirmed order for DVP settlement electronically. If KDD rejects the execution of confirmed order, it deletes the entered order from the information system of dematerialised securities accounts maintenance.

Payment of purchase price to seller: If the buyer deposits the purchase price KDD shall within 30 minutes after execution of buyer's payment order by crediting clearing and settlement account, pay the monetary amount of deposited purchase price by debiting KDD's clearing and settlement account and crediting the seller's bank account, indicated in the entered and confirmed order for DVP settlement

Transfer of securities by crediting buyer's account: If the buyer deposits the purchase price, KDD shall immediately upon the receipt of the confirmation through RTGS payment system that its order for payment of purchase price to seller was executed (upon the receipt of the SWIFT msg. type MT 012), execute the seller's order for DVP settlement by transferring the securities, being the object of order, by debiting the seller's account and crediting the buyer's dematerialised securities account.

55.22. Slovakia

Delivery versus payment is achieved in several steps. For settlement in gross settlement modality on settlement day („SD") members of the CSD deliver their gross cash obligations that arose from trades to be settled on SD to cash settlement account of the CSD kept with the National bank of Slovakia. For those trades, for which cash obligations are fully covered, settlement continues. After delivery of cash depository checks if cash amount is satisfactory and subsequently it initiates transfer of securities title to previously blocked securities. Settlement is concluded with debiting of CSD´s cash settlement account and crediting the respective counterparty member's cash account with settlement amount. If cash obligation is not covered by member until 11:30 a.m. on SD, CSD returns unsettled trades to instructing parties (in case of settlement of OTC trades) or it will postpone the settlement for one day (applies to stock exchange trades). In net settlement modality there is a one-day prefunding of net cash obligations ensuring that all trades included in multilateral netting will settle on intended SD (only trades for which securities were successfully blocked by depository are netted).

Rules of DvP settlement are established by the central securities depository in its Operational Rules that are binding to every entity dealing with the CSD.

Credit to securities account is final and unconditional due to the fact that at the moment when securities are credited cash is already controlled by the CSD.

55.23. Finland

In APK, a transaction is cleared and settled on the settlement date as soon as the seller has the book-entries subject to the transaction in his book-entry account available for settlement and when the payment needed in settlement has been deposited in the respective cash memorandum account by the buyer. Settlement occurs with finality by registering the transfer with a debit from the seller's book-entry securities account and a credit to the buyer's account and by entering a transfer between the respective cash memorandum accounts in an incessant and simultaneous process.

Participants cannot dispose freely of securities prior to fund finality. The transfers of both securities and funds happen simultaneously. Momentary (split second) discrepancies in the payment and securities transfer system processes will not allow any disposal of funds or securities until both the cash and the securities leg have

been settled. Participants cannot dispose freely of funds prior to the finality of the securities transfer and, respectively, participants cannot dispose freely of securities prior to the finality of the funds transfer.

APK initiates registration of securities in the buyer's name when the ownership is transferred to the buyer. The transfer of book-entries and the finality of these transfers have been regulated specially in sections 26 – 29 of the Act on Book-Entry Accounts. In accordance with these provisions, a right or a transfer registered in a book-entry account shall have priority over a right that has not been registered. The information registered in the system may be relied upon legally. Derived from these principles, a transfer of book-entry securities is final when the security has been entered in the receiver's book-entry account. If the receiver acts in good faith (bona fide) the transfer shall not be revoked or challenged even if it turns out later that the transferor did not have a right to transfer the securities. There is no zero-hour rule or any other similar provision in force creating retroactive effects in Finland. A bankruptcy takes effect in general from the moment of the court decision initiating the bankruptcy proceedings. For this part, the Finnish law corresponds to the Settlement Finality Directive and to the Collateral Directive.

55.24. Sweden

See answer to question 17. The relevant rules for DvP between banks and securities firms regarding market transaction of securities are established by the CSD (VPC) and the central bank (Riksbanken) and for most transactions in derivative instruments by Stockholmsbörsen and the central bank. In addition to those rules the rulebook of VPC and Stockholmsbörsen regulates the specific transactions. Furthermore the effectiveness of registration or a notification of a transaction in the book-entry system is regulated in the Financial Instruments Account Act . For CSD-accounts the main rule – that the right is registered – is in chapter 6 (Legal Effect of Registration) section 1 and 2.

Section 1. A person who is listed as the owner on a Swedish CSD book-entry account shall, subject to the limitations set forth in the account, be deemed to have the right to dispose of the financial instrument.

Section 2. Where a notice of transfer of a financial instrument is registered, the instrument may not thereafter be attached by the transferor's creditors in respect of rights other than such as were registered at the time the notice was registered.

For nominee accounts the main rule – the notification of the nominee – is in chapter 3 section 10.

Section 10. The provisions of Chapter 6 shall apply to nominee-registered financial instruments.

The provisions of Chapter 6, sections 1 and 4 with respect to the party who is registered as owner on a Swedish CSD book-entry account shall, however, instead apply to the nominee.

In the event the nominee is notified that a financial instrument has been transferred or pledged, such shall have the same legal effect as if the transfer or pledge had been registered in a Swedish CSD register.

55.25. United Kingdom

To be completed

56. QUESTION NO. 56: IS THE INTERMEDIARY REQUIRED TO HAVE INFORMATION ABOUT FINAL INVESTORS (E.G. BENEFICIAL OWNERS) OF SECURITIES BEFORE IT TAKES ANY ACTION IN RESPECT OF SUCH SECURITIES?

56.1. Belgium

As a rule, the answer is no, ***except*** for the exercise of certain disclosure requirements (to the benefit of the issuer and/or of certain market authorities) imposed by local law or for the exercise of certain corporate actions (e.g. vote at general assembly) and subject to anti-money laundering legislation ("AML"). In certain countries, holding of certain securities are subject to holding restrictions (for example registered securities can not be held through nominee position on behalf of beneficial owners which are domestic residents).Under Belgian financial law, there are no such requirements/constraints (tax area is not addressed here) except the "know your customer" rules and additional obligation to identify the ultimate beneficial owner deriving from AML rules.

56.2. Czech Republic [to be completed]

56.3. Denmark

There is no requirement for intermediaries (account managers or VP) to have knowledge or information of the final investor (beneficial owner) in case of nominee accounts.

56.4. Germany

As outlined under Q 34 and 35, it is the ultimate investor who is entitled to exercise all rights resulting form securities. Consequently, any intermediary could take action in respect of securities owned by investors only on the basis of an authorization which may be embodied in the contractual relationship with the investor (e.g. to collect dividends) or in a power of attorney or other authorization granted for a specific purpose. This concept leads automatically to information about the final investor as far as the first-tier intermediary is concerned. Any upper tier intermediary needs not necessarily to have such information; he acts on instruction given by the first-tier intermediary.

56.5. Estonia

There is no expressi verbis requirement to have information regarding the identity of the beneficial owner.

Pursuant to (7) of § 6 of the ECRSA, the owner of a nominee account is required to maintain records regarding persons (i.e. clients) who have authorised the owner of the nominee account to maintain their securities. The law does not prohibit arrangements, whereby the client acts as the intermediary for another person (i.e. person whose identity is not known to the owner of the nominee account opened at the level of the Central Register).

While (3) of § 6 of the ECRSA provides that the client of the owner of a nominee account is deemed to be the owner of securities with regard to the owner of the nominee account and creditors thereof, that does not necessarily mean that the client actually is the beneficial owner.

However, the identity of the clients has to be established. Furthermore, there is a detailed list of data prescribed by the ECRSA which has to be registered and stored by the owner of a nominee account with regard to clients.

56.6. Greece

As provided in the business conduct rules applying in the case of investment services provision through intermediaries, the latter must know their customers, i.e. the person who is the true beneficiary of the transactions executed though the intermediary. According to the practice adopted in most investment firms and credit institutions providing investment services, the intermediaries ask their customers, when contracting with them, whether they act for own account or in the name of another person and in the latter case the customers have to disclose the details of the person for the account of whom they act and who is the true beneficiary of the transaction. Additionally, according to the mentioned practice, the customers of the above intermediaries are required by the intermediaries to answer particular questions in order to ascertain whether they are part of a "group of connected clients" along with other customers of the intermediary. This matter is of major importance also in terms of determining large exposures of credit institutions and investment firms (see, for example, the provisions of Greek Law corresponding to section 3 of Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions and 93/6/EEC on the capital adequacy of investments firms and credit institutions, found in Act of Governor of BoG n. 2246/1993 as in force and article 33 par. 1 of Law 2396/1996 in conjunction with HCMC Decision n. 104/6C/8.4.1997).

The obligation to know the final investor can also be derived from the Greek money laundering legislation. In particular, article 4 of law 2331/1995 obliges credit and financial institutions to require from their customers to prove their identity. Additionally in the same article it is provided that where the customers act for the account of a third party, not only must they prove their identity but also the identity of the third party for the account of whom they act. The data provided in this framework by the customers to the credit and financial institutions must be certified by the latter. Finally, where the credit and financial institutions have doubts as to whether the customer acts for his own account or where they are certain that the customer does not act for his own account, the abovementioned institutions must take all reasonable steps in order to collect information on the true identity of the persons on whose account their customers act.

Based on the capital market legislation, the obligation to know the final investors is bent over where the customer of the intermediary is another professional intermediary (e.g. credit institution or investment firm), in which case the obligation to know the "end beneficiary" is forwarded to the said professional intermediary, which keeps an omnibus account with the first intermediary (account provider) - see above under (52).

56.7. Spain

No. Intermediaries may take any action following the instructions received from the accountholder, as provided in the account agreement.

56.8. France

Article 321-43 of the AMF General Rules provides that:

- before carrying out a transaction for the account of the new client, the authorised intermediary is required to verify the identity of the client and, as the case may be, the identity of the person for the account of whom the client acts;

- the authorised intermediary is under the duty to verify that the client has the capacity and authority required to carry out such transaction;

- with respect to legal persons, the authorised intermediary verifies that the legal representative has the capacity to act, whether by virtue of its status as legal representative or of a power of attorney or a delegation of authority. In this respect, the intermediary requires any document evidencing such capacity.

The opening of a securities account is subject to the same duties (article 332-3 of the AMF General Rules).

56.9. Ireland

Generally, an intermediary is not required to have any such information although it may be obliged to comply with certain "know your client" requirements imposed by the CJA. If acting as an upper-tier intermediary, it may in turn be dealing with an intermediary, which itself would have obligations under the CJA. In such circumstances, it may be exempted from the requirement to comply with the CJA in respect of the ultimate intermediaries.

56.10. Italy

No, the intermediary is not required to have any information about final investors of securities prior to any action with respect to such securities.

56.11. Cyprus

As a rule no. Under general legal principles, however, there may be circumstances giving rise to an obligation to inquire on the part of the intermediary. If no inquiry is made then the intermediary may incur liability on the basis of constructive notice towards final investors who have suffered damage as a result of the failure by the intermediary to make proper inquiry.

56.12. Latvia

A financial instruments account shall not be opened without identifying a customer. This requirement shall also apply to cash accounts of customers opened by an investment brokerage firm to ensure customers' transactions in financial instruments. Where a nominee account is opened, the account identification shall disclose information to the effect that the account is a nominee account and that financial instruments in the account do not belong to the person who opened the account. An investment brokerage firm and a credit institution shall be entitled to open a nominee account only provided that the person requesting the opening of a nominee account performs pursuant to the regulatory provisions whose requirements in respect of customer identification are as stringent as the requirements of the regulatory provisions effective in the Republic of Latvia.

56.13. Lithuania

The Law on Money Laundering Prevention provides that financial institutions and other entities, before opening accounts, accepting deposits, providing services of

safe custody for valuables or when concluding agreements with their customers must identify the customer in the presence of the customer himself or his agent. Where a customer opening an account or performing operations referred to above, is acting not on his own behalf, financial institutions and other entities must establish identity of the customer and of the person on whose behalf the customer is acting. Such provisions suggest that intermediaries are not obliged to identify beneficial owners if the securities account is opened on behalf of intermediary.

56.14. Luxembourg

No, except in the context of anti-money laundering legislation or within scope of qualified intermediary arrangements (on a purely contractual basis), the intermediary is not required to have information about final investors of securities before it takes any action in respect of such securities.

56.15. Hungary

No.

56.16. Malta

No, however in some cases it may not be possible for an intermediary to rely on another person for indentification, in which case it will have to identify beneficial interest directly.

56.17. Netherlands

Primarily, an intermediary must identify its clients before providing securities services. A natural person is to be identified by a passport or drivers license. A Netherlands legal person, or a foreign legal person incorporated in the Netherlands, can be identified by either a certified extract from the Trade Register, or a notarial deed. A legal person incorporated outside the Netherlands is to be identified by either a certified extract from the trade register of the country of its incorporation, or a notarial declaration from that same country. Intermediaries are only to identify the record owners, i.e. the intermediaries' direct client. Netherlands regulatory law does not provide for a 'look through'-approach.

Secondarily, apart from the contract mentioned under the answer to Question (51), with regards to a non-professional investor, the intermediary must comply with the 'know-your-customer rule'. This means that it is to acquire information on its clients with regards to their financial position, their experience in investing and their investment objectives.

56.18. Austria

No. The account provider must have information to which account the securities are to be transferred (includes the name of the account holder). This information is given by the instructions of the person authorised to dispose of the securities held on this account.

56.19. Poland

A participant in the system (intermediary) is not obliged to obtain information related to the end-investor if it concluded an agreement with another participant or a foreign investment firm and the investor is such other participant's or firm's client.

Therefore, it is possible that a participant keeps a securities account for an investor and transfers the investor's orders.

In any other case, in order to take any steps connected with acquiring or alienating securities, the intermediary is obliged to conclude a brokerage services agreement with the investor.

Finally, when it comes to the institution managing the depository-settlement system, it obtains no information related to end-investors except where it keeps a securities account for a participant (an end-investor in this case).

56.20. Portugal

It depends. Please see our comments to question 52, in what concerns the disclosure of qualifying holdings and the rules on money laundering.

56.21. Slovenia

Non applicable: the concept of ***"final client level" type of dematerialisation*** has been applied by the Dematerialised securities Act (ZNVP). By that concept the holder of the securities, registered on his account of dematerialised securities (i. e. "on whose behalf dematerialised securities are entered in the central registry"), is at the same time legal (and beneficial) holder ("owner") of those securities (Art. 16 of ZNVP). Therefore all end clients' accounts are maintained directly in the central registry. See also answer to Q3 for further details.

56.22. Slovakia

If trade has been closed by securities dealer and dealer instructs intermediary on settlement of trade it must include details on seller – the beneficial owner or on actual buyer although their identity in settlement instruction is represented by certain numbers from which it is not possible to identify final investors. In two-level registration of securities maintained by the Slovak CSD, owners of accounts at the second level are considered to be at the same time the beneficial owners of securities credited to this account. Therefore intermediary is able to identify the beneficial owners of securities registered on accounts kept with that particular intermediary.

56.23. Finland

The intermediary acting as an account operator and providing services to a custodian bank is not required to have specific information about final investors represented by the custodian bank. However, an intermediary is liable to segregate its own holdings from the holdings of the investors in accordance with Chapter 4, Section 5a of the Securities Markets Act. Correspondingly, the custodian bank shall notify the account operator of the fact that an omnibus account is opened on behalf of beneficial owners and that the custodian bank acts only as an intermediary in respect of the securities credited to the omnibus account.

56.24. Sweden

There is no such direct requirement in Swedish law.

56.25. United Kingdom

In general, no. If the intermediary receives instructions in relation to the securities that are suspicious, it incurs a duty to make inquiry to satisfy itself that all is in

order. If it fails to make such enquiries, and if the instructions involved a breach of duty to final investors, the intermediary may be treated as having constructive notice of the beach of duty, and therefore incur liability towards final investors suffering loss in consequence of the breach.

57. QUESTION NO. 57: IS THERE ANY SPECIFIC PENAL LAW PROTECTION IN CASE OF FRAUD ON THE SIDE OF THE INTERMEDIARY? ARE THERE ANY OTHER SPECIFIC RULES OF PENAL LAW APPLICABLE TO PROTECT THE INVESTORS' INTEREST AGAINST APPROPRIATIONS OR OTHER ENCROACHMENTS BY THE INTERMEDIARY UPON INVESTORS' RIGHTS?

57.1. Belgium

Under Belgian law, an intermediary can not use the securities of its client (for own account transactions of for the benefit of others) without prior written authorisation of the latter (art. 148 §3 of the law of April 6, 1995), otherwise it would constitute a misappropriation which is a criminal offence.

57.2. Czech Republic [to be completed]

57.3. Denmark

There is no specific penal law in place for intermediaries just the ordinary penal laws. On the other hand the Danish FSA has the possibility to redraw the license to act as intermediary in cases of severe breach of the rules and penal laws.

57.4. Germany

Apart from the normal criminal law rules on fraud and misappropriation of foreign property (Section 263 and 246 of the German Penal Code – *Strafgesetz-buch*), there is a specific rule with regard to account misappropriation for custodians (Section 34 Securities Deposit Act) as well as a rule concerning the false declaration of ownership pursuant to Section 4 para. 2 and 3 Securities Deposit Act (Section 35 Securities Deposit Act). Further, if a custodian breaches segregation requirements pursuant to Section 2 Securities Deposit Act, recording requirements pursuant to Section 14 Securities Deposit Act or requirements stemming from its role as a commission agent (Section 18 to 24 and Section 26) and becomes insolvent and the described breaches result in a situation where the owner cannot vindicate its property outside the insolvency proceeding, this constitutes a criminal offence as well (Section 37 Securities Deposit Act).

57.5. Estonia

Yes there are: under § 2379 of the SMA, a fine of up to 50 000 Eek (1 euro = 15,6466 Eek) shall be imposed on an investment firm, credit institution or other provider of investment services for failure to perform the obligations related to the maintenance or protection of the assets of clients.

The Financial Supervisory Authority may also initiate the revocation of an activity licence.

57.6. Greece

Greek Criminal law does not determine any specific crimes which establish some particular form of punishable behaviour for account providers/intermediaries. Additionally, it must be noted that in Greek Criminal law, no criminal liability of legal persons is provided for and any punishable behaviour against investors may be attributed only to natural persons.

In this framework, the applicable provisions concern mainly crimes provided for in the Greek Criminal Code and are executed always with malice. In particular, these crimes include crimes against ownership (theft, embezzlement), property crimes

(fraud, acceptance of proceeds deriving from criminal acts) and possibly crimes related to memorandums (forgery). All of these crimes are principally punishable as misdemeanors but if certain additional conditions are applicable (e.g. when the property damage or the intended benefit exceeds a certain amount of money etc.) these are punishable as felonies. Due to the dematerialized form of most kinds of securities and the fact that securities are currently being kept in electronic form, special reference must be made to computer fraud (article 386A Greek Criminal Code), which is punishable in the same manner as common fraud. Finally, reference must be made to specific crimes related to securities and transactions executed thereon which are provided for in the criminal provisions of law 3340/2005 on market abuse and article 1 of law 1960/1991 where it is provided that forgery or adultery of securities constitutes felony in terms of punishment.

57.7. Spain

General penal laws apply. There are no specific "intermediary's crimes". Notwithstanding, there are specific administrative infractions related to an intermediary not complying with its obligations vis-à-vis the accountholder provided for in the law in force.

57.8. France

Should an intermediary commit an offence, general criminal law would be applicable. In particular, Article L. 533-7 of the M&FC prevents intermediaries from using financial instruments owned by their clients without their consent (drawing on the securities pool – tirage sur la masse). This prohibition is sanctioned by general criminal law (breach of trust – abus de confiance) (Article L. 314-1 of the French Criminal code)).

The status of investment services provider (prestataire de services d'investissement) is protected by specific criminal provisions. Investment services providers benefit from a monopoly which is protected by Articles L. 573-1 and L. 573-2 of the M&FC.

Investment services providers are also subject to accounting rules which are sanctioned by specific criminal laws (Articles L 573-3 to L. 573-6 of the M&FC).

57.9. Ireland

There is no specific penal law applicable to protect an investor's interests in the event of a fraud or misappropriation on the part of the intermediary in connection with the exercise of its functions. However, such an intermediary, and certain individuals acting on its behalf or who have responsibility for its activities, may well be found to have committed general criminal law offences relating to theft, fraud and false accounting.

57.10. Italy

Pursuant to Article 168 of the FLCA, unless the act results in a more serious offence, any person who, in the provision of investment services or collective asset management services or as custodian for the financial instruments or funds of a collective investment undertaking, with a view to obtain an undue profit for himself or for others, breaches the provisions governing the separation of assets and thereby causes injury to clients shall be punished by imprisonment for a term between six months and three years and by a fine of between Euro 5,164 and Euro 103,291.

Pursuant to Article 170 of the FLCA (central depository services for financial instruments) any person who falsely represents facts in effecting registrations or in issuing registers or certifications connected to the central depository system which are proven as such by the actual registrations or certifications or any person who transfers or delivers financial instruments or transfers the related rights without recovering the certifications, shall be punished by imprisonment for a term between three months and two years.

57.11. Cyprus

There is no specific penal law protecting against the fraud of the intermediary. However there are other relevant general penal provisions that might come into play in such circumstances.

57.12. Latvia

According to the Criminal law (Article 193) for a person who commits theft, destruction, damage or unlawful utilisation of financial instruments or means of payment of another person, the applicable sentence is deprivation of liberty for a term not exceeding ten years, with or without confiscation of property.

Also according with the FIML there is the general provision that provides the penalty in the case of violation of the FIML or any regulatory provisions issued pursuant to the FIML: if intermediary violates the provisions of FIML or regulatory provisions the supervision institution (Financial and Capital Market Commission) shall be entitled to warn the person that has violated the regulatory provisions or impose a penalty of up to 10 000 lats on that person.

57.13. Lithuania

The Criminal Code of the Republic of Lithuania provides for criminal responsibility for fraud or illegal appropriation of assets held under the responsibility of the offender. In addition, the Criminal code provides for criminal responsibility for insider dealings, securities market price manipulation and money and other assets laundering. Both natural and legal persons may be punished for the aforementioned crimes.

57.14. Luxembourg

Under Luxembourg law there are series of general offences like breach of trust (*abus de confiance*), fraud (*escroquerie*), theft (*vol*) and more specific offences in particular in case of non compliance with the law of 5 April 1993 on the financial sector, as amended.

57.15. Hungary

Offering investment services without the permission of the Hungarian Financial Supervisory Authority, insider dealing, defraud, disclosure of investment secret and money laundering (and also not disclosing money laundering suspicious cases) are penal offences.

57.16. Malta

The criminal code caters for the crime of fraud in article 293 onwards. The first crime is the crime of misappropriation which would apply to intermediaries.

There are no specific rules to protect customer assets.

The general rules which exist refer to the need for licences and authorisations and these are also of a criminal nature.

57.17. Netherlands

Apart from general penal law provisions on theft, misappropriation and forgery, Netherlands penal law does not provide for specific penal sanctions on fraud of the side of the intermediary. Forgery with respect to securities in the form of a document is more severely penalized than 'regular' forgery.

According to the Act on the Economic Offences (in Dutch "Wet Economische Delicten") violation of most regulatory rules from supervision acts, constitute an indictable offence if acted intentionally. The offender can be punished with imprisonment with a maximum of two years or a fine of the fourth category (Eur 11,250). Insider trading and market manipulation are also considered offences under the Act on the Economic Offences.

Offences can be committed both by natural persons as well as legal person. Whether an offence can be attributed to a natural or a legal person depends on the circumstances of the case.

57.18. Austria

There are **no specific** penal law regulations to protect investors against fraud or other actions by which the rights of an investor are illegally affected.

Some penal provisions of banking and capital markets laws could be relevant:

The Financial Markets Authority (the "FMA") may inflict fines in the administration of its various supervisory functions. The nature of these fines will depend on the relevant act (Banking Act, Savings Bank Act, Mortgage Bank Act, Pfandbrief-Act, Investment Funds Act, Securities Supervisory Act, etc.).

The **Banking Act** knows some administrative contraventions which could also be criminal actions falling in the competence of (criminal) courts, such as performing banking business without licence (e.g. for the deposit business) not providing information to the supervisory authority (the FMA) or the public. Infringements of banking secrecy are criminal offences which fall in the competence of criminal courts (prosecution only on request of the affected customer).

The **Capital Markets Act** provides penal sanctions in its sections 15 and 16 in case there are public offerings of securities without a prospectus or other publications are not made according to the requirements of this act (court or administrative procedures).

The **Stock Exchange Act** knows administrative fines in case requirements of this act have not been fulfilled (in particular when information has not been duly provided).

The **Deposit Act**, which is the basis for the business of securities account providers **does not know penal provisions**. Since providing securities accounts as well as safekeeping and administration of securities is banking business the following act might become additionally relevant for the protection of account holders (investors):

The **Securities Supervisory Act** contains penal sanctions in its sections 26 and 27 which relate to rendering financial services without appropriate licence and not providing required information to the supervisory authority or the public.

Moreover the following provisions of the **Penal Code** (listed according to their numbering in the Penal Code) may serve to protect investors property and other rights:

Deception (or fraudulent misrepresentation) pursuant to section 108 Penal Code; theft pursuant to section 127 Penal Code in case there are definitive securities; misappropriation pursuant to section 133 Penal Code; suppression (embezzlement) pursuant to section 134 Penal Code; permanent deprivation (fraudulent conversion) pursuant to section 135 Penal Code; fraud pursuant to section 146 Penal Code; breach of trust (misuse of one's powers) pursuant to section 153 Penal Code; taking gifts pursuant to section 153 a Penal Code and usury pursuant to section 154 Penal Code.

Attachments:

Austrian CSD – General Business Conditions (in German; "Wertpapiersammelbank Allgemeine Geschäftsbedingungen gültig ab 1. Mai 2005") – the GBC of the CSD

Annexes to the GBC of the CSD (in German; "Wertpapiersammelbank Allgemeine Geschäftsbedingungen Anhänge gültig ab 1. Mai 2005")

General Business Conditions of the largest Austrian bank (in German; "Allgemeine Geschäftsbedingungen der Bank Austria Creditanstalt AG" Fassung Mai 2003)

(Securities) Deposit Act (in German; "Depotgesetz")

Finality Act (in German; "Finalitätsgesetz")

Financial Collateral Act (in German; "Finanzsicherheiten-Gesetz – FinSG")

CCP.A Clearing Rules (in German and in English; "CCP.A Abwicklungsbedingungen", "Clearing Rules")

Sections 367 and 371 General Civil Code (in German; "Allgemeines Bürgerliches Gesetzbuch")

Section 1313 a General Civil Code (in German; "Allgemeines Bürgerliches Gesetzbuch")

Sections 1438, 1439, 1440, 1441, 1442 and 1443 General Civil Code (in German; "Allgemeines Bürgerliches Gesetzbuch")

Sections 189 and 190 Commercial Code (in German; "Handelsgesetzbuch")

Sections 363, 364, 365, 366 and 367 Commercial Code (in German; "Handelsgesetzbuch")

Sections 6, 8 and 10 Companies Act (in German; "Aktiengesetz 1965")

Sections 27, 28, 29, 30, 31 and 32 Bankruptcy Act (in German; "Konkursordnung – KonkO")

Sections 9, 38 and 69 Banking Act (in German; "Bankwesengesetz").

57.19. Poland

In the first place, investors are protected by the provisions of the [Polish] Penal Code. Specifically, whoever, being contractually obliged to manage the assets of an investor, causes material damage to the property of the investor by exceeding the powers granted to him or by failing to comply with the obligations imposed on him, is liable to a penalty. Also, whoever, in order to achieve financial profits or in order to cause damage to another person's property, unauthorisedly impacts automated processing, collecting or transferring of electronic data or modifies, deletes or enters a new content of any such electronic data, or causes the investor to use his own or someone else's property in a detrimental manner by misleading the investor or by exploiting the investor's mistake or inability to fully comprehend his behaviour, is liable to a penalty. Also, whoever appropriates rights in securities or other property rights, is liable to a penalty.

Remarkably, intermediaries are also subject to penal liability under the provisions of the [Polish] Act on the liability of collective entities for prohibited punishable acts. Pursuant to the provisions of the Act, an intermediary may be subject to penal liability for acts committed by individuals acting on behalf or on account of the intermediary, or for acts committed by individuals who were allowed to act as a result of exceeding the powers granted to, or failing to comply with the obligations imposed on, the authorised persons.

57.20. Portugal

Yes. The execution of acts or the performance of financial intermediation activities without due authorisation or registration, or outside the scope of authorisation or registration, is considered to be a very serious offence. Additionally, the violation by entities authorised to perform financial intermediation activities, of any of the following duties, is a very serious offence:

a. To effect and maintain updated the daily register of operations;

b. To respect the rules governing conflicts of interest;

c. Not to effect operations which constitute excessive financial intermediation activity (churning);

d. To verify the legitimacy of those placing orders and adopt the steps which permit to establish the time of reception of the order;

e. To reduce in writing or record the received orders orally;

f. To respect the rules of priority in the transmission and execution of market orders;

g. To provide clients with the necessary information;

h. Not to execute, without the authorisation of or the confirmation from the client, contracts in which the client is a counterpart.

The violation of the information duties regarding qualifying holdings in a company authorised to perform financial intermediation activities in Portugal is a very serious offence.

The violation by entities, authorised to exercise financial intermediation activities, of any of the following duties is a serious offence:

a. Preserve documents within the time legally demanded;

b. Prepare rules of procedure;

c. Accept orders that should be refused;

d. Refuse orders that should be accepted;

e. Register with the CMVM the general standard contractual clauses used in contracts.

It is also considered to be a very serious offence the violation of any of the following duties:

a. Confidentiality;

b. Asset segregation;

c. The non-use of securities, other financial instruments or cash outside the cases prescribed by law or regulation;

d. The defence of the market.

These offences are punished with fines between € 25 000 and € 2 500 000.

Additionally, the illegitimate appropriation of securities entrusted to intermediaries ("abuso de confiança"), is punished by the Portuguese Criminal Code with imprisonment up to 3 years or with a fine.

57.21. Slovenia

There is no specific penal law protection in case of fraud on the side of the intermediary. I. e. general penal provisions on fraudulent deeds apply.

57.22. Slovakia

The Act No.566/2001 Coll. on Securities and Investment Services as amended in §144 stipulates sanctions the Financial Market Authority may impose on securities dealer and securities depository in case of nonobservance of provisions of legal acts applicable to their operations.

57.23. Finland

Chapter 28, Section 4 and 5 of the Penal Code prescribe embezzlement of movables (such as securities) held on behalf of another person (such as the investor) punishable. Receiving of such stolen goods is also punishable pursuant to Chapter 32, Section 1 of the Penal Code. Furthermore, fraud and breach of trust are criminal offences pursuant to Chapter 36 of the Penal Code.

57.24. Sweden

No specific penal laws.

57.25. United Kingdom

There is no penal law addressed specifically to the functions of securities intermediaries. However, an intermediary which misappropriated investors' securities might thereby contravene a number of criminal law prohibitions relating to theft, fraud and false accounting. Individuals involved in the misappropriation might also be guilty of such offences.

Contact:

Martin Thomas, Telephone:(32-2) 292 13 95, martin.thomas@cec.eu.int

TABLE OF CONTENTS