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Clearstream

Response

to

Consultation Document:

Legislation on Legal Certainty of Securities Holding and Dispositions

of

The European Commission Services of the Directorate-General Internal Market and Services

5 November 2010

Frankfurt, 19 January 2011

Deutsche Börse Group Interest Representative Register ID: 20884001341- 42

A. Introduction

Clearstream Banking AG, Frankfurt and Clearstream Banking S.A., Luxembourg (jointly referred to as Clearstream; Clearstream is a wholly owned subsidiary of Deutsche Börse Group) appreciate the opportunity to comment on the public consultation on legal certainty of securities holding and dispositions, which is published for a 2-month period.

As one of the world's leading suppliers of post-trading services including settlement, safekeeping, and administration of securities, Clearstream welcomes the objective of the consultation document to enhancing the safety and efficiency of post-trading arrangements across Europe. In particular, Clearstream agrees with the European Commission's aims on improving the legal framework for holding and dispositions of securities in order to further improve cross-border activities in Europe.

Information about the respondent

Name and address of the respondent:

Clearstream Banking AG, Frankfurt

Neue Börsenstrasse 1
60487 Frankfurt am Main
Germany

and

Clearstream Banking S.A., Luxembourg

42 Avenue JF Kennedy
L-1855 Luxembourg
Luxembourg

Field of activity of the respondent:

a. *Does the respondent (or in case of an association, its members) conduct domestic or cross-border securities operations in the EU/EEA area?*

Yes, both Clearstream Banking AG and Clearstream Banking SA conduct domestic as well as cross-border securities operations in the EU/EEA area.

b. *If yes, in which form does your entity conduct these operations?*

Clearstream provides two fundamental services:

- International Central Securities Depository (ICSD): As an ICSD it has, over a period of over 40 years, developed a strong position in the international fixed income market. It handles the clearing, settlement and safekeeping of Eurobonds and offers its customers the possibility to use Clearstream Banking as a single point of access for the settlement and custody of internationally traded bonds and equities across 50 markets.
- Central Securities Depository (CSD) for German and Luxembourgish domestic securities.

The settlement of market transactions and the custody of securities are Clearstream's core businesses.

If the respondent is a securities account provider, please indicate whether the activity relating to holding and dispositions of account-held securities is

Clearstream is a securities account provider.

- made in the context of a European regulated activity (e.g. banking and/or investment services)

Clearstream Banking SA and Clearstream Banking AG Frankfurt are both Monetary Financial Institution and as such are regulated as banks, hence subject to the relevant provisions of directives 2004/39/EC (MiFID) and 2006/48/EC (CRD), among others.

In addition to the above, these institutions are designated as Payment and Security Settlement Systems according to Article 10 of Settlement Finality Directive 98/26/EC.[1]

- made in the context of national regulations (e.g. for the service of safekeeping of securities; or as a CCP, SSS or CSD authorised or supervised by a public authority)

Clearstream Banking SA is a credit institution incorporated in Luxembourg according to the law of 5 April 1993 on financial services which falls within the scope of supervision of the "Commission de Surveillance du Secteur Financier" (CSSF).

Clearstream Banking AG falls according to the German "Bundesanstalt für Finanzdienstleistungsaufsicht" within the category: "Credit institutions, all banks/financial services institutions, ID: 105564".

If the respondent is an association of stakeholders, how many members do you represent and what is your membership structure?

Clearstream is not an association.

[1] http://ec.europa.eu/internal_market/financial-markets/settlement/dir-98-26-art10-national_en.htm

B. Comments to the questions of the consultation

Please find below the answers of Clearstream Banking AG, Frankfurt and Clearstream Banking S.A., Luxembourg (Clearstream) to the questionnaire.

1. Objectives

Q1: ***Do you agree that the envisaged legislation should cover the objectives described above? If not, please explain why. Are any aspects missing (please consider also the following pages for a detailed description of the content of the proposal)?***

We agree with the objectives of the envisaged legislation. We would support the intention of the European Commission to introduce a directive rather than a regulation in this context.

We share the view that a long-term harmonisation within the European Union would also improve the financial stability and would strengthen the financial markets in Europe.

We welcome the Commission proposal to follow a "functional approach" (p. 4) to ensure that the same business is subject to same rules. This would help to obtain a "level playing field" between the different players in the market offering the same services.

Such a functional approach has a proven record of success and acceptance, such as directive 2004/39/EC (MiFID), directive 2006/48/EC (CRD), and directive 98/26/EC (SFD). The Commission should nevertheless bear in mind that in line with this functional approach chosen, a review of the above bodies of law will be required in order to adapt all definitions and its legal consequences to the legal requirements prescribed in this new Directive.

The Commission should ensure that there is consistency with regard to the planned CSD legislation and should closely align both legislative initiatives.

Further, the draft SLD should to the maximum extent possible, stick to
(i) the wording used by Unidroit Convention, the use of which is unify the wording used in cross-border situations (Geneva, 2009) and
(ii) the rules set out therein (to limit the consequences of a breach of the coming SLD directive in a given holding chain).

2. Shared Functions

Q2: ***Would a Principle along the lines set out above adequately accommodate the functioning of so-called transparent holding systems?***

Yes, if limited to transparent systems (no extension to outsourcing for non-transparent systems) and not interfering with the notary function.

Q3: ***If not: can you explain which aspect is not correctly addressed and what could be improved? Which are, if applicable, the repercussions on your business model?***

Q4: ***Do you know any specific difficulties of connecting transparent holding systems to non-transparent holding systems?***

As to the difficulties associated with the connection of transparent to non-transparent systems, the main operational difficulty is probably linked to disclosure requirements. The regulators of transparent jurisdictions tend to expect certain information on holders to be made available to them or to issuers. Such requests are difficult to accommodate when addressed to account providers in non-transparent jurisdictions. Even in the absence of banking secrecy legislation, the disclosure chains are burdensome due to the fact that there is neither a harmonised legal basis nor a cost assignment rule in cross-border holding scenarios.

In particular, in non-EU transparent systems, difficulties might be expected with respect to:

(i) what is the exact legal qualification of the entities between the local CSD and the ultimate account holder (in part. where the local CSD does not identify directly the UAH in its book entries but has to reconcile with its direct intermediary);

(ii) liabilities of the direct intermediary of the UAH toward the CSD or such CSD's direct intermediary.

(iii) change from custody to agency services for intermediary AP

Furthermore, we are aware of cases where transparent systems asked issuers holding their issue with a non-transparent systems as "home CSD" and intending to list their products in a regulated market serviced by a transparent system to explicitly state that the issuer accepts any booking of the transparent system as "investor CSD" irrespective of corresponding positions of the transparent system with the non-transparent system as "home CSD".

3. Account-held securities

Q5: ***Would a principle along the lines described above provide Member States with a framework allowing them to adequately define the legal position of account holders?***

Yes.

However, it should be noted from a German law perspective, that not only the credit/debit to the account is per se decisive for an acquisition/disposition. Due to system stability considerations, good experiences in the past and investor protection reasons, it is important to ensure a balance between debit and credit. Therefore a transfer of rights by connecting a book-entry credit with a corresponding debit should not be excluded but be possible.

Q6: ***If not, which legal aspects that belong, in your opinion, to an adequate legal position of each account holder could not be realised by the national law under an EU framework as described above? What are the practical problems that might occur in your opinion, if Member States were bound by a framework as described above? Which are, if applicable, the repercussions on your business model?***

Q7: ***The Geneva Securities Convention (www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm) provides for a global harmonised instrument regarding the substantive law (= content of the law) of holding and disposition of securities, covering the same scope as those parts of the present outline dealing this subject. Most EU Member States and the EU itself have participated in the negotiations of this Convention. Both the present approach and the Convention are compatible with each other.***

- ***If applicable, does your business model comprise securities holdings or transactions involving non-EU account holders or account providers?***

- ***Is it, in your opinion, important to achieve global compatibility regarding the substantive law of securities dispositions, or would EU-wide compatibility suffice?***

Yes, to both questions.

We have no concerns with regard to the definition of "account held securities".
We would support a strong alignment with the global UNIDROIT/Geneva Securities Convention. In our view the opportunity should not be missed to harmonize beyond EU borders.

The Commission should bear in mind the global nature in which cross-border investors can exercise rights resulting from securities. Non-EU laws may be applicable to the securities held by the account holders. Non-EU law might restrict the rights of account holders without allowing for the possibility of achieving results by the account provider in this regard. Having said this, the account provider should not be made accountable to achieve impracticable cross-border requests.

Global compatibility should be preferred. If intra-EU compatibility is pursued, the SLD should at least allow for EU Account Providers to contractually restrict the rights of their Account Holders where assets are ultimately deposited in an Account Provider outside the EU.

In case a part of the holding chain is outside the scope of the SLD, specific provisions on the duties/liabilities of the AP may be considered.

4. Methods for acquisition and disposition

Q8: ***Would a principle along the lines described above allow for a framework which effectively avoids that more securities are credited to account holders than had been originally issued by the issuer?***

Yes.

Please see refer also to Q8: a linkage between a book-entry debit and credit to reflect a transfer of holdings under *right in rem* principles should be possible under the proposed legislation.

Q9: ***If not, how could a harmonised EU-framework better guarantee that account providers do not create excess securities by over-crediting client accounts (keeping in mind that all account providers are either banks or MiFID regulated entities)? Please distinguish between regulating the account providers' behaviour and issues relating to the effectiveness of excess credits made.***

Q10: ***Is the principle relating to the passing on of costs of a buy-in appropriate? If not, in which way should it be changed and why? What would be the repercussions on your business model?***

Buy–in should only be imposed on a AP where
1) a discrepancy is established and cannot be addressed otherwise
2) a discrepancy results from the negligence of the AP and
3) it is possible (there are securities in the market).

The Commission seems to be concerned about over-crediting. The source of this concern is not immediately clear as many markets, including the US, have accepted that chains of intermediated securities tend to lead to over-crediting as the price to pay for the benefit of aggregation of assets.

We therefore would like to highlight that to make account providers responsible to buy in case of insufficient aggregated positions will not be effective when a position is not liquid (which is probably the sort of security for which over-crediting is most problematic).

5. Legal effectiveness of acquisitions and dispositions

Q11: ***Would a principle along the lines described above provide Member States with a framework allowing them to determine legal effectiveness and ineffectiveness to an extent sufficient to safeguard basic domestic legal concepts, like e.g. the transfer of property?***

Yes.

Par. 6 should also mention the rules of SSS in accordance with national law. Under German law, the recognition of a "conditional credit" (i.e. credit conditional upon a debit) could work as a basis to obtain a valid acquisition under German law.

Q12: ***If not, please specify how and to what extent national legal concepts would be incompatible. Please specify the practical problems linked to these Background, and, if applicable, the repercussions on your business model.***

We believe that the conditional acquisitions and dispositions should be allowed and prevail subject to the contractual agreement established between the account holder and the account provider. This without prejudice of the rules applicable to Securities Settlement Systems (SSS) of the Settlement Finality Directive.

Regardless of Q11, the issue under German law still persists that the acquisition of legal ownership refers to a "no credit without debit" system which is not the rule as the consultation paper refers to a "conditional credit" as an exception to the principle of effectiveness. It is unclear how this is to be understood.

Conditional effectiveness is problematic. It would be clearer for acquisitions and dispositions to be unconditional and to leave broad contractual discretion to account providers/holders on reversals.

Further, we see the issue of "transparency of rights flowing from the book-entry credit for the investor". However, the European Commission should consider and be clear how such transparency might be achieved by other means than technical distinguishing marks in a security account (e.g. by specific booking codes, by contractual agreement, by operation of law). This would be useful to address the valid concern of a significant technical as well as financial effort to implement a transparency approach primarily based on visibility in the accounts.

6. Effectiveness in insolvency

Q13: ***Would a principle along the lines described above provide for a framework allowing effective protection of client securities in case of insolvency of an account provider?***

We note the prior debates in UNIDROIT related to this issue and the difficulty of a limitative definition of par.2. Please consider, whether further specification could be achieved.

Q14: ***If not, which measures needed for effective protection could not be taken by Member States under the proposed framework?***

The Commission should consider that much risk lies in the execution of ring-fencing in case of an account provider's bankruptcy. The delays associated with a bankruptcy court (or regulator) determining the pool of "client assets" entitled to protection are a significant source of risk to financial system stability. The SLD should force short deadlines to be imposed on bankruptcy courts and regulators to make such determination and release assets.

7. Reversal

Q14 (double): ***Is the list of cases allowing for reversal complete? Are cases listed which appear to be inappropriate? Are cases missing? What are, if applicable, the repercussions on your business model?***

Yes, Par. 2 allows flexibility for SSS.

However, we have two open questions:
- Should court orders be included in par 1?
- Should retroactivity of the reversal be provided in SLD or left to national law/SSS rules?

The list of circumstances enabling reversal should be indicative and not exhaustive.

Leaving contractual flexibility would be the most appropriate solution. To make reversals generally subject to an account holder's consent is simply not realistic. If it was to go forward, the account providers can be expected to have to raise cost on all account holders to offset the cost of this new requirement (please also refer to Q12).

Q15: ***Should national law define the extent to which general consent to reversal can be given in standard account documentation? What are, if applicable, the repercussions on your business model in case your jurisdiction would take a restrictive approach to this question and limit the possibility of general consent to reversal?***

Moreover the rules applicable to Securities Settlement Systems (SSSs) should also be taken into consideration in the context of reversals. The SSSs should be entitled to establish its rules, where the account provider and holder could agree on its most suitable reversal conditions.

The Directive should therefore foresee a circumstance that would refer to the contractually agreed grounds for reversal.

Reversals of erroneous debits should also be mentioned.

Par. 3 should make clear it does not prejudice Par.2 (SSS rules are terms and conditions, therefore standard documentation).

8. Protection of acquirers against reversal

Q16: ***Do you agree with the 'test of innocence' as proposed ('knew or ought to have known')? Do you know of any practical obstacle that could flow from its application in your jurisdiction? What would be the negative consequences in that case?***

Please refer to earlier mentioned comments on the reversal right of account provider and refer to UNIDROIT discussions.

Under German law, this would create uncertainty as to the circumstances in which an acquisition has been made in "good faith". Law will need to be amended.

9. Priority

Q17: ***Will a principle along the lines set out above, under which the applicable law would need to afford an inferior priority to interests created under a control agreement, be appropriate and justified against the background that control agreements are not 'visible' in the relevant securities account? If not, please explain why.***

It is proposed that the priority of interests be based on the time when the interest is created. However, interests that were acquired through earmarking should always enjoy priority over other interests regardless of the time of creation. Such a regulation would render all other interests largely worthless because there would always be the risk that an interest created later in time could take priority over an interest created earlier that was not acquired by means of earmarking.

The priority of interests in securities should generally be based on the time of their creation. A differentiation based on the identification of an interest is not advisable.

Therefore we propose that Principle 9, paragraph 1 (c) should be deleted and not used as a basis for a possible EU Directive. Principle 9, paragraph 1 should read: *"interests in the same account-held securities rank amongst themselves in chronological order".*

Please also refer to the Financial Collateral Directive (FCD 2002/47/EC) to be considered in this context in any case. It is of significant importance that the priority rules of the Securities Law Directive do not conflict with the regulations in the Financial Collateral Directive (FCD). To the extent that interests were created under this provision and are to be characterised as financial collateral, such interests must – regardless of the selected manner of creation – have priority over corresponding creations of an interest outside the scope of the FCD. It is critical for APs to know which interest comes first, therefore provisions are welcome.

In principle, a collateral management system is based on an agreement among the system's participants, in particular that they are providing securities in the system as collateral for their own liabilities to collateral takers also participating in the system. One example of such a system is the XEMAC system operated by Clearstream Banking AG, Frankfurt am Main, in which not only banks, but also Deutsche Bundesbank, BIS, European Financial Stability Facility (EFSF) and governmental agencies participate. Such systems contribute significantly to the financial stability and liquidity management of banks during crisis periods precisely by the fact that the interests are marked to market every day, may be replaced by equivalent interests, and also may be further used by the collateral taker to create (central bank) liquidity.

Q18: ***Have you encountered difficulties regarding the priority/rank of an interest created under a mechanism comparable to a control agreement in the context of a priority contest, or, more generally, in an insolvency proceeding? If yes, please specify.***

Not to our knowledge.

Q19: ***Would there be negative practical consequences for your business model flowing from a Principle along the lines set out above? If yes, please specify.***

Impact on business: if AP is the collateral receiver following collateral agreement with AH, AP will need to ensure that in addition the account/securities are earmarked in order to keep priority.

10. Protection of account holders in case of insolvency of account provider

Q20: ***Would a Principle along the lines described above pave the way for the national legal frameworks to effectively protect client securities in case of the insolvency of an account provider?***

Yes.

Q21: ***If not: Which mechanisms should be available which could not be implemented under a framework designed along the lines described above. Please specify.***

Q22: ***Should the sharing of a loss in securities holdings (occurring, for example, as a consequence of fraud by the account provider) be left to national law? Would you prefer a harmonised rule, following the pro rata principle or any other mechanism?***

National law should be able to provide that in case the AP is short in securities, its own securities, if any, shall be available for distribution between the AHs as it is the case under certain national laws. Pro –rata rule seems in accordance with current law regime, extension to EU level is welcome.

11. Instructions

Q23: ***Would a Principle along the lines described above provide for a framework allowing the national law to effectively apply restrictions on whose instructions to follow for purposes of investor protection, notably in connection with the envisaged Principle contained under section 4 (Paragraph 2)? If not, please explain why.***

Yes.

12. Attachment by creditors of the account holder

Q24: ***Would a Principle along the lines described above provide Member States with a framework allowing them, in combination with the envisaged Principle on shared functions, to effectively reflect operational practice regarding attachments in your jurisdiction? If not, please explain why.***

Yes. Within the framework of a non-transparent holding pattern, with regard to in-transparent holding patterns, it depends how Account Provider is defined (cf. shared functions): if account operators are defined as AP, this wouldn't make sense.

Q25: ***Have you ever encountered, in your business practice, attempts to attach securities at a tier of the holding chain which did not maintain the decisive record? If yes, please specify.***

No comment, but we emphasize that such prohibition is critical.

13. Attachment by creditors of the account provider

Q26: ***Would the proposed framework for protecting client accounts be sufficient? Should the presumption that accounts opened by an account provider with another intermediary generally contain client securities become a general rule? If not, please explain why.***

Yes.

14. Determination of the applicable law

Q27: ***Would a Principle along the lines described above allow for a consistent conflict of- laws regime? If not: Which part of the proposal causes practical difficulties that could be addressed better?***

From SSS perspective, please consider interaction with the current legislation providing that the law applicable to the SSS and the participants is the national law. This discussion is linked with the passporting of CSD/SSS services under CSD draft regulation. Understood that for SSS a branch will be submitted to the Host State law, principles described above are fine.

However: "maintained" should be further defined in order to avoid any risk to re-qualify the applicable law due to the outsourcing (T2S discussions). The concept of place of account maintenance should be clarified. The governing law should be left to be contractually agreed between account provider and holder.

Q28: ***Would the mechanism of communicating to the client, whether the head offices or a branch (and if a branch, which one) is handling the relationship with the client, add to exante clarity? Is it reasonable to hold the account provider responsible for the correctness of this information? If applicable, would any negative repercussions on your business model occur?***

Yes.

However, it is not the ultimate solution. Position however reserved on the AP liability on the correctness of the information (no liability is preferred).

Q29: ***The Hague Securities Convention (www.hcch.net/index_en.php?act=conventions.text&cid=72) provides for a global harmonised instrument regarding the conflict-of-law rule of holding and disposition of securities, covering the same scope as the proposal outlined above and the three EU Directives. Most EU Member States and the EU itself have participated in the negotiations of this Convention. The proposed principle 14 differ from the Convention as regards the basic legal mechanism for the identification of the applicable law. However, the scope of principle 14 is the same than the scope of the Convention: property law, collateral, effectiveness, priority. Do you agree that this will facilitate the resolution of conflicts with third country jurisdictions? If not, please explain why.***

Please refer to the debates with third country jurisdictions under HSC.

15. Cross-border recognition of rights attached to securities

Q30: ***Would a general non-discrimination rule along the lines set out above be useful? Have you encountered problems regarding the cross-border exercise of rights attached to securities?***

Yes (also outside EU –non recognition of nominee concept).

Q31: ***If applicable, would a Principle along these lines have (positive or negative) repercussions on your business model? Please specify.***

Positive

16. Passing on information

Q32: ***Is the duty to pass on information adequately kept to the necessary minimum? Is it sufficient?: If applicable, would there be any (positive or negative) repercussion of such a Principle on your business model? Please specify.***

We cannot give a complete answer since “Information” is not defined. - 16. 1 “if possible, to ultimate account holder”: please clarify what scenario is meant. If there is no contractual relation between AP and UAH, obligation should not apply. - 16.1(b) what when not directed to all legal holders? Generally, the scope of providing information should be focussing on these information which are (a) essential to the ultimate account holder/ investor to maintain his legal position with respect to the securities and (b) are not provided by other means on the basis of legal or market rules. It should be left to the market and to the competitive offering of account providers. It is not realistic to expect a directive to provide the level of details required per instrument type and per geographical market. The directive should focus on encouraging member states to enforce standards developed by the market (e.g. ISMAG).

Q33: ***How do you see the role of market-led standardisation regarding the passing on of information? What are your views on a regulatory mechanism for streamlining standardisation procedures?***

The rule is broadly drafted with regard to the scope of the concerned information. The information to be covered by such obligations is difficult to capture in a directive. Who shall decide the "necessary" feature of the information (with subsequent responsibility)? Should the account provider need to assess whether the information received complies with the requirements?

17. Facilitation of the ultimate account holder's position

Q34: ***If you are an investor, do you think that a Principle along the lines described would make easier any cross-border exercise of rights attached to securities, provided that technical standardisation progresses simultaneously? If not, please explain why.***

Q35: ***If you are an account provider, would you tend towards the opinion that your clients can exercise the rights attached to their cross-border holdings as efficiently as their domestic holdings? What would be the technical difficulties you would face in implementing mechanisms allowing for the fulfilment of the duties outlined above? What would be the cost involved?***

Par. 3 should include SSS rule and scope “client protection” should be clarified (exclude institutionals?)

18. Non-discriminatory charges

Q36: ***If you are account holder, have you encountered differing prices for the domestic and the cross-border exercise of rights attached to securities? If yes, please specify.***

We disagree with the Principle 18.1 "non-discriminatory charges". The assumption that charges levied by an account provider on its account holders for any service in respect of cross-border holdings of securities should be the same as the charges levied in respect of comparable domestic holdings of securities is not realistic and not practicable. The cost structures for cross-border holdings are different to domestic ones and thus not comparable with regard to pricing. The higher costs of cross-border services derive from the complexity involved in dealing with different jurisdictions, market practices and tax regimes, as well as from the costs charged by the intermediaries used to provide access to foreign CSDs (multi-level holding chains).

Further, the proposed principle will lead to a cross-subsidisation of domestic and cross-border services, thereby removing the correlation between prices and the costs of the services offered and leading to a potential increase in domestic prices, with a major impact on the users in those domestic markets. Another risk would be that securities account providers simply might stop providing cross-border services, if they are unable to recover the costs of those services.

Q37: ***If you are an account provider: do you price cross-border exercise of rights differently from domestic exercise? If yes: on what grounds are different pricing models necessary?***

The variation in price reflects the time spent and expertise maintained in house or bought from providers across multi-level holding chains. It is not realistic to expect an account provider to incur the same cost in facilitating entitlements in its domestic market as in foreign markets.

The likely result of such a requirement will be for some account providers to restrict their offering to their domestic market and/or raise the price of their domestic service to bring them in line with those of their services on foreign markets. Either way, the outcome is not in line with an integrated European market.

19. Holding in and through third countries

Q38: ***Have you encountered difficulties in using non-EU linkages as regards the exercise of rights attached to securities? If yes, please specify. If not, please explain why.***

Yes (see above Q 30).

Q39: ***Admitting that non-EU account providers cannot be reached by the planned legislation, which steps could be undertaken on the side of EU account providers involved in the holding in order to improve the exercise of rights attached to securities through a holding chain involving non-EU account providers?***

Further guidance from the EU would be appreciated. The SLD should pursue transparency (account providers informing their account holders of the custody structure and any related constraints) and adopt a pragmatic approach (account providers should not be bound to give more rights than what they receive as account holders).

20. Exercise by account provider on the basis of contract

Q40: ***Do you think that a general authorisation to exercise and receive rights given by the account holder to the account provider should be made subject to certain formal requirements? Please specify.***

21. Account provider status

Q41: ***Should the status of account provider be subject to a specific authorisation? If not, please explain why.***

The account provider should be authorised either specific or as part of a wider license (e.g. credit institution – please refer also to CSD legislation discussion). The activity of account provider should be subject to authorization, not the status. Most relevant account providers are likely to already be regulated entities. It would seem more realistic to catch those account providers who are not otherwise regulated through the performance of the activity rather than their qualification based on a set of criteria.

Q42: ***If yes, do you think that MIFID would be an appropriate instrument to cover the authorisation and supervision of account providers?***

Securities account provision is one of the most important functions of a CSD, as part of its safekeeping function. The Commission's consultation document suggests that all account providers should in the future be authorised under the MiFID, even if they are not investment firms. We disagree with this proposal. Today, most CSDs do not fall within the scope of the MiFID because they are neither investment firms nor organised trading venues. We believe that it would be more sensible for the relevant MiFID provisions to be included within the proposed CSD legislation to avoid overlapping regulations.

Further, given that currently a comprehensive MiFID review is on its way, referring in the drafting of SLD provisions to MiFID articles seems difficult at the current stage of discussion. Should the relevant articles within MiFID be changed in the MiFID review process this would directly result in changes to the SLD. This would not allow for legal certainty within the SLD.

Elevating "safekeeping of securities" to an "investment service" under MiFID would cause MiFID to apply to the activities of CSDs, therefore a specific carve-out from MiFID provisions would be essential in order to avoid unnecessarily increased operational burden and procedures to ensuring compliance with the relevant articles for "investment service".

It need to be clarified, if CSDs are exempt from (e.g.) the MiFID as a whole or rather certain parts of the MiFID (e.g. certain articles) or with regard to special services (e.g. securities accounts) from the MiFID requirements as a whole / certain parts of the MiFID. Within this context, the Commission's intention leverage on existing legislation, such as directive 2004/39/EC (MiFID), directive 2006/48/EC (CRD), and directive 98/26/EC (SFD), is once more relevant.

A clear hierarchy between MiFID, the banking directive (2006/48/EC), the SFD (with respect to SSS), and the SLD regarding functional scope of regulation will be needed.

22. Glossary

Q43: ***Do the terms used in this glossary facilitate the understanding of the further envisaged Principles? If no, please explain why.***

Yes. The glossary facilitates the understanding of the Principles.

Q44: ***Would you add other definitions to this glossary?***

We propose to add definitions to the terms below:

1. "securities interest"
2. "other limited interest"
3. "control agreement"
4. "erroneous credit"
5. "intermediary"
6. "instruction"
7. "Information"
8. "rights attached to the securities"
9. "earmarking/ designating entry"

We hope that you have found these comments useful and remain at your disposal for further discussion. If you have any questions please do not hesitate to contact:

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