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FESE RESPONSE TEMPLATE
COMMISSION CONSULTATION ON HARMONISATION OF SECURITIES LAW

INTRODUCTION

We generally support the Commission proposals on steps towards harmonisation, as it would obviously enhance the single rule book thereby simplifying cross-border activities, for our issuers, shareholders and remote members primarily, in the end strengthening the internal market. Consequently, future legislation should leave as limited room as possible for national options and discretions. We encourage the Commission to continue working towards the goal of harmonisation in order to fully enjoy the benefits of a single market.

1. LEGAL FRAMEWORK OF HOLDING AND DISPOSITION OF BOOK-ENTRY SECURITIES

1.1. GENERAL NEED TO HARMONISE LAWS IN THE RELEVANT AREA

In 2001 and 2003, two reports of a Commission expert group (the first and second "Giovannini Reports") stated that there is increased legal uncertainty in cross-border securities holding. At the source of these uncertainties were the differences in the legal concepts that applied to securities booked to securities accounts. This situation stemmed from the fact that the development of the law applicable to securities did not keep apace with market developments, namely the fact that securities holdings nowadays were evidenced by electronic book entries and the securities were held through a chain of account providers. Therefore, first, book entries on an account should be given identical legal significance throughout the EU. Second, conflict-of-laws rules regarding “proprietary issues” of intermediated securities should be harmonised.

Account holders hold securities with the assistance of account providers, which keep accounts in favour of the account holder to which the securities are credited. Account providers are considered entities like banks, brokers, central banks, central securities depositories and similar. In some national holding arrangements, only one single account provider intervenes in the holding of securities, whereas, in other systems, it might be a multitude of them (in which case, reference is often made to a "holding chain"). However, the kernel of the practicalities of holding is regularly the relationship between one account holder and one account provider.

Additional background information supporting this section can be found in the Introduction and Recommendations 1 and 2, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

Question 1: The far greatest part of securities are held and administered through securities accounts maintained by an account provider (e.g., a bank, a broker, a custodian or similar). What is your estimate regarding the percentage of securities which are *not* held through a securities account?

In some FESE members’ jurisdictions, all listed securities (and securities accounts) are maintained by the Central Securities Depository The securities are usually held either in the accounts at the Final Investor Level except Government Bonds or in “omnibus” accounts for those systems which allow this use. These latter accounts are not a Final Investor Level. In some markets, shareholders have the right to hold shares directly in their own name, with their name appearing on the share register outside of the CSD and that these markets are strongly supportive of retaining this shareholder right and method of share ownership.

Question 2: Do you assume that the application of the legal framework for acquisition or disposition of book-entry securities, including the creation of collateral interest, is more complex as soon as there are cross-jurisdictional elements to be taken into account? [Yes, considerably more complex/Yes, slightly more complex/No/I don't know. Please specify and make a distinction between operations occurring inside and outside a securities settlement system, if possible.]

Yes, slightly more complex when documentation is required to be sent. It is probable that in a cross-jurisdictional context, conflicting substantive rules on the acquisition/disposition of book-entry securities could lead to complex disputes leading to uncertainty of possible legal determination and resolution. Moreover, if instructions are validated and effected inside a securities settlement system, it is crucial to determine in a cross-jurisdictional context, the respective settlement system rights and obligations between the account provider and the account holder and any third party interests.

1.2. THE LEGAL NATURE OF BOOK-ENTRY SECURITIES / MINIMUM HARMONISATION

The most relevant aspect of any future European legislation in the field of securities held through account providers would certainly relate to the requirements which need to be fulfilled in order to render the acquisition of securities or of a security interest in securities, legally effective. However, the certainty that an account holder acquires such position must be accompanied by the knowledge of what exactly he acquired. This is because account holders need to be sure to what extent the acquired position can be used: to participate in a corporation, to receive dividends or similar payments, to sell the securities or realise their value in case a security provider does not fulfil his obligations, etc.

The legal design of the acquired position must provide clarity regarding these elements. To this extent, there is a clear need for harmonisation. Beyond this, it appears that the exact legal-conceptual nature (property, shared property, trust, specifically designed right) of the acquired position is only of secondary importance to the acquirer. Consequently, harmonised European legislation might provide for a legal position of the acquiring account holder which comprises a set of legal attributes in the sense of a minimum content, without determining the exact legal characterisation of that position.

Starting from a functional point of view, the legal position of the acquirer should be shaped along the practical-economical purposes of an acquisition of securities or interests in securities. Notably, account holders need to know (a) that the securities can be disposed of or used to provide a security interest; (b) whether they can enjoy the rights flowing from the securities (dividends, voting rights), and, (c) whether and to what extent they can change the holding situation, if necessary.

Additional background information supporting this section can be found in Recommendation 4, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

Question 3: Do you think that harmonisation of the law of holding and disposition of book-entry securities should be done by way of minimum harmonisation, i.e. that in general, Member States' law shall continue to define the general legal characterisation of book-entry securities, whereas certain characteristics of book-entry securities are harmonised? [Yes/No/I don't know; please specify]

Yes, it is desirable that harmonisation of legal provisions on the holding and disposition of book-entry securities should be limited to the essential functional aspects involved while still maintaining the role of Member States' law in defining the characterisation of legal concepts involved. The harmonisation of legal provisions should apply to all

holdings of securities where the holding is maintained in the EU whether or not the underlying security comes from the EU.

Question 4: Do you think that book-entry securities should confer upon the account holder the following minimum rights [Yes/No/I don't know, please specify and indicate whether additional elements should be harmonised]:

(a) the right to exercise and receive the rights attached to the securities, as far as the account holder itself is identified by the issuer law as the person entitled to these rights;
(b) the right to instruct the account provider to dispose of the securities;
(c) the right to instruct the account provider to arrange for holding the securities with another account provider or otherwise than with an account provider, as far as the applicable law allows holding otherwise than with an account provider.

Yes to all. It is useful to ensure that throughout the EU, all account holders enjoy right of full information relating to the book-entry securities (over which they hold beneficial ownership/interest even though these are legally held by the account providers) on such terms as may be agreed upon in the relevant account agreement, which may limit or restrict the rights of the Final Investor.

1.3. ACQUISITION AND DISPOSITION OF BOOK-ENTRY SECURITIES

Different methods are used throughout EU jurisdictions to realise one or the other type of acquisition and disposition.

- Book-entry methods
  - crediting of an account;
  - debiting of an account;
  - earmarking of securities in an account or of a securities account;
  - removing of an earmarking.
- Non-book-entry methods
  - conclusion of a control agreement;
  - conclusion of an agreement with and in favour of the account provider.

The future European legislation would probably endorse all six methods.

Furthermore, certainty requires the assurance that, from a specific point in time, acquisitions and dispositions can no longer be “undone” and are “good against” third parties. Under future EU legislation, acquisitions and dispositions would probably be effective once they are established under one of the six methods set out above, establishing at the same time the effectiveness between account holder and account provider, the effectiveness against the insolvency administrator and the creditors in any insolvency proceeding and the effectiveness *vis-à-vis* third persons. However, in some Member States, so-called conditional credits are used to establish a linkage between effectiveness of a book entry and factors external to the account. In such a scenario, the crediting or debiting of book-entry securities to a securities account is made dependent upon the fulfilment of a condition.

However, once an effective book-entry position is established, there needs to be clarity on the conditions under which it can be subsequently “undone” and what the legal consequences in such a case would be. Therefore, future harmonised legislation should provide for a limited set of reasons allowing for "invalidity" or "reversal".

This would also require a harmonised approach to the question of the so-called "good faith acquisition". In most Member States, there are such rules in place in order to protect the parties against the risk of unwinding a sequence of acquisitions. The rules resemble each other as regards their general reasoning, while differing considerably as regards their exact legal requirements and consequences.

As a further issue, harmonisation of rules on priority of interests appears to be necessary. Priority conflicts between several market participants with respect to the same bookentry securities can, and do in practice, arise. The laws of Member States address this question in different manners. Future harmonised legislation will have to provide appropriate rules, striking a balance between the protection of acquisitions effected under methods that are visible on the account (book-entry methods) and those effected under methods which are not visible (non-book-entry methods).

Additional background information supporting this section can be found in Recommendations 5-8, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

- Book-entry methods
  1.3.1. crediting of an account;
  1.3.2. debiting of an account;
  1.3.3. earmarking of securities in an account or of a securities account;
  1.3.4. removing of an earmarking.
- Non-book-entry methods
  1.3.5. conclusion of a control agreement;
  1.3.6. conclusion of an agreement with and in favour of the account provider.

The future European legislation would probably endorse all six methods.

Question 5: Do you think that a fix set of methods for acquisition and disposition of book-entry securities (crediting an account; debiting an account; earmarking book-entry securities in an account, or earmarking a securities account; removing of such earmarking; concluding a control agreement; concluding an agreement with and in favour of an account provider) should be available to market participants throughout all EU jurisdictions? [Yes/No/I don't know; please specify]

Yes, the set of above-mentioned methods should be available to market participants throughout the EU. However, specific options actually prescribed within any particular Member State should not be restrictive and rather be left to such Member State's national law

Question 6: In the event of not all six methods listed in Question 5 becoming available to market participants in all Member States: do you think that the law of any Member State should recognise, in particular in an insolvency proceeding, acquisitions and dispositions effected by one of these methods under the law of another Member State, even if the law of the first Member State does not provide for that method? [Yes/No/I don't know; please specify]

Some members agree with this recognition and some others are against it.

Question 7: Do you think that future legislation should leave to Member States the possibility of making the effectiveness of an acquisition or disposition subject to a condition contractually agreed upon between account holder and account provider, in particular a condition that a corresponding acquisition or disposition occurs? [Yes/No/ I don't know; please specify]

As a matter of policy, transparency should prevail. A credit or a debit throughout the EU should be matched by a corresponding debit or credit, so as to mitigate the risk, for instance, of what is commonly referred to as an "inflation" of securities developing in practice. Leaving it solely to the Member States' discretion could lead to such risks arising in parts of the European market but not in others, as well as the possibility of (regulatory) arbitrage depending on whether the particular Member State permits such a contractual condition to be introduced in the relevant account agreement.

Question 8: Do you think that there should be a short, harmonised list of conditions giving rise to a reversal of an acquisition or disposition, notably (a) the consent of the account holder; (b) the credit or debit which was made in error; (c) the debit or earmarking or removal of an earmarking which was not authorised. [Yes/No/I don't know, please specify, indicating which one to add/delete, if any]

Yes, a harmonised list of conditions would facilitate legal certainty as to pre-conditions for the validity of such a reversal in a pan-European market. Any such reversal must return both stock and cash to the original holders and place both parties in the same position before they were in before the transaction was settled. However, there must be a clear stage at which a transaction cannot be reversed and certainty is assured to all parties.

Question 9: Do you think that account holders in whose favour a credit has been made should be protected against the reversal unless they knew or ought to have known that the credit should not have been made? [Yes/No/I don't know; please specify]

Some members believe that account holders should be protected. In particular, third-party acquirers should be protected under certain conditions such as in the presence of good faith and the application of the concept of acquired interests. Moreover, the legal definition of the pre-requisites for such protection would also ensure that third-party acquirers claiming protection would not on the other hand avail of such protection in undeserving situations or circumstances, such as for instance, in the event of genuine and proven error where such a third party fails to satisfy a justified economic interest.

Some other members believe they should not, as proving the fact that account holders should have known that the credit should have not been made could be challenging.

Question 10: Do you think that interests in book-entry securities, notably security interests, which are "visible" in the account, should have priority over book-entry securities which are not "visible" in the account? [Yes/No/I don't know; please specify]

No. There may be other statutory privileged/priority interests applying in virtue of Member States' national laws even though they may still not be visible. Thus the issue of the ranking of priority interests should best be addressed by national law that could well identify such security interests that should enjoy legally privileged status (provided they are proven to exist of course) even in preference to (visible) book-entries of security interests in the security account.

1.4. INTEGRITY OF THE ISSUE AND PROTECTION IN THE EVENT OF INSOLVENCY OF THE ACCOUNT PROVIDER

As issuers regularly issue a fixed number of securities, the chain of account providers must ensure that the total number of securities belonging to a specific issue does not exceed the number of securities originally issued. To this end, a mechanism should be in place which is designed to avoid imbalances at the level of the account provider. Different legislations use different means to avoid and rectify imbalances that adversely affect the integrity of the issue. None of these national rules gives rise to particular legal concerns when examined in a purely domestic context. However, their diversity amongst EU jurisdictions is problematic since they may lead to conflicting results in relation to the same issue.

Generally speaking, it should be the first aim of account providers and the holding chain as a whole to avoid imbalances between the amount of securities validly credited and the amount issued, since any imbalance persists, at least for some time, raising operational and legal uncertainty, e.g. as regards the payment of dividends and the exercise of voting rights. However, for reasons of operational failure or potential fraud, the practical occurrence of a shortfall cannot be entirely excluded, entailing the necessity of having appropriate rules in place on how to deal with it.

Additional background information supporting this section can be found in Recommendation 9, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

Question 11: Do you think that there should be a legal obligation for account providers to maintain, for securities of the same description, a number of securities or book-entry securities that corresponds to the aggregate number of book-entry securities of that description credited to the accounts of the account holder's clients plus those securities held for its own account, if any? [Yes/No/I don't know; please specify]

Yes, account providers should be obliged to hold at any point in time a sufficient number of securities as would in aggregate correspond to the total number of securities held on behalf of clients as well as those held for its own account.

Question 12: Do you think that, in case of insolvency of the account provider, securities kept by it for its own account shall be attributed to its account holders, as far as the number of securities kept by the account provider for its account holders is insufficient? [Yes/No/I don't know; please specify]

Some members believe that in case of insolvency, the liquidator will decide who is to be paid. Some other members believe that indeed an account provider should be held personally responsible to account for its clients' securities holdings as a distinct and separate patrimony with preference over securities held for its own account.

Question 13: Do you think that a remaining shortage should be shared amongst account holders of that account provider, in the case of its insolvency? [Yes/No/I don't know; please specify].

Some members believe that it should be possible for account holders to share in the securities shortfall in the event of the account provider's insolvency. Some other members believe that in case of insolvency, the liquidator will decide who is to be paid.

1.5. IDENTIFICATION OF THE APPLICABLE LAW

Many dispositions in securities involve a cross-border element. Therefore, more than one jurisdiction may be relevant to these dispositions. As already mentioned, not only the legal concepts applying to securities held through account providers vary considerably, but similarly the conflict-of-laws rules do not conform to each other. Three directives

address the issue, amongst other questions, notably Article 9(1) of the Financial Collateral Directive, Article 9(2) of the Settlement Finality Directive, and Article 24 of the Winding-Up Directive.

The current situation raises three questions. First, the conflict-of-laws rules as contained in the three directives are based on slightly different criteria. Second, these rules exclusively apply to the relatively limited scope of the directives. Third, there is a risk that in (admittedly rare) cases the interpretation of where securities accounts are "located" could diverge.

Additional background information supporting this section can be found in section 2.3.2 of the Introduction and section 1.4.2 of Recommendation 1 of the 2008 Advice of the Legal Certainty Group.

Question 14: Have you encountered difficulties in the application of the legal framework regarding holding and disposition of book-entry securities that could be fully or partially attributed to an unsatisfactory conflict-of-laws regime? [Yes/No/I don't know; if yes, please specify the difficulties]

It is believed that the PRIMA approach enshrined in the Settlement Finality Directive has served the market well. However, the conflict of laws rule should be further elaborated where necessary. Thus, for instance, even where an account provider delegates the task of physical updating electronic book-entry records and databases, it is the law of its place of control and management that should continue to prevail. Moreover, there could be certain issues such as fiscal, corporate and markets regulation and/or law that could be reserved for national (host) Member State discretion and competence.

Question 15: Do you think that future legislation on the legal framework of book-entry securities holding and disposition should harmonise issues of substantive law as well as the question of which law is applicable to holding and disposition of book-entry securities, including the creation of security interests? [Yes/No/I don't know; please specify]

Yes, we believe that future legislation should harmonise the legal framework of holding and disposition of book-entry securities. Such a regime should be broad in scope, covering securities irrespective of whether the owner of the security is a financial institution, professional or retail investor, etc.

Question 15bis: If yes: do you think that a uniform conflict-of-laws rule should govern the issues within the scope of the Settlement Finality Directive, the Directive on Winding-Up of Credit Institutions and the Financial Collateral Directive plus the aspects which are to-date not included in the scope of the three directives? [Yes/No/I don't know; please specify]

Yes, a uniform conflict-of-law rule should cover the Settlement Finality Directive, the Directive on Winding-Up of Credit Institutions and the Financial Collateral Directive. A clarification of the PRIMA approach in particular circumstances and the deference to national law on certain defined matters would also be desirable. We also encourage a regime which is compatible with global initiatives in the field of conflicts of laws.

1.6. COST RELATED TO ASPECTS ADDRESSED IN SECTION 1

Question 16: Do you think that holding and disposition of book-entry securities is more costly in cases where the situation involves a cross-jurisdictional element? [Yes/No/I don't know; please specify]

Yes.

Question 16bis: If yes, could you give your best estimate of the additional cost and specify what types of cost arise?

Such additional costs (these could vary widely depending on the particular circumstances) may be the result of the increased costs of access of/linking up with other proprietary payment and settlement systems.

2. PROCESSING OF RIGHTS FLOWING FROM SECURITIES

Member States' laws governing the processing of rights flowing from securities by account providers considerably differ and are a potential barrier to efficient cross-border clearing and settlement. The reason is the *de facto* operational "separation" of the investor from the issuer. This is often accompanied by legal incompatibilities as soon as a holding chain crosses jurisdictional borders. Notably, the law of one Member State applicable to the issuer of securities might not tie in smoothly with the law governing holding and settlement in the Member State where such securities are actually held. Against this background, future EU legislation might address this issue from two angles.

First, the jurisdiction of the issuer must ensure that a cross-border investor can exercise rights enshrined in his securities, either directly or through assistance by the chain of account providers, so as to be in a comparable situation to investors holding identical securities in a purely domestic context. Incompatibilities of holding patterns or the fact that the securities are held cross border must not lead to a discrimination of the investor.

Second, account providers, as the central element of modern securities holding and settlement, have to ensure a harmonised level of basic assistance to investors as regards the exercise of rights enshrined in securities.

Additional background information supporting this section can be found in Recommendations 12-14, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

2.1. NEED TO HARMONISE THE RELEVANT LAWS

Question 17: Do you think that investors face difficulties in exercising rights flowing from securities as soon as they hold through a cross-border holding chain? [Yes, considerable difficulties/Yes, slightly more difficulties than in a domestic context/No/I don't know, if yes, please specify the difficulties]

Yes, considerable difficulties are faced when securities are held through a cross-border holding chain. Such difficulties can be the result of varying evolution of market practices and trends (e.g., proxy voting and other forms of remote consultation between issuers and account holders) as well as legal practice of tax authorities and tax reclaim assistance for instance.

2.2. FACILITATION OF THE EXERCISE

Question 18: Do you think that the law of Member States should bind account providers to facilitate the exercise of rights flowing from the securities (e.g. by providing the investor, upon demand, with a certificate confirming his holdings; or, by making the investor the account provider's representative with respect to the exercise of the relevant rights {proxy}), where the exercise of rights would be impossible or cumbersome without the assistance of the account provider? [Yes/No/I don't know; please specify]

We generally support the idea of facilitating the exercise of rights flowing from the securities where the exercise of rights would be impossible or cumbersome without the assistance of the account provider. However, the Commission may however need to carefully consider the costs of the duties to be imposed on account providers. It may be relevant to leave it up to the parties to contractually agree on at least some of the duties of the account providers. In

some jurisdictions, the legislation or the lack of appropriate technical infrastructures does not enable the account provider to facilitate the process.

Question 19: Do you know other cases where assistance of the account provider is a prerequisite for the exercise of the right by the investor? [Yes/No/I don't know; if yes, please specify]

There could be other cases where the assistance of account providers may be necessary, such as for instance, in tax reclaim/audit procedures for a definite confirmation/certification of transactions (acquisitions and disposals) and payments history/records for computation of chargeable capital assets and/or income flows that the investor will need to prove as the beneficial owner of the investments.

2.3. EXERCISE OF RIGHTS BY AN ACCOUNT PROVIDER ON BEHALF OF THE INVESTOR

Question 20: Do you think that Member States' law should make possible the exercise of rights flowing from securities by an account provider on behalf of the investor where the exercise of the rights by the investor himself is impossible? [Yes/No/I don't know; please specify]

Some members believe that Member States' law should make possible the exercise of the above-mentioned rights, but in a non-binding form. Some other members believe they should not, as it is felt that harmonised law should determine the exceptions to the rule of investors determining the exercise of such rights. The circumstances should be listed so as to ensure that, as a matter of policy, such exceptions are uniformly defined.

Question 20bis: In the affirmative case, do you think that this possibility should be subject
(a) to feasibility on the side of the account provider [Yes/No/ I don't know, please specify, in particular, the exact scope of such feasibility exemption], and/or
(b) to contractually agreed levels of service between the account holder and the account provider? [Yes/No,/ I don't know, please specify].

(b) This possibility should be subject to contractually agreed levels of service between the account holder and the account provider.

Question 21: Do you think that Member States' law should make possible the exercise of rights flowing from securities by an account provider on behalf of the investor, in a scenario where the investor does not want to exercise the rights himself? [Yes/No/I don't know; please specify]

Yes, all Member States should make possible the exercise of the above mentioned rights.

Question 21bis: In the affirmative case, do you think that this possibility should be subject
(a) to feasibility on the side of the account provider [Yes/No/ I don't know, please specify, in particular the exact scope of such feasibility exemption], and/or
(b) to contractually agreed levels of service between the account holder and the account provider? [Yes/No/I don't know; please specify].

Yes to both.

Question 22: Do you think that an account provider should be bound to exercise, on behalf of the investor, the following rights flowing from securities:
(a) Rights entailing a change of the relevant security itself (e.g. conversions, reorganisation) [Yes/No/I don't know; please specify];

(b) Collection of dividends or other payments and subscription rights [Yes/No/I don't know; please specify];
(c) Acceptance or refusal of takeover bids and other purchase offers? [Yes/No/I don't know; please specify];
(d) Other rights [please specify which and why]

(a) No, unless the investor agrees to it.

(b) Yes, such exercise should be uniformly mandated as the automatic collection of income as and when due.

(c) No, unless investor agrees to it.

(d) No, unless investor agrees to it.

2.4. PASSING UP AND DOWN OF THE NECESSARY INFORMATION

Question 23: Do you think that account providers should be bound to pass on information with respect to book-entry securities which is required in order to exercise a right enshrined in the securities which exists against the issuer? [Yes/No/I don't know; please specify];

Yes.

Question 24: Do you think that this obligation should be restricted to information
(a) which is received "through the holding chain", (i.e. directly either from the issuer or an account provider which maintains an account for the account provider in question, or from the investor or another account provider for which the account provider in question maintains an account.) [Yes/No/I don't know; please specify];
(b) which is directed to all investors in securities of that description [Yes/No/I don't know; please specify]?

Yes to both, subject to any other contractually agreed levels of service.

Question 25: Would you advise other/additional restrictions to this duty? [Please specify]

No.

2.5. COST RELATED TO ASPECTS ADDRESSED IN SECTIONS 2.1-2.5

Question 26: Do you think that the processing of rights flowing from securities is more costly in case where the situation involves a cross-jurisdictional element? [Yes/No/I don't know]

Yes.

Question 26bis: If yes, could you give your best estimate of the additional cost and specify what types of cost arise?

Variable depending on contractually agreed levels of service.

3. FREE CHOICE REGARDING INITIAL ENTRY INTO A HOLDING AND SETTLEMENT STRUCTURE, IN PARTICULAR FREE CHOICE OF CSD, BY THE ISSUER

Throughout the EU, there are restrictions regarding issuers' choice as to where securities are initially held. These restrictions come in the form of either market rules or national law and take, for instance, the form of (a) requirements that issues in securities listed in regulated markets have to be deposited exclusively in settlement systems local to those markets; or, (b) requirements that securities listed on a regulated market be submitted to registration with a local registrar for purposes of holding of the issue. However, such restrictions constitute an important barrier to the integration of the EU financial system. Therefore, as a pre-condition for market-led integration of the EU post-trading environment, they might need to be removed.

Additional background information supporting this section can be found in Recommendation 15, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

Question 27: Do you think that an issuer incorporated under the law of an EU Member State should be allowed to arrange for its securities to be initially entered into holding and settlement structures (in particular those maintained by a central securities depository) in, or governed by the law of, another EU Member State? [Yes/No/I don't know; please specify]

Some members believe this possibility should be allowed. This would support competition on the level of CSDs which would benefit the participants on the financial markets. However, we recognise the many difficulties from various legal aspects such as tax and company law. An additional difficulty could be the potential lack of connectivity between a trading venue to alternative CSD locations to facilitate straight through processing of transactions. This could be resolved if the CSDs used would provide transaction feed access, as defined in the Access and Interoperability Guidelines[1] of the Code of Conduct on Clearing and Settlement[2], to a suitably wide range of trading venues and/or their CCPs. Hence, provided that certain mandatory national jurisdictional features and competence issues (e.g., assistance to national tax/regulatory authorities, compliance with non-market abuse and market supervision law, corporate law compliance, as may be required by national law) are preserved, choice should be granted. Such rules would obviously have a very broad effect, considering the number of companies registered within the EU. Based on the limited background material available so far, it is however not possible to give more views on the way forward. We would encourage the Commission to further explore the possibilities on the way forward, as based on the limited background material available it is difficult to have a strong position. However, in view of the difficulties going forward and as a starting point, we suggest to start allowing free choice for issuers listed on regulated market they represent the most commonly used trading venues across Europe for issuers to list the securities.

Few members believe that an issuer incorporated under the law of an EU Member State should not be allowed to arrange for its securities to be initially entered into holding and settlement structures in, or governed by the law of, another EU Member State.

Question 28: Do you think that holding and settlement structures for securities, in particular those maintained by a Central Securities Depository, which are governed by the law of an EU Member State, should be open for securities constituted under the law of another EU Member State? [Yes/No/I don't know; please specify]

Yes.

Question 29: Are there, in your view, issues stemming from other branches of law, such as corporate law, fiscal law, etc., or regulatory/supervisory concerns that could advise against the establishment of free choice by an issuer, as set out above. [Yes/No/I don't know; if yes, please specify the issues]

No.

Question 30: Do you at present incur additional cost because either or both of the above possibilities of choice do not exist? [Yes/No/I don't know/Not applicable]

[1] Access and Interoperability Guidelines available for download at http://www.fese.eu/_lib/files/AccessInteroperabilityGuideline.pdf

[2] Code of Conduct for Clearing and Settlement available for download at http://www.fese.eu/_lib/files/European_Code_of_Conduct_for_Clearing_and_Settlement.pdf

Yes (due to the need to establish links with other existing CSDs).

Question 30bis: If yes, could you give your best estimate of the additional cost and specify what types of cost arise?

Variable depending on the links involved.

4. DUTIES OF ACCOUNT PROVIDERS

Member States aim at increasing the safety and soundness of holding through account providers as these entities are in a position to play a central role in the safeguarding of the integrity of a securities issue and the protection of investors' holdings. Therefore, account provider's activity is regularly put under the scrutiny of a competent authority. Providing the service of maintaining securities accounts is an "ancillary service" under Annex I Section B of the MiFID. The provision of ancillary services per se does not require an authorisation. However, if provided by an investment firm, the rules of the MiFID apply, cf. Articles 5(I) and 6(1) of the MiFID. This means that if an account provider is not an investment firm in the sense of MiFID, its activity, though being an ancillary service, is not subject to the rules of the Directive; hence, at a Community level, there is a regulatory "gap" as there is no common rule on the question of whether or not such entities have to be subject to authorisation and regulation which might be filled by upcoming harmonised legislation.

Additional background information supporting this section can be found in section 2.4 of Recommendation 2 and in Recommendation 3, and the accompanying explanatory text, of the 2008 Advice of the Legal Certainty Group.

Question 31: Do you think that all providers of securities accounts established in the EU should be subject to authorisation and supervision in relation to their services of maintaining securities accounts? [Yes/No/I don't know; please specify]

Yes, we believe it is relevant and a current practice in Europe to subject all account providers to supervision by the relevant authority (i.e. market regulator, central bank, etc.) A harmonisation of this practice would avoid any possible regulatory/supervisory arbitrage and ensure a level playing field.

Question 31bis: If no, which account providers should not be subject to authorization and supervision by competent authorities? [Please designate the type of account provider and specify why.]

All account providers, irrespective of the institution or form of incorporation, should be subject to the same set of requirements with regards to the authorisation and supervision of the services of maintaining securities accounts.

Question 32: Do you think that the service of safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management (which is a so-called ancillary service under MiFID) should be made an investment service in the sense of MiFID (i.e. inserted in Section A of Annex I of the MiFID and be deleted from Section B)? [Yes/No/I don't know; please specify]

Some FESE members representing large European markets, believe that MiFID is not the right legal framework to regulate account providing services. This is based on the fact that MiFID was not specifically conceived to serve as a legal framework for account providers, nor was it adopted with the aim to provide a legal certainty context of securities holding and disposition.

Some members believe that MiFID seems to be relevant and should not raise significant difficulties.

Question 32bis: If yes, do you see any specific difficulties in including certain types of account provider in the full or even a limited scope of MiFID? [Yes/No/I don't know; if yes, please specify the difficulties]

FESE believes that achieving a uniform set of harmonised regulatory/supervisory conditions for account providers in Europe should be a priority. As earlier mentioned, level playing-field in this market, should be a pre-requisite for regulation of account provision services. FESE believes that the future EU legislation on Harmonisation of Securities Law, which aims to achieve these conditions in Europe, is the right vehicle to define the rules applicable to the authorisation and supervision regime for account providers and not within the scope of MIFID.