Finland
CENTRAL CHAMBER OF COMMERCE
Leena Linnainmaa


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European Commission
Internal Market and Services DG
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**CONSULTATION ON THE HARMONISATION OF SECURITIES LAW**

The European Commission has launched a consultation on legal certainty of securities holding and dispositions. The Central Chamber of Commerce of Finland submits the following statement.

**Information on the Respondent**

A) Central Chamber of Commerce of Finland
P.O. BOX 1000
FI-00101 Helsinki
Finland

B) National chamber of commerce

C) Some of the Finnish chambers' member companies conduct national and cross-border securities operations in the EU/EEA area.

D) Not applicable.

E) The Finnish chambers of commerce have 16.000 member companies.

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

### *1.1. General need to harmonise laws in the relevant area*

**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?

**Answer:** The law requires that the shares of all Finnish companies with shares traded on a Finnish regulated market must be entered into the book-entry system. We estimate that the amount of securities held outside securities accounts is less than 0,1 % of the total value of securities.

**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?

**Answer:** Yes, the legal framework becomes considerably more complex. Cross-border trading of securities as such does not add complexity in legal terms, but using securities as collateral, other than collateral for clearing and settlement, is very complex. Practices and legal requirements vary in the Member States for both operational procedures and documentation. Legal advice is needed and this is quite costly in most cases.

### *1.2. The legal nature of book-entry securities / minimum harmonization*

**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?

**Answer**: No. We find it necessary to attempt a more far-reaching solution than minimun harmonisation. We acknowledge that challenges of full-scope maximum harmonisation but we wish to see all unnecessary differences to be rooted out.

**Question 4:** Do you think that book-entry securities should confer upon the account holder the following minimum rights?

**Answer**: Yes.

### *1.3. Acquisition and disposition of book-entry securities*

**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?

**Answer**: Yes. A fix set of methods would reduce the problems of cross-border operations considerably.

**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?

**Answer:** Yes. Legal certainty should be enhanced especially for insolvency situations. Also, this would reduce legal costs.

**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?

**Answer:** Yes. Conditional credits, debits or entries to book-entry accounts should be allowed. However, the book-entry account should include information on the conditionality of a transaction.

**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 authorized?

**Answer:** Yes. Mistakes are usually noticed immediately or shortly after they have occurred. Correcting them in a timely manner reduces the risk of damages.

**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?

**Your answer:** No, at least in most cases. Account holders should not receive unjustified benefit because of a mistake.

**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?

**Answer:** Yes. This does not, however, apply to interests based directly on law.

### *1.4. Integrity of the issue and protection in the event of insolvency of the account Provider*

**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?

**Answer:** Yes.

**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?

**Answer:** If there is a clear mistake, it should be corrected so that an account holder does not suffer from the mistake. Otherwise, the assets of a debtor should be distributed among all of the creditors of the debtor in proportion to their claims.

**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?

**Answer:** Yes, as a last resort, if any collateral or insurance or other assets do not cover the loss.

### *1.5. Identification of the applicable law*

**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?

**Answer:** No.

**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?

**Answer:** Yes.

**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?

**Answer:** Yes.

### *1.6. Cost related to aspects addressed in sections 1.1 – 1.5*

**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?

**Answer:** Yes. If securities are used as collateral, cross-border processing costs are higher due to different procedures and documentation requirements that require more manual work and legal assistance.

## 2. PROCESSING OF RIGHTS FLOWING FROM SECURITIES

### *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?

**Answer:** Yes, slightly more difficulties than in domestic context. Difficulties are mostly caused by different practices and documentation requirements in foreign jurisdictions.

### *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?

**Answer:** Yes. Both options should be available, giving investors and account providers a possibility to choose the best alternative for each individual case.

**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?

**Answer:** No.

### *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?

**Answer:** Yes. Account provider's right to exercise the rights on behalf of the investor should always be based on the investor's consent or agreement between the investor and account provider.

**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, and/or (b) to contractually agreed levels of service between the account holder and the account provider?

**Answer:** Yes, (b) 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?

**Answer:** Yes. Account provider's right to exercise the rights on behalf of the investor should always be based on investor's consent or agreement between the investor and account provider.

**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, and/or (b) to contractually agreed levels of service between the account holder and the account provider?

**Answer:** Yes, (b) to contractually agreed levels of service between the account holder and the account provider.

**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); (b) Collection of dividends or other payments and subscription rights; (c) Acceptance or refusal of takeover bids and other purchase offers?; (d) Other rights?

**Answer:**
(a) Yes.
(b) Yes.
(c) Yes.

### *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?

**Answer:** Yes. However, the account provider should not have such a duty if the investor has received the information elsewhere (from the media, directly from the issuer etc) or has agreed with the account provider not to receive such information.

**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.); (b) which is directed to all investors in securities of that description?

**Answer:** Yes. (a) Obligation should be restricted only to information which is received "through the holding chain".

### *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?

**Answer:** Yes.

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

**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?

**Answer:** Yes. However, attention should be given to eliminating any undesirable regulatory arbitrage between the respective securities legislations of Member States.

The integration and efficiency of securities holding and settlement structures at the EU level can be enhanced through better interoperability between central securities depositories and settlement systems. We suggest that the Commission explore possibilities to strengthen interoperability arrangements.

**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?

**Answer:** Yes. This would enhance competition between central securities systems and settlement systems.

## 4. DUTIES OF ACCOUNT PROVIDERS

**Question 32:** 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?

**Answer:** Yes. However, if an account provider (e.g a central securities depository) is authorised and supervised through national law, dual requirements of national legislation and MiFID should be avoided. Furthermore, the obligations of MiFID should not be applicable, unless it is necessary, to those account providers that do not offer other investment services.

**Question 34:** 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)?

**Answer:** Yes, this would help create a level playing field for all account provides. However, it might require that MiFID, especially its conduct of business rules applicable to investment services, to be adjusted taking into account their application to the service of safekeeping.

**Question 35:** 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?

**Answer:** No.

THE CENTRAL CHAMBER OF COMMERCE OF FINLAND

Kari Jalas
Director General