NORDIC SECURITIES ASSOCIATION

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NSA response regarding the consultation on Legislation on Legal Certainty of Securities Holdings and Dispositions

The Nordic Securities Association (NSA) represents the common interests of Member firms in the Nordic securities dealers associations towards external stakeholders primarily in the Nordic market but also on European and international issues of common interest. Members of the NSA are the Danish Securities Dealers Association, the Finnish Federation of Financial Services, the Norwegian Securities Dealers Association and the Swedish Securities Dealers Association.

In all Nordic countries most (and all listed) securities are dematerialized with a Central Securities Depository. We have all relative long experience of dematerialized securities and our systems have worked very well for quite some time for all involved, account holder, account providers and account operators. From the Nordic perspective we want to address some questions in the consultation of general interest for the Nordic Securities Market.

The first one and of course one of utmost importance is how to include the specific elements of the *Nordic holding systems*[1] in an EU- legislation regarding dematerialized securities and book-entry systems. In those systems the CSD and the so called account operator has very important duties which must be acknowledged in the legislation. In our view the proposed principles regarding "transparent" systems" and the notification system are acceptable for us. However, the Commission still calls the system for a transparent one which is wrong and not acceptable. To use "transparent" as a description of book-entry system give the wrong impression and can lead to misunderstandings. A better description is to call the systems in the Nordic area for mixed systems because in those systems exists both direct holdings with the CSD as account provider as well as indirect holdings with banks or securities firms as account providers.

[1] See Second Advice of the Legal Certainty Group page 34 and also Report of Transparent Systems Working Group, Doc. 88 Unidroit. For a more general description of the Nordic holding systems see Karin Wallin-Norman and Lars Afrell Direct or Indirect Holdings: a Nordic Perspective, Uniform Law Review Vol.X 2005-1/2 page 277.

One open issue is still how to incorporate the CSD as an account operator in a future legislation. The securities legislation must be coordinate with a proposal which give CSDs the right to fill the role of account provider. That role is a main function for the Nordic CSDs and should according to our opinion be included in the forthcoming proposal regarding CSDs.

Financial markets today are global and all large financial institutions are active in one way or another outside the Union. *The Geneva Securities Convention* will promote legal certainty and economic efficiency with respect to cross-border holdings and dispositions of securities held with an intermediary. In our firm opinion it is extremely important to achieve global compatibility regarding the substantive law of securities dispositions. EU should in the interest of the Union as global financial market implement legislation fully compatible with the Convention.

Furthermore, we have for long time being very concerned about the lack of progress regarding *the conflict of law issue*. There is still in the EU no uniform conflict of laws rule that govern issues of crucial practical importance for holdings and dispositions of securities held by an intermediary. Uncertainties in this regard lead to significant expense for market participants and it adds an unnecessary risk to the global capital market. We therefore support the way forward suggested in the consultation. However, the rule has to be more precise. We find the criteria behind the connecting factors are too vague and we suggest that they should be further clarified. Furthermore we want to stress the importance that the liability of the account provider for inaccurate communication is strictly limited to cases of negligence.

Regarding *corporate actions* investors of course face more difficulties cross-border than in a domestic context. But, there are several good reasons to put further legislative action in this area on hold for time being. Firstly to give time to study the effects of the implementation in Member States of Shareholder´s right Directive. Work is for example taking place on market standards for general meetings in respect of that Directive. Secondly, this section lacks an impact assessment and also an analysis of the needs of different types of investors. Some investors may only want to have the basic rights flowing from securities; others want more or less full service.

Furthermore, to compare securities transaction with a payment is to underestimate the complexity of a securities transaction. Before any proposal for legislation is made about the *costs* there must be an impact assessment taking into account that most holdings are national and a proposal to level the costs between domestic and cross-border holdings could have adverse effect on the financial market and increase costs for the small investor.

It should be left for contractual arrangements between the account holder and account operators to agree on the level of services and thereby the costs for the holding of securities. Furthermore, we believe that the

competitive element itself will see to it that such services are offered in the market. Account provider´s right to exercise the rights on behalf of the investor should always be based on investor´s consent or an agreement between the investor and the account provider.

The principle that prescribes that Member States should ensure the full exercise of investor rights must be limited. One way forward is that the principle should only impose an obligation for account providers to process material rights (like dividends). The processing of participatory rights attached to the securities should in our opinion be subject to a contractual party autonomy. Such a division would ensure an efficient system of cross-border holding of securities that satisfy all types of investors.

We are of the opinion that a harmonization for securities law must have effects on company law and especially who the issuer must recognize as securities owner. It is not possible to state or, worst, legislate for example that the account provider should ensure that the account holder can exercise his rights without having impact/effects on company law.

Finally, critic has been raised regarding Geneva Securities Convention that the harmonization achieved in the text is minimal due to the references to declarations, national insolvency law and "non-convention law". In our view the same critic can apply to some of the principles in this consultation and we are not convinced that this in some areas is the right way.

Kind Regards

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