DACSI 11-1006

Remarks on the proposed Securities Law Directive

Answers to the consultation document of the European Commission's Internal Market and Services DG of 2010

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DACSI (the Dutch Advisory Committee Securities Industry) is the principal not-for-profit association in The Netherlands for firms active in the securities industry. The association represents the interests of its members as users/clients of infrastructure providers in the field of securities, e.g. exchanges, central counterparties, central securities depositories. With 12 members, DACSI represents the vast majority of the banks active in The Netherlands, and positions the Dutch view to the market infrastructure service providers and the regulatory authorities in The Netherlands and the European Union.

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Thank you for the opportunity to contribute to future legislation by making remarks on the EC consultation paper "Legislation on legal certainty of securities holdings and dispositions" (Securities Law Directive or SLD)[1]. We hope that our contribution is helpful in the debate on the various issues addressed in the paper and are of course more than prepared to elaborate on particular items when helpful.

One important element in the approach chosen in the consultation document is that existing national legislations are kept intact, and that functional requirements are specified as to bring the effectiveness of the national regimes closer together. This contrasts to the approaches chosen for adjacent domains:

- MiFID is a directive requiring strongly converging (and effectively converged) national regimes including provisions for trading infrastructures,
- EMIR is a European regulation resulting in uniform requirements for (e.g.) central counterparties and various functions in the clearing chain,
- for CSDs, legislation is being prepared to ensure harmonised rules for central securities depositories.

We have expressed at an earlier stage that we would have preferred a similar approach of the strongest possible prescriptive framework for the intermediaries in the custody and settlement chain (of account holders and providers); shouldn't the legislative requirements for this field at least be based on the legislation for CSDs, as these are the critical end points of the securities (holding) chain, and shouldn't the latter (the CSD legislation) be calibrated more before the SLD provisions are completely detailed?

The chosen approach results in numerous principles and requirements that can be implemented by national legislators in different ways. Despite the rightfulness of these principles, we envisage that national solutions will be formulated that will comply with the requirements, but along different routes. We are not confident that no additional local requirements will be kept intact or created (gold plating), and hence fear the uniform processes will be difficult. Where the industry has found work-arounds for securities holdings and transfers across the borders between different regimes, new solutions will have to be found and – we believe – will be found to manage the new differences between regimes. However, we think that an opportunity would be lost to gain the efficiencies of uniform processes and to create more cost-effective solutions.

It should be recognised that – if no harmonised legal framework through Europe is enforced, as chosen in the current proposal - compliance with the principles will have major consequences for business operations and their costs. The issues to be addressed will be of a functional nature and should be tackled by a functional approach. In order to reduce costs of this nature, and to fill the gaps between the various European regimes, the industry has initiated market standards, viz. for general meetings and for corporate actions processing. We think these standards, endorsed by all relevant parties and already implemented to a substantial extent, and with their greater flexibility compared to legislation, deserve a more prominent role in formulating solutions to the questions at hand.

Next to this fundamental consideration we would like to make the following General Remarks before answering the specific questions in the consultation document.

General Remarks

Before reacting to the specific questions in the consultation document, we want to state the following:

- The future SLD should be in line with the existing EU legislation/directives and there should be a coherent approach regarding new legislative initiatives. This means that the same definitions should be used in all relevant European legislation/directive/regulations. For instance, next to the definition of "securities", other

[1] DG Markt G2 MET/OT/acg D(2010) 768690

definitions are used like “financial instruments”, “transferable securities” and now introduced by the SLD “account held securities”.

- Regarding a coherent vision we see for example that the SLD and the Market in Financial Instruments Directive (“MiFID”) require protection of client securities against bankruptcy of the account provider/investment firm. Although clients are protected, the draft Investor Compensation Scheme Directive requires to pre-fund up to 50 basis points! That would amount to an immobilisation of € 27 billion (EFAMA statistics), all over the EU, for UCITS only. This would not be consistent.

- At least the following (existing) directives should be considered for drafting the SLD: The Financial Collateral Directive, the Shareholders Rights Directive, the Settlement Finality Directive, the MiFID, the Investor Compensation Scheme Directive (being prepared), but also the Geneva Securities Convention, the Market Standards for Corporate Actions Processing, and the Market Standards for General Meetings. A more holistic approach is needed.

- A lower level account provider in the intermediary chain should not be held responsible or liable for a loss due to error/fraud/bankruptcy of a custodian upstream in the chain.
  We recommend not to establish such a responsibility in the proposed Directive; otherwise, an (unforeseen) incident in the chain would contaminate the entire chain and hence systemic risk would be introduced.

- DACSI believes that it should be (made) clear in national legislation when the owner legally owns the account-held securities. There are differences in the different EU markets: in some markets, the owner gets legal ownership of the securities on the trade date, in others on the settlement date.
  DACSI recommends to remove these differences and to harmonise the mechanisms by legislation; DACSI supports the settlement day, which makes it very clear on what positions (settled positions end-of-day) the owner can exercise his rights.

- Removing ineffectiveness and major obstacles for exercising the rights should not be incorporated in legislation, but should be part of a functional approach.
  DACSI believes that the implementation of endorsed European Market Standards (i.e. those for corporate actions processing and for general meetings) in all member states is the proper way to eliminate ineffectiveness and major functional/operational obstacles.
  DACSI would like to stress that if there are local legal obstacles to implement any endorsed European market standard in a Member State, it is the responsibility of that state to remove this legal obstacle; if this responsibility is not carried out effectively, the European Commission should interfere.

- If cross-border holdings of securities result in higher costs for the account provider (e.g. because of the necessary custodian links), an account provider must be able to pass on these costs to the account holder. This is not discrimination, but (adequate) functioning of pricing mechanisms.
  It should be made clear that Principles 16.1 (Passing on information) does not apply to publicly available information like quarterly reports and (semi) annual accounts (largely covered by the Transparency Directive).

- A clearer distinction should be made between the so-called material rights (e.g. rights on dividend and interest) and participatory rights (in particular voting rights). Operationally, it is often very difficult and/or disproportionately expensive or even impossible to exercise voting rights in securities held through international links (especially of issuers outside Europe). A (contractual) opt-out must be possible. On page 30 (17.2, Background) this opt-out is indicated, but in our opinion it should be stated more explicitly.

Answers to specific questions

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)?

No.
The scope for the legislation is too broad. First of all, other Directives such as the Shareholders Rights Directive, MiFID, Financial Collateral Directive and the Settlement Finality Directive cover most of the principles of the proposed SLD and otherwise those Directives would be a better measure to extend certain rules and principles. Furthermore, DACSI feels that the initiatives of Market Standards should be taken into account by the EC, e.g. the Market Standards for Corporate Actions Processing, the Market Standards for General Meetings and new initiatives of the EC such as the undertaken Investor Compensation Scheme Directive.
Nevertheless, DACSI agrees to a certain point that legislation may be needed, although we prefer legislation taking into account market practice and market standards. Removing ineffectiveness and major obstacles for exercising the rights should not be incorporated in legislation but should be part of a functional/operational approach. Legislation is not the solution for functional/operational problems throughout Europe.
DACSI believes that the implementation of endorsed European market standards in all member states is the proper way to eliminate the ineffectiveness and major functional obstacles.
DACSI would like to stress that if there are local legal obstacles to implementation of any endorsed European market standard in a Member State, it is the responsibility of that Member State to remove this legal obstacle; if this responsibility is not carried out effectively, the EC should intervene.

2. Shared Functions

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

Yes.
The current definitions distinguishing the “other person” from an ordinary outsourcing agreement are rather imprecise. A future directive should clarify that any related rules could only apply within the national Member State having implemented a “transparent system”. A clarification could also take place within the Recitals to the directive.

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?
n/a

Q4: Do you know any specific difficulties of connecting transparent holding systems to non-transparent holding systems?
If an account provider services account holders under a non-transparent holding system (which system is in majority used in the EU) and if the account provider wants to extend its services to a transparent holding system, it would be very supportive if the use of an omnibus account will be allowed legally; if not, it will have a great (and costly) impact on the business model of an account provider (and the account holder).

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, the proposed framework would allow for an adequate definition of the legal position of an account holder. However, it should be clarified that the *'right for the ultimate account holder to instruct the account provider to arrange for holding the securities with another account provider'* reflects the possibility for the account holder to move his securities to another account provider. This should not impose an obligation on the account provider to enter into business relationships with depositaries according to the choice of the ultimate account holder.

Yes, it should be clearly emphasised, that the ultimate account holder has the right to instruct ***his*** account provider, who - in a chain of account providers and account holders - is the account provider closest to the ultimate account holder and with whom the ultimate account holder has entered into a direct business relationship. The wording contained in the consultation paper leaves room for the misunderstanding that the ultimate account holder may instruct at any level of account providers in a chain.

We wonder whether the scope of the Directive shouldn't be limited to European securities held in a European CSD. Europe doesn't have any competences outside Europe. This means that e.g. for US or Japanese securities the exercise of rights cannot be ensured. Next to that, concerning participatory rights, it isn't always possible to exercise these rights (operational problems and time lag) or costs may be extremely high. The possible contractual opt-out for participatory rights should be stated more clearly. It is now mentioned vaguely in paragraph 17.2, Background, page 30.

In addition, DACSI recommends a definition of account-held securities; first, the definition in the glossary as financial instruments is too broad and should be limited; second, as mentioned above, a limitation to account-held European securities held in a European CSD would be advisable.

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?

We refer to our answer to Q5 concerning extra-territorial aspects and participatory rights.

Q7: The Geneva Securities Convention 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?*

DACSI members provide account holding in EU and non-EU securities and they work with EU an non-EU account providers (custodians).
Given the substantial part of holding chains including non-EU account providers or holders, international compatibility of the most relevant jurisdictions worldwide is of high importance. The alignment of the proposed Directive to the Geneva Securities Convention is the only way to achieve this.

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?

In the business model of some of our members contractual settlement is possible. This means that the account of the account holder is credited already although the settlement process is not finished. The account holder is not able to dispose these credited positions until the settlement process is finished. The Directive should explicitly allow contractual settlement.

We would like to seek clarification over the Commission's intention to propose the Principles listed in section 4.1.2 of the consultation document as alternative or cumulative.

It seems clear that the introduction of a "no credit without debit" rule, in the sense of a legal conditioning, would prevent overissuance more effectively. However, this approach would hardly be compatible with the characterisations of account-held securities in the legal systems of all Member States, and would therefore not stay within the limits of a functional approach. Against this background, it is preferable for the Directive to provide for specific corrective methods in case of a shortfall, and to leave it to the Member State to decide whether it wants to introduce the "no credit without debit" principle within the rules on effectiveness of credits (particularly by way of introducing a corresponding condition).

Regarding the proposed requirement that conditional credits must be identifiable as such in the account (Principle 4.1.2), it should be clarified that this obligation can be fulfilled by informing the relevant account holder of the conditional nature of the credit. This would provide for sufficient transparency, as it would ensure knowledge about the condition by both the account provider and the account holder as the two parties which would be involved in any further transfer of the security before the credit has become effective. It should also be clarified that no further steps need to be taken by the account provider once the credit has become effective.

For transparency reasons the scope of Principle 4.1.5 should be limited to taking of collateral and should also be in line with other Directives (such as the Financial Collateral Directive). Acquisition and disposition of securities should be done in a transparent way as mentioned in Principle 4.1.2.

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.

It is felt that the envisaged legislation should establish different mechanisms of supervision in order to achieve the integrity of each position in securities and book-entry securities, regardless the size and the presence of cross-border elements in the account provider's chain.

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?

DACSI would welcome a further explanation on the proposed buy-in procedure, especially in which part of the chain such a method should be opportune.
Relating to Principle 4.1.4.b we want to stress that a lower level account provider in the intermediary should not be held responsible or liable for the loss/shortage of securities as a result of error/fraud/bankruptcy of a custodian upstream in the chain. This could introduce systemic risk because liability for such an incident could contaminate the entire chain.

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?

No, because trades executed on a Regulated Market for retail clients, are usually cleared according to the netting principle by a Central Counterparty; the method currently used is based on the very efficient contractual settlement principle.
Changes in legislation in this area would have major (cost) impact on the current business model for the entire chain. DACSI recommends an exception in the legislation for retail clients, because the intermediary guarantees the settlement of the trade.

There is concern about the likelihood that the proposed principle would require changes in the legal concepts of at least some Member States. However, it would seem that Member States would keep a substantial degree of flexibility to at least strongly approximate their legal characteristics to the legal concepts currently in force, particularly by deciding on their rules on the effectiveness of credits. At the same time, without the rules proposed under this principle, it would not only be doubtful if sufficient harmonisation of the laws of Member States could be achieved, but the directive would also not be in full compliance with Geneva Securities Convention.

In addition, the integrity along the entire chain of account providers through which the securities are held must be ensured, and the principles should be complemented with a rule distributing the losses in case of uncovered excess-securities.

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.

Problems may arise in jurisdictions where the ultimate account holder has a property right and where the existence of fiduciary positions is not recognised.

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?

Yes, although we feel that client securities are currently well protected under national law. Also MiFID (article 13 MiFID and article 16 of the Implementing Directive[2]) provides rules for segregation of client assets.

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

7. Reversal

Q14: 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?

[2] COMMISSION DIRECTIVE 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive OJ L 241.

DACSI recommends to include that a reversal should also be possible in the case of an unexpected technical failure of the system.

We consider the list to be neither complete nor appropriate: the case foreseen in Principle 7.1.1.a ("account holder consents") should be excluded: this consent cannot be accepted by itself, because it would affect the rights of other securities holders and also the integrity of the system (with risk of excess-securities). On the other hand, the list should be completed with a the judge/court decision.

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?

We consider it sufficient for the laws of Member States to apply the general rules on general business conditions and the prevention of unfair terms in this field. It is difficult to predict any business repercussions without regard to the exact content of any restrictive national rules; however, rules not allowing for a reversal even where credits are clearly not justified could have noticeable cost effects, and could potentially force account providers to charge higher fees for their services.

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?

The proposed text is appropriate. In case of falsification or compulsion however, the account holder, when acting in good faith, should be protected against reversal.

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 appears preferable from a bank's point of view to leave the question of inferior priority of control agreements to national laws, as leaving this issue non-harmonised does not appear to cause any detriment. Indeed, it appears doubtful whether the general aim of transparency can justify the proposed transparency rule, particularly as transparency can also be established by other means than by a book-entry or earmark.
Further, there is doubt over the concept of "pledge". Is it included within the concept of "earmarking"? If not, it should be clarified whether "pledges" should have priority over "earmarking" and "control agreements".

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.

"Control agreements" and "earmarking" are not common in all European jurisdictions.

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.

Not as long as the chronological order of priority is used for the acquisition and disposal of securities, as well as for the recording rights (i.e. rights *in rem*) and control agreements over securities.

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?

No, not necessarily. This would depend on the level of harmonisation among the different laws applicable along the chain of account providers through which the securities are held. DACSI is of the opinion that the principle of property rights is the best protection (in national law?) for the account holder in case of insolvency of the intermediary/account provider.

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

Whilst the principles appear appropriate, it should be clarified that the account holder can give authority over its account to his account provider, including the sending of instructions to a third party the account provider deems fit. As such, the principle should clearly recognise this exception.

In addition, to ensure coherence, reference to the 'account provider', rather than 'intermediary' should be made, to ensure coherent use of terminology throughout the text.

As suggested above, a clarification that the ultimate account holder has a right to instruct his account provider is deemed beneficial.

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?

Yes, because currently pro rata requirements are part of national law.

It seems preferable to leave the rules on loss sharing in case of an insolvency of the account provider to national laws, as such rules need to conform to the respective national insolvency regimes.

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 (Article 44 of the Dutch Securities Giro Act).

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.

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.

No need for further harmonisation because this is assured in the current national law.

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?

The criteria defining the 'connecting factor' are not precise enough and deserve further precision. When deciding which branch is servicing the client, the suggested provision outlines appropriate conditions, but leaves open how those should be applied in relation to each other, causing some uncertainty. In practice, this may lead to difficulties in establishing the servicing branch.

The introduction of a communication could – in general – cause two types of uncertainty:

- on the one hand, an account holder can in good faith believe the indication provided by the account provider and an erroneous law would be applied to the account;
- on the other hand, we fear that an account provider who provides erroneous information would be held responsible for providing erroneous information.

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 ex ante 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?

We are not in favour of harmonisation of communication to clients. The applicable law will be mentioned in the relevant documents. It should be left to the account providers how to communicate. Please see above.

Q29: The Hague Securities Convention 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 differs 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.

Conforming the scope of the proposed conflicts-of-law rule to the one contained in the Hague Convention will be of help with regard to third country jurisdictions. However, the highest degree of compatibility could be achieved by adopting the rules of the Convention for the proposed directive.

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?

No, this is a functional harmonisation issue, see our General Remarks. From an operational point of view it is not always realistic to assume that account holders in foreign securities can receive and exercise their rights like holders of domestic securities. Especially this is the case for participatory rights.

Whilst the practical need for such principle is not given across all European jurisdictions, it would be appropriate in any case to ensure that account holders can act as account provider for further account holders. Difficulties are encountered indeed with the exercise of voting rights, the use of securities as collateral, tax issues, etc.

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

Yes: higher costs.

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.

This is a functional harmonisation issue, see our General Remarks.
It should be made clear that the obligation of Principles 16.1 (Passing on information) does not apply to publicly available information like quarterly reports and (semi) annual accounts. Account holders can get this information directly – enforced to a large extent by the Transparency Directive - and obliging account providers to (re)distribute this public information would be unnecessary and costly.

We stress that the right for information should not only be valid for rights attached to the securities which exist against the issuer but also against third parties as it arises in the case of a takeover offer. Having said that, in general the duty to pass on information is adequately kept to the necessary minimum and is aligned with what the industry has so far succeeded to achieve through a set of endorsed Market Standards in the field of Corporate Actions and General Meetings that are currently being implemented. However, as a minimum, the duty to pass on information should not apply in cases where information would not reach the account holder in time, or where the cost of passing on information would be out of proportion to the benefit of the information for the account holder.

We disagree that the duty to pass on information should not be subject to a contractual opt-out and point out that the related explanation for Principles 16.1 contradicts the explanation given for Principles 17.1. In accordance with the endorsed Market Standards for General Meetings and their Frequently Asked Questions which have set forward and defined the parameters for a 'realistic' opt-out scheme for the last account provider in case the ultimate account holder does not wish to receive the information, we believe that such an opt-out should be possible, at least for the participatory rights (like voting in General Meetings). For the financial rights an opt-out could also apply for the passing on of information as long as the client's interests are properly defended (collection of dividend and income, exercise of mandatory reorganisation, etc.).

We acknowledge that Principles 16.1 are aligned with the obligation stated in the Market Standards for General Meetings according to which each party (incl. the intermediaries) is responsible for passing on up and down the value chain the information it receives from another party, but we also recall what has been achieved within the Joint

Working Group on General Meetings (JWGGM) to allow for our endorsement of the Standards, viz. subject to a forthcoming gap analysis:

- the issuer should only communicate using standardised electronic means (ISO formatted messages or other secure systems);
- the issuer is fully responsible for the content of the information;
- the issuer is invited to also provide such information in a language customary in the sphere of international finance (i.e. English), although there is no obligation for the last intermediary to translate the information in another language than the one used in the issuer's communication;
- the last intermediary is obliged to provide 'basic service' to the ultimate account holder (i.e. minimum service level) but he is free to offer extra/'value-added services', i.e. translation, paper based communication, etc.;
- there is no need to provide the basic service additionally if the last intermediary already provides 'value-added services' that are similar or go beyond the 'basic service'.

Finally, we support the cost approach defined in the background section 16.2 and recall that the JWGGM, when developing the Market Standards, came to the same conclusion. First, the passing on of information constitutes a service provided by account providers who should therefore be able to ask the main beneficiaries of the information, i.e. the issuers and the ultimate account holders (or end investors), to bear the cost of such a service. Second, the practical implementation of the sharing of the financial burden should be left to the market, allowing the compensation schemes that exist in some countries to remain untouched by the proposed legislation like already foreseen in the Market Standards for General Meetings which do not intend to interfere with such schemes. Therefore, the argumentation developed by the European Commission to sustain Principle 18.1 on "Non-discriminatory charges" is in contradiction with the cost approach defined alongside Principles 16.1.

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?

This is a functional harmonisation issue, see our general remarks above.

Having actively participated in the work of the Corporate Actions Joint Working Group (CAJWG) and the Joint Working Group on General Meetings which have developed Market Standards in the field of Corporate Actions Processing and General Meetings respectively, we are very supportive of market-led standardisation and welcome the recognition, by the European Commission, of the primordial role of those Standards for the development of cross-border investment. We believe that only Market Standards can harmonise complex operational processes caused by a still fragmented European securities market.

Therefore, we invite the European Commission to base the implementation of the principle defined in the future legislative proposal and the elaboration of further details regarding the passing on of information on the Market Standards that have been developed and endorsed by the relevant stakeholders represented through their respective European associations in the Broad Stakeholder Group (BSG).

The overall status of implementation of the Corporate Actions Processing standards is very positive, with many of them already implemented at national level by the market participants. Of the remaining standards to be implemented, many of them are indeed dependent on legal barriers and regulatory requirements at domestic level – which require changes in local law – or IT developments at market infrastructures level. In respect of General Meetings standards, a gap analysis will be launched in Q1 2011 as a first step towards the implementation.

Referring to the Market Standards as the applicable and practical implementation rules of the Principle(s) defined in the future Commission's proposal for a Securities Law Directive would be very helpful for their ongoing (Corporate Actions Processing) or forthcoming (General Meetings) implementation in the different markets. Because they are

based on best market practices, Market Standards enable a coherent application at industry level due to the prospective efficiency gains and peer pressure associated with the monitoring of the implementation.

In that respect, the organisational structure set-up under the auspices of the BSG, to steer, coordinate and monitor, at European level, the implementation of the Market Standards at national level, has proved to work well and is most helpful in speeding up the process by identifying early enough policy issues that need to be tackled to ensure a comprehensive and timely implementation of the standards. Since the BSG is an all-inclusive body which works through consensus and benefits from the knowledge of market experts together with senior staff of key European trade associations, it is able to strongly commit its member participants.

Finally, because they are initiated and developed by the market, Market Standards go beyond the EU borders and also apply to EFTA countries, making them pan-European in essence, which is not possible if specific EU law is not extended to EEA countries, left apart the special case of Switzerland.

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.

Yes. However, the we emphasise that Principle 17.1.2.c makes sense only for participatory rights for general meetings, but certainly not for financial rights like distributions (e.g. dividends or interests) or reorganisations (e.g. stock dividend, take over). More clarity is needed here to prevent uncertainty, that may imply significant financial risks in the processing of corporate actions.

In reality, the requirements to facilitate the ultimate account holder's position are today already fulfilled in the field of corporate actions with the implementation of the Market Standards for Corporate Actions Processing. As regards General Meetings, there are currently gaps and impediments in the cross-border exercise of rights attached to securities. The setting up of Market Standards for General Meetings should help closing those gaps and removing the remaining obstacles.

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?

Generally, taking into consideration the time lag and longer intermediary chain, the cross-border exercise of rights is believed to work sufficiently well. However, practical problems arise with regard to the exercise of voting rights in a General Meeting, where information provided by the issuer reaches investors too late or in a foreign language. To this end, the Joint Working Group on General Meetings (JWGGM) has developed Market Standards to harmonise General Meeting related operational processes in Europe.

It should be stated that the role of the account provider and especially the service levels between him and his account holder are not harmonised (as an effect of competition). Standards and harmonisation will bring a level playing field for account providers, but it is the responsibility of the account provider to organise his services towards his account holders. And having said this, it should be clear that charged costs should be related to the choices made by the account provider – and implicitly by the account holder as his client - in this respect.

A distinction should be made between the so-called material rights (e.g. rights on dividend an interest) and participatory rights (in particular voting rights). Operationally, it is often very difficult and/or disproportionately

expensive or even impossible to exercise voting rights in securities held through international links (especially of issuers outside Europe). We agree that a (contractual) opt-out at least for participatory rights must be possible (we refer to 17.2 Background last paragraph on page 30). However, it could be stated more explicitly.

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.

Yes, in some cases, higher charges in cross-border holding situations are encountered.

It is evident that the longer the intermediary chain (and for cross-borders the length may be substantive), the higher the price the account holder has to pay. E.g. Central Securities Depositories ("CSDs") may charge for transaction costs, not only in member states, but also by CSD's located elsewhere. DACSI wonders whether the EC has taken this into account. Therefore, DACSI believes that account providers should be able to compensate higher costs by higher charges.

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?

We think that the proposed legislation is not the appropriate framework to regulate pricing and commercial issues. The answer to such questions depends on the business model of individual account providers for the services they render to issuers and/or end investors. The reality is that these charges are a contractual matter and frequently form part of a bundled rate (where other services are offered simultaneously). A bank can indeed be connected either directly or indirectly to securities markets globally. In case other intermediaries are involved, any account provider will have to pass on these third party costs which are an important driver of different cost arrangements. However, most of the wholesale securities business is cross-border by nature (i.e. servicing inbound flow) and the pricing would not *per se* differentiate with a local investor holding assets in its market through a local office.

Nevertheless, the actual processing of cross-border instructions is costly and, due to its complexity, in many instances not a profit-generating activity. Hence, a pricing regulation could have the counter-effect of increasing the costs for cross-border activity, especially for institutional investors.

Besides, the reference to the approach used in the payment area is misleading. The regulatory framework for securities transactions is much more complex than the one related to pure cash transactions, as recently stated again by a senior official from the ECB. For instance, a corporate action related transaction cannot be compared to a simple cash settlement instruction. It often implies complex legal descriptions and requirements which have to be understood in the context of local jurisdictions and specific processes based on national laws and regulations or individual company requirements that are governing such type of transactions.

We are therefore convinced that the principle of non-discriminatory charges as defined and explained in the public consultation document is not workable as long as regulations and process requirements are not harmonised at European level, through the development and implementation of market standards for instance.

It is evident that the longer the intermediary chain, the higher the costs for the account provider. See also our answer to question 35. It should be clear that implementation of standards and harmonisation is not a guarantee for lower prices for the account holder if the account provider decides not to follow the developments in the markets (competition).

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.

Although cross-border holding of securities is subject to international technical market standards, difficulties are encountered in certain jurisdictions regarding (i.a.) the operational aspects, extra costs, delays of information, non-assumption of obligations to allow the exercise of rights flowing from the securities.

The provision deserves further clarification. It is not clear under which regime an account provider would become liable when he has made all reasonable and appropriate arrangements with its foreign account holder, who subsequently fails to fulfil the principles outlined in this proposal for a directive. Moreover, the terms 'reasonable' and 'appropriate' give little explanation as to the requirements of EU-based account providers.

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?

Since account providers are not in a position to influence the holding chain beyond their immediate account holders, further room for additional steps does not seem available. However, more important than the exterritorial enforcement of EU law would be globally accepted and implemented market standards, based on efficient and effective processes and easily applicable by the global community. In that respect, non-EU countries/account providers which are applying the Market Standards for Corporate Actions Processing and for General Meetings should be considered as compliant with those Standards without any further requirements.

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.

No, formal requirements in this regard are not considered necessary, because they are part of contractual agreements between account provider and account holder.

21 – Account provider status

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

No. To our opinion, the protection under MIFID is adequate. Therefore, we see no reason to introduce a new specific authorisation mechanism for the services of account provider.

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

22 – Glossary

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

No.

Firstly, we would like to see a clarification on the definition of “earmarking” (see Q17).
Secondly, terms/definitions in this consultation document are not used consistently; terms/definitions which do not appear in the list are used in the consultation document such as “account-held securities”.
Thirdly, we feel that an inconsistency of terms/definitions exists between the different Directives (mentioned above), e.g. reference to securities while financial instruments are meant; this should be harmonised.

Q44: Would you add other definitions to this glossary?

Yes:

- Account-held securities: securities held by an account holder on a securities account with an account provider.
  Earmarking: DACSI suggests a definition matching with the different relevant jurisdictions.