



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR  
THE PREPARATION OF A DRAFT CONVENTION ON  
SUBSTANTIVE RULES REGARDING INTERMEDIATED  
SECURITIES**

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**Working Group on so called Transparent Systems – Intersessional Work**  
**Comments of the Delegation of South Africa on the draft Working Paper on Transparent  
Systems**

*(submitted by the Government of South Africa)*

1.1 On “intermediary”, “account agreement” and “relevant intermediary”:

1.1.1 The respective roles of the CSD, Participants and other “Account Operators” are relevant for the discussion of the definition section. The definitions on the above terms do not clarify the position of the various role players and may create legal uncertainty.

1.1.2 It is submitted that the problem concerns the interpretation of the wording “*maintains securities accounts*” in the above definitions. Our reading of the definitions is that for Transparent systems the Participant, and not the CSD, should be the “intermediary” or “relevant intermediary” for purposes of the Convention, because the Participant *maintains securities accounts* for the account holders in terms of the mandate or “*account agreement*”. The CSD does not fulfill the function of maintaining the accounts, because it does not have a mandate or agreement with the account holders. In practice, the Participants keep and maintain their clients’ accounts at the level or tier of the CSD (through electronic links) where the legal record of ownership is held and recognized by law and not in their own back offices. It is important for various reasons (i.e. the giving of instructions to transfer, the payment of dividends, supervision functions) that an account agreement is required between the account holder and the relevant intermediary.

1.1.3 It is furthermore not the purpose of Transparent systems to dis-intermediate clients (account holders) from their Participants (intermediaries). The fact that the CSD can identify the “true owners” or end-investors or “beneficial owners” on the legal record of ownership, does not change the legal relationship with regards to services provided by these intermediaries to their account holders in terms of their agreements.

1.1.4 In line with above interpretation, the CSD fulfills a different role and most of the definitions and other articles of the Convention are consistent with practices in most Transparent systems. In fact, the CSD could be regarded as a mere notary that keeps the record of legal ownership; records irrevocable and final delivery versus payment (transfers), pledges, attachments, etc; allows inspection of the legal register; does reconciliation with the records of the issuer where necessary; identifies and discloses information on the register to issuers and regulators in terms of the applicable laws; etc.

1.1.5 It is submitted that there is no need to define a new role of “account operator” as suggested by Finland and Columbia. In many Transparent systems, the Participant is the “relevant intermediary” responsible for “maintaining securities accounts” and therefore solely liable for any errors, etc. The CSD is not an “intermediary”, does not maintain securities accounts for account holders and would not share liability on the maintenance of the account with the “relevant intermediary”.

1.1.6 We do not believe that that the “account operator” is acting on behalf of the CSD. The “account operator” in many Transparent systems is the Participant acting on behalf of the account holder in its maintenance of the securities accounts.

1.2 On “designating entry”:

1.2.1 The “flagging” or “blocking” of an account can only be effective against third parties when the indicator is entered on the legal record of ownership. In terms of South African law, the “designating entry” must be published to third parties to give the necessary protection of publicity.

1.2.2. In the case of Transparent systems, it is submitted that since the CSD keep the legal record of ownership, the designating entry should be made at this level. It is therefore recognized that the CSD should exercise some form of control over the process of making designating entries.

1.2.3. As stated above, the CSD should not be regarded as the “relevant intermediary” in terms of the current definitions, and the reference to “relevant intermediary” in the definition of “designating entry” may be problematic for many Transparent systems.

1.2.4. It is submitted that a functional approach must be followed to allow **non-Convention law to determine** the process or requirements for making a “designating entry” at the level where the legal record of ownership is kept and for protecting the rights of the relevant person other than the account holder (i.e. pledgee or collateral taker).

## 2. On Article 7 (Acquisition and disposition by debit and credit)

2.1 In South Africa, transfer of securities can only take place on the debiting and crediting, respectively, of the account holder’s securities account in the legal record of ownership. In other words, in the case of a Transparent system where the legal record of ownership is held at CSD level, the entries can only be made at CSD level (and not at “relevant intermediary” level where the CSD is not interpreted as such).

2.2 It is submitted that each contracting state should define the level at which these entries are recognised for purposes of acquisition and disposition. The incorporation of a reference to **non-Convention law** in the Article should address the concern.

## 3. On Article 17 (Prohibition of upper-tier attachment)

3.1 The prohibition concerns the meaning of “relevant intermediary” and whether or not the CSD is included in the definition. In line with our view that the CSD should not be seen as the “relevant intermediary”, the wording of the article needs to be amended for purposes of Transparent systems. In Transparent systems, the CSD would have all the relevant information available for an upper-tier attachment, since account holders are reflected in investor specific accounts at CSD level. The

CSD can identify all end-investors and attachments can only be made against the relevant specific investor account.

3.2 The legal record of ownership is held at CSD level and thus control over attachments could only be carried out at this level.

3.3 It is submitted that Transparent systems don't share the concerns of attachments where "pooling" takes place and that upper-tier attachments at the upper-level of CSD should be allowed in terms of the **non-Convention law** in the case of Transparent systems