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DIPLOMATIC CONFERENCE TO ADOPT A
CONVENTION ON SUBSTANTIVE RULES REGARDING
INTERMEDIATED SECURITIES

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Possible examples and options for UNIDROIT's future webpage for the Legislative Guide on Intermediated Securities

INTRODUCTION

1. The final session of the diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities (Geneva, 5-9 October 2009), *inter alia*, adopted the UNIDROIT Convention on Substantive Rules for Intermediated Securities (the 'Geneva Securities Convention' or the 'Convention') and established a Committee on Emerging Markets Issues, Follow-Up and Implementation (the 'Committee') to assist with the Convention's promotion and implementation.
2. Since then, the Committee has met three times. The first meeting was held in Rome (6-8 September 2010) at UNIDROIT's headquarters, the second in Rio de Janeiro (27-28 March 2012), and the third in Istanbul (11-13 November 2013). Documents from the Committee's prior meetings are available on UNIDROIT's website at <http://www.unidroit.org/work-in-progress-studies/current-studies/emerging-markets>.
3. At the third meeting (Istanbul, 11-13 November 2013), in focusing its attention on the scope and structure of a future Legislative Guide on principles and rules capable of enhancing trading in securities in emerging markets, the Committee discussed the possibility of including examples and options, such as legislative or regulatory texts or related descriptions, for States to consider in establishing an intermediated securities holding system or evaluating an existing one (see UNIDROIT 2014 – S78B/CEM/3/Doc. 3, Item No. 6).
4. In preparing and reviewing the draft Legislative Guide (see UNIDROIT 2016 – S78B/CEM/4/Doc. 2), the informal experts group recommended, at its third meeting (Rome, 12-13 December 2016), that the possible examples and options collected thus far be moved from the draft Legislative Guide into a separate document that could then serve as the basis for a future webpage on UNIDROIT's website, on which the examples and options could be keyed to the relevant paragraphs of the Legislative Guide and be kept up to date.
5. Pursuant to that recommendation, this document sets forth possible examples and options, which are to be considered in conjunction with the indicated paragraphs of the Legislative Guide (i.e. Example 99-2 below relates to paragraph 99 in the draft Guide). As the collection of possible examples and options continues, the Secretariat would welcome the submission (via email to Ms Isabelle Dubois, i.dubois@unidroit.org, by 10 March 2017) of legislative or regulatory texts or related descriptions, which could be considered for inclusion on UNIDROIT's future webpage on the Legislative Guide. Such submissions would help to ensure that the future webpage properly reflects a sufficiently diverse set of examples and options from intermediated holding systems around the world.

POSSIBLE EXAMPLES AND OPTIONS

III.A: Rights of account holders

Example 99-2: Statutory provision of a European civil law State

² *If the custody of securities with a sub-custodian is not governed by this Act, the credit confers upon the account holder rights that are at least equal to the rights acquired by the custodian with the sub-custodian.*

Notably, the system in example 99-2 uses the terms “custodian” to designate an intermediary, and “sub-custodian” to designate the intermediary at the next step in the holding chain, which maintains a securities account in the name of the “custodian.”

III.B: Measures to enable the exercise of rights of account holders

Example 109-1: Excerpt of a Directive of a regional economic integration Organisation

[...]

2. *An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons.*

3. *An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 18 from adversely affecting the interests of its clients.*

4. *An investment firm shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end the investment firm shall employ appropriate and proportionate systems, resources and procedures.*

5. *An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations.*

An investment firm shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

6. *An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.*

7. *An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent.*

8. *An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the clients' rights and, except in the case of credit institutions, prevent the use of client funds for its own account.*

9. *In the case of branches of investment firms, the competent authority of the Member State in which the branch is located shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in paragraph 6 with regard to transactions undertaken by the branch.*

[...]

Example 109-2: Excerpt of a Regulation of a regional economic integration Organisation

1. *For each securities settlement system it operates, a CSD shall keep records and accounts that shall enable it, at any time and without delay, to segregate in the accounts with the CSD, the securities of a participant from those of any other participant and, if applicable, from the CSD's own assets.*

2. *A CSD shall keep records and accounts that enable any participant to segregate the securities of the participant from those of the participant's clients.*

3. *A CSD shall keep records and accounts that enable any participant to hold in one securities account the securities that belong to different clients of that participant ('omnibus client segregation')*

4. *A CSD shall keep records and accounts that enable a participant to segregate the securities of any of the participant's clients, if and as required by the participant ('individual client segregation').*

5. *A participant shall offer its clients at least the choice between omnibus client segregation and individual client segregation and inform them of the costs and risks associated with each option.*

However, a CSD and its participants shall provide individual clients segregation for citizens and residents of, and legal persons established in, a Member State where required under the national law of the Member State under which the securities are constituted as it stands at 17 September 2014. That obligation shall apply as long as the national law is not amended or repealed and its objectives are still valid.

6. *CSDs and their participants shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide and shall offer those services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation offered, including information on the insolvency law applicable in the relevant jurisdictions.*

7. *A CSD shall not use for any purpose securities that do not belong to it. A CSD may however use securities of a participant where it has obtained that participant's prior express consent. The CSD shall require its participants to obtain any necessary prior consent from their clients.*

Example 109-3: Statutory provisions of an Asian civil law State

141. *Upon accepting an entrustment of securities transaction, a securities company shall, on the basis of the description of the securities, trading volume, method of bidding, price band, etc. as indicated in the power of attorney, undertake securities trading as an agent according to the trading rules and make trading records in a faithful manner. After a transaction is concluded, a securities company shall, according to the relevant regulations, formulate a transaction report and deliver it to the relevant clients. The statements in a check sheet that confirms trading acts and results in securities trading shall be authentic. Such statements shall be subject to the examination of an examiner, other than the relevant transaction handler, on a transaction-by-transaction basis, so as to guarantee the consistency between the balance of securities in book account and the securities as actually held.*

[...]

160. *A securities registration and clearing institution shall provide the roster of securities holders as well as the relevant materials to a securities issuer. A securities registration and clearing institution shall, according to the result of securities registration and settlement, affirm the fact that a securities holder*

holds the relevant securities and provide the relevant registration materials to a securities holder. A securities registration and clearing institution shall guarantee the authenticity, accuracy and integrity of the roster of securities holders as well as records of transfer registration and may not conceal, forge, alter or damage any of the aforesaid materials.

Example 109-4: Regulation of a European civil law State

The custody account-keeper shall in all circumstances comply with the following obligations:

1° It shall take every care to carry out all the security and cash movements in line with the instructions from its clients;

2° It shall take every care in the conservation of the financial securities and, in this respect, ensure the strict account-recording of these latter and their movements in compliance with the procedures in force; it shall also take every care to facilitate the exercise of the rights attached to these financial securities, in compliance with the regulations applicable to the said securities;

3° It shall ensure that the assets of its clients are distinguished from its own assets in the books of third parties with which, in application of 2° of Article 322-3, it keeps the corresponding assets;

4° In accordance with the provisions of Article 313-17, it may neither make use of the financial securities recorded in the account or the rights attached thereto, nor transfer the ownership thereof without the express agreement of their owner. It shall organise its internal procedures in such a way as to guarantee that any movement related to the holding of financial securities on behalf of third parties for which it is responsible is justified by a validly registered operation in an account of the holder;

5° Subject to the provisions of Article 322-35, it shall have the obligation to return the financial securities which are recorded in a securities account in its books. If the securities are not represented by any medium apart from the accounting entry, it shall transfer them to the custody account-keeper which the holder of the securities account shall designate. This return shall be carried out as quickly as possible, on condition that the said holder has fulfilled his/her own obligations.

Example 109-5: Statutory provision of a North American common law State

If the substance of a duty imposed on a securities intermediary . . . is the subject of another statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

Example 109-6: Description from a South American civil law State

The law regulates the activity of the CSD, granting to the Central Bank and Securities and Exchange Commission the powers to set the regulations regarding the activities of the CSD and of custodians, which includes the duties of passing on information and distributions received to account holders and promoting the conciliation among issuers and intermediaries in the intermediated holding chain. Using their powers, the Central Bank and the Securities and Exchange Commission have both enacted regulations dealing with the role and the services rendered by the CSD.

III.C: Liability of intermediaries

Example 121-1: Excerpt of a Directive of a regional economic integration Organisation

12. The depositary shall be liable to the [alternative investment fund (AIF)] or to the investors of the AIF, for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of paragraph 8 has been delegated.

In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the AIF or the [manager of the alternative investment fund (AIFM)] acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

The depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.

13. *The depositary's liability shall not be affected by any delegation referred to in paragraph 11.*

Notwithstanding the first subparagraph of this paragraph, in case of a loss of financial instruments held in custody by a third party pursuant to paragraph 11, the depositary may discharge itself of liability if it can prove that:

(a) *all requirements for the delegation of its custody tasks set out in the second subparagraph of paragraph 11 are met;*

(b) *a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf; and*

(c) *a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.*

Example 121-2: Statutory provision of a European civil law State

² *A custodian who is authorised to hold intermediated securities with a sub-custodian shall be liable for due care in the selection and instruction of the sub-custodian and for verifying its continued compliance with the selection criteria.*

³ *A custodian may waive its liability under paragraph 2 if the account holder has expressly designated the sub-custodian contrary to the custodian's advice.*

⁴ *A custodian shall be liable, as if they were its own, for the acts of a sub-custodian which:*

- a) *independently and over a long period of time administers and settles all securities transactions on behalf of the custodian; or*
- b) *is part of the same economic entity as the custodian.*

Example 122-1: Regulation of a European civil law State

When it makes use of a third party, in application of Article 322-33, and apart from cases where it retains the assets corresponding to the securities of its clients in one or more accounts opened with a central depositary or issuer, the custody account-keeper shall apply the provisions of Articles 313-14 to 313-16 and 313-72 to 313-75.

The responsibility of the custody account-keeper to the holder of the securities account shall not be affected by the fact that it makes use of a third party mentioned in Article 322-33.

However, where a custody account-keeper retains, on behalf of a professional client, financial securities issued on the basis of a foreign right, it may agree on a clause which exempts it totally or partially from its liability to this professional client.

IV.A: Acquisition and disposition of intermediated securities

Example 132-1: Regulation of a European civil law State

The custodian shall describe its accounting organisation in an appropriate document.

It shall maintain its securities account records in accordance with the rules of double entry accounting.

The nomenclature of the accounts and their rules for operation shall be fixed by an instruction from the [Financial Markets Regulator]. The purpose of this nomenclature is in particular, for the purposes of audit, to classify the financial securities in collective investment schemes in separate categories from those of the other clients and those belonging to the custody account-keeper.

[...]

The custodian shall implement continuous audit procedures relating to the accuracy of the processing procedures.

For each financial security, it shall verify on a daily basis:

1° The balance between the total of credit entries on the accounts and the total of debit entries thereon;

2° The balance between the accounts with credit balances and the accounts with debit balances.

It shall also organise the system of accounting for the financial securities, in such a way that it allows, by the implementation of appropriate procedures, for the audit of the data.

Example 133-1: Statutory provisions of a European civil law State

¹ A debit to a securities account must be reversed if . . . (c) the credit of intermediated securities to the acquirer's securities account . . . is not executed within the customary settlement period.

[...]

¹ A custodian may reverse a credit of intermediated securities to a securities account if: (a) the corresponding debit was reversed . . .

Example 148-1: Description

In some markets, both title transfer and non-title transfer collateral transactions are effected by Article 12 methods. Some central banks and other intermediaries take intermediated securities in repurchase operations, known as repo transactions, without debiting the relevant securities from the transferors' securities account.

Example 159-1: Statutory provision of a European civil law State

¹ A custodian shall be entitled to retain and foreclose on intermediated securities credited to a securities account, provided a debt owed by the account holder is due and arises from the custody of the intermediated securities or the financing of their acquisition.

Example 159-2: Statutory provision of a European civil law State

When an intermediary . . . shall deliver securities or settle a price in substitution for his defaulting client, he shall have full ownership of the financial securities or the money received in exchange. The [insolvency rules] shall not prevent the application of this article. No creditor of the defaulting client may have any claim whatsoever to these securities or this cash.

IV.B: Unauthorised dispositions and invalidity, reversal and conditions

Example 165-1: Description

An interest may arise by an attachment order. Article 12(8). The debtor's intermediary executes the attachment order by a designating entry in the debtor's securities account without the account holder's authorisation.

Example 169-1: Description for conditional/invalid entries

Depending on the non-Convention law, credit-entries may be conditional in case of registered shares with restricted transferability before the consent of the issuer. The credit-entries may be invalid if the consent is denied.

Example 169-2: Description for conditional entries

In some States, the practice is that provisional book-entries are made before the end of the settlement period. See OFFICIAL COMMENTARY, paragraph 16-22.

Example 169-3: Description for entries that are liable to be reversed:

In the co-ownership system of a European civil law State, the law provides that debit and credit book-entries are effective but are liable to be reversed if the underlying contract is void.

Example 169-4: Excerpt of a Directive of a regional economic integration Organisation

(13) Whereas nothing in this Directive should prevent a participant or a third party from exercising any right or claim resulting from the underlying transaction which they may have in law to recovery or restitution in respect of a transfer order which has entered a system, e.g. in case of fraud or technical error, as long as this leads neither to the unwinding of netting nor to the revocation of the transfer order in the system.

IV.C: Protection of an innocent acquirer

Example 174-1: Description

A debit of securities to a securities account may be unauthorised by an account holder and therefore void. The intermediated securities are transferred to the account of transferee #1 who is not an innocent acquirer. As the non-Convention law of the respective Contracting State regards the credit as void, the credit is defective. The original account holder who is affected by the unauthorised debit entry therefore still has an interest in the securities which may, however, be violated by the later innocent acquisition of

transferee #2. In this case, transferee #2 may be protected under paragraph 1 and paragraph 2 of Article 18.

Example 178-1: Statutory provision of a European civil law State

No one may act for recovery of any security, for any reason, whose title has been acquired in good faith by the holder of the account where such security is credited.

V.A: Prohibition of upper-tier attachment

Example 202-1: Description

An account holder has a securities account with intermediary #1. Intermediary #1 has a securities account with intermediary #2 which it uses as global custodian. Therefore, intermediary #1 pools all securities which it holds for account holders in its account with intermediary #2. A creditor of the account holder tries to obtain an attachment order against intermediary #2 in order to seize securities belonging to that account holder.

In this case, the court of a Contracting State cannot issue an attachment order against intermediary #2. Even if it is clear that all securities of intermediary #1's account holders are part of the pool in the account with intermediary #2, there is no account maintained by intermediary #2 for the relevant account holder. Intermediary #2 usually does not have any means of knowing how many, if any, securities belong to that account holder. However, the result does not change under Article 22(1) even if intermediary #2 for some reason has a means of knowing how many securities belong to that account holder. See OFFICIAL COMMENTARY, ex. 22-2.

Example 202-2: Statutory provision of a European civil law State

No enforcement measure or protective measure against an intermediary . . . shall be allowed in respect of financial securities entered in an account opened in his name in the books of another intermediary . . . where they do not belong to the initial intermediary.

Example 204-1: Description

In a given State, the CSD is the relevant intermediary and broker firms act as "account operators" vis-à-vis the investors (who are account holders). The sharing of functions between the CSD and the "account operators" is acknowledged by means of a declaration under Article 7. The national law prescribes that an attachment order aimed at impounding intermediated securities of an account holder has to be addressed to the account operator. See OFFICIAL COMMENTARY, ex. 22-5.

Example 204-2: Description

State A maintains a transparent system in which the CSD participants rather than the CSD itself are considered to be the relevant intermediaries for lower-tier account holders. The participants maintain the accounts for and have direct relationships with the account holders, have legal responsibility to the account holders and receive and act upon instructions from the account holders. However, credits, debits and designating entries to the lower-tier accounts, though performed by the participants, are recorded in the CSD's computer systems (including in sub-accounts that fully identify the lower-tier account holders), and the intermediated securities are registered in the issuers' books in the name of the CSD as a fiduciary. The sharing of functions between the CSD and the relevant intermediary is acknowledged by means of a proper declaration under Article 7 and Article 22(3). The national law and regulations prescribe that an attachment

order has to be addressed to the CSD. This attachment shall not be considered an upper-tier attachment under the Convention as the exemption of Article 22(3) applies. See OFFICIAL COMMENTARY, ex. 22-6.

Example 204-3: Description

In State B, the holding patterns in place do not involve the sharing of functions and the CSD is not the relevant intermediary. However, the law prescribes that an attachment has to be made against the CSD and identify the debtor and the debtor's relevant intermediary. It also prescribes that the CSD has to communicate to and check with the debtor's relevant intermediary what the debtor's holdings are before freezing the intermediated securities in both the relevant intermediary's and the CSD's securities accounts simultaneously.

Both States would have to make a declaration under Article 22(3) in order to be able to maintain the practice described in the above examples. Without such declaration, their laws would not properly reflect the substance of Article 22. See OFFICIAL COMMENTARY, ex. 22-7.

Example 206-1: Possible special safeguards regarding upper-tier attachment

Upper-tier attachment by a creditor of a debtor against an intermediary other than the debtor's relevant intermediary (the "subject intermediary") is permitted only if the following conditions are satisfied:

(a) the relevant securities to be subject to the upper-tier attachment (the "restrained securities") must be identified by (i) issue, (ii) quantity or amount, and (iii) account (the "restrained account") of the subject intermediary's account holder (the "restrained account holder"), all with sufficient specificity so as to permit the subject intermediary to block the restrained securities and the restrained account without any material adverse effect on the subject intermediary or its operations or on the restrained account holder or its operations;

(b) the creditor must satisfy the burden of persuasion that the debtor has a legal, equitable or beneficial interest in the restrained securities;

(c) the creditor must pay the reasonable expenses incurred by the subject intermediary in its compliance with the upper-tier attachment order, as determined by the court issuing the order, to the extent that such expenses exceed those that would have been incurred had the debtor been an account holder of the subject intermediary; provided, that the costs of compliance do not include costs of non-compliance, such as litigation costs of objecting to or contesting the attachment; and

(d) the debtor's relevant intermediary is (i) located outside the State in which the upper-tier attachment order has been rendered or issued or (ii) legal process against the debtor's relevant intermediary (x) is not available (y) would not provide for a the practical realisation of a recovery from the restrained securities, or (z) would be unreasonably burdensome for the creditor.

V.B: Prevention of shortfalls and allocation of securities

Example 212-1: Statutory provision of an Asian civil law State

A securities company may not incorporate any trading settlement funds or securities of its clients into its own assets. Any entity or individual is prohibited from misusing any trading settlement funds or securities of its/his clients in any form. Where a securities company goes bankrupt or goes into liquidation, the trading settlement funds or securities of its client may not be defined as its insolvent assets or liquidation assets. Under any other circumstance as irrelevant to the liabilities of its clients or under any other circumstance as prescribed by law, the trading settlement funds or securities of its clients may not be sealed-up, frozen, deducted or enforced compulsorily.

Example 219-1: Regulation of a European civil law State

4° *[Intermediaries] must take the necessary steps to ensure that any client financial instruments deposited with a third party can be identified separately from the financial instruments belonging to the investment services provider by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection.*

Example 219-2: Description from a South American civil law State

The securities are maintained in the name of the investor by the CSD, segregated from the CSD's own assets or, when admitted by regulation, in the name of the investor's intermediary. As intermediated securities in this system are regulated by the Central Bank and by the Securities and Exchange Commission, according to the latter's regulation for securities under its authority, the securities of each investor must be maintained by the CSD in a securities account, opened by its custodian, that identifies the investor, and are transferable by means of credit or debit, in a manner totally segregated from the custodian's own accounts, if existent. For securities under the authority of the Central Bank, according to its regulation, the CSD should maintain a securities account system that allows the identification of the investor, when that is imposed by the pertinent regulation, and when that is not the case, the securities accounts system of the CSD must segregate the position on securities held by the intermediary from the position held by the intermediary clients.

V.C: Securities clearing and settlement systems**Example 229-1:** Excerpt of a Directive of a regional economic integration Organisation

1. *Transfer orders and netting shall be legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant, provided that transfer orders were entered into the system before the moment of opening of such insolvency proceedings as defined in Article 6(1). This shall apply even in the event of insolvency proceedings against a participant (in the system concerned or in an interoperable system) or against the system operator of an interoperable system which is not a participant. Where transfer orders are entered into a system after the moment of opening of insolvency proceedings and are carried out within the business day, as defined by the rules of the system, during which the opening of such proceedings occur, they shall be legally enforceable and binding on third parties only if the system operator can prove that, at the time that such transfer orders become irrevocable, it was neither aware, nor should have been aware, of the opening of such proceedings.*

2. *No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceedings, as defined in Article 6(1) shall lead to the unwinding of a netting.*

3. *The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.*

4. *In the case of interoperable systems, each system determines in its own rules the moment of entry into its system, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, one system's rules on the moment of entry shall not be affected by any rules of the other systems with which it is interoperable.*

Example 229-2: Statutory provision of a European civil law State

III - Notwithstanding any statutory provision to the contrary, payments and deliveries of financial instruments made within the framework of interbank payment systems or systems used for settlement and delivery of financial instruments cannot be cancelled in the event of an order to commence court-ordered reorganisation or liquidation proceedings being made against an institution participating directly or indirectly in such a system until the close of the day on which said order is made, even on the grounds of such an order being made.

IV - These provisions shall also apply to payment instructions and delivery instructions for financial instruments, once they have acquired irrevocable status in one of the systems referred to in paragraph II. The time and conditions that determine whether an instruction is considered irrevocable in a system are defined by said system's operating rules.

V.D: Issuers**Example 247-1:** Excerpt of a Directive of a regional economic integration Organisation

2. Where the applicable law imposes disclosure requirements as a prerequisite for the exercise of voting rights by a shareholder referred to in paragraph 1 [an intermediary], such requirements shall not go beyond a list disclosing to the company the identity of each client and the number of shares voted on his behalf.

3. Where the applicable law imposes formal requirements on the authorisation of a shareholder referred to in paragraph 1 [an intermediary] to exercise voting rights, or on voting instructions, such formal requirements shall not go beyond what is necessary to ensure the identification of the client, or the possibility of verifying the content of voting instructions, respectively, and is proportionate to achieving those objectives.

Example 248-1: Excerpt of a Directive of a regional economic integration Organisation

5. Where the applicable law limits the number of persons whom a shareholder may appoint as proxy holders . . . such limitation shall not prevent a shareholder referred to in paragraph 1 of this Article [an intermediary] from granting a proxy to each of his clients or to any third party designated by a client.

Example 249-1: Statutory provision of a European civil law State

In order to identify a security holder of bearer securities, by-laws of a company may provide that the issuer may request at any time the CSD in charge of the holding of the relevant securities, with proper compensation, the name, place and date of birth or incorporation and mail and email address of such security holder with the amount of securities held by each security holder.

This information is gathered by the CSD from the intermediaries holding accounts with it in a time frame provided for in implementing rules. The CSD shall forward this information to the requesting issuer within five business days from their reception from the intermediaries.

Based on the information so forwarded by the CSD, the issuer may request either the CSD or directly the person whose name as security holder has been disclosed by an intermediary to the CSD, whether the security holder is acting for its own account or for the account of a third party, and in this latter case, the name, place and date of birth or incorporation and mail and email address of the person on behalf of which this person is acting on behalf of.

VII: Special provisions in relation to collateral transactions

Example 282-1: Excerpt of a Directive of a regional economic integration Organisation

1. *When applying the resolution tools and exercising the resolution powers, resolution authorities shall have regard to the resolution objectives, and choose the tools and powers that best achieve the objectives that are relevant in the circumstances of the case.*
2. *The resolution objectives referred to in paragraph 1 are:*
 - (a) *to ensure the continuity of critical functions;*
 - (b) *to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;*
 - (c) *to protect public funds by minimising reliance on extraordinary financial support;*
 - (d) *to protect depositors . . . and investors . . . ;*
 - (e) *to protect client funds and client assets.*

When pursuing the above objectives, the resolution authority shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

3. *Subject to different provisions of this Directive, the resolution objectives are of equal significance, and resolution authorities shall balance them as appropriate to the nature and circumstances of each case.*

Example 288-1: Excerpt of a Directive of a regional economic integration Organisation

7. *An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent.*

Example 288-2: Excerpt of a Directive of a regional economic integration Organisation

3. *Where the [manager of an alternative investment fund (AIFM)] on behalf of an [alternative investment fund (AIF)] uses the services of a prime broker, the terms shall be set out in a written contract. In particular any possibility of transfer and reuse of AIF assets shall be provided for in that contract and shall comply with the AIF rules or instruments of incorporation. The contract shall provide that the depositary be informed of the contract.*

AIFMs shall exercise due skill, care and diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

[...]

4. *AIFMs shall set a maximum level of leverage which they may employ on behalf of each AIF they manage as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:*
 - (a) *the type of the AIF;*
 - (b) *the investment strategy of the AIF;*
 - (c) *the sources of leverage of the AIF;*
 - (d) *any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;*
 - (e) *the need to limit the exposure to any single counterparty;*

- (f) *the extent to which the leverage is collateralised;*
- (g) *the asset-liability ratio;*
- (h) *the scale, nature and extent of the activity of the AIFM on the markets concerned.*

[...]

10. *In the context of their respective roles, the AIFM and the depositary shall act honestly, fairly, professionally, independently and in the interest of the AIF and the investors of the AIF.*

A depositary shall not carry out activities with regard to the AIF or the AIFM on behalf of the AIF that may create conflicts of interest between the AIF, the investors in the AIF, the AIFM and itself, unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

The assets referred to in paragraph 8 shall not be reused by the depositary without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

[...]

11. *The depositary shall not delegate to third parties its functions as described in this Article, save for those referred to in paragraph 8.*

The depositary may delegate to third parties the functions referred to in paragraph 8 subject to the following conditions:

- (a) *the tasks are not delegated with the intention of avoiding the requirements of this Directive;*
- (b) *the depositary can demonstrate that there is an objective reason for the delegation;*
- (c) *the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and*
- (d) *the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:*
 - (i) *the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;*
 - (ii) *for custody tasks referred to in point (a) of paragraph 8, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;*
 - (iii) *the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;*
 - (iv) *the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the depositary; and*
 - (v) *the third party complies with the general obligations and prohibitions set out in paragraphs 8 and 10.*

[...]

1. AIFMs shall for each of the EU AIFs that they manage and for each of the AIFs that they market in the Union make available to AIF investors, in accordance with the AIF rules or instruments of incorporation, the following information before they invest in the AIF, as well as any material changes thereof:

(a) a description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM are entitled to employ on behalf of the AIF;

[...]

(o) the identity of the prime broker and a description of any material arrangements of the AIF with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and information about any transfer of liability to the prime broker that may exist;

[...]

5. AIFMs managing EU AIFs employing leverage or marketing in the Union AIFs employing leverage shall, for each such AIF disclose, on a regular basis:

(a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;

(b) the total amount of leverage employed by that AIF.

[...]

4. An AIFM managing AIFs employing leverage on a substantial basis shall make available information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which the AIF's assets have been reused under leveraging arrangements to the competent authorities of its home Member State.

That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIFs managed by the AIFM, and the amounts of leverage received from each of those sources for each of those AIFs.

Example 288-3: Excerpt of a Directive of a regional economic integration Organisation

6. The assets held in custody by the depositary shall not be reused by the depositary, or by any third party to which the custody function has been delegated, for their own account. Reuse comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending.

The assets held in custody by the depositary are allowed to be reused only where:

(a) the reuse of the assets is executed for the account of the [undertakings for collective investment in transferable securities (UCITS)];

(b) the depositary is carrying out the instructions of the management company on behalf of the UCITS;

(c) the reuse is for the benefit of the UCITS and in the interest of the unit holders; and

(d) *the transaction is covered by high-quality and liquid collateral received by the UCITS under a title transfer arrangement.*

The market value of the collateral shall, at all times, amount to at least the market value of the reused assets plus a premium.

Example 288-4: Excerpt of a Regulation of a regional economic integration Organisation

8. *A [central counterparty (CCP)] shall have a right of use relating to the margins or default fund contributions collected via a security financial collateral arrangement . . . provided that the use of such arrangements is provided for in its operating rules. The clearing member shall confirm its acceptance of the operating rules in writing. The CCP shall publicly disclose that right of use, which shall be exercised in accordance with Article 47.*

[...]

1. *CCPs that enter into an interoperability arrangement shall:*

[...]

(d) *identify, monitor and address potential interdependences and correlations that arise from an interoperability arrangement that may affect credit and liquidity risks relating to clearing member concentrations, and pooled financial resources.*

[...]

For the purposes of point (d) of the first subparagraph, CCPs shall have robust controls over the re-use of clearing members' collateral under the arrangement, if permitted by their competent authorities. The arrangement shall outline how those risks have been addressed taking into account sufficient coverage and need to limit contagion.

[...]

2. *If a CCP that enters into an interoperability arrangement with another CCP only provides initial margins to that CCP under a security financial collateral arrangement, the receiving CCP shall have no right of use over the margins provided by the other CCP.*

Example 288-5: Statutory provision of an Asian civil law State

214. *During the existence of the pledge, with the consent of the pledgor, the pledgee may transfer the right of pledge. However, the pledgee shall bear civil liability for any loss or destruction of or damage to the pledged property.*