



Memorandum

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To: Legal Certainty Sub-Group
Copy to: Marianne Sandel
From: Diego Devos
Date: 26 January 2006
Subject: Draft paper on core issue relating to Transfer Requirements (LCG questionnaire : Question 17)

1. FACT FINDINGS

The review of the legal regime in all ¹Member States indicate that **generally book-entry securities ²are not as a rule subject to specific legal transfer requirements, except of course:**

- The need to operate the **corresponding debit and credit** of the relevant securities accounts to carry out the book-entry transfer; and
- **Between the underlying parties** to the concerned securities transaction, the need to act under a **contract causing the transfer** (sale, loan, pledge³, etc) but this last requirement is in our view alien to the scope of LCG investigations as it refers in fact to the underlying transaction.

For a limited number of countries (such as the UK for example), there is an additional need -for certain transactions- to execute a stock transfer form (with payment of stamp duty). Update of the issuer's register may also be required for transparency reasons (corporate actions)-as in France with the issuance of a special form (BRN- "bordereaux de référence nominatifs").

In certain EU jurisdictions, the conclusion of the contract will lead to the effectiveness/enforceability of the transfer of ownership (where applicable depending

¹ DD comment: I still need to check Austrian answers (not available in my last binders of answers to Q 17 and consult Italian answers in relation to Question 34 (on the concept of "legitimizing requirements")-not available. Answers provided by Hungary and Malta would require moderation as they do not answer question 17 at all, in my view.

² Bearer and registered securities immobilised through their recording on a securities account with an intermediary and/or a CSD; as well as dematerialised securities represented from the outset solely by book-entry on an account maintained with a designated account provider.

³ DD comment: With respect to pledge transfers, my impression is that Question 17 has been understood by all LCG colleagues in a context of mere transfer of securities, and not in a pledging context . Additional requirements may therefore be set for this last type of "transfer" even though they should have been by now almost eliminated in view of Article 3 (see also recital 10) of the



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on the type of transactions-not for a pledge for example) **between the parties** to the securities transaction, while the book-entry transfer will be required to achieve the perfection/enforceability of the transfer (of ownership) **vis-à-vis third parties**. In most countries, book-entry transfer will suffice to make the transfer effective both between the parties and vis-à-vis third parties.

From an operational viewpoint, transfer requirements may consist in a number of steps (e.g. matching, positioning, freeze-unfreeze , settlement) to complete a securities transfers but again these aspects should normally remain outside the scope of the LCG review unless such aspects would be caused or affected by legal or regulatory rules.

It seems that the above analysis with respect to transfers requirements is valid for transactions within a CSD/securities settlement system and normally as well for securities transactions settled by an intermediary in its own books (even though some answers are not always entirely clear regarding this last type of transactions where they seem to refer to a need to "notify the transfer" to the intermediary⁴ as if it would be a (cash deposit) claim assignment to notify to the debtor of the claim-which should not be).

When transferring the underlying securities **outside a book-entry system**, one has obviously to take into account the type of securities in question which will be transferred by physical delivery if in bearer form, or by way of registration of the transfer in the issuer's register if it concerns registered securities.

2. PRELIMINARY CONCLUSIONS

From the above analysis (see also the Legal Research Sub-Group summary paper on Q 17), we have not identified any specific legal issue or barrier with respect to transfer requirements *per se*, which seem in line with general expectations and needs (underlying contract and book-entry delivery in the books of the relevant intermediary).

WE WOULD THEREFORE RECOMMEND THE COMMISSION NOT TO TAKE ANY SPECIFIC ACTION REGARDING TRANSFER REQUIREMENTS AS SUCH (see however below with respect to Irish situation).

Collateral Directive (to be checked -see also the recent Collateral Directive questionnaire distributed by the Commission).

⁴ DK , NL and FIN for example.



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In contrast with what is suggested in some answers (see German answer for example) as existing in other countries, we have not identified, from the other answers, situations where ownership of transferred securities would have to be attributed first – even temporarily – to the intermediary/account provider. One may however eventually refer to cases where securities (especially those in registered form) would be held in trust (for fungibility sake) by a nominee company acting on behalf of the account provider and its clients account holders, in which case the nominee is considered as the legal owner of the securities in the primary place of deposit of the securities whereas the account holder is the beneficial owner. In this last case however, the beneficial owner is protected additionally and specifically by the legal regime governing its account relationship with the account provider allowing the ultimate owner to recover its ownership rights on the securities through its intermediary.

It is worth mentioning in this respect that Crest Books are by law assimilated to the register of the issuer and therefore transfer of legal direct title is made directly on Crest books while in contrast, there is still a time gap (of two hours maximum) between transfer of Irish registered securities on Crest Irish system and their registration in the issuer's register. During that time period, the purchaser/transferee is legally protected as equitable owner but this is not equivalent to the protection given by a full title transfer. *This situation could eventually be considered as requiring improvement.*

[TWO PARAGRAPHS ABOVE MAY OVERLAP WITH ANALYSIS UNDER QUESTION 19 ON MOMENT OF TRANSFER BUT REFLECT WHAT HAS BEEN MENTIONED UNDER Q 17]

We do not express here any opinion regarding eventual (holding and) transfer restrictions linked to the admissible counterparts for certain types of securities or to the account provider (CSD only, etc) to the extent such restrictions should be addressed in Question 54 (in our view, these aspects can be constitutive of legal barriers to be investigated further and removed).

Diego Devos