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**To:** Legal Certainty Group members

**From:** Martin Thomas, Secretary  
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**Subject:** EU Clearing and Settlement  
Legal Certainty Group  
Common terminology  
“Account Provider” and CESR’s Technical Advice on Safeguarding  
of clients’ assets

It was noted at the first meeting of the Legal Certainty Group that one early hurdle will be to settle upon a common vocabulary for the conduct of the work: even expressions (in rem, for example) that are used in most if not all EU legal regimes turn out on analysis to be used with different meanings. Indeed, the necessity of establishing a common usage of technical terminology was a constant theme of the meeting.

Two aspects of this agreed need for a common usage of technical terminology are dealt with in this note.

## **1. “ACCOUNT PROVIDER”**

Discussions about terminology that started at the first meeting of the Group have been continuing. One focus has been on the word ‘intermediary’. It is now suggested that we should adopt a different expression, namely ‘account provider’.

Since the first meeting of the Legal Certainty Group, there has also been a meeting of the CESAME Definitions Sub-Group, investigating how to establish a common usage of technical terminology in order to marshal the CESAME debate. The discussion in that sub-group emphasised the importance of establishing a frame of reference for analysis and debate that does not confuse those participating in it, and which aims at describing functions, rather than relationships.

To that end, it is important not only to settle upon terminology that will be used by all those involved, but also to choose words that do not carry with them connotations so strongly felt that the agreed meaning is obscured.

One of the central concepts relates to those who operate securities accounts. The purpose of this note is to suggest that these entities should be called “account providers”.

The word "intermediary" is often used in debate and in law. For example, in the Legal Certainty Group Questionnaire, where we have aimed away from any definition, trying instead to have a very wide and loose meaning:

*“In this questionnaire, ‘intermediary’ is to be taken to mean any person or entity that maintains positions regarding securities by way of book-entry. In this meaning, note that intermediary does not exclude an entity that maintains positions by way of book-entry for investors where according to the applicable law there is a direct relationship between the investor and the issuer. And in this questionnaire, ‘securities accounts’ is accordingly to be taken to mean all accounts maintained by intermediaries where positions for clients regarding securities are entered by way of book-entry.”*

It also appears in the UNIDROIT draft convention and the Hague Convention, which read identically as follows:

*“... "intermediary" means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity ...”*

And a similar phrase, ‘securities intermediary’, is central to the 1994 Revisions to the Uniform Commercial Code Article 8 of the USA, which reads:

*“Securities intermediary” means: (i) a clearing corporation; or (ii) a person, including a bank or a broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.”*

In Ireland the term ‘intermediary’ appears in the regulations that implement the Collateral Directive. The European Communities (Financial Collateral Arrangements) Regulations 2004, as amended, in the context of the definition of "book entry securities collateral", where "book entry securities collateral" means financial collateral provided under a financial collateral arrangement that consists of financial instruments, title to which is evidenced by entries in a register or account kept by or on behalf of an intermediary. The term ‘intermediary’ itself is not defined. This definition is a direct copy from Article 2(1)(g) of the Collateral Directive, which contains the same reference to “intermediary”.

It is also used in the UK regulations that implement the Collateral Directive. The Financial Collateral arrangements (No 2) Regulations 2003 provide, at article 3, “... “intermediary” means a person that maintains registers or accounts to which financial instruments may be credited or debited, for others or both for others and for its own account but does not include - (a) a person who acts as a registrar or transfer agent for the issuer of financial instruments ; or (b) a person who maintains registers or accounts in the capacity of operator of a system for the holding and transfer of financial instruments on records of the issuer or other records which constitute the primary record of entitlement to financial instruments as against the issuer.”

It has been pointed out that the word ‘intermediary’ has become so closely associated with existing definitions, that it would be better to use a different term (unless of course

the Group should in the future advise that one of those definitions should be adopted) in order to avoid confusion.

It has also been pointed out that the aim of the Legal Certainty Group's common terminology should be to capture functions, rather than entities or the roles they play. In this regard, "intermediary" may be seen as describing the relationship, but not the function.

It is therefore suggested that it would be appropriate to replace "intermediary" in our work by "account provider". This has these advantages: it is in line with the focal importance of the account as the pivot of the structures that tend to be debated; it has no strong connotations; it leaves us room to use 'intermediary' when we want to refer to one of the texts in which it has been given a specific definition.

We have considered also the expression 'account keeper', but consider it to be too close by connotation to the expression *teneur des comptes* and perhaps too close also to the German concept of *kontoführende Stelle*.

**Should the work of the Legal Certainty Group use the expression 'account provider' to describe one who maintains accounts about securities?**

## **2. CESR'S TECHNICAL ADVICE ON SAFEGUARDING OF CLIENTS' ASSETS**

At the 27th Meeting of the European Securities Committee, on 23 February 2005, the activities of the Legal Certainty Group (LGC) were presented. At the same meeting, the ESC discussed some recent advice from CESR. The CESR advice had been issued under its reference CESR/05-024c, and is entitled "CESR's Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments - 1st Set of Mandates - January 2005".

In the body of the advice, CESR proposes certain definitions. Some of these relate to the advice concerning regulation intended to elaborate a regime requiring those who have clients' assets to keep them safe, as required in article 13 of MiFID. During the discussion in the ESC it was noted that these may overlap with, and require to be considered alongside, the work of the Legal Certainty Group. An approach was advocated whereby, at the level of the EU, efforts should be made to use the same words for the same things throughout the laws, rules and regulations that apply to Community financial markets and services.

The CESR definitions in question are as follows:

### *"SECTION 1 – DEFINITIONS*

*7. "client assets" means financial instruments and/or funds belonging to clients, and "client funds" and "client financial instruments" must be read accordingly;*

*8. references to client assets "held" by an investment firm (and similar expressions) include client assets held by a third party on behalf of that*

*investment firm, but exclude client assets held by a third party that has been directly appointed by the client;*

*9. "client financial instruments held on an omnibus basis" means financial instruments of more than one client that are included in the same account on the books of the or financial instruments that are registered under the same designation on behalf than one client in the issuer's register;*

*10. "depository" means a third party with whom an investment firm holds client including clearing or settlement systems and central securities depositories;"*

**Are these definitions suitable for the work of the Legal Certainty Group?**