**ANNEX 2**

# I. QUESTIONNAIRE ON PLEDGES

## A. Domestic law of security interest ("pledge"):

1. Please list and briefly describe the current statutes or relevant case law applicable to the pledge (or transfer of fiduciary title, if applicable) of securities located in your country.

2. Please briefly outline and define your investment securities and how they are typically held in your country? (e.g. Government Bonds: they need to be held in an account through a recognised account keeping institution...).

3. Is there a centralised clearing system or systems in your country to facilitate transfers of securities?

4. Considering as a valid way of classifying securities in certificated and uncertificated securities, if applicable to your country: are there different statutes for certificated and uncertificated securities?

5. State your domestic law aspects regarding the validity of the collateral contract and the creation of a valid security interest.

   (Here you are invited to mention: the formalities required in order to create a valid security interest (oral/in writing, by deed or notarisation) and any restrictions on the ability to enter into a collateral agreement: *regulatory restrictions* (ex: provisions declaring unenforceable transactions entered into in breach of the restriction on unauthorised investment business); *contractual restrictions* (ex.: prohibition on disposals or restrictions forming part of the asset itself prohibiting the creation of security over it); *substitution risk; certainty in identifying the securities; pledgee's liability to be secured; possession of the securities;*…).

   5.1 Would the security interest be valid in relation to future collateral?

   5.2. Is the creation of a security interest over a fluctuating pool of assets possible?

6. Substitution risk: how does the substitution of the securities originally the subject of the pledge for other securities affect the continuity of the security interest? (Are there any conditions that must be satisfied?)

7. Once a security is established, it may be necessary for the secured party to perfect or register its security in order to obtain protection. Describe the actions or requirements necessary to ensure the perfection of a security interest (filing, registration, notification, stamping, notarisation, the taking of possession, transfer to especial account, the obtaining of a governmental, judicial, regulatory order,…).

8. Please briefly explain the particularities in the creation, validity and perfection of the security interest collateral arrangement of bearer, registered and dematerialised securities in your country.

9. Regarding rights of depositors: Does your jurisdiction follow traditional categories of legal rights ("regular deposit": when the person who deposits securities with a financial intermediary retains whatever property rights it had in them; or "irregular deposit" when the financial intermediary is allowed to co-mingle the securities with its own assets, the person will lose its property rights in the individual securities and is deemed to have a personal or contractual claim for the return of the same amount and type of securities as those deposited, with title in the individual securities having passed to the financial intermediary); or has your jurisdiction created new legal categories by estatute to prevail over the rule that depositaries lose their property rights in the in the individual securities deposited with the intermediaries and co-mingled in fungible pools?

10. Is it possible to effect a fiduciary transfer of legal title in your country?

11. Explain the incidence of stamp duty or any equivalent documentary tax on pledges.

## B. Realisation of Collateral

1. Please outline what type of realisation procedures take place in taking pledge over investment securities in your legislation (e.g. Formal notice to the pledgor that the pledge will be realised in the case of unrepaid debt; the waiting period given to pledgor or liquidator to repay the debt; pledgor's liquidator or court authorisation to realise the collateral or if applicable to obtain collateral's ownership to allow those authorities to assess the preference of the pledgee's right in relation other claims, reductions of collateralised claims in insolvency proceedings)

2. What types of remedies are available in your country for the enforcement of the secured creditor's rights? (e.g. public auctions vs. private sale; foreclosure; stays on enforcement (moratorium); …). Please describe them.

2. Which principle of priority applies in your country? (Ex.: timing, registration, bona fide purchaser doctrine …). How does the security rank from preferential and unsecured creditors?

3. Are there any rules (for instance, "zero-hour" rule) entailing invalidity of fraudulent actions, under-valuation of the collateral or collateral transactions being challenged by the liquidator of an insolvent counterpart because such transactions were taken in a "suspect period" (period of time prior to insolvency)?

4. Please, outline any mandatory provisions of your insolvency law that may interfere in taking collateral (special emphasis in the commencement of insolvency proceedings relating to a debtor).

5. Are there any provisions in your insolvency laws under which an insolvent debtor may force the collateralised creditor to realise his collateral or assert his claim and to waive part of the collateral value to support the recovery of the debtor? Please describe how re-organisation of insolvent debtor works in your country, if it does apply.

6. Are there any custodian/depositories laws and regulations that can entail risks with the insolvency of a custodian)?

**C. Cross-Border Issues**

Please consider three legal systems and their impact upon collateral arrangements: *lex contractus* as the law which creditor and debtor choose to govern their contractual relationship; *lex rei sitae* as the law of the place where the collateral is located and finally *lex concursus*, the law which governs the insolvency of the debtor which is normally the law of the place of incorporation of the debtor.

1. Please identify whether your jurisdiction follows a "universal" approach (which extends insolvency proceedings to all assets of the insolvent party, even assets located abroad), "universal subject or mitigated universality" (the law allows for separate branch insolvency proceedings despite the existence of foreign main bankruptcy proceedings) or "territorial " approach (where the bankruptcy proceedings are effective only in the country in which they are opened).

2. Which legal system will apply for the establishment and realisation of pledge:

   a) where there is a domestic debtor and a foreign collateral?

b) where there is a foreign debtor and a domestic collateral?

c) where there is a foreign debtor and a foreign collateral?

3. Please, briefly state your conflicts of law position with each of the following aspects of a collateral arrangement :

- formation of valid contract: (e.g.. in England this contract is valid if it complies with the requirements of its governing law or the law where either party is located; the constitutional power and capacity issues are determined by the law of incorporation, although can be limited by the governing law of the collateral contract);

- perfection: (in English private international law the perfection will be governed by the lex situs, although reference to the law of incorporation or branch should be considered);

- priority: (in the English case of successive security interests the law to apply will be the law governing the securities and alternatively the law of the forum; in the case of breach of fiduciary duty the priorities will be determined by the lex situs).

- enforcement: (taking again as example the English case, the English courts allow enforcement over English securities arising under a foreign law agreement, so long as the requirements of the English law as lex situs have been complied).

- insolvency: (English courts have jurisdiction to wind up any English registered or unregistered which is unable to pay its debts or if it is just or equitable to do that; English insolvency relates to assets wherever located, although in practice the enforcement of English insolvency rules against foreign assets may be limited.

## D. Other issues

1. Upon completion of Parts A, B, C of the questionnaire, could you highlight the advantages and disadvantages of the security interest arrangement?

2. If any “special regime” exists in your country relating to the treatment of pledges in insolvency, please make this clear when answering Parts A, B, C of the Questionnaire. Please also give a general description of the special regime in Part D.

3. In your experience, which is the most flexible form of pledge in Europe?

## II. QUESTIONNAIRE ON "TITLE OF TRANSFER"

1. Is there any statutory provision in the laws of your country which recognises the validity of the transfer of title for security purposes?

2. Are there any filing or "perfection requirements" necessary in taking "transfer of title over investment securities"?

   Are there any proceeds, consents, governmental/regulatory approvals that must be followed or obtained in order to have a valid transfer of title?

3. Describe the effect of substitution or exchange of the securities to which title was originally transferred under the laws of your country.

4. Are "set-off" rights available or partially available in your insolvency laws?

   If not: explain why *(e.g. not available for policy reasons: prejudicial to general creditors: partially available because the law permits insolvency set-off but only subject to some restrictive criteria).*

5. Is there any risk that any such transfer will be recharacterised as creating a security interest? If there is, what effects will such recharacterisation have?

6. Please, describe any type of particularities of this collateral arrangement in relation to your insolvency laws.

7. Will substitution in "suspect period" invalidate an otherwise valid transfer, even if the substituted assets are of no greater value than the assets they are replacing?

8. Please, describe the tax implications entering into a transfer of title arrangement.

   *(For instance, in the English case there could be the following implications: in relation to capital gains: because each transfer might be viewed as an acquisition or disposal; in relation to income tax: if transferee passes back to transferor income received on securities transferred, but could itself be charged to tax on that income as legal owner; in relation to withholding tax on cash collateral by a non-bank party).*