



EUROPEAN CENTRAL BANK

## QUESTIONNAIRE FOR PROJECT ON DEMATERIALIZED DEBT

### A. Holding system

1. In your country, how are debt securities held?

(a) Are investors recorded on the issuers' registers? (*Direct holding system*)

(b) Are investors in physical possession of bearer certificates? (*Direct holding system*)

(c) Are the interests of investors recorded on the books of a financial intermediary, which in turn has its interest recorded with another intermediary and so on up the chain till some intermediary is recorded as the owner on the books of the issuer or its official record holder? (*Indirect holding system*)

2. What is the most common system?

(a) A direct holding system in which investors have a direct relationship with the issuer

(b) An indirect holding system in which investors do not have a direct relationship with the issuer

## **B. Transfer**

3. How does title pass from the transferor to the transferee?

(a) By entry on the register kept by the issuer

(b) By delivery of a certificate

(c) By entry in an account with an intermediary

4. What is the most common way to transfer title?

(a) By entry on the register kept by the issuer

(b) By delivery of a certificate

(c) By entry in an account with an intermediary

5. If the most common way to transfer title is by book-entry in an account with an intermediary, does your legal system consider that the title is evidenced by the book-entry with the immediate intermediary or by a book-entry with the Central Depository System (CDS)?
  
6. Does the buyer (or the pledgee) acquire debt securities free from any defects of title that the seller or any other prior holder may have? For example, if a pledgor pledges securities which do not belong to him, does the pledgee acquire a good title? In other words, what should be the order of priority between the competing interests of the real owner and the pledgee?<sup>1</sup>

### **C. Fully dematerialised system or partially dematerialised system**

7. Can investors call for the delivery of certificates kept in the vaults of the CDS?
  
8. In your legal system, are there fully dematerialised securities which can only be evidenced by book-entry in an account?

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<sup>1</sup> In the Maxwell case (see Millet J., *Macmillan Inc. v. Bishopgate Trust, plc. and others* [1995] 1 W.L.R. 978), Robert Maxwell pledged securities which did not belong to him. The securities pledged were shares in a U.S. company. The pledges were perfected either by book-entry in the DTC in New York or by delivery of physical certificates. It was held in this case that the pledgees who were *bona fide acquirer for value without notice* had priority over the owner of the shares, not only when the pledge was perfected by delivery of certificates representing the shares but also when the pledge was perfected by book-entry in the DTC.

On the other hand, a similar case was judged in France in a different way. The French judge decided that a pledgee who was a *bona fide acquirer for value without notice* could not have priority over the owner when the pledge was perfected by book-entry (Tribunal de commerce de Paris, 12 juin 1995, *not published*). According to this decision (and more importantly, according to decisions of the *Cour de cassation*), Art. 2279 of the French Civil Code is not applicable to book-entries).

9. If this form of securities exists

- (a) Is it the most common form in your legal system?
- (b) Since when does it exist?
- (c) Has it been imposed by law?
- (d) What sort of securities are concerned?

**D. Fungible or non-fungible accounts**

10. Are the customers accounts with their intermediaries and the intermediaries accounts with the CDS:

- (a) Fungible accounts (omnibus accounts)?<sup>2</sup>
- (b) Non-fungible segregated accounts? <sup>3</sup>
- (c) What is the most common type of account ?
  - (i) Fungible accounts
  - (ii) Non-fungible accounts

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<sup>2</sup> *i.e* securities are not attributable to individual investors as they are not separately identified in the intermediaries' accounts and in the CDS's accounts.

<sup>3</sup> *i.e* securities attributable to individual investors are separately identified in the intermediaries' accounts and in the CDS's accounts.

## **E. Nature of the investor's interest**

11. How is the interest of an investor characterized?

- (a) As a right *in personam* against the issuer
- (b) As a right *in personam* against the intermediary when the securities are held indirectly
- (c) As a right *in rem*

## **F. Control of intermediaries**

12. Are there “watchdogs” which control intermediaries?

- (a) Who are those “watchdogs”?
- (b) How do they control intermediaries?

## **G. Insolvency of an intermediary**

13. Should an intermediary become insolvent, are there specific rules which protect the interests of the customers who hold an account with the intermediary? In other words, do the intermediary's securities holdings corresponding to customer claims satisfy these claims before they satisfy the claims of general creditors?