

EU requirements on rendering accounts to financial regulators by persons conducting depository and clearing activities on capital markets

CSDR, MiFID II/MiFIR, MAR, and national securities laws

*Anamarija Staničić
Chief advisor – HANFA, Capital Markets Division*

TABLE OF CONTENTS

A. INTRODUCTION

B. MiFIDII/MiFIR transaction data reporting – the obligation to report client information and MAR requirements

C. CSDR requirements for data access for regulators

D. Cross border requests: regulator to regulator (Memorandums of understanding)

A. INTRODUCTION

Relevant EU regulations

▶ What are the relevant EU regulations?

- ▶ MiFID II/MIFIR (transaction reporting and competent authority powers): „ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU” & „Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012”
- ▶ CSDR: „REGULATION (EU) No 909/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012”
- ▶ MAR/CSMAD: „REGULATION (EU) No 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC” & „Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)”
- ▶ EMIR (access to TR data): „REGULATION (EU) No 648/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on OTC derivatives, central counterparties and trade repositories”

Other sectoral regulations and directives contain provisions that will determine the scope of a CA's mandate and determine what information that CA may have access to.

MAR/EMIR/CSDR/MiFID/MIFIR contain provisions on powers of competent authorities (CA) under different sectoral regulations that enable those CAs relevant data access to information stored in TRs/CSDs or recorded in regulatory reports (transaction data, STOR reports).

Activities in scope

- ▶ What are clearing and depository activities in this context?
 - ▶ CCP clearing services, including collateral management and CM and client account data
 - ▶ CSD „core services” – mostly notary service and central maintenance service
 - ▶ CSD non-banking-type ancillary services - services related to shareholders' registers, supporting the processing of corporate actions, including tax, general meetings and information services & providing regulatory reporting
 - ▶ CCP CMs direct and indirect clearing services and client position and account data
 - ▶ CSD participants services – account operators and securities holding services
 - ▶ Custodian services and custody chain client data

The registration of securities holders may or may not be done at a CSD level.

This depends on a MS national law

Securities law is not harmonised at the EU level

Activities in scope

▶ What may be of interest to regulators?

1. The identity of an account holder (end client/beneficiary)

Why?

- ❑ The crossing of takeover thresholds under the Takeover Directive (Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids)
- ❑ The acquisition of qualifying or control holdings in regulated subjects (banks, insurance, investment companies, asset management companies, CCPs, CSDs...)
- ❑ The crossing of voting rights thresholds (in listed issuers) under the Transparency Directive (TD) - 2004 and revised in 2013
- ❑ Companies shareholder structures – needed to determine group structures
 - ❑ This may be of interest for exposure management/limits for investment funds, insurance and banks, determining the existence of financial holdings or conglomerates,
 - ❑ May be of interest to competition authorities that approve mergers and/or acquisitions
- ❑ Securities issuance – prospectus obligations
- ❑ Suspected market manipulation or insider dealing
- ❑ Other criminal investigations
- ❑ Tax implications
- ❑ AML requirements
- ❑ Other legal proceeding, including property claims (at a court's request)
- ❑ Customer complaints (i.e. for arbitration purposes)

Activities in scope

▶ What can be the CA mandate - examples?

▶ **1. The identity of an account holder (end client/beneficiary)**

The Takeover directive:

- ❑ Mandatory public offers to minority shareholders once a prescribed voting rights threshold is exceeded (in most MS 30%, 33% or 25%)
- ❑ MS CA are mandated to monitor these thresholds in listed companies and to enforce the obligation

Qualifying holdings:

- ❑ These are usually set as direct or indirect holdings which represent 10 % or more of the capital or of the voting rights, and then set additional thresholds at 20 %, 30 % or 50 % or so that the subject would become a subsidiary
- ❑ The acquisition of QH is subject to CA approval and requires a notification

Transparency directive voting rights acquisitions:

- ❑ This is used to monitor and disclose stake building in listed companies
- ❑ The thresholds can be set at ie. : 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 55, 60, 65, 70, 75, 80, 85, 90, 95
- ❑ The level of thresholds differs under MS transposition to national law
- ❑ The CA monitors transparency disclosures and enforces disclosures if necessary

Suspected market manipulation or insider dealing

- ❑ the CA designated under MAR has the obligation to monitor, stop and sanction market manipulation and insider dealing,
- ❑ To do this, the CA needs to have access to a number of disclosures (including insider lists and manager transactions disclosures) and must be able to have information on the clients involved in the transactions
- ❑ MiFIR transaction reporting
- ❑ Custodial chains and ownership information

Activities in scope

▶ What may be of interest to regulators?

1. The identity of an account holder (end client/beneficiary)

Where is this information available?

- This depends on the MS holding system and their applicable securities law

Who is considered:

- the account holder?
- the beneficiary?
- the end client?

This depends on MS ownership laws.

The information:

- ❑ Can be available at the level of the CSD – if the CSD is a registrar of ownership under MS securities law
- ❑ Can be available at the level of a separate registrar that reconciles data with the CSD account structures
- ❑ Can be available only at a local register if no book entry obligation is applicable (Article 3 of CSDR is limited in scope)
- ❑ Can be available only at a bank or other financial institution level (internal book-keeping) if instruments other than shares or listed bonds are considered
- ❑ Can be available only at a CSD participant level (where the CSD has omnibus structures, or where individual account holders are not disclosed to the CSD)
- ❑ Can be available at the end of a custody chain

Activities in scope

▶ What may be of interest to regulators?

1. The identity of an account holder (end client/beneficiary)

How to get this information?

- This depends on if the information can be obtained on a local level (one MS) or cross-border
- Depends on the scope of the mandate of the CA asking for the information
- Consolidated regulators that cover more services/activities will have broader access to data
- MoUs are usually required
- Mandate must be specified by law

Who to contact:

- The CSD?
- Local ownership register?
- The CSD participant?
- The custodian?
- Another regulator (locally)
- Another regulator (cross border)
- the end client?

This also depends on MS ownership laws.

Information request under MoUs

Activities in scope

▶ What may be of interest to regulators?

2. Securities and cash transfers between accounts and sub accounts (account activity data)

Why?

- ❑ Such transfers (i.e. cash or securities lending) can be used to indicate persons acting in concert in the context of the takeover directive, or colluding parties in insider dealing or market manipulation
- ❑ The indication of securities ownership is the first step, but this data is usually needed to build an enforcement case
- ❑ The data is especially relevant in the case of custody chains
- ❑ In indirect holding systems, this data may be exclusively held by participants in the CSD (internal records) and regulators need to be able to access them

Activities in scope

▶ What may be of interest to regulators?

3. Transaction data – on and off venues (MiFIR)

Why?

- ❑ Mostly to monitor market abuse under MAR
- ❑ This data is combined with ownership information and cash flows to build enforcement cases
- ❑ In MiFIR transaction reports, client information needs to be disclosed, as well as trader information
- ❑ However, when custody chains are involved, MiFIR transaction reports will not be enough
- ❑ This is also compared with MiFID firms' STOR reports to see if the firms had complied with their MAR obligation to notify CAs of suspicious transactions
- ❑ MiFIR transaction reports can be cross checked with MAR insider lists/insider information disclosures by issuers and their account data to check for insider trading cases
- ❑ MiFIR transaction reports can be cross checked with MAR manager transaction disclosures to make sure that all relevant transactions had been disclosed and if the MAR trading ban in the prohibited period was breached by managers in listed issuers
- ❑ These requirements may all be monitored by different CAs that need to exchange data effectively

MAR/CSMAD

Regulatory goals:

- Ensure a harmonised approach at the EU level
- Caused by the LIBOR scandals
- Needed to cover new trading technologies and to cover manipulation of benchmarks
- Cover high frequency trading and algorithmic trading
- Ensure the application of criminal sanctions for market abuse in all MS, at least in the most severe cases
- previously, there were diverging practices in the application of criminal sanctions
- strengthen CA powers and administrative sanctions
- Tie in to MiFIR transaction reporting obligation

Dates of application:

LEVEL I – MAR:

- applicable since 3.7.2016.,
- Because of delays, RTS&ITS came into force very close to the date of application

LEVEL I – CSMAD:

- transposition into national law,
- applicable since 3.7.2016

LEVEL II

- Delegated acts – EC
- ESMA RTS & ITS

LEVEL III

- ESMA Guidelines
- ESMA Q&A

Activities in scope

▶ What may be of interest to regulators?

4. Exposures of CCPs to CMs and CMs exposures towards clients

Why?

- ❑ To monitor the risks the CCP is exposed to and to ensure compliance with minimal coverage requirements
- ❑ CCP's exposure not being covered by collateral can lead to systemic risk for the MS market
- ❑ Cross border exposures can also impact MS that do not have a local CCP
- ❑ If a MS financial sector (i.e. banking sector) is predominately exposed to a cross border CCP /the foreign CCP is systemically important to that MS), recovery and resolution of that CCP can negatively impact the local banking sector and cause a chain reaction
- ❑ A default of a large CM can also lead to a chain reaction in the market

Aggregation of TR data?

Cross border request for information to other regulators?

CCP Colleges information requests?

Relying on data from local CMs and clients?

Activities in scope

► What may be of interest to regulators?

5. CSD settlement fails reports and data from settlement internalisers

Why?

- ❑ The rate of settlement fails may be important to the CA of the trading venue, the CA of the CSD, the CA of the CCP and the CA of the trading participants and their clients
- ❑ If the rate of settlement fails crosses a certain threshold on an annual level, the CSD is obligated to implement additional mechanism to improve settlement (partial settlement and hold and release mechanisms)
- ❑ If a CSD from another MS operates the securities settlement system of a MS, the information on the rate of settlement fails is important to the local CA
- ❑ This information needs to be communicated to the host CA by the home CA (the CA of the CSD)
- ❑ Information exchange mechanisms need to be in place, or formal cooperation agreements in the CSD is of systemic importance
- ❑ Data on internal settlement is not available at the level of the CSD
- ❑ CSDR implements a new obligation for settlement internalisers to submit quarterly reports to their CAs
- ❑ The CAs submit those reports to ESMA

Activities in scope

▶ What may be of interest to regulators?

6. TR transaction and position data on derivatives

Why?

- ❑ To monitor the level of systemic risks in that MS or at an EU level (ESMA, ESRB)
- ❑ To check compliance with EMIR obligations (reporting, risk management, collateral exchange, valuation, clearing)
- ❑ Indirectly – check for types of derivatives that can impact transparency (voting rights) disclosures and can trigger mandatory bids
- ❑ Check the NFC clearing threshold
- ❑ Check cross-border clearing exposures

B. MIFIDII/MIFIR TRANSACTION DATA REPORTING – THE OBLIGATION TO REPORT CLIENT INFORMATION AND MAR REQUIREMENTS

RELEVANT REGULATIONS

MiFIR, Article 26 („Obligation to report transactions”)

- ❑ Investment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day.
- ❑ The CA's need to establish the necessary arrangements in order to ensure that the CA of the most relevant market in terms of liquidity for those financial instruments also receives that information.
- ❑ The CAs shall make available to ESMA, upon request, any information reported

Instruments in scope:

- financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made;
- financial instruments where the underlying is a financial instrument traded on a trading venue; and
- financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue

OTC transactions are also in scope.

MiFID II trading venues

What is a MiFID II „trading venue“?

- Regulated market,
- MTF,
- OTF (Organised trading facility - a new trading venue for non-equity instruments).

What's the difference between an OTF and a MTF?

- scope of instruments that can be traded (OTF is more restricted)
- Transparency levels
- Less restrictions for the operator
- unlike an MTF, the OTF operator must play an active role in bringing about transactions on its platform and exercise discretion either when deciding to place or retract an order on the OTF and/or when deciding not to match potential matching orders available in the system

OTP – traded products?

- bonds,
- Structured products,
- Emission allowances,
- derivatives

An OTF should not include facilities where there is no genuine interaction of trading interest, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, electronic post-trade confirmation services, or portfolio compression.

Any system that only receives, pools, aggregates and broadcasts indications of interest, bids and offers or prices shall not be considered a multilateral system for the purpose of MiFID II.

This is because there is no reaction of one trading interest to another other within these systems – they do not 'act reciprocally'

Compared to MiFID I?.

MIFID I vs. MIFIR			
MIFID I		MIFIR	
Number of reporting fields	26	Number of reporting fields	65 The new reporting fields include: Identification of person or computer algorithm responsible for the investment decision, Designation to identify natural persons, Identification of person or computer algorithm responsible for execution of a transaction
Instruments in scope	Equity, bonds, indices, equity derivatives (OTC & ETD)	Instruments in scope	financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made; financial instruments where the underlying is a financial instrument traded on a trading venue; and financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue, (OTC i ETD)
Counterparty data	ID of the counterparty (BIC or an internal ID). No client data.	Counterparty data	ID of the counterparty (LEI) Client data must be included. Format for the client data is standardised.
Instrument data	(Aii – Alternate Investment Identifier/ISIN)	Instrument data	Basic instrument data. Standardised taxonomy.
Execution transparency data	No requirements.	Execution transparency data	Detailed information.

MiFIR transaction reporting

- The reporting format is defined in the Annex of RTS-a 22: „Regulatory technical standards on reporting obligations under Article 26 of MiFIR“ (Table 2)

Who is obligated to report?

Investment firms executing transactions/transmitting orders (Article 26. MiFIR):

- Report to their CA
- T+1.

Who can submit reports?

- The investment firm itself,
- ARM
- The trading venue

The investment firms remain liable for the accuracy and completeness of the reporting to CAs.

The MiFIR reporting obligation overlaps with the EMIR reporting obligation for derivatives

Double reporting

MiFIR transaction reporting

- ❑ RTS-a 22: „Regulatory technical standards on reporting obligations under Article 26 of MiFIR“ (Table 2)

- Regulation (EU) 2017/590

- ❑ **A transaction report relating to a transaction executed on behalf of a client who is a natural person shall include the full name and date of birth of the client as specified in Fields 9, 10, 11, 18, 19 and 20 of Table 2 of Annex I.**

- ❑ A natural person shall be identified in a transaction report using the designation resulting from the concatenation of the ISO 3166-1 alpha-2 (2 letter country code) of the nationality of the person, followed by the national client identifier listed in Annex II based on the nationality of the person.
- ❑ Alternate - the natural person shall be identified by the investment firm using the concatenation of the following elements in the following order:
 - a) the date of birth of the person in the format YYYYMMDD;
 - b) the five first characters of the first name;
 - c) the five first characters of the surname.

Identification of person or computer algorithm responsible for the investment decision

- ❑ Where a person or computer algorithm within an investment firm makes the investment decision to acquire or dispose of a specific financial instrument, that person or computer algorithm shall be identified as specified in field 57 of Table 2 of Annex I.

Identification of person or computer algorithm responsible for execution of a transaction

- ❑ Where a person or computer algorithm within the investment firm which executes a transaction determines which trading venue, systematic internaliser or organised trading platform located outside the Union to access, which firms to transmit orders to or any conditions related to the execution of an order, that person or computer algorithm shall be identified in field 59 of Table 2 of Annex I.

MAR obligations – Investment firms/banks

RTS (EU) 2016/957 - regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions

MAR Article 16(5) – Prevention and detection of market abuse

- ❑ To ensure effective detection of market abuse or attempts of market abuse, MAR mandates an obligation to have appropriate arrangements, systems and procedures to prevent, detect and report abusive practices or suspicious orders or transactions.
- ▶ Reporting templates are standardised

The RTS covers:

- ❑ general requirements for persons professionally arranging or executing transactions“ (investment firms, banks, asset managers, proprietary traders):
 - ▶ establish systems to prevent, monitor and detect market abuse,
 - ▶ STOR reporting to CA,
- ❑ obligations of trading venue operators,
- ❑ minimum requirements for the system used to prevent, monitor and detect market abuse,
- ❑ the obligations to train staff to recognise suspicious transactions and to use the established system
- ❑ the obligation to report suspicious transactions,
- ❑ reporting deadlines,
- ❑ reporting content and format (STOR)

SUPERVISORY POWERS OF CAs

MiFID II, Article 69 (more detailed in the definition of CAs supervisory powers)

- ❑ have access to any document or other data in any form which the competent authority considers could be relevant for the performance of its duties and receive or take a copy of it;
- ❑ require or demand the provision of information from any person and if necessary to summon and question a person with a view to obtaining information;
- ❑ carry out on-site inspections or investigations;
- ❑ require existing recordings of telephone conversations or electronic communications or other data traffic records held by an investment firm, a credit institution, or any other entity regulated by this Directive or by Regulation (EU) No 600/2014;
- ❑ require the freezing or the sequestration of assets, or both;
- ❑ require the temporary prohibition of professional activity;
- ❑ require the auditors of authorised investment firms, regulated markets and data reporting services providers to provide information;
- ❑ refer matters for criminal prosecution;
- ❑ allow auditors or experts to carry out verifications or investigations;
- ❑ require or demand the provision of information including all relevant documentation from any person regarding the size and purpose of a position or exposure entered into via a commodity derivative, and any assets or liabilities in the underlying market;
- ❑ require the temporary or permanent cessation of any practice or conduct that the competent authority considers to be contrary to the provisions of Regulation (EU) No 600/2014 and the provisions adopted in the implementation of this Directive and prevent repetition of that practice or conduct;
- ❑ adopt any type of measure to ensure that investment firms, regulated markets and other persons to whom this Directive or Regulation (EU) No 600/2014 applies, continue to comply with legal requirements;
- ❑ require the suspension of trading in a financial instrument;
- ❑ require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;
- ❑ request any person to take steps to reduce the size of the position or exposure;
- ❑ limit the ability of any person from entering into a commodity derivative, including by introducing limits on the size of a position any person can hold at all times in accordance with Article 57 of this Directive;
- ❑ issue public notices;
- ❑ require, in so far as permitted by national law, existing data traffic records held by a telecommunication operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to an investigation into infringements of this Directive or of Regulation (EU) No 600/2014;
- ❑ suspend the marketing or sale of financial instruments or structured deposits where the conditions of Articles 40, 41 or 42 of Regulation (EU) No 600/2014 are met;
- ❑ suspend the marketing or sale of financial instruments or structured deposits where the investment firm has not developed or applied an effective product approval process or otherwise failed to comply with Article 16(3) of this Directive;
- ❑ require the removal of a natural person from the management board of an investment firm or market operator.

SUPERVISORY POWERS OF CAs

MAR, Article 23 (more detailed in the definition of CAs supervisory powers)

- ❑ to access any document and data in any form, and to receive or take a copy thereof;
- ❑ to require or demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information;
- ❑ in relation to commodity derivatives, to request information from market participants on related spot markets according to standardised formats, obtain reports on transactions, and have direct access to traders' systems;
- ❑ to carry out on-site inspections and investigations at sites other than at the private residences of natural persons;
- ❑ subject to the second subparagraph, to enter the premises of natural and legal persons in order to seize documents and data in any form where a reasonable suspicion exists that documents or data relating to the subject matter of the inspection or investigation may be relevant to prove a case of insider dealing or market manipulation infringing this Regulation;
- ❑ to refer matters for criminal investigation;
- ❑ to require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions;
- ❑ to require, insofar as permitted by national law, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to the investigation of an infringement of point (a) or (b) of Article 14 or Article 15;
- ❑ to request the freezing or sequestration of assets, or both;
- ❑ to suspend trading of the financial instrument concerned;
- ❑ to require the temporary cessation of any practice that the competent authority considers contrary to this Regulation;
- ❑ to impose a temporary prohibition on the exercise of professional activity; and
- ❑ to take all necessary measures to ensure that the public is correctly informed, inter alia, by correcting false or misleading disclosed information, including by requiring an issuer or other person who has published or disseminated false or misleading information to publish a corrective statement.

C. CSDR REQUIREMENTS FOR DATA ACCESS FOR REGULATORS

Information availability

▶ CSDR, Article 11:

- „The competent authorities shall have the supervisory and investigatory powers necessary for the exercise of their functions.”

➤ CSDR, Article 29 (Record keeping)

1. A CSD shall maintain, for a period of at least 10 years, all its records on the services and activities, including on the ancillary services referred to in Sections B and C of the Annex, so as to enable the CA to monitor the compliance with the requirements under this Regulation.
2. A CSD shall make the records referred to in paragraph 1 available upon request **to the competent authority and the relevant authorities and any other public authority which under Union law or national law of its home Member State has a power to require access to such records for the purpose of fulfilling their mandate.**

CSDR cooperation arrangements – Articles 23 & 24

CSDR participants' obligations

Article 38 of CSDR mandates that:

- ❑ 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.
- ❑ 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')
- ❑ 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').
- ❑ 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.

Why is the segregation requirement used?

EU has different securities holding systems that expose clients to different risks

Broadly:

- Direct holding systems
- Indirect holding systems

CSDR participants' obligations

Participants (account operators) hold client securities in a CSD (indirect and hybrid systems)

- ❑ This exposes the clients to the risk that the participant will default, or another client of the participant if omnibus account structures are used
- ❑ CSDR mandates that all CSDs and participants, regardless of holding system, give their clients a choice between omnibus and individual accounts in a CSD
- ❑ CSDR also mandates that client securities need to be recorded separately from the participant's securities (this was previously not the case in „pure” omnibus holding systems).
- ❑ The reasoning is similar to the EMIR segregation obligation

Direct holding systems already have individual account as a default option.

Article 38(5) of CSDR (“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.”),

Legal ownership registers and account segregation levels in the EU

CSDR recognises the difference between direct and indirect holding system in recital 39

- *„CSDR should not prevent MS allowing direct securities holding systems from providing in their national law that parties other than CSDs shall or may perform certain functions, which in some other types of securities holding systems are typically performed by CSDs and specifying how those functions should be exercised. In particular, in some MS, account operators or participants in the securities settlement systems operated by CSDs record entries into securities accounts maintained by CSDs without necessarily being account providers themselves. In view of the need for legal certainty on the entries made into accounts at the CSD level, the specific role played by such other parties should be recognised by CSDR.”*
- *„It should therefore be possible, under specific circumstances and subject to strict rules laid down by law, to share the responsibility between a CSD and the relevant other party or to provide for exclusive responsibility by that other party for certain aspects related to maintaining of securities accounts at the top tier level provided that such other party is subject to appropriate regulation and supervision. There should be no restrictions on the extent to which responsibility is shared.”*

Legal ownership registers and account segregation levels in the EU

CSDR also recognises the differences in MS corporate law in recital 56

„Since harmonisation of national corporate law is beyond the scope of this Regulation, such national corporate or similar law under which the securities are constituted should continue to apply and arrangements be made to ensure that the requirements of such national corporate or similar law can be met where the right of choice of CSD is exercised. Such national corporate and similar law under which the securities are constituted govern the relationship between their issuer and holders or any third parties, and their respective rights and duties attached to the securities such as voting rights, dividends and corporate actions. A refusal to provide services to an issuer should be permissible only based on a comprehensive risk assessment or if that CSD does not provide any issuance services in relation to securities constituted under the corporate or similar law of the relevant Member State. A quick and appropriate remedy should be made available to competent authorities to address any unjustified refusal of CSDs to provide their services to issuers.”

Legal ownership registers and account segregation levels in the EU

There are variations of holding systems

- ❑ **Omnibus markets** (CSDs do not have direct access to information on the identity of individual clients of CSD participants or on end investors, even if CSD participants use different accounts for segregation purposes)
- ❑ **Hybrid markets with individual client segregation** (CSDs offer a special type of account allowing CSD participants to segregate securities of individual clients, whereby the CSD has direct access to information on the identity of individual clients)
- ❑ **Hybrid markets with end investor segregation** (CSDs offer a special type of account allowing CSD participants to segregate securities of end investors, whereby the CSD has direct access to information on the identity of end investors)
- ❑ **Segregated markets** (CSDs offer a special type of account allowing CSD participants to segregate securities of individual clients or end investors whereby the CSD has direct access to information on the identity of individual clients or end investors. In addition, the use of segregated accounts is legally compulsory for domestic participants and/or investors , at least for shares and sometimes for all financial instruments)

Individual client or end investor account segregation typically does not apply in cross border scenarios.

CSD links usually operate on the basis of omnibus accounts

Legal ownership registers and account segregation levels in the EU

There are variations of holding systems

- ❑ Omnibus markets
 - ❑ 14 countries (15 CSDs):
 - ❑ AT, BE, CH, DE, FR, HU, IT, LT, LV, NL, PL, PT, RU, UA
- ❑ Hybrid markets with individual client segregation
 - ❑ 2 countries (4 CSDs):
 - ❑ ES, LU
- ❑ Hybrid markets with end investor segregation
 - ❑ 9 countries (9 CSDs):
 - ❑ CY, CZ, DK, EE, IS, RO, SE, SK, UK
- ❑ Segregated markets
 - ❑ 12 countries (13 CSDs):
 - ❑ BA, BG, FI, GR, HR, ME, MK, MT, NO, RS, SI, TR

Legal ownership registers and account segregation levels in the EU

Individual client segregation is not the same as end-client segregation.

- Individual client segregation: a participant maintains separate accounts at the CSD for separate clients.
- End client segregation: the highest degree of segregation - a separate securities account for each end investor, including retail investors.

Under the end client segregation model, the information on the identity of the end investor is usually attached to the securities account maintained at the CSD.

These holding systems can then be combined with the national concept of securities ownership and if the CSD is in fact a register of ownership, to make further sub-categories.

These three elements:

- the holding system,
- the national framework for legal ownership
- if the CSD is a register of ownership,

will determine who the CA needs to contact to get the relevant account and client identity information.

Legal ownership registers and account segregation levels in the EU

Legal ownership concepts (main groups identified)

I. The trust model (England and Wales, Ireland, Australia)

- ❑ The issuer entrusts its securities to the CSD.
- ❑ The CSD in England (which also serves Ireland) is called the CREST System and is operated by Euroclear UK & Ireland.
- ❑ The CSD itself assumes the role of the company register under corporate law and has no legal interest in the securities.
- ❑ The participants in CREST are considered the legal owners of the securities which they hold, whether for their own or their clients' accounts.
- ❑ The account holder of the CREST participant becomes trustor (beneficiary) and receives an 'equitable ownership' in the securities which is not exactly equal to legal ownership but encompasses similar elements and is protected in case of the insolvency of the trustee.
- ❑ This goes down the securities holding chain.

Legal ownership registers and account segregation levels in the EU

Legal ownership concepts (main groups identified)

II. The security entitlement model (USA and Canada)

- ❑ Resembles the trust model.
- ❑ The CSD in the USA is called the Depository and Trust Company (DTC).
- ❑ The legal owner of the security entitlement under this model is a special legal entity, Cede&Co, which is a 100% subsidiary company of the NYSE.
- ❑ Every account holder receives a 'security entitlement' against his account provider
- ❑ The legal nature of a security entitlement is not exactly equal to legal ownership and is similar to an equitable interest under English law.
- ❑ Security entitlements are separated from the intermediary's estate in the event of the latter's insolvency.
- ❑ security entitlements do not 'overlap' as is the case with equitable interests

Legal ownership registers and account segregation levels in the EU

Legal ownership concepts (main groups identified)

III. The undivided property model (France)

- ❑ only 'dematerialised' securities are recognised in France
- ❑ physical paper certificates have been abolished and the securities are only represented by a register entry in the CSD.
- ❑ The French CSD is Euroclear, and acts as a register.
- ❑ Neither the CSD nor any of the intermediaries have any legal interest or right in the securities.
- ❑ The investor has the full property over the securities which are deemed to be located directly in his account, i.e. the account maintained by his account provider.
- ❑ The investor can only access his securities through his account provider but not through any other intermediary at a higher level.

Legal ownership registers and account segregation levels in the EU

Legal ownership concepts (main groups identified)

IV. The pooled property model (Germany, Austria)

- ❑ Clearstream Banking in Germany and OeKB in Austria
- ❑ The investor receives a shared interest in a pool of securities which is located at the level of the CSD.
- ❑ The intermediaries have no interest or legal ownership, or only a very minor, 'residual' one, comparable to 'possession', which describes a relationship of having control over the securities.
- ❑ The investor can access his securities only through his own account provider and other account providers up the chain would be unable to identify him (as a consequence of pooling client securities in pooled accounts).

Legal ownership registers and account segregation levels in the EU

Legal ownership concepts (main groups identified)

- v. The transparent model (Nordic countries, Greece, Poland, China)
 - ❑ There are no intermediaries involved, except the CSD.
 - ❑ Every investor has his account directly in the CSD.
 - ❑ the banks intervening in the securities business do not maintain an account for the investor but only operate the one maintained by the CSD under a special legal and operational framework.
 - ❑ The investor has a direct and unshared property interest in the securities.
 - ❑ For cross-border holdings, the transparent system resembles the pooled property model.

Legal ownership registers and account segregation levels in the EU

Legal ownership concepts

The PRIMA approach - 'place of the relevant intermediary approach'.

Two approaches:

- The law of the account is the law agreed upon by the parties. This is the approach taken by a number of countries (Switzerland, England and other common law countries, USA) and also by the Hague Securities Convention.
- The law of the account is the law of the place where the account is actually maintained. This is the approach taken by Article 9 of the Financial Collateral Directive and Article 9(2) of the Settlement Finality Directive and by most, but not all, civil law jurisdictions.

EU and international framework:

- Settlement finality Directive
- Financial Collateral Directive
- CSDR
- MiFID
- Target2Securities
- The Hague Securities Convention
- The Geneva Securities Convention

Legal ownership registers and account segregation levels in the EU

Registers of legal ownership

- The registration of securities holders refers to the process of recording ownership or legal holding in securities in an official list called the register. This list facilitates the identification of securities holders by issuers and regulators.

This differs depending on national law.

CSDs are not always involved in the maintenance of the register.

ECSDA data – „in more than half of European markets, the CSD acts as the sole or primary registrar”

In the majority of European markets, the names on the register do not necessarily correspond to the names of end investors since securities can be held in “nominee” accounts, i.e. the legal holder of the securities is the intermediary maintaining securities accounts on behalf of the end investor, rather than the end investor.

This entirely depends on the MS corporate law.

ESMA publishes a list of key provisions of MS corporate law under Article 49(1) CSDR

D. Cross border requests: regulator to regulator (Memorandums of understanding)

Memorandums of understanding

What are MoUs used for?

- ❑ to provide a general framework for cooperation and the exchange of information between regulators, in relation to the regulation of securities and financial markets
- ❑ provision of information to, and obtaining information from, other regulators,
- ❑ joint investigations and joint on-site inspections with one or more other regulators.
- ❑ can be multilateral and bilateral
- ❑ can be local or cross-border
- ❑ can be sectoral or cross-sectoral

Examples:

- ❑ ESMA Multilateral Memorandum of Understanding on Cooperation Arrangements and Exchange of Information
- ❑ IOSCO Multilateral memorandum of understanding concerning consultation and cooperation and the exchange of information

Memorandums of understanding

Scope of ESMA MoU?

- ❑ insider dealing, market manipulation and other related fraudulent or manipulative practices in financial markets, whether attempted or committed
- ❑ whether or not a financial market participant should be authorised under the Laws and Regulations and whether it continues to meet the requirements for continuing can be sectoral or cross-sectoral business as a financial market participant;
- ❑ entities providing market infrastructure including clearing, settlement or custody services and activities;
- ❑ the duties of issuers or offerors of financial instruments in relation to the registration, issuance, offer or sale of financial instruments and the disclosure of information; and
- ❑ general conduct of business and prudential requirements of EU legislation or applicable national law,
- ❑ Other issues within the regulators' mandates,

Examples:

- ❑ ESMA Multilateral Memorandum of Understanding on Cooperation Arrangements and Exchange of Information
- ❑ IOSCO Multilateral memorandum of understanding concerning consultation and cooperation and the exchange of information

MoUs cannot derogate national law or EU law provisions and in that context are entirely non-binding.

Memorandums of understanding

Scope of assistance under an MoU?

- ❑ having access to any document and any other data in any form from any person, including documents sufficient to enable transactions in financial instruments to be reconstructed, the origin and destination of any funds transferred for those transactions to be identified and any beneficial owners of those transactions or persons that own or control those beneficial owners to be known;
- ❑ requiring information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and, if necessary, taking or compelling a statement from such person and, where permissible, testimony under oath;
- ❑ the verification of any information held by an Authority;
- ❑ carrying out investigations and on-site inspections;
- ❑ the provision of existing recordings of telephone conversations, electronic communications held by investment firms, credit institutions or other financial institutions;
- ❑ the provision of existing data traffic records held by a telecommunication operator, where there is a reasonable suspicion of a breach of the EU or national laws and where such records may be relevant to the investigation; and
- ❑ to the extent permitted by applicable national law, identification of the owner (individual or firm) of a telephone number and the obtainment of the telephone numbers of an individual or a firm.

Memorandums of understanding

Can the requested regulator refuse to cooperate?

The requested regulator may only refuse to act on a request for assistance if that refusal:

- relates to a request that is outside of the scope of assistance, or
- refusal is permissible under applicable EU Legislation, or
- if the request does not relate to applicable EU Legislation) is refusal is permissible under national law.

MoUs contain provisions on how requests are sent and how responses are made, as well as general deadlines.

Standard information requests templates

Under the MoU, it is possible to:

- Send a request for information
- Send a requests for an authority to take a statement from a person
- Send a request for an authority to open an investigation or carry out an on-site inspection

Designated contact persons

Memorandums of understanding

Standard information requests templates

Standard format for a request for assistance

Minimal information that needs to be provided with the request:

- ❑ detailed description of the subject matter of the request;
- ❑ a detailed description of the purpose for which the assistance is sought and why the assistance will be helpful to the requesting authority, including the EU legislation or national legislation under which the requesting authority is competent to deal with the matter;
- ❑ a detailed description of the type of assistance sought, such as the provision of information, taking of a statement, the opening of an investigation, a joint investigation or other assistance;
- ❑ if the request concerns an investigation into breaches of Laws and Regulations:
 - i. details of the offence;
 - ii. description of the facts underlying the investigation which forms the basis of the request;
 - iii. details of the laws which may have been breached;
- ❑ if the request concerns information relating to a transaction or order in a specific financial instrument, any information known to the requesting authority that provides:
 - i. a precise description of the financial instrument, including the ISIN code;
 - ii. the identity of any person connected with the transaction or order, including a Person dealing in the financial instrument or on whose behalf the dealing is considered to have taken place;
 - iii. the dates between which transactions or orders in those financial instruments took place including in the case of a significant period of time reasons why the entirety of the time period is beneficial

Memorandums of understanding

Standard information requests templates

Standard format for a request for assistance

If the request concerns the taking of a statement, the following information is required:

- ❑ description and explanation of the type of the statement requested;
- ❑ detailed description of the need for and purpose of the taking of a statement;
- ❑ details of the persons from which the statement will be taken to enable the requested authority to begin the summoning process where applicable
- ❑ a detailed description of the information sought, including a preliminary list of questions (if available at the time of the request)

If the request concerns the opening of an investigation on behalf of an Authority or the opening of a joint investigation, the following additional information:

- ❑ sufficient information to enable the Requested Authority to assess whether it may have an interest in entering into a joint investigation, including the Requesting Authority's proposal for the investigation, its reasoning and the perceived benefits to the Requested Authority;
- ❑ all relevant information required by the Requested Authority to enable the latter to provide the necessary assistance by opening an investigation or a joint investigation, as appropriate

Thank you for your attention.

Questions?