

# Insolvency Proceedings of VP SECURITIES A/S or a Participant

Tuesday, 31 May 2017





## 1. Introduction

- 1.1 The objective of this memorandum is to describe potential consequences in relation to Insolvency Proceedings (as defined below) of either VP Securities A/S ("**VP**") in its capacity as a central securities depository ("**CSD**"), or a participant (a "**Participant**") in the VP Clearing and Settlement system as defined in paragraph (f) of Article 2 of Directive 98/26/EC of 19 May 1998, cf. paragraph (19) of Article 2(1) of Regulation (EU) no. 909/2014 of 23 July 2014 on improving securities settlement in the EU and on central securities depositories (the "**CSDR**") relating to dematerialised securities existing in book-entry form in VP Clearing and Settlement system.
- 1.2 This memorandum is confined to and has been prepared on the basis of applicable Danish law as it exists on the date hereof, including the CSDR.
- 1.3 VP is a CSD having its registered address in Denmark. VP is a Danish limited liability company (Da: *Aktieselskab*) incorporated and existing under the laws of Denmark. VP is conducting notary and settlement services as defined in Section 50(6) and 59(3) of the Danish Securities Trading Act (Da: *Lov om værdipapirhandel mv.*) which is subject to the supervision of the Danish Financial Supervisory Authority (Da: *Finanstilsynet*) pursuant to Section 83(1) of the Danish Securities Trading Act. Further, the notary and settlement services is subject to a CSD license which is granted by the Danish Financial Supervisory Authority to VP upon compliance with the requirements set out in Section 8 of the Danish Securities Trading Act.
- 1.4 VP is subject to capital requirements pursuant to the Danish Securities Trading Act which will be replaced by the capital requirements in Article 47 of the CSDR when VP has obtained authorisation after CSDR.
- 1.5 VP does not hold an authorisation to provide banking-type ancillary services as set out in Section C of Annex 1 to the CSDR. As VP does not hold such authorisation, VP does not hold cash accounts (except for the SEK Client Settlement Account mentioned below), and does not extend cash or securities credit to its Participants in accordance with Article 54(1) of the CSDR. As stated above, VP does hold a SEK Client Settlement Account (as defined below) with the Swedish Central Bank (Se: *Sveriges Riksbank*) which is exclusively applicable for settlements in SEK. The application of Danish law on the SEK Client Settlement Account is described under paragraph 4.4 (*Settlements in SEK*) below.
- 1.6 The EU Bank Recovery and Resolution Directive no. 59 of 15 May 2014 ("**BRRD**") regarding financial institutions in the European Union is implemented in Denmark by the Act on Restructuring and Resolution of certain Financial Enterprises (Act no. 333 of 31 March 2015) (Da: *Lov om restrukturering og afvikling af visse finansielle virksomheder*) and is administered by the Danish independent public enterprise, Finansiell Stabilitet. Insolvency Proceedings of most of the Participants in VP is likely to be subject to the BRRD and the Danish implementation of BRRD or comparable regimes of other EU member states. VP is not a direct subject matter of the Act implementing the BRRD.

## 2. Danish Insolvency Proceedings

- 2.1 The types of statutory insolvency proceedings to which an entity may become subject in Denmark, are the following:
- (1) a restructuring under the supervision and authority of a restructuring administrator appointed by the bankruptcy court (Da: *Rekonstruktion*); and
  - (2) a bankruptcy under the supervision and authority of a bankruptcy trustee appointed by the bankruptcy court (Da: *Konkurs*).

2.2 These proceedings are in the following referred to as "**Insolvency Proceedings**". A restructuring administrator and a bankruptcy trustee are in the following referred to as an "**Insolvency Administrator**".

### 3. Danish insolvency law

3.1 The insolvency laws and procedures to which a party being a Participant in VP would be subject in Denmark in Insolvency Proceedings are the following:

- (1) the Danish Bankruptcy Act (Da: *Konkursloven*),
- (2) the Danish Administration of Justice Act (Da: *Retsplejeloven*), and
- (3) the Danish Executive Order no. 674 of 24 June 2004 (the "**Bank Executive Order**"), implementing Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the "**Winding-up Directive**"), which applies to Danish banks, Danish mortgage credit institutions and Danish issuers of electronic money.

3.2 As stated above, the Winding-up Directive has been implemented into Danish law by the Bank Executive Order.

3.3 Denmark is not party to the EU Insolvency Regulation. Consequently, only Danish insolvency law will apply to a Danish legal entity under Insolvency Proceedings. If a legal entity is not incorporated under the laws of Denmark, Danish insolvency legislation will in general not apply.

3.4 A Danish bankruptcy estate has jurisdiction over assets in Denmark only. Pursuant to the Nordic Bankruptcy Treaty, assets in the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) belonging to an entity subject to Insolvency Proceedings in Denmark are included in the bankruptcy estate. Assets in countries outside the Nordic Bankruptcy Treaty belonging to an entity subject to Insolvency Proceedings in Denmark are included in the bankruptcy estate if this does not conflict with the applicable law of the country in which such asset is located.

### 4. Insolvency Proceedings of VP

4.1 Ownership of securities

4.1.1 Danish law provides that legal ownership of securities vests in the end-investor (the "**End-Investor**") having acquired title to and by book-entry having received the relevant securities. This means that as the CSD's business is the settlement and custody of securities (i) the legal ownership to securities recorded in a CSD vests in the End-Investors and (ii) legal ownership to securities held by and in the name of a Participant on behalf of an End-Investor vests in that End-Investor.

4.1.2 Pursuant to Article 38 of the CSDR on protection of securities of Participants and those of their clients (the "**Clients**"), any CSD must keep records and accounts that shall enable it, at any time and without delay, to segregate in the securities accounts with the CSD, the securities of a Participant from those of any other Participant, and, if applicable, from the CSD's own assets. Further, the CSD shall keep records and accounts that enable any Participant to segregate the securities account of the Participant from those of any of its Clients.

4.2 Custody of securities

4.2.1 Securities are either directly registered in VP in the name of a Client in an individual Client segregated account (an "**Individual Client Segregated Account**") or in a Participant's omnibus account (an "**Omnibus Client Segregated Account**") in the name of the Participant.



#### 4.2.2 Individual Client Segregated Accounts

4.2.2.1 An Individual Client Segregated Account contains a Client's own securities and/or any securities held by that Client on behalf of its potential End-Investors. The securities held by such Client or its End-Investors are thus effectively segregated from assets belonging to other Clients of the Participant that controls the Client's Segregated Account with VP and the securities owned by the Participant itself.

4.2.2.2 In the event that VP would become subject to Insolvency Proceedings, any Participant will be entitled to retrieve securities held in its own name and securities held on behalf of its Clients in Individual Client Segregated Accounts with VP. Accordingly, in the event VP becomes subject to Insolvency Proceedings, securities held in an Individual Client Segregated Account with VP will not form part of in the bankruptcy estate, cf. Section 82 of the Danish Bankruptcy Act.

#### 4.2.3 Omnibus Client Segregated Accounts

4.2.3.1 An Omnibus Client Segregated Account is an account held by and set up in the name of a Participant. Such account may contain securities that belong to several Clients of that Participant. The Participants will in the event of Insolvency Proceedings of VP, cf. Section 82 of the Danish Bankruptcy Act, be entitled to retrieve the securities held on Omnibus Client Segregated Accounts.

4.2.3.2 The individual Client's right to claim delivery of securities require that there is no conflict concerning the Client's legal ownership of the securities deposited in such Omnibus Client Segregated Account in spite of the lack of segregation of the securities. The Client's right to claim delivery is regulated by the Danish Financial Business Act (Da: *Lov om finansiel virksomhed mv.*) as described in paragraph 5.3 (*Custody of securities*).

#### 4.3 Settlement of registered transactions

4.3.1 Insolvency Proceedings of a CSD is not subject to any special insolvency legislation. Consequently, Insolvency Proceedings of VP would be subject to general Danish insolvency law, including the Danish Bankruptcy Act. Generally, an Insolvency Administrator succeeds control of the bankruptcy estate and is thereafter mandated to decide either to liquidate the business or, if appropriate, to continue the operation for some time for the purpose of disposing of the business. The settlement by VP after the commencement of any Insolvency Proceedings would as a result depend on such decision by the Insolvency Administrator. However, such settlement would still be subject to both the supervision of the Danish Financial Supervisory Authority and the existing CSD license granted to VP by the Danish Financial Supervisory Authority. The granting of such CSD license is *inter alia* subject to compliance with the applicable capital requirements as set out in Section 82 of the Danish Securities Trading Act. In the event VP (or the bankruptcy estate) is not complying with the applicable capital requirements, the Danish Financial Supervisory Authority would have authority to withdraw VP's CSD license, cf. Section 92 of the Danish Securities Trading Act, meaning that the Insolvency Administrator would have to cease the settlement immediately.

4.3.2 Pursuant to Article 22(3) of the CSDR, the competent authorities shall ensure that an adequate resolution plan is established and maintained for each CSD so as to ensure continuity of at least its core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned and any relevant resolution plan established in accordance with BRRD.

#### 4.4 Settlements in SEK

4.4.1 The services offered by VP in relation to settlement of securities and corporate actions in Swedish kroner ("SEK") are subject to certain exemptions compared to the above. The reason for this is that the securities

involve settlement in an account set up by VP in the Swedish Central Bank (unlike settlements in DKK and EUR which are settled through accounts opened with the Danish Central Bank or in the TARGET2 CSD system in the name of the relevant Participants).

- 4.4.2 The account is an SEK cash account set up for the purpose of enabling VP to receive cash from the buyer of the securities to be settled in SEK and pay-out to the seller of such securities in connection with transactions (the "**SEK Client Settlement Account**").
- 4.4.3 As the SEK Client Settlement Account is an omnibus cash account held by VP, the proper legal segregation under Danish law requires highly accurate, clear, and reliable bookkeeping in respect of the cash shortly deposited on the SEK Client Settlement Account. For that reason, VP keeps exact records in its system that ensures that VP is able to allocate the full amount standing to the credit of the SEK Client Settlement Account on each relevant transaction and at any given time identify the purpose of each payment and from where it is coming and to whom it must be paid in connection with each settlement.
- 4.4.4 This implies that in case of Insolvency Proceedings of VP, the deposited amounts on the SEK Client Settlement Account would not form part of the bankruptcy estate provided that proper and exact allocation of the cash amount standing to the credit of the SEK Client Settlement Account is possible pursuant to VP's bookkeeping and records in accordance with Section 82 of the Danish Bankruptcy Act and relevant Danish principles on security and property law.
- 4.4.5 Most importantly to note in that connection is that the proper legal segregation is not maintained by VP under Danish law in case an even minor confusion of cash belonging to VP with cash standing to the credit of Clients in the SEK Client Settlement Account has occurred. In other words, the Clients would only have a (joint) claim against the bankruptcy estate as secured creditors (Da: *samlet separatistret*) with respect to the amount held by VP in the SEK Client Settlement Account at the time of opening of Insolvency Proceedings if the total cash amount deposited on the SEK Client Settlement Account corresponds exactly to the total cash amount which can be allocated to the Clients pursuant to the books and records of VP.
- 4.4.6 In the event such exact allocation is not possible due to insufficient or incorrect bookkeeping of VP or confusion with VP's own deposited funds on the SEK Client Settlement Account, cash held by VP on the SEK Client Settlement Account at the time of the commencement of the Insolvency Proceedings would form part of the VP bankruptcy estate.

## 5. Insolvency Proceedings of a Participant

### 5.1 Account controllers

- 5.1.1 Pursuant to Section 64(1) of the Danish Securities Trading Act, any Participant shall enter into a participation agreement with a CSD in order to obtain access to the CSD-services provided by such agreement ("**Participation Agreement**"). Section 64(4) of the Danish Securities Trading Act provides that a Participation Agreement terminates immediately following the occurrence of Insolvency Proceedings against a Participant. Consequently, the services provided pursuant to the Participation Agreement will no longer be available to the Participant, including the right to submit transaction registrations.
- 5.1.2 Upon the receipt of authoritative notice from the Danish FSA or other public authority on the Insolvency Proceedings of a Participant, the Participant's rights and obligations may be transferred to another Participant if so agreed by the relevant Client and Participant. In the event that such transfer agreement is not entered into, VP will be obligated to undertake the responsibility of the registrations on the affected accounts for up to 4 month, cf. Section 64(4) of the Danish Securities Trading Act.

- 5.1.3 In the event that VP assumes control over an account, the holder of such account may request VP in order to exercise its ownership rights over the securities held in the account.
- 5.1.4 Upon any transfer of accounts to VP pursuant to Section 64(4) of the Danish Securities Trading Act, the respective account holders will receive a request from VP to transfer such accounts to other Participants (Securities Account Controllers) within reasonable time. In case an account holder following such request fails to transfer its securities to another Participant within the 4 months' time limit, the securities will be transferred to the relevant issuer itself.
- 5.1.5 Upon receipt of a transfer declaration from both a transferor and a transferee, certain legal and technical adjustments are effected in the VP Clearing and Settlement system. The declaration shall contain the relevant information on the transfer procedure, and enable VP to make the correct adjustments in the VP Clearing and Settlement system, including relevant accesses, etc. Subsequently, the transferor must notify the transferee of any changes regarding the securities account registrations.
- 5.1.6 Securities transactions that have already been registered, irrespective of any settlement status, are only subject to a transfer if the transferee accepts such transfer.
- 5.2 Settlement of registered transactions
- 5.2.1 When a Participation Agreement is terminated due to Insolvency Proceedings of a Participant some transactions will not be settled even though the transactions are ready for settlement. With respect to such transaction, distinctions must be made between a Participants' own transactions ("**Participant Transaction**") and transactions on behalf of a Client ("**Client Transaction**").
- 5.2.2 Client Transaction
- 5.2.2.1 Client Transactions will not be settled if the Participation Agreement is terminated due to Insolvency Proceedings of the Participant. This is to avoid that a Client as the seller of securities will dispose of the legal ownership of the securities in return for an unsecured and non-preferential claim subject to Section 97 of the Danish Bankruptcy Act against the bankruptcy estate of the Participant, since payment for the securities normally will be made to the Participant which is then subject to Insolvency Proceedings. However, Client Transactions that have been instructed for net settlement in batches which have commenced will be settled.
- 5.2.3 Participant Transaction
- 5.2.3.1 The settlement system of VP is a designated securities settlement system intended to provide Participants protection and predictable settlement of securities transactions in the event of Insolvency Proceedings of a Participant. The designation entails that fixed rules are applied to the settlements reported by a Participant which is subject to Insolvency Proceedings.
- 5.2.3.2 A Participant Transaction may be submitted to the CSD up to 365 days' before contemplated settlement. Such transactions are generally protected by the Settlement Finality Directive. However, the settlement will in some cases not be effected due to Insolvency Proceedings of a Participant and the settlement procedures of the relevant CSD, including VP. VP's insolvency procedure in case of Insolvency Proceedings of a Participant is described below in paragraph 5.2.4 (*VP Insolvency Procedure*). The procedure provides transparency on the legal and practical consequences of the Insolvency Proceedings of a Participant for the purpose of allowing other Participants to accommodate their businesses thereto.

#### 5.2.4 VP Insolvency Procedure

5.2.4.1 The settlement rules of VP provide that the settlements take place at certain days and hours. The settlement day of VP starts each day at 18.00 ("**VP-Day**") and thus differs from a calendar day.

5.2.4.2 In accordance with the Danish Securities Trading Act, Sections 57 and 57c, VP has provided for a procedure that deals with Insolvency Proceedings of a Participant (the "**VP Insolvency Procedure**") set out in the Participation Agreement and the VP Settlement Rules, being part of the VP Rule Book.

5.2.4.3 Following the occurrence of Insolvency Proceedings of a relevant Participant VP shall initiate the VP Insolvency Procedure if certain conditions are fulfilled. When the VP Insolvency Procedure is initiated, VP may continue for the rest of the VP-Day to execute orders in accordance with its normal principles for settlement in the VP Clearing and Settlement system. The VP Insolvency Procedure shall only be applicable if:

- (1) VP has received an authoritative notice on the Insolvency Proceedings from the Danish FSA or other public authority, and
- (2) the transactions have obtained status as "Ready for Settlement" in the VP Clearing and Settlement system prior to the notice on the Insolvency Proceedings.

With regard to (1) VP may issue a default notice prior to any authoritative notice and request that the Participant provide VP with a statement on the Participants current status pursuant to its applicable corporate or company law.

With regard to (2) a transaction is "Ready for Settlement" when both parties have instructed and released the transaction in the VP Clearing and Settlement system and these instructions have been matched. Transactions that are ready for settlement are binding, cf. section 57c(1) of the Danish Securities Trading Act, and are subject to the Settlement Finality Directive.

5.2.4.4 The VP Insolvency Procedure implies that if VP is notified of the insolvency procedure before 18:00 o'clock on the day for which the Insolvency Proceedings have commenced, transactions marked "Ready for Settlement" are included in the net settlement batches in the VP-Day ending at 18.00 o'clock this day, and settlement is effected in accordance with the normal principles for settlement in such net settlement batches. Transactions which are "Ready for Settlement" for a subsequent VP-Day will be cancelled.

5.2.4.5 In accordance with the VP Insolvency Procedure transactions will be included in the settlements until the authoritative notice is given, cf. above item (1), and the VP Insolvency Procedure is initiated. If VP is notified after 18.00 o'clock VP will seek to cancel transactions instructed for net settlement that day. If the VP Insolvency Procedure is initiated during the settlement of a net batch, the effects thereof will not occur until the current net batch has been concluded. Transactions concluded in the net settlement batches are final, irrespective of the any Insolvency Proceedings.

5.2.4.6 The VP Insolvency Procedure implies that if VP is notified of the insolvency procedure on the day for which the Insolvency Proceedings have commenced real time gross settlement in the VP Clearing and Settlement system are included and settled in accordance with the normal principles for gross settlement, which mean that transactions will be settled if Ready for Settlement prior to notice of the VP Insolvency Procedure is received and other wise will be cancelled.

5.2.4.7 Transactions registered by a Participant subject to Insolvency Proceedings, which have not been concluded due to the VP Insolvency Procedure, will not be settled in the VP Clearing and Settlement system.

5.3 Custody of securities

5.3.1 Section 72(3) of the Danish Financial Business Act provides that a Participant may keep Client's securities in Omnibus Client Segregated Accounts or safekeep if the Participant has informed the Clients about potential legal consequences hereof and the Clients have consented thereto. Further, the Participant shall keep a register clearly designating each Client's ownership of each of the registered securities.

5.3.2 Section 72(6) of the Danish Financial Business Act provides that in the event of Insolvency Proceedings of a Participant, the Client may, on the basis of the register stated above, withdraw its securities from an Omnibus Account or safekeep, if there is no dispute about the right of ownership of such Client beforehand.

5.3.3 The above provisions require that the Participant segregates the Client's securities from any of the Participant's own securities held in Omnibus Accounts. If the securities are properly segregated (Da: *individualiseret*), the Client may claim its securities from the bankruptcy estate as a secured creditor (Da: *separatist*) which will imply that Insolvency Proceedings against a Participant will have no consequences for the Client with respect to securities in custody of the CSD if the segregation of securities is conducted properly by the Participant.

5.3.4 If the segregation of securities has somehow failed, such securities may not be properly segregated and will in such case be part of the bankruptcy estate. In such case the Clients cannot claim the securities as secured creditors. The End-Investors may in that case seek their losses up to EUR 20,000 covered by the Depositor and Investor Guarantee Scheme (Da: *Indskyder- og investorgarantiordningen*) under Danish Law and claim additional losses covered against the bankruptcy estate.

**6. Account holders (non-Participants)**

6.1 Account holders (which are not Participants) may hold securities on behalf of Clients. VP is not directly involved in any procedure regarding any Insolvency Proceedings of such account holders. The Securities Account Controller acting for the account holder towards VP must perform any required registrations regarding the Insolvency Proceedings of an account holder.