

Omnibus accounts in Poland – new solutions available to foreign investors and custodians

On 16 September 2011, the Act Amending the Act on Trading in Financial Instruments and Other Acts was adopted (the "**Amendment Act**"). The Amendment Act introduces to Polish law omnibus accounts ("**Omnibus Accounts**"), i.e. securities accounts maintained in Poland for foreign custodians or CSDs/ISDs acting for the account of their clients, participants or other intermediaries within tiered indirect holding systems.

Omnibus Accounts will thus be accounts where solely book-entry securities and other financial instruments¹ not belonging to the holders of such Omnibus Accounts will be registered. The assets held via Omnibus Accounts will be segregated from the account holders' proprietary assets.

The Amendment Act comes into force on 1 January 2012.

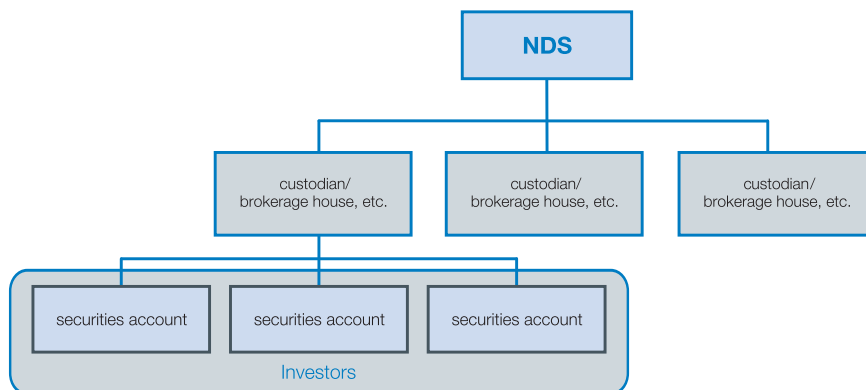
Key issues

- Current legal status
- Legal status from 1 January 2012
- Enforcement against securities held via an Omnibus Account
- Security interests over securities held via Omnibus Accounts

¹ References to "securities" in this briefing also include other financial instruments which may be registered in accounts within the Polish deposit and settlement system. Therefore, a "securities account" should be understood as an account in which book-entry securities and other relevant financial securities may be registered.

Current legal status

Currently, the deposit and settlement system in Poland is characterised by a two-tier structure of records of book-entry securities: (i) the first tier is the registration of securities in deposit accounts in the Polish CSD system (currently maintained by the National Depository for Securities (*Krajowy Depozyt Papierów Wartościowych S.A.*) (the "NDS")); and (ii) the second tier is the registration of securities in securities accounts held by the participants of the NDS (mainly local brokerage houses, custodian banks, banks carrying out brokerage activity and branches of foreign investment firms) or by the NDS itself. The scheme below presents it in a simplified manner:



In this system, book-entry securities are created when a book-entry in a securities account is made for the first time. The securities belong to the person to whose account they are registered. As the securities accounts are held in Poland, it is always possible to determine who is the owner of individual securities as a matter of Polish law, without the necessity of "going" outside Poland (i.e. analysing entries made in an indirect holding system outside Poland). That person is entitled to exercise the rights attached to the securities (e.g. to vote at the general shareholders' meeting of a joint-stock company or to receive a dividend or interest payments etc). It is also obliged to fulfil certain obligations as the owner of securities (e.g. the obligation to disclose that it has reached or exceeded a given threshold of votes in a public company or the obligation to launch a public tender offer/takeover bid).

This also means that Polish law does not differentiate between nominal ownership, which may be vested in an intermediary (e.g. a foreign custodian bank), and beneficial ownership, which would be vested in an investor – a foreign client of the intermediary (or another intermediary further down the chain of intermediaries, if applicable). Currently, under Polish law,

it is always the holder of a securities account that will be the owner of securities. This may be inconvenient for it, e.g. in a situation where, fulfilling the disclosure requirements concerning shares in public companies, it has to take into account not only its "own" securities, but also the securities that it holds for beneficial owners. In turn, from the point of view of a foreign client of a holder of a Polish securities account, such a situation is associated with the risk of the holder's possible insolvency; under Polish law, in the event of insolvency, all securities recorded in its accounts in Poland would be part of its bankruptcy estate and would not be its segregated property. This means that it could be difficult to retrieve those securities from the holder's insolvency estate and transfer to the actual investors².

Consequently, the only "safe" solution currently available to foreign investors, where the custody of Polish securities is concerned, is for them to open their own securities accounts in Poland. This is a solution relatively often applied on the Polish capital market – a foreign investor gives its foreign custodian a power of attorney and that foreign custodian opens a securities account in Poland on behalf of the investor as its attorney-in-fact, not in its own name. Therefore, the foreign investor, not its foreign custodian bank, is the owner of the securities account and the securities held in that account.

² However, this will largely depend on the law applicable to the bankruptcy proceedings concerning the holder of a Polish securities account which could be pending outside Poland and the outcome of which may be recognised by the courts of Poland.

Legal status from 1 January 2012

Omnibus Accounts

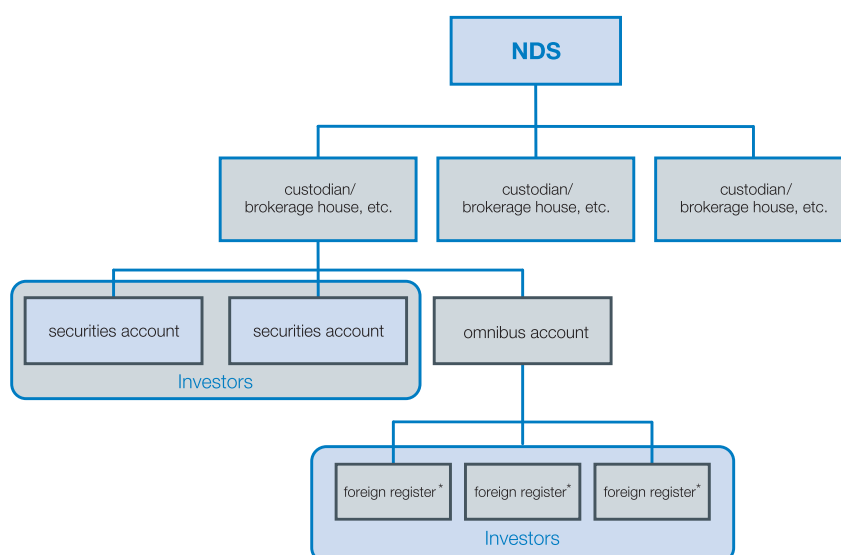
In introducing Omnibus Accounts into Polish law, the Amendment Act represents a fundamental change in the above-mentioned respect because in the case of an Omnibus Account, one person will be the holder of the Omnibus Account and other persons will be the owners of the securities registered in it. What is more, securities belonging to more than one investor may be recorded in a single Omnibus Account.

This means that a foreign investor holding, outside Poland, an account in a foreign custodian will be able to deal in Polish securities without opening its own securities account in Poland. An Omnibus Account opened in Poland for the foreign custodian of such investor will be sufficient. A similar solution is already available in many jurisdictions of the European Union (among others, in Germany and France) and in other jurisdictions (including Switzerland and the US).

Definition of an Omnibus Account

Those entities that are licensed to maintain an "ordinary" securities account (primarily local Polish brokerage houses, custodian banks, banks conducting brokerage activity, branches of foreign investment firms and also the NDS) will be able to maintain Omnibus Accounts. The Amending Act defines Omnibus Accounts as accounts in which securities not belonging to the holder of the Omnibus Account but belonging to (an) other person(s) who is (are) the "owner(s)" of the securities in the Omnibus Account may be recorded. The change resulting from the introduction of Omnibus Accounts to Poland can be presented by way of the following simplified diagram³:

The Amendment Act introduces a material exception with regard to the type of instruments recorded in an Omnibus Account, stipulating that derivative instruments that are not securities⁴ cannot be held via Omnibus Accounts.



* Register kept by the holder of the Omnibus Account outside the Polish deposit and settlement system (outside Poland).

³ Similar rules will be applicable to the system maintained by the National Bank of Poland (the "NBP System") for some securities issued by the State Treasury of the Republic of Poland or by the National Bank of Poland. The NBP System is not discussed in this briefing.

⁴ It means that derivative securities can be held via Omnibus Accounts.

Omnibus Accounts only for foreign entities

Omnibus Accounts may be maintained only for a specific category of foreign entities that have their registered office in an EU member state or in an equivalent jurisdiction in the meaning of the Polish anti-money laundering legislation, i.e. in a country that has anti-money laundering legislation consistent with the relevant EU anti-money laundering laws. It will hence not be possible to maintain Omnibus Accounts for entities with their registered office in Poland or for entities from other countries⁵.

The foreign entities for which Omnibus Accounts may be kept include: foreign institutions fulfilling tasks within the scope of central registration of securities (e.g. ISDs such as Clearstream and Euroclear and CSDs – "local" equivalents of the NDS in EU member states and equivalent jurisdictions), foreign investment firms not operating in Poland, investment firms carrying out brokerage activity in Poland without a local branch in place (i.e. fully on a cross-border basis) and foreign banks. All the above-mentioned entities must be authorised to keep securities accounts in the country in which they have their registered office.

Rights attaching to securities held via an Omnibus Account

The holder of an Omnibus Account is not considered the owner of the securities held via that account. In order to determine who the actual owners are, as a rule, the laws of Poland will not be applicable. In addition, the declaration of bankruptcy in Poland of the holder of an Omnibus Account will not affect the rights of the actual owners of the securities held via that Omnibus Account.

Under Polish law (i.e. in Poland), a person notified to the entity maintaining the Omnibus Account by the holder of the Omnibus Account is considered the owner of the securities held via the Omnibus Account.

A distribution in respect of securities recorded in an Omnibus Account (e.g. dividends and interest payments) is transferred by the entity maintaining the Omnibus Account to the holder of the Omnibus Account, and the actual owners of the securities have no direct claims against the entity maintaining the Omnibus Account for the delivery of such distribution. This means that the rules governing how the distributions should reach the actual owners of the securities should be contained in an agreement between the holder of the Omnibus Account and its clients (who may be the beneficial owners of the securities or intermediaries interposed between the holder of the Omnibus Account and the beneficial owners).

Rights attaching to securities held via Omnibus Accounts are exercised on the basis of appropriate documents issued by the holders of the Omnibus Accounts to the relevant beneficial owners or their representatives (e.g. intermediaries). For example, the clients of a foreign custodian bank will be able to vote at the general shareholders' meeting of a Polish listed company as its shareholders from the shares held via an Omnibus Account on the basis of a document issued to them by their foreign custodian. Foreign custodian banks will be able to prepare such documents in Polish or in English.

- Currently it is not possible to open Omnibus Accounts under Polish law.
- The position will change as of 1 January 2012 when legislative changes will enter into force introducing Omnibus Accounts into the Polish legal system.
- Only securities that do not belong to the holder of an Omnibus Account can be recorded in such account. Such securities will not be taken into account in calculating, e.g. whether the holder of the Omnibus Account has reached a relevant voting power threshold in a public company. Securities in Omnibus Accounts will be segregated from Omnibus Account holders' bankruptcy estates.

⁵ This applies to holders of Omnibus Accounts, not the investors to whom the securities recorded in an Omnibus Account will belong. The Amendment Act does not provide for any special limitations with regard to investors using the intermediary of holders of Omnibus Accounts.

Information requirements of holders of Omnibus Accounts

At the request of the Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*) or the General Inspector of Financial Information (*Generalny Inspektor Informacji Finansowej*), the holder of an Omnibus Account is required to promptly provide data enabling the identification of beneficial holders of securities (and the number and type of securities held by individual beneficial holders) recorded in the Omnibus Account. If the holder of the Omnibus Account does not possess such information, it should provide the relevant information about the intermediaries (its clients) for whom the securities held via the Omnibus Account are kept.

At the same time, an entity maintaining an Omnibus Account may demand the data of authorised holders of securities held via the Omnibus Account to the extent necessary for that entity to correctly fulfil requirements related to tax liabilities

Enforcement against securities held via an Omnibus Account

The Amendment Act also introduces regulations concerning the conduct of enforcement against securities held via an Omnibus Account.

Both in the provisions on enforcement in civil proceedings (enforcement by a court bailiff) and on administrative enforcement, the rule is that enforcement against securities may not be conducted at the Omnibus Account level because the purpose of an Omnibus Account is to register securities belonging to many persons that may be unknown to the entity maintaining the account.

Excluding the possibility of enforcement at the level of an Omnibus Account is a logical consequence of the structure of this type of account. It prevents the seizure of securities held via an Omnibus Account and belonging to persons other than the debtor.

- Entities that can keep "ordinary" securities accounts in Poland will also be authorised to keep Omnibus Accounts. Only foreign entities licensed to keep securities accounts in their home jurisdictions will be allowed to open Omnibus Accounts in Poland, provided that they are based in European Union member states or in countries applying equivalent anti-money laundering standards.
- Holders of Omnibus Accounts will issue certificates to their clients allowing such clients to exercise rights attaching to securities held via Omnibus Accounts. Holders of Omnibus Accounts will have certain reporting obligations vis-à-vis the Polish regulators in relation to the securities held via Omnibus Accounts and the holders of such securities.

Security interests over securities held via Omnibus Accounts

The provisions of the Amendment Act are unfortunately not entirely clear with regard to the establishment of security interests over securities held via Omnibus Accounts. It seems that the legislators' intention was to rule out the possibility of establishing security interests over such securities at the Omnibus Account level.

In our view, the possibility to create a security interest at the level of the records kept by the holders of Omnibus Accounts outside Poland or in records outside Poland kept by intermediaries further down the chain (if applicable) does not give rise to any significant doubts. In such a case, non-Polish law will be applicable to such a security interest. Moreover, we would think it to be unnecessary (albeit potentially possible) to record such security interests at the Omnibus Account level. On the other hand, the Amendment Act also makes certain changes to the Polish implementation of the Collateral Directive. They indicate that financial collateral security interests (e.g. a financial pledge) over securities held via Omnibus Accounts should be recorded at the Omnibus Account level and that Polish law will apply to such financial collateral arrangements. This suggests that it should be safer to take financial collateral security interests not only at the level of the relevant foreign intermediary (which interests would be subject to foreign law) but also at the level of the Omnibus Account held in Poland.

The ambiguities discussed above should not undermine the quality of security interests over securities held via Omnibus Accounts, provided that such security interests are appropriately structured.

Conclusion

We believe that, despite certain failings, the Amendment Act is a positive change to the regulation of the Polish capital market. It fulfils the Polish legislators' intentions according to which the purpose of the Amendment Act is to open the Polish financial instruments market to foreign investors to a greater degree. In light of the decreased costs related to investment and the considerable simplification, investing in Polish financial instruments should become more attractive to them. We note, however, that the framework applicable to Omnibus Accounts will take its final shape once the secondary legislation implementing the Amendment Act enters into force. This should take place within a few months after the Amending Law comes into effect.

- Enforcement from securities held via Omnibus Accounts will not be possible at the level of such Omnibus Accounts.
- There are certain ambiguities regarding the establishment of security interests over securities held via Omnibus Accounts. Such ambiguities would not in our view undermine the possibility to take valid and enforceable security interests over securities held via Omnibus Accounts.

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