CONTENTS

Preface by the Series' Editors  

Introduction  
1. The need for a protected fund  
2. The need for harmonisation  
3. The choice of a directive  
4. The protected fund  
5. Integration of the protected fund within civil law and common law  
6. The culmination of a trust project  

Commentary to the draft Directive on Protected Funds  
- Introduction  
- Commercial purposes  
- Separation of patrimony  
- Creation  
- Publicity  
- Transfer of individual assets  
- The regulated administrator  
- Relations with third parties  
- Duration  
- Termination  
- Juridical nature  
- Equivalent institutions  

Draft Directive on Protected Funds  
- Article 1 – Subject matter and scope  
- Article 2 – Definitions  
- Article 3 – The Protected Fund  
- Article 4 – Establishing a protected fund  
- Article 5 – Constitutive document: further provisions  
- Article 6 – Conferral of powers  
- Article 7 – The administrator  
- Article 8 – Obligations of the administrator  
- Article 9 – Enforcers  
- Article 10 – Obligations to third parties  
- Article 11 – Special court powers
Towards an EU Directive on Protected Funds

- Article 12 – Termination 35
- Article 13 – Shared positions 36
- Article 14 – Joint administrators 37
- Article 15 – Jurisdiction 38
- Article 16 – Mutual Recognition 39
- Article 17 – Review 39
- Article 18 – Implementation 39
- Article 19 – Entry into force 40
- Article 20 – Addressees 40
- Annex – Categories of person who can be appointed as administrator 40

National Report for Belgium 43

I. Introduction 43
   A. Problems posed by Belgian property law 43
   B. Exceptional instances of ring-fenced assets within a patrimony 44
II. Existing law and future developments 45
   A. Ring-fencing of assets in succession law 45
   B. Homestead exemption 46
   C. Undisclosed agency 46
   D. Statutory examples in the financial sector 47
   E. Certification of shares 48
   F. Security trusts 48
   G. Escrow accounts and qualified accounts 49
III. Private international law 50
IV. Implementation of the Protected Fund Directive 52
   A. General comments 52
   B. Article by article 53
      - Article 1 – Subject matter and scope 53
      - Article 2 – Definitions 54
      - Article 3 – The Protected Fund 54
      - Article 4 – Establishing a protected fund 54
      - Article 5 – Constitutive document: further provisions 56
      - Article 6 – Conferral of powers 56
      - Article 7 – The administrator 56
      - Article 8 – Obligations of the administrator 56
      - Article 9 – Enforcers 57
      - Article 10 – Obligations to third parties 57
      - Article 11 – Special court powers 57
      - Article 12 – Termination 58
- Article 13 – Shared positions
- Article 14 – Joint administrators
- Article 15 – Jurisdiction
- Article 16 – Mutual Recognition
- Article 17 – Review
- Article 18 – Implementation
- Article 19 – Entry into force
- Article 20 – Addressees
- Annex – Categories of person who can be appointed as administrator

National Report for The Czech Republic

I. Introduction

II. Existing law and future developments
   A. Trust-like constructs in current Czech law
      1. The mutual fund
      2. Assets entrusted to licensed asset managers or members of the legal profession
      3. General comment on the above
      4. Undisclosed agency (the commission agreement)
   B. The trust in the draft new Civil Code
      1. Basic features
      2. Internal relations
      3. External relations

III. Private international law

IV. Introducing the protected fund into Czech law
   A. General Comments
   B. Article by article
      - Article 1 – Subject matter and scope
      - Article 2 – Definitions
      - Article 3 – The Protected Fund
      - Article 4 – Establishing a protected fund
      - Article 5 – Constitutive document: further provisions
      - Article 6 – Conferral of powers
      - Article 7 – The administrator
      - Article 8 – Obligations of the administrator
      - Article 9 – Enforcers
      - Article 10 – Obligations to third parties
      - Article 11 – Special court powers
      - Article 12 – Termination
      - Article 13 – Shared positions
Towards an EU Directive on Protected Funds

- Article 14 – Joint administrators  75
- Article 15 – Jurisdiction  76
- Article 16 – Mutual Recognition  76
- Article 17 – Review  76
- Article 18 – Implementation  76
- Article 19 – Entry into force  76
- Article 20 – Addressees  76
- Annex – Categories of person who can be appointed as administrator  76

National Report for England and Wales  77

I. Introduction  77

II. Existing law and future developments  79
   A. The obligation at the core of the trust concept  79
   B. Personal rights against trustees and proprietary rights in trust assets  80
   C. The segregation of a trust fund from the private fund of the trustee  80
   D. The identification of assets within a trust fund  81
   E. Settlor, beneficiary, trust property, and perpetuity period  83
   F. The office of trustee  84
   G. The powers and duties of trustees  84
   H. Helpful assistance from the court  86
   I. A trust is not a legal person, the trustees acting in their own right  87
   J. Creditors' problems  88
   K. Crucial significance of commercial and charitable trusts  89

III. Private international law  89
   A. The ambit of the Recognition of Trusts Act 1987  89
   B. Recognition of trusts that would not be valid if English trusts  93
   C. Jurisdiction and recognition and enforcement of judgments  94

IV. Implementation of the Directive on Protected Funds  94
   A. General comments  94
   B. Need for self-contained legislation implementing all the articles  95
   C. Article by article implementation  96
      - Article 1 – Subject matter and scope  96
      - Article 2 – Definitions  96
      - Article 3 – The Protected Fund  96

VIII
National Report for France

I. Introduction 99

II. Existing law and future developments 99
   A. Existing law: the double evolution of French law 99
   B. Future developments: an unfinished evolution 102

III. Private international law 104

IV. Implementation of the Directive on Protected Funds 104
   A. General comments 104
   B. Article by article 105
      - Article 1 – Subject matter and scope 105
      - Article 2 – Definitions 106
      - Article 3 – The Protected Fund 107
      - Article 4 – Establishing a protected fund 108
      - Article 5 – Constitutive document: further provisions 110
      - Article 6 – Conferral of powers 111
      - Article 7 – The administrator 111
      - Article 8 – Obligations of the administrator 112
      - Article 9 – Enforcers 112
      - Article 10 – Obligations to third parties 112
      - Article 11 – Special court powers 112
      - Article 12 – Termination 113

Annex – Categories of person who can be appointed as administrator 98
Towards an EU Directive on Protected Funds

- Article 13 – Shared positions 113
- Article 14 – Joint administrators 113
- Article 15 – Jurisdiction 113
- Article 16 – Mutual Recognition 113
- Article 17 – Review 113
- Article 18 – Implementation 113
- Article 19 – Entry into force 113
- Article 20 – Addressees 113
- Annex – Categories of person who can be appointed as administrator 113

National Report for Germany 115

I. Introduction 115

II. Existing law and future developments 116
   A. The fiduciary relationship (Treuhand) 116
   B. The investment fund (Investmentfonds) 119
   C. The investment public limited company (Investment Aktiengesellschaften) 123
   D. Future developments, perspectives and options 125

III. Private international law 127

IV. Implementation of the Directive on Protected Funds 127
   A. General comments 127
      1. Technical possibility of implementation 127
      2. Advantages of implementing the Protected Fund Directive 128
   B. Article by article 128
      - Article 1 – Subject matter and scope 129
      - Article 2 – Definitions 130
      - Article 3 – The Protected Fund 131
      - Article 4 – Establishing a protected fund 133
      - Article 5 – Constitutive document: further provisions 135
      - Article 6 – Conferral of powers 135
      - Article 7 – The administrator 135
      - Article 8 – Obligations of the administrator 137
      - Article 9 – Enforcers 139
      - Article 10 – Obligations to third parties 140
      - Article 11 – Special court powers 140
      - Article 12 – Termination 142
      - Article 13 – Shared positions 143
      - Article 14 – Joint administrators 143
      - Article 15 – Jurisdiction 143
National Report for Greece

I. Introduction

II. Existing law

A. The Civil Code

1. Instances of "separate patrimony" in the Civil Code
   i. Inheritance contexts
      a. Liquidation of estates by the Court at death on the petition of creditors (Article 1913-1922 of the Civil Code)
      b. Acceptance of inheritance under the benefit of inventory (Article 1902-1912 CC)
      c. Testamentary executor (Article 2017, 2020 CC)
      d. Hereditary fideicomissum (Article 1923-1941 CC)
   ii. Dependent "foundation" for a public benefit
   iii. Other instances of "separate patrimony" of groups of assets
   iv. Conclusion

2. Administration of the assets of another mostly by means of contract
   i. Introduction
   ii. Problems with the transfer of assets for administration (Fiducia cum amico)
      a. Questioning the validity of fiduciary transfers
      b. The discontinuous character of the administrative function
      c. The uncertain position of the beneficiary in insolvency or bankruptcy of the administrator
      d. The limited protection of the beneficiary in the event of an improper transfer to a third party
      e. Conclusion
   iii. Difficulties where the ownership of the assets to be administered stays with the beneficiary
      a. Agency, representation and mandate
Towards an EU Directive on Protected Funds

b. Contract for work 157
c. Contract of deposit 158

3. Transfer of assets to the creditor for security 158
   (Fiducia cum creditore) etc
   i. Transfer of movables as security 158
      a. The pledge 158
      b. The Fiducia cum creditore 159
      c. The new institution of the fictitious pledge 159
   ii. Assignment of claims as security device 160
   iii. The publicity aspect 160
   iv. Distinguishing trusts from transfers and assignments by way of security 161

B. The Commercial Code and other legislation 162
   1. The Commercial "Commission" 163
   2. Bankruptcy 163
      i. Separate property and the "bankruptcy estate": the prior regime 163
      ii. The Bankruptcy Code of 2007 164
      iii. Termination of continuing contractual relationships on bankruptcy 166
   3. "Separate property" in investing and financing contexts: the particular institutions 166
      i. Bonds of mortgage banks 166
      ii. Mutual funds 167
      iii. Portfolio management through Stock Exchange Service Companies 168
      iv. Securitisation of claims 169

III. Private international law 171

IV. Implementing the Directive in Greece 172
   A. Introduction 172
   B. The technical dimension 172
      1. Ad hoc additions or amendments or consolidations with particular articles of the Civil Code or separate legislation? 172
      2. The "protected funds" in insolvency and bankruptcy 173

National Report for Hungary 175
I. Introduction 175
II. Existing law and possible future developments 178
   - Commission contracts (commission agents) 178
   - Foundations 178
- Investment funds 180
- Portfolio management by investment service providers 181
- Cash and securities on client accounts 181
- Pools of mortgages (mortgage backed securitisation) 181
- Securitisation of receivables – draft legislation 182
- Management of state-owned assets 182
- The Concept Paper on the New Civil Code and the Menyhárd proposals 184
- The drafts and the Bill of the new Civil Code 186

III. Private international law 191

IV. Implementation of the Protected Fund Directive 192
- General comments 192
- Comments article by article 192
  - Article 1 – Subject matter and scope 192
  - Article 2 – Definitions 194
  - Article 3 – The Protected Fund 194
  - Article 4 – Establishing a protected fund 196
  - Article 5 – Constitutive document: further provisions 199
  - Article 6 – Conferral of powers 201
  - Article 7 – The administrator 201
  - Article 8 – Obligations of the administrator 202
  - Article 9 – Enforcers 206
  - Article 10 – Obligations to third parties 207
  - Article 11 – Special court powers 208
  - Article 12 – Termination 208
  - Article 13 – Shared positions 208
  - Article 14 – Joint administrators 209
  - Article 15 – Jurisdiction 209
  - Article 16 – Mutual Recognition 209
  - Article 17 – Review 209
  - Article 18 – Implementation 209
  - Article 19 – Entry into force 209
  - Article 20 – Addressees 209
- Annex – Categories of person who can be appointed as administrator 209

National Report for Italy 211
I. Introduction 211
II. Existing law and future developments 212
  A. General comments 212
Towards an EU Directive on Protected Funds

C. Patrimonies destined for the achievement of a specific business purpose (Article 2447-bis of the Civil Code) 217
1. Introduction 217
2. Financial resources originating from the assets of the company 217
3. Financial resources originating from external lenders 218
D. Fiduciary contracts 219
E. Specific legal regimes permitting the creation of a protected fund 220
F. Patrimonial fund for family needs 222
III. Private international law 223
IV. Implementation of the Directive on Protected Funds 228
A. General comments 228
B. Article by article 230
- Article 1 – Subject matter and scope 230
- Article 2 – Definitions 230
- Article 3 – The Protected Fund 230
- Article 4 – Establishing a protected fund 231
- Article 5 – Constitutive document: further provisions 232
- Article 6 – Conferral of powers 232
- Article 7 – The administrator 233
- Article 8 – Obligations of the administrator 234
- Article 9 – Enforcers 235
- Article 10 – Obligations to third parties 236
- Article 11 – Special court powers 236
- Article 12 – Termination 236
- Article 13 – Shared positions 237
- Article 14 – Joint administrators 237
- Article 15 – Jurisdiction 237
- Article 16 – Mutual Recognition 237
- Article 17 – Review 238
- Article 18 – Implementation 238
- Article 19 – Entry into force 238
- Article 20 – Addressees 238
- Annex – Categories of person who can be appointed as administrator 238

XIV
National Report for Luxembourg

I. Introduction 239

II. Existing law and future developments 239
   A. General objectives 239
   B. Reception and definition of trust 240
      1. The grand-ducal regulation of 19 July 1983 240
      2. Law of 27 July 2003 241
   C. Fiducie regime 241
      1. Personal scope and material scope of the legislation 242
         a. Personal scope 242
         b. Material scope 243
      2. Autonomy of the fiduciary estate 243
      3. Contractual relationships and relationships with third parties 244
         a. Extensive role of contractual freedom 244
         b. Evidence and third party effect 244
         c. Overriding powers of the judge 245

III. Private international law 246

IV. Implementation of the Directive on Protected Funds 246
   A. General comments 246
   B. Article by article 247
      - Article 1 – Subject matter and scope 247
      - Article 2 – Definitions 248
      - Article 3 – The Protected Fund 249
      - Article 4 – Establishing a protected fund 250
      - Article 5 – Constitutive document: further provisions 250
      - Article 6 – Conferral of powers 251
      - Article 7 – The administrator 251
      - Article 8 – Obligations of the administrator 252
      - Article 9 – Enforcers 252
      - Article 10 – Obligations to third parties 253
      - Article 11 – Special court powers 253
      - Article 12 – Termination 253
      - Article 13 – Shared positions 254
      - Article 14 – Joint administrators 254
      - Article 15 – Jurisdiction 254
      - Article 16 – Mutual Recognition 254
      - Article 17 – Review 255
      - Article 18 – Implementation 254
      - Article 19 – Entry into force 255
      - Article 20 – Addressees 255
### National Report for Scotland

I. Introduction 257

II. Existing law and future development 258
- Sources of law 258
- Nature of a trust 259
- Creation 260
- Trustees and beneficiaries 261
- A ring-fenced fund 263
- Dealing with third parties 265
- Public scrutiny 268
- Termination 269

III. Private international law 269

IV. Implementation of the Protected Fund Directive 270

### National Report for Spain

I. Introduction 271

A. Tripartite structure 271
B. Ownership over the assets of the fund 272
C. Separation of patrimonies 273

II. Existing law and future developments 274

A. Management of assets for another's benefit 274
   1. Traditional contracts for the management of assets for another's benefit 274
   2. A special instance of fiducia? Transfer ofmonies or negotiable securities as security 278
   3. Fiducia in Spanish regional law 279

B. Separate patrimonies in Spanish law 281
   1. *Donatio sub modo*, gift with the effect of reversion and fideicommissary substitution as a result of a gift 283
   2. The creation of separate patrimonies by legislation 284
      a. Separate patrimonies earmarked for a particular purpose: the patrimony of a disabled person 286
      b. Separate and "ring-fenced" patrimonies 287
   3. Separate patrimonies and the issue of registration 289

C. Conclusions 291

D. Future developments 292

III. Private international law 293

IV. Implementation of the Directive on Protected Funds 294
A. General comments 294
B. Article by article 295
  - General comments 295
  - Article 1 – Subject matter and scope 295
  - Article 2 – Definitions 296
  - Article 3 – The Protected Fund 296
  - Article 4 – Establishing a protected fund 298
  - Article 5 – Constitutive document: further provisions 299
  - Article 6 – Conferral of powers 300
  - Article 7 – The administrator 301
  - Article 8 – Obligations of the administrator 303
  - Article 9 – Enforcers 305
  - Article 10 – Obligations to third parties 306
  - Article 11 – Special court powers 307
  - Article 12 – Termination 308
  - Article 13 – Shared positions 308
  - Article 14 – Joint administrators 309
  - Article 15 – Jurisdiction 309
  - Article 16 – Mutual Recognition 309
  - Article 17 – Review 309
  - Article 18 – Implementation 309
  - Article 19 – Entry into force 309
  - Article 20 – Addressees 309
  - Annex – Categories of person who can be appointed as administrator 309

National Report for Switzerland 311
I. Introduction 311
II. Existing law and future developments 313
  A. General comments 313
  B. Fiduciary transfer of assets for management purposes (fiducia cum amico contracta, Verwaltungstreuhand) 313
  C. Deposit Accounts 315
  D. Investment Funds 315
  E. In-House Funds 316
  F. Foundations 316
  G. Fideicommissary Substitution 316
  H. Internal Trust (Binnentrust, trust interne) 316
III. Private international law 317
  A. Situation before the implementation of the Hague Convention 317
Towards an EU Directive on Protected Funds

B. Current situation

IV. Implementation of the Protected Fund Directive

A. General comments

1. Follow-up implementation of EU Law in Switzerland
2. The need for a protected fund
3. Implementation of the Directive in Swiss Law

B. Article by article

- General Comments
- Article 1 – Subject matter and scope
- Article 2 – Definitions
- Article 3 – The Protected Fund
- Article 4 – Establishing a protected fund
- Article 5 – Constitutive document: further provisions
- Article 6 – Conferral of powers
- Article 7 – The administrator
- Article 8 – Obligations of the administrator
- Article 9 – Enforcers
- Article 10 – Obligations to third parties
- Article 11 – Special court powers
- Article 12 – Termination
- Article 13 – Shared positions
- Article 14 – Joint administrators
- Article 15 – Jurisdiction
- Article 16 – Mutual Recognition
- Article 17 – Review
- Article 18 – Implementation
- Article 19 – Entry into force
- Article 20 – Addressees
- Annex – Categories of person who can be appointed as administrator

National Report for The Netherlands

I. Introduction

II. Existing law and future developments

A. General comments/Trust law and separate patrimony

B. An example of a separate patrimony in Dutch law: the investment fund

C. Trust-like arrangements

1. Introduction
2. The administrator obtains ownership
   a. Fiduciary ownership (fiducia cum amico)
b. Specific applications of the 'fiducia cum amico' 339
c. Reducing the bankruptcy risk in case of a fiduciary transfer: the separation of administration and custody 340
d. Undisclosed agency and contract 340
3. The beneficiary retains ownership 341
   a. Undisclosed agency and mandate (lastgeving) 341
   b. The nominee account (kwaliteitsrekening) 342
   c. Book-Entry Securities Transfer Act (Wet giraal effectenverkeer) 344
d. Statutory administration over assets (bewind) 344
4. Disadvantages 345
III. Private international law 346
IV. Implementation of the Protected Fund Directive 346
   A. General comments 346
      1. The need for a protected fund 346
      2. Introduction to Dutch law 348
   B. Article by article 349
      - General comments 349
      - Article 1 – Subject matter and scope 350
      - Article 2 – Definitions 350
      - Article 3 – The Protected Fund 350
      - Article 4 – Establishing a protected fund 351
      - Article 5 – Constitutive document: further provisions 352
      - Article 6 – Conferral of powers 352
      - Article 7 – The administrator 352
      - Article 8 – Obligations of the administrator 353
      - Article 9 – Enforcers 355
      - Article 10 – Obligations to third parties 355
      - Article 11 – Special court powers 356
      - Article 12 – Termination 357
      - Article 13 – Shared positions 357
      - Article 14 – Joint administrators 357
      - Article 15 – Jurisdiction 357
      - Article 16 – Mutual Recognition 357
      - Article 17 – Review 357
      - Article 18 – Implementation 357
      - Article 19 – Entry into force 357
      - Article 20 – Addressees 357
      - Annex – Categories of person who can be appointed as administrator 358
XIX