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The Harmonisation of Corporate Actions in the European Securities Markets

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I hereby declare that the work submitted is mine and that, where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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ABSTRACT

The European securities market infrastructure has been constantly characterised as fragmented and cumbersome. The era of immobilisation and dematerialisation of securities and the introduction of the intermediated system created a new challenge for the European Union: the harmonisation of corporate actions linked with securities issued and traded within the EU territory. This dissertation outlines the steps that major European institutions made for the creation of a harmonised and efficient securities market. The presentation of the existing regime is “food for thought” and still raises doubts but also future hopes. On the basis of the critical analysis of the existing level of harmonisation and the interaction between harmonised actions, this thesis proposes recommendations towards a structural reform so as to establish efficiency for the real economy and the end investor in the European securities markets.

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ABBREVIATIONS

BSG	Broad Stakeholder Group
CA	Corporate action
CAJWG	Corporate Actions Joint Working Group
CAJWG Standards	Corporate Actions Joint Working Group Standards (also referred in the text as market standards for corporate actions processing)
CASG	Corporate Action Sub-Group
CESAME	Clearing and Settlement Advisory and Monitoring Expert Group
CSD	Central Securities Depository
EBF	European Banking Federation
ECB	European Central Bank
E-MIG	European Market Implementation Group
ESMA	European Securities and Markets Authority
EU	European Union
GM	General Meeting
IOC	Instruction Owner CSD
MIGs	Market Implementation Groups
MSGM	Market Standards on General Meetings
SRD	Shareholders' Rights Directive
T2S	TARGET2-Securities

INTRODUCTION

Over the past decades, the development of the intermediated system had a significant impact on the volume of trading of corporate and government securities. In addition, increased trade across borders has created a variety of legal and operational issues. An important discussion concerns the investors' engagement in corporate actions, as well as how the processing of corporate actions would function homogeneously within Europe.

The direct connection between the issuer of securities and the end investor is interrupted in indirect systems by a chain of intermediaries. This intervention has a practical impact in the exercise of corporate actions. It basically implies that all the necessary information must flow through this chain. In European equity markets there is no common pathway in relation to who is characterised as a shareholder, although non-national shareholders hold some 44% of the shares¹. Moreover, the transmission of information is influenced by cross border difficulties. On the one hand, it is very difficult to identify the beneficiary of a corporate action and pass on information. On the other hand, national policies in the exercise of voting rights and dissimilar deadlines in income distribution create a huge gap in the processing of corporate actions. The first chapter, as starting point of the analysis, presents in depth these difficulties, by taking into account the structure of the intermediated system as the root of the problem.

The European Union in response to this issue set a goal: to create transparency in the EU securities markets and to provide harmonised engagement rules that will ensure that both individual and institutional investors enjoy the rights linked to their shareholder status. Multiple institutions and working groups are involved in this effort. At the institutional European level, the harmonisation of corporate actions is accomplished by the European Commission, while the European Central Bank and Groups of Experts developed market standards. This work will present the legislative

¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement*, COM (2014) 213 final, Brussels, 9.4.2014, p 3.

and collective actions that affect corporate actions across borders targeted at providing a sound understanding of the existing regime, and to consequently comment on its positive and negative effects.

The second chapter evaluates the European Commission's actions which focus on general meetings. The basic instrument published by the Commission is the Shareholders' Rights Directive (Directive 2007/36/EC). This dissertation illustrates the Shareholders' Rights Directive, as the basic tool which revealed the complexity of the harmonisation of corporate actions. Another great step was the Commission's proposal for the amendment of the Shareholders' Rights Directive. The proposal observes that there is difficulty in the exercise of rights flowing from securities to shareholders and inadequate transparency on costs. Furthermore, in February 2015 the Commission, by publishing a Green Paper, set another important goal that affects corporate actions: the building of a Capital Markets Union. In relation to corporate actions, the Green Paper underlines main inefficiencies in the European securities markets connected with the intermediated chain.

In addition, the third chapter demonstrates that market initiatives contribute to the harmonisation of corporate actions. Industry working groups, after multiple consultations, have achieved the creation of market standards that, based on the assumption that they are respected by market participants, favourably affect corporate actions processing in cross border situations. The presentation of the European actions will be completed with reference to the already operational project TARGET2-Securities (T2S). The efficiency of T2S requires harmonisation of corporate actions. This chapter mainly deals with the regulation of corporate actions processing and post trading activities, but there is also reference to general meetings.

This study links the complexity of exercising corporate actions across the EU with the intermediated system. By presenting the current status of harmonisation, it unravels the existing gaps and requests further actions through a series of recommendations.

CHAPTER I: Intermediated chain: the gap between the issuer and the investor

Securities, such as bonds and shares, are issued by governments and corporations in order to raise money from financial markets. The issuance of securities is accompanied by statutory and contractual obligations. A government or a corporation issues bonds and must pay interest to bondholders². Regarding shares, the corporation commits to pay dividends to the investor and grant him certain participatory rights. Such rights include, e.g. the right to attend meetings, to vote and participate in decisions on mergers, takeovers or stock splits. An extended part of the analysis focuses on the harmonisation of general meetings across the EU and, therefore, refers mainly to shares. However, issues observed with income payments are linked to bonds as well as shares. This section begins with an introduction to fundamental concepts and terminology associated with the processing of corporate actions. Subsequently, basic pathologies will be examined.

1. Definition of corporate actions

Corporate actions are linked with actions that the issuer of securities takes and result in an allocation of benefits to shareholders or bondholders or in an alteration to the security's structure³. In more precise terms, corporate actions are "all kinds of actions triggered by the issuer or by the terms of a security which affect the security (equity or debt) and consequently the processing of corporate actions is necessary in the chain of account providers, in order to ensure that the investor participates in corporate actions"⁴. This thesis adopts the definition of the Legal Certainty Group because it analyses issues of legal uncertainty and it targets the integration of European securities clearing and settlement systems. To this end, it proposes a common EU definition for corporate actions. We must distinguish between mandatory corporate actions which take place irrespective of the

² T. Keijser, 'Transactions in Securities', in R. Goode, H. Kronke, and E. McKendrick (ed), *Transnational Commercial Law, Texts, Cases, and Material*, Second Edition, Oxford University Press, September 2015, p. 425.

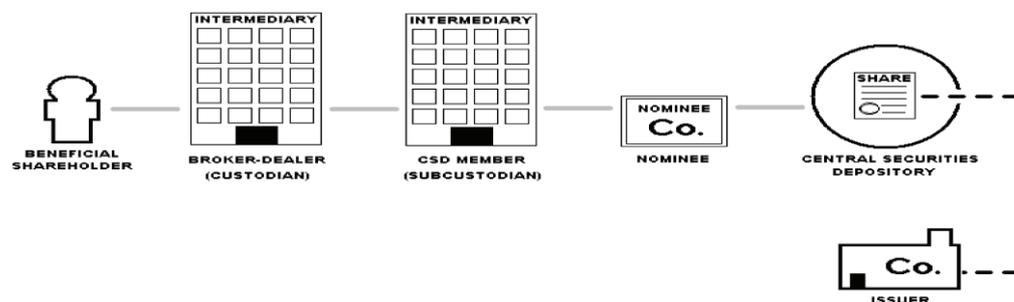
³ M. Simmons and E. Dalglish, *Corporate Actions: A Guide to Securities Event Management*, John Wiley & Sons, England, 2006, p. 3.

⁴ Legal Certainty Group, *Second Advice of the Legal Certainty Group, Solutions to Legal Barriers related to Post-Trading within the EU*, Brussels, August 2008, available at: <http://ec.europa.eu/internal_market/financial-markets/docs/certainty/2ndadvice_final_en.pdf> (date accessed: 13-12-2015) p. 79.

investors' decision (e.g. interests, redemption) and voluntary corporate actions where an instruction by the investor is required (e.g. merger).

2. The system of intermediated securities

Whereas in the past, securities were interchanged manually, today they are mostly transferred by book-entries, which means that the transfer requires a securities account and the interference of a third party, the account provider (often a bank or an investment firm)⁵. The transition from physical securities to ones that are immobilised and dematerialised takes place via a complex and sophisticated system. Securities are held in Central Securities Depositories (hereinafter CSDs) and the transmission of securities is promoted further by the so called intermediaries or custodians, which maintain securities accounts with the CSD. The custodians holding the securities will normally hold them on behalf of end investors in an omnibus account⁶. Each custodian signs a bilateral contract with its immediate client and is also linked with a bilateral contractual relationship with its immediate sub-custodian⁷. Investors, then, constitute the beneficial shareholders, placed at the end of a chain which links securities with the CSD through a number of intermediaries⁸ (picture 1).



Picture 1: A simple intermediated shareholding

(Source: A. Hainsworth, *The Shareholders Rights Directive and the challenge of refinancing beneficial shareholders*, *Law and Financial Markets Review*, 11, 2007, p. 14).

⁵ European Commission, *Legislation on legal certainty of securities holdings and dispositions, Consultation Document of the services of the Directorate-General Internal market and services*, DG Markt G2 MET/OT/acg D (2010) 768690, Brussels, 2010, available at: http://ec.europa.eu/internal_market/consultations/docs/2010/securities/consultation_paper_en.pdf (date accessed: 12-12-2015) p. 4.

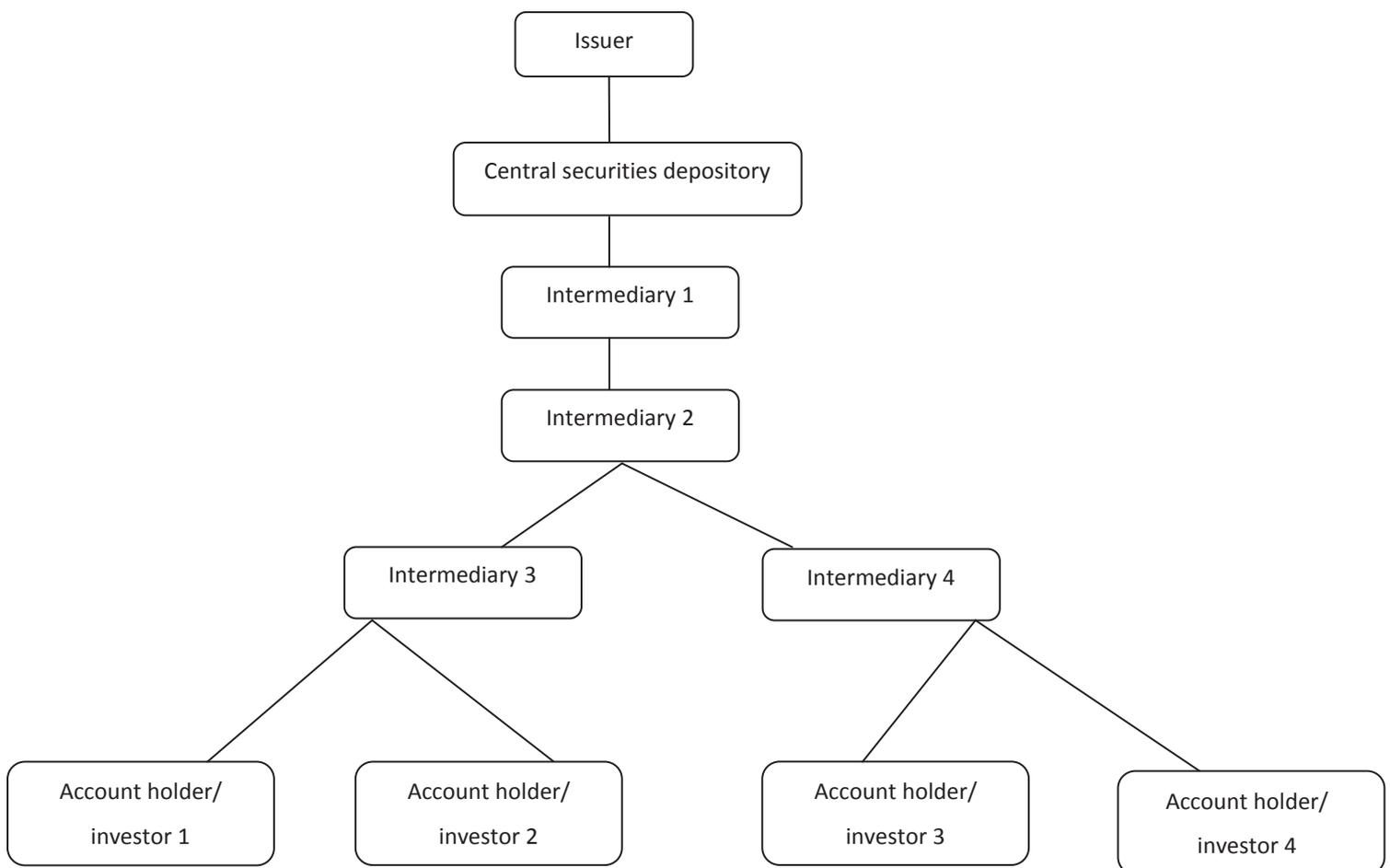
⁶ J. Payne, 'Intermediated Securities and the Right to Vote in the UK', in L. Gullifer, J. Payne (ed), *Intermediated Securities: Legal Problems and Practical Issues*, Hart Publishing, 2010, p. 194.

⁷ E. Micheler, *Custody Chains and Remoteness - Disconnecting Investors from Issuers*, March 2014, available at SSRN : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413025 (date accessed: 12-12-2015) p. 5.

⁸ In some jurisdictions there is, besides the CSD, no other intermediary involved and investors hold their securities directly with the CSD. These systems are called transparent systems.

3. The identification of the investor

Whilst it is indisputable that developments in the immobilisation and dematerialisation of securities have resulted in the facilitation of cross-border investment, this financial infrastructure has an undesirable drawback: a weakening of the interface between issuers and the ultimate holders of their securities⁹. The end investor that faces the economic risk is usually at least two or three, if not more stages removed from the issuer (picture 2).



Picture 2: The intermediated system

(Source: T. Keijser, 'Transactions in Securities', in R. Goode, H. Kronke, and E. McKendrick (ed), *Transnational Commercial Law, Texts, Cases, and Material*, Second Edition, Oxford University Press, September 2015, p. 427).

When securities cross borders this side effect is even more prominent. The consequence of this remoteness is that the issuer has no knowledge of many of its ultimate investors'

⁹ A. Hainsworth, The Shareholders Rights Directive and the challenge of refinancing beneficial shareholders, *Law and Financial Markets Review*, 11, 2007, p. 12.

identities. This is a first pathology observed in the intermediated chain. Additionally, each jurisdiction has formed a different legal framework concerning the property model that governs this holding chain¹⁰. In this regard, the notion and the rights of the shareholder are adapted to the law that governs each bilateral contract in the chain. Whichever property model is applied, the end investor, who faces the economic risk of the investment, should be ultimately entitled to exercise the rights attached to the securities and not the registered shareholder at the top level of the chain. However, reality has proved that in complex intermediated chains it is very difficult to reach the ultimate account holder. Furthermore, it should be underlined that there are investors that do not form part of the intermediated chain and prefer to remain anonymous by operating through nominees¹¹.

4. Transmission of information and liability

The issuer is where the corporate action originates¹². As mentioned before, the identity of the end investor may not be known to the issuer. This situation consequently prevents direct communication, except with investors registered under their own name. Communication therefore needs to take place through the chain of intermediaries.

In the announcement of a corporate action event the end investor must become aware of every action that influences the value of shares. For this reason, the issuer must constantly provide such information to investors from the top of the chain to the bottom (downstream flow). In particular, a research conducted by Oxera observed that “there is no standard way in which the events are announced by issuers, there is not a securities identification system that is universally accepted, and the processing details and terminology are often highly specific to the particular market or financial instrument”¹³. There is also lack of accurate information since there are long deadlines for instructions and market

¹⁰ For example there is the trust model (UK), the security entitlement model (US), the undivided property model (France), the pooled property model (Germany – Japan), the transparent model (Greece), for more information see P. Paech, *Cross-border Issues of securities Law: European efforts to support securities markets with a coherent legal framework*, Policy Department A: Economic and Scientific Policy, European Parliament, Brussels, 2011, pp. 14 – 20.

¹¹ See T. Keijser (n 2) p. 427.

¹² An exemption to this rule exists in takeovers where a third party (potential acquirer) initiates corporate actions.

¹³ Oxera, *Corporate action processing: what are the risks?*, May 2004, available at: <www.dtcc.com/~media/Files/Downloads/WhitePapers/oxera_2004.pdf> (date accessed: 13-12-2015) p. 12.

fluctuations usually appear. Another complication is that the information of the issuer may be misinterpreted by market participants, which leads to biased decisions. For mandatory actions with options and for voluntary actions, the flow of information additionally goes upstream in order to transmit instructions from the investor to the issuer¹⁴. For example, voting instructions given by the investor must reach the issuer timely via the holding chain. In this situation, it has been underlined that the large number of intermediaries in a chain and the presence of several fund managers complicate matters. This results, for example, in inconsistent instructions from the same investor and time lapse of crucial deadlines in the upstream flow of information¹⁵.

Generally, CSDs and intermediaries do not consider themselves liable because their duty is to enable the communication between the issuer and the investor. It must be taken into consideration that liability is formed in the context of each bilateral contract between the participants of the intermediated chain. As a consequence, it has been observed that liability is rejected when matters arise in other levels of the chain. Another example linked with this problem is that retail customers usually sign standard terms offered by the intermediary, but even if they are protected under national law, the erosion of contractual terms across borders also erodes investors' primary rights¹⁶.

5. The obstacles in exercising voting rights

Usually, corporate actions events are subject to prior shareholder approval at a general meeting and the latter itself can also be seen as a corporate action¹⁷. Generally, it is the register at the top level of the chain that indicates the names of the shareholders who are entitled to vote. According to the intermediated system of shareholding the registered owner holds the rights to the shares and instructions on how to vote should be capable of being passed up the chain (upstream flow) to this registered owner who is legally entitled to cast votes¹⁸. Therefore, the registered shareholder may be located at the upper tier level of

¹⁴ Oxera (n 13) p. 12.

¹⁵ N. Rachman, M. Vermaas, 'Corporate Actions in the Intermediated System: Bridging the Gap between Issuer and Investor', in T. Keijser (ed), *Transnational Securities Law*, Oxford University Press, March 2014, pp. 164-165.

¹⁶ E. Micheler, *Intermediated Securities and Legal Certainty*, (February 10, 2014), LSE Legal Studies Working Paper No. 3/2014, available at SSRN: <<http://ssrn.com/abstract=2336889>> (date accessed: 13-12-2015) p. 6.

¹⁷ <<http://www.corporate-actions.net/Events.html>> (date accessed: 03-12-2015).

¹⁸ J. Payne (n 6) p. 197.

the intermediated chain whereas the investor with the economic stake has no direct influence upon the voting procedure (picture 2). For this reason, the investor must be enabled to pass its voting preference through intermediaries.

The voting results at the annual general meeting of Daimler AG that took place in Berlin on April 1, 2015, is sufficient to indicate a core problem. The total number of represented shares was only 36,15 %¹⁹. A key explanation links the participation of shareholders with the complexity of the intermediated chain²⁰. Basically, end investors will exercise their voting rights when the meeting notice arrives promptly. Furthermore, even when the ultimate account holder gives voting instructions, the votes may be delivered after the crucial time of the voting procedure. It has also been observed that the voting procedure terminates when the sufficient percentage of votes is achieved²¹.

In some jurisdictions, end investors are given the right to appoint a proxy holder who is bound to participate in the general meeting and act according to their instructions. However, it is not obligatory for intermediaries to provide such service because it is considered costly. Furthermore, it has been observed that there are negative effects related to proxy communication as votes are lost, miscounted and information is distorted²². Confusion is also observed when the intermediary, as registered shareholder, must vote representing more than one account holder having different opinions about the votes. The allowance to split votes may be problematic.

6. Trading and ownership of securities

In the securities market place, the changing of ownership affects corporate actions. The establishment of the record date structure for shareholders identification is linked with the assumption that relatively few shares would change ownership between the record date and the meeting date²³. Nevertheless, reality is very different nowadays when securities are

¹⁹http://www.daimler.com/Projects/c2c/channel/documents/2620681_Daimler_AM_2015_Voting_Results.pdf (date accessed 16-09-2015).

²⁰ M. Kahan, E. Rock, The Hanging Chads of Corporate Voting, *The Georgetown Law Journal*, Vol. 96, 2008, p. 1250.

²¹ See M. Kahan (n 20) p. 1253.

²² D.C. Donald, *The rise and effect of the Indirect Holding System*, September 2007, p. 34.

²³ Latham & Watkins LLP, *Empty Voting and Other Fault Lines Undermining Shareholder Democracy: The New Hunting Ground for Hedge Funds*, M & A Deal Commentary, April 2007, available at:

traded cross – border in a 24/7 basis. Tactics such as securities lending²⁴ and short selling²⁵ are basic activities carried out by intermediaries resulting in an alteration to the entitled owner of the securities.

The abovementioned situation creates two core problems. Firstly, when the processing of a corporate action has already initiated and transmitted through the chain of intermediaries, the change of the ownership in securities creates confusion as to who is entitled to benefit from a corporate action, e.g. the seller or the buyer. Secondly, it affects negatively the exercise of voting rights. For example, there will be investors who have voting rights but no economic interest and on the other hand there will be investors who have an economic interest but do not have the right to vote²⁶. Additionally, it may create a mismatch in the votes as both sellers and buyers of the shares may have been eligible to send their vote preference through proxies²⁷.

7. The difficulties in income distribution

The payment of income is another type of corporate action. Examples of income payments are cash or securities distributions. The income is often distributed through the intermediated chain and therefore, intermediaries again play a key role in the transmission of income. The issuer pays the income to the CSD, which has no right to it but is obliged to transmit it through the chain. For dividend payments, delays have been observed up to 2–3

<https://www.lw.com/upload/pubContent/_pdf/pub1878_1.Commentary.Empty.Voting.pdf> (date accessed: 13-12-2015) p. 3.

²⁴ See M. C. Faulkner, *An Introduction to Securities Lending*, Spitalfields Advisors Limited, fourth edition, London, 2007, available at: <<http://www.bankofengland.co.uk/markets/Documents/gilts/slcgjun05.pdf>> (date accessed: 13-12-2015).

²⁵ For short selling see M. Simmons and E. Dagleish (n 3) p. 29.

²⁶ As Paul Myners wrote “Borrowing shares for the purpose of acquiring the vote is inappropriate, as it gives a proportion of the vote to the borrower which has no relation to their economic stake in the company”, *Review of the Impediments to voting UK shares, Report to the Shareholder Voting Working Group*, March 2005.

²⁷ Consider the following example: End investor A sends the proxy and the voting instructions to his custodian or voting agent before the cut-off date that the latter has set; however, after the aforementioned cut-off date end investor A chooses to transfer his shares to B; end investor B’s shares are held in custody with a different custodian, who has set his own cut-off date later in time; thus, B is still eligible to send the proxy and the voting instructions to his custodian; the result is that both the custodian or voting agent of shareholder A and the custodian of shareholder B will forward the votes to the tabulator of the issuer, since all aforementioned actions occurred before the official record date set by the corporation. Example taken from: P. Masouros, *Is the EU Taking Shareholder Rights Seriously?: An Essay on the Impotence of Shareholdership in Corporate Europe*, *European Company Law*, Vol. 7, Issue 5, October 2010, p. 198.

months²⁸. Late payments cause losses to investors. Moreover, the identification of the investor and the correct bank account information are vital. However, identification failure is possible. Firstly, post trading activities are intertwined with transaction failures that result from the changing of ownership in securities. Secondly, it may derive from intermediaries' reports regarding the information of the investor, which contains errors. Such failures must be managed because they create an unsafe investment environment.

8. Focus of attention to Europe

The abovementioned analysis shows that the EU market infrastructure is cumbersome and complex. The European regulator must focus on the issues below, in order to achieve legal certainty and harmonisation of corporate actions:

- Create a common definition of shareholder within the EU.
- Harmonise cross border voting, taking into account that the general meeting is the source of corporate actions and establish homogenous key dates.
- Create transparency in the intermediated chain and an efficient flow of information because it is the key element in the processing of corporate actions.
- Standardise income payments, post trading activities and manage transaction failures.

²⁸ Oxera (n 13) p. 30.

CHAPTER II: Commission's actions for the harmonisation of EU securities markets

During the lifecycle of securities, a company seeks approval for decisions from the shareholders. The European Commission focuses on the improvement of European shareholders' rights²⁹. The first step was taken in June 2007 with the adoption of the Shareholders' Rights Directive (hereinafter SRD)³⁰. The SRD improved shareholders' engagement in general meetings, whilst in other topics it remained silent. The second step took place in April 2014, when the Commission proposed a revision of the SRD. Finally, in February 2015, the Commission published a Green Paper that addressed both the SRD and its proposed revision and set out further development plans.

1. An overview of the Shareholders' Rights Directive

The SRD is the basic legal instrument that introduced minimum standards to ensure that shareholders of companies, whose shares are traded on a regulated market, receive the relevant information timely and are enabled to vote at a distance³¹. Whilst it is not interpreted as "a kick-start of the EU Member States into the digital age", it attempts to reduce procedural costs through the use of the internet.³² The rules established by the SRD affect compulsorily four steps of the shareholder meeting which are shareholder identification and authentication, information in the downstream flow, communication in the upstream flow and voting³³.

²⁹ <http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm> (date accessed: 02-10-2015).

³⁰ Directive 2007/36/EC. It was transposed in the Greek legislation with article 6 of law 3884/2010 and was integrated as article 28A of law 2190/1920 for SA.

³¹ Press Release, *Corporate Governance: Directive on Shareholders' Rights Formally Adopted*, 12 June 2007, available at <http://europa.eu/rapid/press-release_IP-07-800_en.html> (date accessed: 02-10-2015).

³² D. Zetsche, Shareholder Passivity, Cross-Border Voting and the Shareholder Rights Directive, *Journal of Corporate Law Studies*, Vol. 8, No. 2, 2008, CBC-RPS No. 0031, available at <<http://ssrn.com/abstract=1120915>> (date accessed: 02-10-2015), p. 1.

³³ The division derives from D. Zetsche (n 32) pp. 34 – 49.

1.1 Shareholders' identification and authentication

Generally, there was a legal uncertainty in Europe over how to determine entitlement and how this must be realised³⁴. In some jurisdictions, shareholders were asked to deposit their shares before the general meeting in order to prove their entitlement³⁵. The SRD abolishes share blocking, which banned the trading of shares for a certain period until the general meeting and establishes the record date system as the mandatory mechanism for shareholders' identification and authentication³⁶. The record date is a specific time prior to the general meeting which determines who is allowed to exercise voting rights. The SRD does not define this date but it sets that the limit cannot be any earlier than 30 days before the meeting³⁷.

Furthermore, it has also been observed that the vast majority of shareholders are non nationals of the issuing company and exercise their rights via complex chains of securities intermediaries³⁸. Indeed, in cases that one intermediary refuses to promote voting rights all other bilateral agreements are rendered worthless and the voting chain dysfunctional³⁹. However, the SRD did not establish rules that directly refer to the intermediated chain although it recognises its significance⁴⁰.

Indirectly though, article 13 of the SRD is applicable when the intermediary cast votes on behalf of end investors. Nevertheless, the relationship between the end investor and the intermediary is still determined by national provisions of Member States. In the context of article 13 SRD the term "client" designates the end investor⁴¹. It therefore recognises that firstly, intermediaries must be allowed to exercise voting rights on behalf of their clients,

³⁴ Expert Group on Cross-Border Voting in Europe, *Final Report: Cross-Border Voting in Europe*, WODC no. 2002/ 6, The Hague, 2002, available at: <https://www.wodc.nl/images/on2002-6-summary_tcm44-57611.pdf> (date accessed: 13-12-2015) p. 1.

³⁵ For example, see article 28 of Greek Law 2190/1920 for SA. Share blocking is still applicable for shares which are not traded in stock exchange.

³⁶ Article 7(2) SRD.

³⁷ Art 7(3) SRD.

³⁸ See Expert Group on Cross-Border Voting in Europe (n 34) p. 1.

³⁹ See D. Zetzsche (n 32) p. 56.

⁴⁰ Recital 11 of the SRD reads "In order to enable the investor to exercise his voting rights in cross-border situations, it is therefore important that intermediaries facilitate the exercise of voting rights". The SRD proposes the matter to be harmonised via a non binding act of a Recommendation, under article 288 of the TFEU.

⁴¹ See analysis of the article 13 in Conac P. H., 'Rights of the Investor', in P. H. Conac, U. Segna and L. Thévenoz (ed), *Intermediated Securities: The impact of the Geneva Securities Convention and the Future European Legislation*, Cambridge University Press, Cambridge 2013, pp. 113-122.

provided that they have received instructions. Secondly, intermediaries are able to vote via omnibus accounts not requiring temporal registration of shares into individual accounts. Furthermore, in this case, intermediaries are allowed to split votes and to appoint a proxy or any third party designated by the client. Nevertheless, the application of article 13 seems insufficient because it does not oblige all custodians' and CSD's collaboration along a cross border chain.

1.2 Downstream flow of information

The downstream flow of information refers to actions that the company must take for dissemination of information, notably before the general meeting. The first attempt to harmonise the transmission of such information for listed companies was in the Transparency Directive⁴². The SRD extends these requirements⁴³. Initially, it sets a minimum notice period of 21 days before the day of the general meeting. Secondly, it proposes the transmission of information through two methods known as "pull" or "push" methods⁴⁴. The pull method refers to the obligation of the company to provide all the relevant information in the company's website, where the shareholder has access and is able to get information about the convocation and other useful material. In case the company cannot inform through a website, the push method implies that it must send the information in paper form by post or by electronic means and without cost for this service, after an identification process.

1.3 Communication in the upstream flow

One of the key provisions of the SRD is the possibility that shareholders put items on the agenda and table draft resolutions for items on the agenda, with a minimum ownership requirement that does not exceed five per cent of the company's share capital⁴⁵. They are also given the right to communicate with the management team and ask questions related

⁴² Directive 2004/109/EC, see recital 22 and article 21.

⁴³ Article 5 SRD.

⁴⁴ See D. Zetzsche (n 32) pp. 39 – 42.

⁴⁵ Article 6 SRD.

to the items on the agenda⁴⁶. For this reason, the agenda must be available to shareholders within sufficient time, so that they are able to become active players and interact with the management team. It is also important to underline that whenever the SRD refers to writing, it mandates that “writing” be understood as submission by post or electronic means⁴⁷.

1.4 Voting

The SRD promotes the electronic participation of shareholders in the general meeting by establishing three key features: electronic proxy voting, electronic direct voting and virtual shareholder meetings. It basically implies that the physical presence is no longer necessary. Furthermore, the SRD eliminates restrictions on eligibility to act as proxy holder and excessive prerequisites for the process of proxy appointment⁴⁸. The proxy may be any legal entity and the only requirement for its appointment is its legal capacity and its obligation to address any potential conflict of interests. Moreover, the proxy can be appointed by electronic means and it is enhanced with the same rights as shareholders during the general meeting. Finally, the SRD implies that every company offers to its shareholders at least one effective method of notification by electronic means. The effect of articles 10 and 11 of the SRD was commented as significant: “with its coming-into-force, all European public companies must offer some type of electronic proxy voting system to their shareholders, and using the system, the shareholder is free to choose whether he wishes to grant a proxy to a corporate representative or any person that he so designates”⁴⁹.

2. Proposed revision of the Shareholders’ Rights Directive

The SRD designated that the transposition period for each member state would not exceed 3rd August 2009⁵⁰. Until today, its implementation does not seem to have covered the cross-border gaps that the intermediate system creates. Particular deficiencies in the

⁴⁶ Article 9 (1) SRD.

⁴⁷ Article 6(1) SRD.

⁴⁸ L. Renebogg, P. Szilaguyi, ‘Shareholder engagement at European general meetings’, in M. Belcredi, G. Ferrarini (ed), *Boards and Shareholders in European Listed Companies, Facts, Context and Post-crisis Reforms*, Cambridge University Press, 2013, p. 326.

⁴⁹ See D. Zetzsche (n 32) p. 45.

⁵⁰ Article 15 SRD.

drafting of the SRD showed that there was a need for a revision that would address in greater depth issues that the original text left unregulated. This section addresses the main disadvantages of the SRD and summarizes the amendments proposed by the Commission in April 2014.

2.1 The incomplete solutions of Shareholders' Rights Directive

It has been argued that the SRD contains a technical definition of shareholder that is not uniform with the notion of the ultimate account holder⁵¹. In particular, article 2 of the SRD states that shareholder means the natural or legal person that is recognised as a shareholder under the applicable law. An investor's right to participate in general meetings still remains local property law and the registered shareholder at the upper tier of the intermediated chain has no obligation to facilitate cross border voting. Hence, the SRD, by not harmonising who is entitled to become a shareholder, fails to give to end investors direct rights against their securities intermediaries.

It has also been observed that the silence of the SRD with regard to intermediaries' participation is particularly unfavourable⁵². Even when the end investor is equipped with voting rights under the national law of one Member State, the proposed rules do not imply that all intermediaries, in cross border chains, will comply and promote voting instructions received from the end investor or that they will all facilitate proxy voting⁵³. It must be taken into account that such unwillingness may be facilitated where the applicable national law does not impose such obligation on intermediaries. Recital 11 of the SRD states that intermediaries will be regulated in the form of a recommendation. Nevertheless, the choice of a recommendation as a legal act is insufficient because it cannot have a binding effect on the intermediary – investor relationship and it is underlined that this recommendation has not been drafted up until today.

Although the right to put items on the agenda seems to be a triumph, it has been underlined that the provision on shareholder proposals is an “empty letter”, because the

⁵¹ A. Hainsworth (n 9) p. 17.

⁵² See D. Zetzsche (n 32) p. 50.

⁵³ European Corporate Governance Forum, *Annual Report 2006*, Brussels, January 2007, available at: <http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-annual-report-2006_en.pdf> (date accessed: 13-12-2015) p. 3.

five per cent ownership threshold is highly restrictive, as it is very difficult for shareholders to access share registries, to congregate and to form alliances⁵⁴. Furthermore, it was negatively commented that the SRD refers to equal treatment of shareholders⁵⁵. The notion of equality appears vague in the context of the SRD. In a similar vein, the equal treatment seems contradictory to the downstream flow of information because the company may choose to send information to a specific category of shareholders, (push method) while other shareholders will be informed through the company's website (pull method)⁵⁶.

2.2 Proposed amendments to the Shareholders' Rights Directive

The issues that the SRD left uncovered revealed the complexity to manage the intermediated shareholding system across borders and gave birth to a proposal amending the SRD⁵⁷ (hereinafter proposed revision of SRD) which recognised that shareholders' rights were hindered because of the market's infrastructure⁵⁸. The orientation of the amendments focuses particularly on: the identification of the shareholders, the transmission of information and the facilitation of the exercise of shareholders' rights⁵⁹.

The proposed revision of SRD took an innovative step. New rules allow a listed company to identify its shareholders for the facilitation of voting rights and more specifically, oblige all intermediaries in the chain to disclose the contact details of shareholders without undue delay⁶⁰. The project will be assisted by the Legal Entity Identifier, an international centralised database that will ensure consistent and comparable data about the identity of legal persons who act as shareholders⁶¹. The obligation to provide contact details is extended to any third

⁵⁴ See P. Masouros, Is the EU Taking Shareholder Rights Seriously?: An Essay on the Impotence of Shareholdership in Corporate Europe, *European Company Law*, vol. 7, issue 5, October 2010, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686725> (date accessed: 06-12-2015) p. 201.

⁵⁵ See Article 4 of the Shareholders Rights Directive and A. Hainsworth (n 9) pp. 16-17.

⁵⁶ P. Masouros (n 54) p. 197.

⁵⁷ European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement*, COM (2014) 213 final, Brussels, 9.4.2014, available at: <http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm> (date accessed: 14-11-2015).

⁵⁸ See Recital (5) and (6) of the proposed revision of the SRD. See also Commission, *Impact Assessment* accompanying the document in (n 57) SWD(2014) 127 final Brussels 9.4.2014, p. 35.

⁵⁹ The division stems from the text of the proposed revision of the SRD.

⁶⁰ Article 3a of the proposed revision SRD.

⁶¹ See European Commission (n 57) p. 9.

country intermediary that offers services in the EU territory through a branch⁶². The contact details will be used for direct communication between the company and the shareholder and they will be maintained for 24 months. When the company does not choose a direct communication with the shareholder, article 3b applies: it mandates all participants of the intermediated chain to transmit information both in the downstream and the upstream flow timely. Particularly for voting rights, intermediaries are required to transmit the voting information from the shareholder to the company and confirm the vote to the shareholder⁶³. The facilitation of voting rights through the downstream and the upstream flow of information will be enhanced by the Commission's implementing acts that will specify for example the content of the voting confirmation and deadlines for this action. Finally, a significant amendment implies that intermediaries are obliged to publicly disclose the pricing of all their provided services⁶⁴.

The current amendments, however, did not escape from criticism. The basic drawback is that the new legal text emphasizes that the identification of shareholder is subject to national law of Member States⁶⁵. Another deficiency constitutes the lack to establish penalties and to provide inspection measures⁶⁶. Although the ECB welcomed the provisions related to the request of identification, other market participants disagreed with its functionality⁶⁷. More specifically, it was opined that the efficient exercise of shareholders' rights has no relation with the ability of companies to have their shareholders identified but it is based on the efficiency of the intermediated chain to proceed timely and securely in the exchange of the relevant information⁶⁸. It was also emphasized that, as shares are traded

⁶² Article 3e of the proposed revision of the SRD.

⁶³ Article 3c of the proposed revision of the SRD.

⁶⁴ Article 3d of the proposed revision of the SRD.

⁶⁵ The original text of the proposed revision of the SRD, article 3a (1) reads "*Member States shall ensure that companies have the right to identify their shareholders, taking account of existing national systems*" available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0257+0+DOC+XML+V0//EN#BKMD-6>> (date accessed: 12-11-2015).

⁶⁶ Böckli et al., *Shareholder Engagement and Identification*, 23 February 2015, Available at SSRN: <<http://ssrn.com/abstract=2568741>> (date accessed: 12-11-2015) p. 7.

⁶⁷ European Central Bank, *Building a Capital Markets Union – Eurosystem contribution to the European Commission's Green Paper*, Frankfurt, 2015, available at: <https://www.ecb.europa.eu/pub/pdf/other/150521_eurosystem_contribution_to_green_paper_-_building_a_cmuen.pdf?d45301c62386a193f81154659fe87345> (date accessed: 12-11-2015) pp. 13-14.

⁶⁸ European Banking Federation, *EBF Position Paper on the Commission's Proposal for a Directive amending the Shareholders' Rights Directive (Directive 2007/36/EC) of 9 April 2014 - COM(2014) 213 final*, Brussels, October 2014, available at: <http://www.ebf-fbe.eu/wp-content/uploads/2014/09/EBF_010608-Revision-of-the-Shareholders-Rights-Directive-fnal-draft-EBF-position-paper-on-Chapter-IA-clean.pdf> (date accessed: 12-11-2015) p. 2.

continuously, the shareholder status would never be accurate when the issuer receives the information. The proposal for a full identification would generate considerable costs, because it must proceed via the entire holding chain and involves numerous transactions⁶⁹.

3. Green paper “Building a Capital Markets Union”

The realisation of a common economic and financial market that exceeds national structures was recently addressed in a Green Paper published by the Commission in February 2015. The European Commission accepted once again the challenge to unlock investment in European companies and market infrastructure in order to create a Capital Markets Union. It is important to mention the Green Paper because it refers to general observations that will improve market effectiveness, intermediaries’ infrastructure and the broader legal framework.

The Commission observes that the recently expressed goal of a Capital Markets Union is hindered by differences in relation to the legal ownership in securities. In this regard, it welcomes a convergence of views that call for a targeted change as to the property model of securities holding. Furthermore, it comments on corporate actions and notices that the technological development with the target to decrease costs and enable voting procedures, still remains on a theoretical level. Shareholders are still deprived of electronic voting and many EU companies do not use on-line registration systems⁷⁰. For this reason, the European Commission through this Green Paper urges that the use of modern technologies in these areas could help reduce costs and burdens, but also ensure more efficient communication, particularly in a cross-border context.

In response to this Green Paper, the European Central Bank (ECB) underlined that a key point for the building of a Capital Markets Union is to enhance the exchange of information between investors, shareholders and CSDs across the investment chain and industry plays a major role in this objective⁷¹. Likewise, the European Securities and Market Authority (ESMA) expressed its view on the Green Paper and underlined the need for further

⁶⁹ Böckli, et al. (n 66) p. 7.

⁷⁰ European Commission, *Green Paper Building a Capital Markets Union*, COM (2015) 63 final, Brussels, February 2015, <http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper_en.pdf> (date accessed: 12-11-2015) p. 26.

⁷¹ European Central Bank (n 67) p. 20.

improvements, despite the existence of the SRD and its proposed revision. It therefore proposed the standardisation of record dates, ex dates and other deadlines in the voting process⁷². In addition, it stated that intermediaries' cooperation in voting processes and confirmation of vote delivery would also maximize the benefits arising from increased automation of general meetings.

4. Conclusions

Taking everything into account, the SRD did not respond effectively to the challenges. It was though, "food for thought" for the next steps. The EU legislator turned its attention to the financial infrastructure of the 21st century. For this reason, the proposed revision of the SRD involved positive elements that would create transparency in the custody chain. The proposal for the amendment of the SRD has already been approved by the European Parliament on the 8th July 2015 and the matter has been referred back to the committee responsible for reconsideration⁷³. Albeit this great step, it did not embrace any provision for the ultimate account holders and the question as to who owns securities within EU markets still remains unanswered.

⁷² European Securities and Market Authority, *ESMA response to the Commission Green Paper on Building a Capital Markets Union*, 2015/ESMA/856, Paris, May 2015, available at: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-876_press_release_-_esma_response_to_the_cmu_green_paper.pdf> (date accessed: 12-11-2015) p. 20.

⁷³ See European Parliament, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0257+0+DOC+XML+V0//EN#BKMD-6>> (date accessed: 24-01-2015).

CHAPTER III: Market Standards and the European Central Bank's actions for the harmonisation of corporate actions

The harmonisation of corporate actions processing is influenced by the activity of major players in the securities industry and the advent of the ECB's project, TARGET2-Securities (T2S). A key point for the analysis that follows is the functional distinction between i) the processing of a corporate action on stocks, which refers to usual corporate actions events that result in distributions or reorganisations and ii) the processing of a corporate action on flows, which deals with the management of a pending transaction⁷⁴. Both the industry and the ECB target to create market standards in order to consolidate the processing of corporate actions and the general meetings across EU.

1. Dismantling Giovannini Barrier 3 with the creation of market standards

It was first observed by the Giovannini Group, in 2001, that the fragmentation in the EU clearing and settlement infrastructure was hindered because of the differences in national rules relating to corporate actions, beneficial ownership and custody (Barrier 3)⁷⁵. The task of tackling the operational differences in corporate action processing was assigned to the Clearing and Settlement Advisory and Monitoring Expert Group (the CESAME2 group) which initiated actions in 2004 and invited the private sector to create market standards⁷⁶. Since the dissolution of CESAME in 2008, market participants promoted an entirely self-guided harmonisation progress. The Broad Stakeholder Group (BSG), an industry working group, chaired by the European Banking Federation (EBF) and composed of issuers and other market participants, has undertaken this role and has formed two Joint Working Groups to elaborate the respective standards. Thus, the groups established key principles which are

⁷⁴ T2S Advisory Group, *T2S Corporate actions standards – Market claims*, 16 May 2013, 09.04.01/2013/004654, available at: <<https://www.ecb.europa.eu/paym/t2s/progress/pdf/subcorpact/20130516-t2s-market-claim-standards-ag-approved-march.pdf?c9ff3488f7660466f76ce5001da27606>> (date accessed: 12-12-2015) p. 2.

⁷⁵ For detail analysis of Giovannini Barrier 3 see: The Giovannini Group, *Cross-Border Clearing and Settlement Arrangements in the European Union*, Brussels, November 2001, available at: <[http://www.ebf-fbe.eu/uploads/First%20Giovannini%20Report%20on%20Clearing%20&%20Settlement%20in%20the%20EU%20\(2001\).pdf](http://www.ebf-fbe.eu/uploads/First%20Giovannini%20Report%20on%20Clearing%20&%20Settlement%20in%20the%20EU%20(2001).pdf)> (date accessed: 10-11-2015) p. 47.

⁷⁶ For CESAME2 Group see <http://ec.europa.eu/finance/financial-markets/clearing/cesame/index_en.htm> (date accessed 10-11-2015).

significantly important as they constitute the basis for the other driver of corporate actions standards, the TARGET2-Securities corporate action standards.

1.1 European industry standards: a self regulatory instrument

Market standards derive from the identification and endorsement of practices recognised by the whole securities industry as “state-of-the-art” principles⁷⁷. In the cross border context, the processing of a corporate action requires the adoption of a common European language that will define concepts, terms, and key dates⁷⁸. The first set of market standards is based on the analysis of the Joint Working Group on General Meetings and has the objective to harmonise general meetings⁷⁹. They are applicable to all types of shares with the condition that issuers have a registered office or an issuer CSD in Europe⁸⁰. The second set is created by the Corporate Actions Joint Working Group and focus on the harmonisation of corporate actions processing⁸¹. For these standards the title Corporate Actions Joint Working Group standards is also very common (hereinafter CAJWG standards). Their scope of application is extended to all types of corporate actions provided that the issuer CSD is situated in Europe⁸².

1.1.1 Market Standards on General Meetings (MSGM Standards)

Initially, it was questionable whether or not general meetings are included in the notion of corporate actions as described in Giovannini Barrier 3. However, they must be taken into

⁷⁷ *Market Standards for Corporate Actions Processing & for General Meetings, Guiding Principles*, available at: <<http://www.ebf-fbe.eu/uploads/Guiding%20Principles%20for%20Market%20Standards%20for%20Corporate%20Actions%20Processing%20General%20Meetings.pdf>> (date accessed: 12-11-2015).

⁷⁸ P. Colladan, in *TARGETing corporate actions: A panel of experts assesses the potential effects of TARGET2-Securities on corporate actions in Europe, and what Asia is doing to catch up*, *Asset Servicing Times*, 29 SEP - 02 OCT, SIBOS 2014, available at: <http://www.assetservicingtimes.com/specialistfeatures/specialistfeature.php?specialist_id=80#.VmXYVLiLRdh> (date accessed 13-11-2015) p. 20.

⁷⁹ MSGM, available at: <<http://www.ebf-fbe.eu/uploads/Market%20Standards%20for%20General%20Meetings.pdf>> (date accessed: 03-12-2015).

⁸⁰ See MSGM, p. 9.

⁸¹ CAJWG standards, available at: <<http://www.ebf-fbe.eu/european-industry-standards/>> (date accessed 11-11-2015).

⁸² See CAJWG standards, p. 4.

account because they constitute the source of almost any subsequent corporate action⁸³. The MSGM are built upon a basic structure. They standardise the information flow, the content of information and the sequence of events. Three general principles dominate: Firstly, the information regarding the general meeting must reach the end investor through the intermediated chain. Secondly, if the end investor does not wish to receive such information, he can opt out for any category of meetings and the last intermediary is released from his duty⁸⁴. Thirdly, for all processes the abolishment of paper use is mandatory. The standards declare their compatibility with the SRD mentioned in chapter II and are structured in 3 processes: the meeting notice, the record date and entitlement, and the notification of participation.

The meeting notice must be announced from the issuer to the end investor and circulate through the chain of intermediaries⁸⁵. The reasoning behind this standard is that every market participant, involved in trading and settlement services, must be connected with CSDs in order to transmit the meeting notice so as to ultimately reach the end investor⁸⁶. Intermediaries must provide a basic service which will be characterized by a reasonable cost. The meeting notice passes down the chain via ISO messages or other electronic means and its minimum content is also defined in the standards⁸⁷. It must be noted though, that the MSGM do not oblige the last Intermediaries in the chain to establish electronic communication systems with end investors because they are built on the assumption that such systems exist or will exist in the near future⁸⁸. The recommended sequence of days is represented below:

⁸³ CESAME REPORT, *Solving the industry Giovannini Barriers to post-trading within the EU*, Brussels, November 2008, available at: <http://ec.europa.eu/internal_market/financial-markets/docs/cesame/cesame_report_en.pdf> (date accessed: 13-12-2015) p. 34.

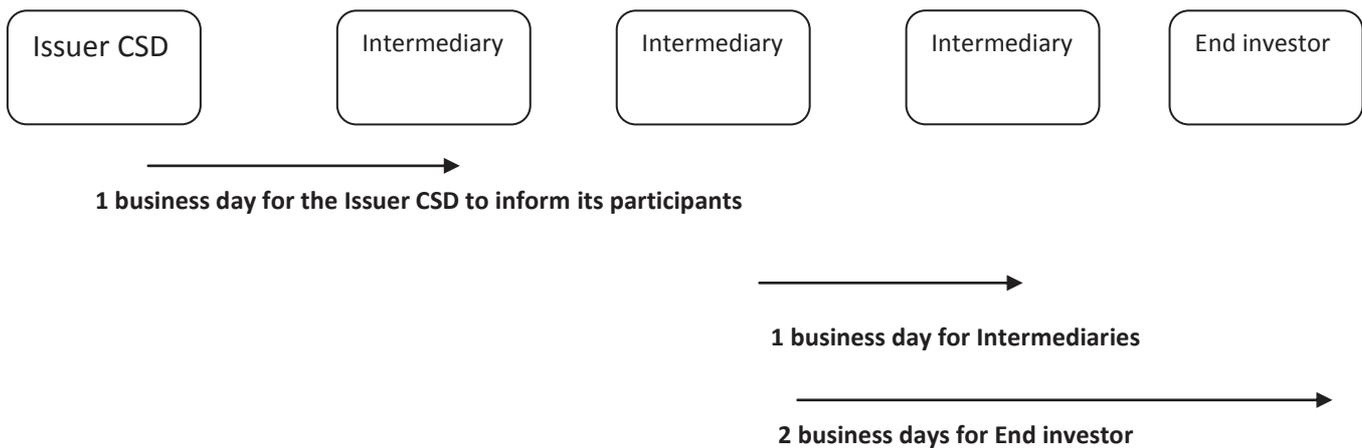
⁸⁴ See MSGM, pp. 9-10.

⁸⁵ In case the end investor is registered in the issuer's register in its own name, then it receives the convocation directly from the issuer and these standards do not apply (Standard 1.9 of the MSGM).

⁸⁶ *E-MIG Workshop on the implementation of the Market Standards for General Meetings*, Brussels 9-10 November 2011, available at: <<http://www.ebf-fbe.eu/uploads/E-MIG-Summary-Report-Workshop-Nov-2011.pdf>> (date accessed: 13-12-2015) p. 5.

⁸⁷ See MSGM, standards 1.10 and 1.11.

⁸⁸ For example, systems like e-banking are considered electronic means because in this system end investors are able to review balances of cash and securities, see *Market Standards on General Meetings, Frequently asked questions*, 12 March 2010, available at: <<http://www.ebf-fbe.eu/uploads/Market%20Standards%20for%20General%20Meetings%20-%20FAQs.pdf>> (date accessed: 13-12-2015) p. 1.



Picture 3: Deadlines for the meeting notice according to MSGM, standards 1.4, 1.6, and 1.7.

Entitlement is determined on the record date and share blocking is not allowed. Nevertheless, the record date is not defined by MSGM. In all cases, the meeting notice must definitely mention the record date so as to activate promptly the facilitation of the voting process⁸⁹. It is important to underline that national law will indicate the periods between the issuance of meeting notices and the record date, as well as the dates between the record date and the general meeting. The MSGM only set out the sequence, which is: issuance of meeting notice, record date, last intermediary deadline, issuer deadline and general meeting⁹⁰. Furthermore, the entitlement does not require validation on every level of the chain⁹¹.

During the process of notification of participation, the end investor informs of his involvement or not in the general meeting through a standardised system⁹². If it is requested by national law or the issuer, the notification of participation may contain contact details of the shareholder and the end investor⁹³. Although it is not obligatory to participate via notification of participation, when the end investor opts for it, the intermediaries must pass it on mandatorily within the following recommended deadlines:

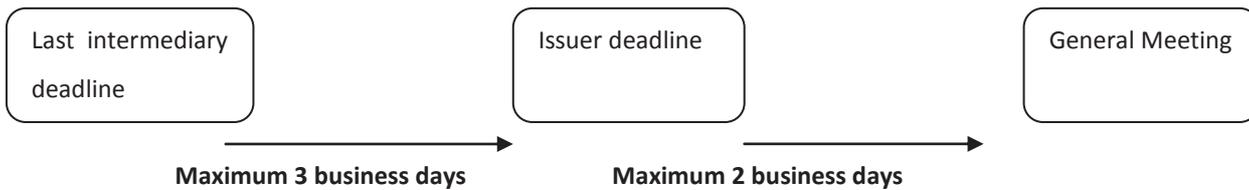
⁸⁹ See E-MIG Workshop (n 86) p. 3.

⁹⁰ See MSGM, standard 2.3.

⁹¹ See MSGM, standard 3.5.

⁹² See MSGM, standard 3.1.

⁹³ See MSGM, Standard 3.10 (number 6) reads “*The Notification of Participation should comprise at least the following: If required by the applicable law or if requested by the Issuer, identity and contact details of the Shareholder, if any, and End Investor*”.



Picture 4: Example of MSGM, standards 3.2 and 3.3.

The first observation about the MSGM is that they generally establish efficiency in the intermediated chain. More importantly, it is the first set of harmonised standards that declare enforceable the rights of the end investor and promote them through the chain. Moreover, the MSGM use a simultaneous combination of the push and pull method for the meeting notice. They imply that the end investor will be notified by the intermediary (push method) in the meeting notice, in the context of which there will be a reference to the company's website for detailed information (pull method). The use of agreed deadlines in the process creates market safety and legal certainty.

1.1.2 Corporate Actions Joint Working Group standards (CAJWG standards)

Corporate actions processing is deemed one of the most complex areas of post trading⁹⁴. Post trading activities involve clearing and settlement of securities⁹⁵. The latter plays a significant role in determining who should be addressed in a corporate action⁹⁶. In a similar vein as the MSGM, the CAJWG standards place the investor in the centre of their reforms and are organized in two basic categories: corporate actions on stock and on flow.

- a) Corporate actions on stock regulate the processing of corporate actions that circulate normally through the intermediated chain and usually result in payment situations (e.g. distribution of cash or securities) or reorganisations⁹⁷.

⁹⁴ See CAJWG standards, p. 3.

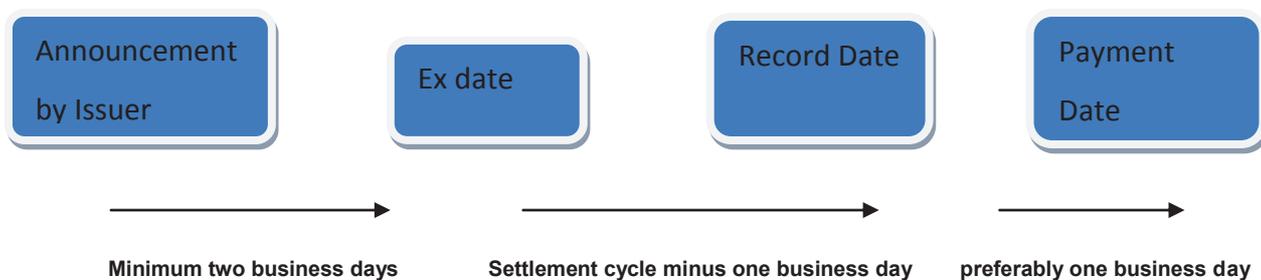
⁹⁵ A securities transaction can basically be divided into two parts. The first part is the trading phase, in which the involved parties agree on the purchase conditions of a financial asset. The second phase is the post-trading, during which the obligations of the parties are formally calculated (clearing) and the transfer of the asset and the funds between seller and buyer is completed (settlement), see P. Inglesias-Rodriguez, *The regulation of cross-border clearing and settlement in the European Union from a legitimacy perspective*, *European Business Organization Law Review*, 2012, pp. 442-472.

⁹⁶ P. Phillips in (n 78) p. 22.

⁹⁷ For a technical definition see Rosen Ivanov, *Corporate actions in T2S*, T2S Special Series, Issue No 3, Frankfurt, January 2014, available at:

The first basic principle of the CAJWG standards is built upon the flow of information. The issuer is the “golden source”, which informs its issuer CSD the details of any corporate action event, including the key dates⁹⁸. The announcement of mandatory and elective corporate actions starts with the issuer, then goes to the issuer CSD, and intermediaries, until it reaches the end investor. The upstream flow of information follows the same pattern in order for the end investor to declare his choices for elective corporate actions to the issuer⁹⁹.

The second important component of the CAJWG standards is the agreement on key dates. The harmonisation of the sequence of key dates is very important because it actually determines who is entitled to participate in a corporate action event. Ex date is defined as the date when securities are traded without the rights attached to them and therefore, the buyer of the shares will not benefit from the income payment whereas record date determines entitlement for the corporate action¹⁰⁰. The sequence of key dates is specified for particular types of corporate actions, such as distribution with options, mandatory reorganisations with options and voluntary reorganisations¹⁰¹. This component of CAJWG standards is of significant importance because it unravels issues related with ownership and trading of securities presented in chapter I. For example:



Picture 5: Sequence of key dates for securities and cash distributions.
Source: CAJWG standards, p. 12.

<https://www.ecb.europa.eu/paym/t2s/pdf/specser/T2S_SpecialSeries_issue3.pdf> (date accessed: 13-12-2015) p. 5.

⁹⁸ The characterization “golden source” was given by Ben van der Velpen from ING Bank in the Summary Report of the Seminar on European Market Practices Standards for Corporate Actions & General Meetings, ING Bank, Budapest, 7 February 2012.

⁹⁹ The CAJWG standards adopt the so called “Christmas tree model”, see Rosen Ivanov (n 97) p. 6.

¹⁰⁰ See CAJWG standards, Glossary pp. 6-9.

¹⁰¹ See CAJWG standards, pp. 21-37.

As to operational processing, a standardised procedure contributes to the safety and the efficiency of the EU market. An example of automation, under the standards, is that all payments should be made by book entry. The communication in the intermediated chain will take place in the form of standardised messages, e.g. the ISO securities messaging standards¹⁰².

b) Corporate actions on flow, also known as transaction management, control transaction failures that derive from the trading of securities¹⁰³. Before the adoption of CAJWG standards market participants used different methods to manage such failures and usually did not use a centralised CSD mechanism¹⁰⁴. The functionality of these standards is based on the fast and efficient exchange of information in the intermediated chain and results in i) market claims in distribution events, ii) transformations in reorganisations and iii) buyer protection in elective corporate actions.

Market claims are created when the contractually entitled party has not received the underlying securities on the record date and a distribution event has been initiated. In this scenario, for shares the benchmark is the ex date. The seller must activate a claim and receive proceeds or cash if the trade took place before the ex date, whereas when the trading is pending on or after the ex date, the buyer has the right to file a market claim to the seller¹⁰⁵. The claim is processed centrally by the CSD, which creates a separate transaction from the underlying transaction, as soon as possible and within a deadline of 20 business days.

In a transformation scenario, there will be pending transactions as a result of securities trading and new securities created due to a reorganisation event e.g. merger, acquisition or tender offer¹⁰⁶. Any pending transaction must be cancelled and replaced in accordance with

¹⁰² For ISO Standards see *Corporate Actions, Enabling and improving event communications between public companies and their stakeholders*, available at: <https://www.swift.com/assets/swift_com/documents/products_services/SWIFT_Corporate_Actions_infopaper.pdf> (date accessed: 13-11-2015).

¹⁰³ See P. Colladan in (n 78), p. 21.

¹⁰⁴ T2S Corporate Action Sub Group, *Market claims and transformations in T2S: Which CSD should identify them?*, 09.04.01/2009/011713, Frankfurt, November 2009, available at: <https://www.ecb.europa.eu/paym/t2s/progress/pdf/subcorpact/ca_key_market_claims.pdf?c6e54103e99d80e1cc5e9250366eba08> (date accessed: 13-12-2015) p. 1.

¹⁰⁵ See CAJWG standards, p. 42.

¹⁰⁶ See CAJWG standards, p. 8.

new terms because the reorganisation implies a change in the old ISIN of the securities¹⁰⁷. The CSD, once again should proceed to the transformation and replacement.

Finally, buyer protection refers to elective corporate actions in which the buyer has not received the securities yet, however, he has the right to pass instructions to the seller. A buyer protection can involve significant market exposure for both parties and therefore a rapid exchange of information between the buyer and the seller will ensure that the issuer deadline has not expired (see picture 4)¹⁰⁸. Within the market infrastructure, buyer protection may take two forms: one is automated and the other is manual. The automated buyer protection takes place via the intermediated chain within a specific deadline of one business day before the issuer deadline. The settlement of this transaction will be extended until the instruction of the buyer reaches the issuer. On the contrary, a bi-lateral agreement between the respective trading parties constitutes a manual buyer protection. Market standards establish that the buyer protection deadline should be identical for the same transaction within the EU.

The significance of the market standards is linked with its all inclusive membership: all parties in the securities industry are represented, with a convergence of relevant European trade associations, issuers, market infrastructures for trading, clearing, settlement and safekeeping of securities, financial intermediaries and end-investors¹⁰⁹. Furthermore, the creation of these market standards does not remain on a theoretical level, but there is a collective action for their implementation on a national and European level. There are national Market Implementation Groups (MIGs) with the target to ensure the proper performance of the standards and report to the European Market Implementation Group (E-MIG). Moreover, the organisational structure implies that the E-MIG reports to the BSG, which is responsible for transmitting information to the European Commission regarding the implementation status of market standards across the EU.¹¹⁰ Hence, this hierarchical

¹⁰⁷ International Securities Identification Number is the 12-character code that serves to uniform identification of a security at trading and settlement.

¹⁰⁸ *Market Standards for Corporate Actions Processing Question & Answer Document*, 21 March 2014, available at: <www.afme.eu/WorkArea/DownloadAsset.aspx?id=12415> (date accessed: 13-12-2015) p. 12.

¹⁰⁹ European Commission, *Info-letter on post-trading*, Unit MARKT/G2, Issue 3, Brussels, July 2011, available at: <<http://www.ebf-fbe.eu/uploads/European%20Commission%20Info-letter%20on%20post-trading%20-%20Issue%203%20-%20July%202011.pdf>> (date accessed: 03-12-2015) p. 16.

¹¹⁰ Broad Stakeholder Group (BSG), *Dismantling Giovannini Barrier 3: The Market Standards for Corporate Actions Processing & General Meetings: Third Implementation progress report*, CB (EBF) D1174B-2011, Munich, June 2011, available at: <http://www.ebf-fbe.eu/uploads/D1174B-2011->

structure indicates that market standards constitute an instrument of soft law which is of significant importance while their implementation is monitored by serious committees.

2. An overview of TARGET2-Securities: the pan European Settlement platform

TARGET2-Securities (hereinafter T2S) is a single pan-European platform created to harmonise and facilitate the settlement of securities transactions within the EU and is already operational since June 2015. It is a technical platform based on the TARGET2 payment system¹¹¹ which provides a computer programme for central securities depositories, central banks, custodians and other intermediaries to process their respective transfers and record their respective securities holdings¹¹². One of the key features of T2S is that it is not profit-driven but on a cost recovery basis¹¹³. Hence, cost reductions will lead to an increase in securities trading as issuers will have access to foreign investors and investors will have the possibility to invest in T2S-eligible securities in the same way as they do in domestic securities¹¹⁴. Although it is in the CSDs' discretion to participate in the project, it already counts 24 participating CSDs and more are to follow¹¹⁵. It is important to underline that the T2S platform is not a single CSD but a common technical location, with the CSDs maintaining full legal responsibility and custody functions.

<BSG%20implementation%20progress%20report%20to%20the%20EC%20on%20Giovannini%20Barrier%203-%20June%202011.pdf> (date accessed: 13-12-2015) p. 2.

¹¹¹ General Principle 2 of T2S available at:

<https://www.ecb.europa.eu/paym/t2s/progress/pdf/2011_t2s_general_principles.pdf> (date accessed: 13-11-2015). TARGET2 is the second generation payment system replaced TARGET in May 2008. The initial TARGET stands for Trans-European Automated Real-time Gross Settlement Express Transfer system. It is the real-time gross settlement (RTGS) system owned and operated by the Eurosystem. It plays a key role in ensuring the smooth conduct of monetary policy, banking and financial stability. For more information see: <www.target2.eu> (date accessed: 13-11-2015).

¹¹² E. Micheler (n 16) pp. 24-25.

¹¹³ P. Athanassiou, T2 Securities: an overview of the Eurosystem's aims and competence, *Journal of International Banking Law and Regulation*, 2008, p. 2.

¹¹⁴ M. Papenfuß, in M. Manaa *T2S: from issuer to investor*, T2S Special Series, Issue No 4, Frankfurt, September 2014, available at https://www.ecb.europa.eu/paym/t2s/pdf/specser/T2S_SpecialSeries_issue4.pdf (date accessed: 13-12-2015) p. 14.

¹¹⁵ The CSDs that participate in T2S programme can be found at:

<<https://www.ecb.europa.eu/paym/t2s/stakeholders/csd/html/index.en.html>> (date accessed 13-11-2015).

2.1 What does TARGET2-Securities mean for corporate actions

T2S is a settlement engine and corporate actions that result in payments will be processed through T2S. Therefore, income distribution such as the payment of dividends or other proceeds, are directly relevant to the T2S project, where they involve settlement of securities¹¹⁶. The efficiency of this settlement platform becomes more obvious in pending transactions and settlement failures. Any risk of processing incorrect transactions is reduced because the participating CSDs exchange information in a common technical location and thus there will be no gaps in the communication between them¹¹⁷.

On the other hand, corporate actions related to voting processes and shareholder identification do not fall within the main remit of T2S and therefore, T2S does not regulate such transmission of information. It was negatively commented that "as T2S may lead to more cross border settlement and more cross border transactions, this will mean less access to information for issuers, and so companies will continue to lose information on their shareholder base as it becomes more international"¹¹⁸. To avoid such circumstances, the T2S community urged for the conformity to the already mentioned CAJWG Standards and required the compliance with the market standards as a prerequisite for a CSD to join in the T2S programme. In addition, T2S gave priority to the creation of a harmonised framework in the management of pending transactions¹¹⁹. More specifically, the Corporate Actions Sub-Group (CASG) developed the T2S Corporate Action Standards (hereinafter T2S CA standards) which were approved by the T2S Advisory Group in 2009¹²⁰. Hence, the significance of T2S is based on the fact that it imposed rapidly the standardisation of corporate actions as a requirement for the CSDs which desired to participate in the platform¹²¹.

¹¹⁶ N. Rachman, M. Vermaas, noter-up Chapter 6, T. Keijser (ed) *Transnational Securities Law*, Oxford University Press, May 2015, GENERAL NOTER-UP 1, par. N-6-9.

¹¹⁷ P. Phillips in (n 78) p. 22.

¹¹⁸ S. Haan, in M. Manaa (n 114) p. 24.

¹¹⁹ See priority 6 of T2S activities available at:

<<https://www.ecb.europa.eu/paym/t2s/harmonisation/activities/html/index.en.html>> (date accessed: 13-11-2015).

¹²⁰ For more information visit:

<<https://www.ecb.europa.eu/paym/t2s/governance/ag/html/subcorpact/index.en.html>> (date accessed: 13-11-2015).

¹²¹ P. Ruault in (n 78) p. 20.

2.2 TARGET2-Securities corporate action standards

The T2S CA standards are standards on flow and deal with pending transactions¹²². They are structured in the same manner as the CAJWG standards and are divided into market claims, transformations and buyer protection. Firstly, it is important to refer to a new concept applicable to T2S CA Standards, the instruction owner CSD (IOC). The IOC is defined in simple terms as the central CSD that is always aware of the pending transactions of its own participants in T2S¹²³. There are always two IOCs per transaction. In the T2S CA standards, IOCs should be responsible for detecting and instructing market claims and transformations. The concept of IOC basically implies that the T2S platform is able to settle transactions with CSDs that participate in the programme as domestic ones¹²⁴. Therefore, the characterisation of T2S as “an electronic highway” between all the participants of the intermediated chain is particularly felicitous and definitely improves corporate actions processing¹²⁵. The T2S buyer protection standards basically follow the CAJWG standards, without introducing new concepts and terms. There is no obligation for a CSD in T2S to provide buyer protection services for its domestic securities. Nevertheless, this obligation is generated when the CSD decided to act as an investor CSD to a market in which the issuer CSD provides buyer protection. In this circumstance, it can choose to provide either the automated or the manual buyer protection¹²⁶.

3. Conclusions

The analysis shows that market participants attempted to create communication channels and to provide efficiency in the intermediated chain. The recognition of the end investor as the primary source of corporate actions is significant. Subsequently, the ECB rewarded this attempt by approving and incorporating these standards in T2S. However, T2S

¹²² T2S Corporate Action Standards, Market Claims (n 74) p. 3.

¹²³ T2S Corporate Action Standards, Market Claims (n 74) p. 5.

¹²⁴ T2S Corporate Action Sub Group (n 104) p. 5.

¹²⁵ Colladan (n 78) p. 20.

¹²⁶ European Central Bank, *Implementation of the T2S buyer protection Standards: Is it mandatory or not?*, 09.04.01/2012/002600, Frankfurt, March 2012, available at: <<https://www.ecb.europa.eu/paym/t2s/progress/pdf/ag/mtg17/item-6-2-annex-1-implementation-of-the-buyer-protection-standards-mandatory-or-not.pdf?21c98248565a98c6ab42fd7b2393362b>> (date accessed: 13-12-2015) p. 5.

is simply the beginning of the story. It was appropriately commented that “it is just a pipe and the most important things are at each end and what goes through it, not the pipe itself”¹²⁷. The T2S structure urgently combined an IT and regulatory change to drive its harmonisation effort in the form of the establishment of a common settlement platform with the compliance to the market standards by all participating CSDs. However, it should be remembered that market standards are simply a set of solutions created by the industry with the target to smooth corporate action processing and to provide efficiency in intermediated chains¹²⁸. They merely constitute an industry guide and not an automatic elimination of differences between European markets. On the positive side, however, the standards were endorsed by every market participant, and this in itself is a great achievement.

¹²⁷ P. Colladon in (n 78) p. 27.

¹²⁸ P. Ruault in (n 78) p. 27.

Chapter IV: The way forward: the interaction between legislation, market standards and T2S standards

The presentation of efforts by different institutions and market players and from different angles raises the question; is there finally a common pathway for the harmonisation of corporate actions within the EU? This chapter will provide a comparative analysis of the harmonisation approaches and will conclude with recommendations for the creation of a real integrated EU securities market.

1. The existing regulatory framework and market reality

Summarising the analysis presented in the previous chapters, the Commission's steps towards the harmonisation of corporate actions are to some extent related to the industry standards. In principle, the MSGM declare that they follow the SRD. Indeed, they contain common provisions. The SRD does not distinguish between foreign and domestic shareholders and MSGM are consistent with this structure¹²⁹. A core component of the SRD is the exercise of voting rights by electronic means and likewise MSGM recommend the abolishment of paper use. Additionally, each of them eliminates share blocking mechanisms and settles the record date as the only reliable moment for a shareholder's authentication. With regard to the information prior to the general meeting, the SRD declares that the issuance of the convocation should not be subjected to any specific cost for shareholders and the MSGM respect this principle¹³⁰. The minimum content of information transmitted prior to the general meeting presents similarities in both texts¹³¹. Finally, they both propose push and pull methods in the downstream flow of information.

However, a core contrast between the two texts is that the SRD does not provide rules that establish a link between the issuer and the end investor. On the other hand, the MSGM describe in detail how the meeting notice will reach the end investor, and therefore they explicitly recognise investor's involvement in corporate action processing. Another antithesis is that the SRD provides minimum harmonisation, leaving the time between key dates to the

¹²⁹ See MSGM, p. 6.

¹³⁰ See article 5 (3) of SRD and MSGM, p. 10.

¹³¹ For example they both must contain information at least about: the date and place of the general meeting, reference to company's website, record date and deadlines, methods for voting and proxy appointment.

discretion of national laws whereas the MSGM recommend specific deadlines for the dissemination of information concerning the general meeting. The complete process of receiving information for a general meeting may be avoided in MSGM because the investor is given the right to choose for an opt-out scheme if he does not wish to receive meeting notices, while in SRD there is no such arrangement¹³².

The proposed revision of the SRD converges with the market standards as it reflects the flow of information similar to MSGM and CAJWG standards¹³³. Hence, both instruments promote the facilitation of voting rights through the chain. However, the beneficiary of the chain differs as market standards chains terminate at the end investor whereas the revision of SRD does not define who act as shareholders and provides reference to national provisions of member states.

The general standpoint of the MSGM and the proposed revision of the SRD is clearly different; whereas the MSGM focus on the efficiency of the intermediated chain, the revision of the SRD underlines that intermediated holding chains act as significant obstacles to shareholder engagement. For this reason, the revision of the SRD introduced an optional direct communication between issuers and shareholders that skips the custody chain. The fact that market standards included a similar identification process required under national law or by the issuer was not enough to smooth this contrast¹³⁴. Another example that strengthens the juxtaposition between the two texts is that MSGM with the opt-out provision give an optional character to the participation in general meetings and thus cultivate a passive shareholder status, whereas the revision of the SRD focuses on direct channels of communication between issuer-shareholder with the objective to achieve higher shareholders' engagement in general meetings. Additionally, the proposed revision of SRD obliges intermediaries to confirm cast votes in order to prevent voting misuse. Market standards do not include a similar provision as the EBF considers it to be completely unnecessary and costly¹³⁵. Finally, the Commission observes that price discrimination acts as a barrier to the internal market and imposes transparency requirements to the pricing of intermediaries for cross-border transmission of information. On the contrary, market

¹³² See MSGM, p. 9.

¹³³ See article 3b and c of the proposed revision of SRD, MSGM, standards 1.1, 1.6, 1.7 and CAJWG standards, pp. 13-14.

¹³⁴ See MSGM, Standard 3.10 (n 6).

¹³⁵ See EBF (n 68) p. 5.

standards do not require public disclosure of prices and fees and the establishment of the opt-out scheme provides a minimization of costs by the non transmission of information to the end investor.

Comparing the ECB's actions to the Commission's approach, the conclusion is the same, because the T2S Corporate action standards are based on the industry standards for corporate actions on stock and on flow. The T2S CA standards, thus take the efficiency of the intermediated chain as a basis and therefore they perpetuate the current market infrastructure which relies on non-transparent intermediation¹³⁶.

Hence, the analysis indicates that, the market standards interact positively with the SRD and go one step further by improving the information process in the custody chain. However the proposed revision of the SRD tends to establish a more transparent system with the elimination of indirect communication between the issuer and the shareholder, even if the end investor is not included in the concept of shareholder in all Member States. Commission proposes transparency requirements and this is opposed to the maintenance of the current regime and its long intermediated chains. This juxtaposition leaves a big question mark regarding the future of the harmonisation of corporate actions. Should public authorities legislate upon the industry standards, instead of introducing new legal obligations which are incompatible with market reality? We must not forget that market standards have been endorsed by all market participants and the application of these reforms would create a completely different regime in today's custody chain.

2. Recommendations

The desired harmonised framework within the EU is hindered by the intermediated system. The structure of securities holding systems is both a technical and a legal issue. Therefore, it would be much more efficient to begin the harmonisation by restructuring the system and eradicating all these long, cross-border chains. The position of this thesis is that a structural reform is needed and as the Commission's Green Paper has correctly pointed out: we must start by creating a common property model in securities in order to build a Capital

¹³⁶ E. Micheler (n 16) p 26.

Markets Union¹³⁷. This structural reform does not rely on the efficiency of the custody chains but on a transparent system that directly links the issuers and the ultimate investors¹³⁸.

Let's imagine now how corporate actions would be processed in this transparent model which would assure that shareholders in the European Union can exercise their rights directly vis-à-vis the issuer¹³⁹. In line with the Green Paper's observation regarding technology, the EU must take into consideration IT developments and create one central electronic system that would hold and transfer securities for all European jurisdictions and that system would be accessible directly by the ultimate account holders, being recognised as shareholders and having direct and unshared ownership on their securities. Shareholders would exercise their voting rights electronically via the company's website after receiving an electronic certification code. Problems related to overvoting and costly processes for the transmission of meeting notices and deadlines therefore would disappear. Accordingly, payments of dividends and other proceeds would be simplified drastically and transfer failures would not occur as the information in the share registry would be easily and continuously up to date.

Diverging implementation within the EU and the possible refusal of member states to abandon their current property models on securities, would render the abovementioned recommendation useless. For this reason and in addition, I recommend a legal reform on the basis of a European regulation that will target to provide an amicable solution between the efficiency of the intermediated chain and transparency requirements. Only a regulation will create a directly applicable common EU language so that all intermediaries can

¹³⁷ See Chapter II, Section 3, European Commission Green Paper, *Building a Capital Market Union*, Brussels, February 2015, COM(2015), Section 4.3, p. 23.

¹³⁸ Such transparent model already exists inside EU: e.g. Czech Republic, Finland, Greece, Malta, Spain, Poland and partly the UK, outside EU: e.g. Argentina, Brazil, China, Colombia, South Africa. See UNIDROIT, *Working paper regarding so called "Transparent Systems"*, Study LXXVIII – Doc. 44, Rome, November 2006, available at: <<http://www.unidroit.org/english/documents/2006/study78/s-78-044-e.pdf>> (date accessed: 10-12-2015).

¹³⁹ The transparent system has been suggested by great number of Expert Groups and Academics. See FIN-USE Expert Forum of Financial Services Users, *Response to public consultation on Shareholders' Rights*, p. 2, European Commission, *Report of the Reflection Group On the Future of EU Company Law*, Brussels, 5 April 2011, section 3.1.5., p. 50, Böckli et al., *Shareholder engagement and identification*, February 2015, p. 8-9, P. T. Keijser, 'Transactions in Securities', in Goode R., Kronke H., and McKendrick E. (ed), *Transnational Commercial Law, Texts, Cases, and Material*, Second Edition, Oxford University Press, 2015, p 433, Masouros, *Is the EU Taking Shareholder Rights Seriously?: An Essay on the Impotence of Shareholdership in Corporate Europe*, *European Company Law*, Vol. 7, Issue 5, October 2010, p. 203, E. Micheler, *Intermediated Securities and Legal Certainty*, LSE Legal Studies Working Paper No. 3/2014, February 2014, N. Rachman, M. Vermaas, 'Corporate Actions in the Intermediated System: Bridging the Gap between Issuer and Investor', in Keijser T. (ed), *Transnational Securities Law*, Oxford University Press, 2014, p. 156.

communicate within EU using the same tactics and terminology in the processing of corporate actions¹⁴⁰. The scope of this regulation must be extended to all issuers, CSDs and intermediaries that offer services in the European territory¹⁴¹. The substance of this regulation will focus on harmonising collectively all corporate actions processing and must include the following suggestions. Firstly, the regulation must acknowledge the end investor's voting rights, whichever property model is applied along the chain and at least create a homogenous direct voting procedure via internet means. Furthermore, it must declare mandatory the "know your customer" standards in order to create transparency in the intermediated chain and it must establish that intermediaries are responsible for any dolus or negligence based liability. The regulation will select a certain type of ISO messaging and all intermediaries will be obliged to follow it for the communication through the chain. T2S corporate actions for transaction management should be incorporated in this regulation in order to create a common framework for possible transaction realignments. Finally, the regulation will envisage clear sanctions for any participant failing to comply with it. This regulation will standardise corporate actions wholistically by weighting both a modern and synchronized voting process and the already established communication channels created by market standards for distributions, reorganizations and elective corporate actions.

¹⁴⁰ The recent EU terminology is Securities Law legislation, see <http://ec.europa.eu/finance/financial-markets/securities-law/index_en.htm> (date accessed: 18-01-2015).

¹⁴¹ And therefore to any third country intermediary that offers services within EU.

CONCLUSION

EU key actors including the Commission and market participants, although being active in harmonising corporate actions, did not manage to create a sufficient level of harmonisation until today. However, the Commission has detected the root of the problem and this is extremely positive. This thesis recommends the adoption of a transparent model. Even if this might seem rather utopian because of political and market participants' vested interests that hold the intermediated systems into existence until today, it should be noted that technology is innovating and expanding at an exponential growth rate and societies are redefined continuously. The same path must follow the EU financial architecture in order to benefit from the IT world and become increasingly robust. We must not forget that the accumulated value represented in securities derives from the end investor. The aftermath of the financial crisis shows that a safe market is based on increased liquidity and this is only attached when the end investor trusts the financial system. A safe and harmonised EU securities market implies that all corporate actions must be processed in the context of a transparent system because only then markets work for the real economy and systemic risks are prevented.

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APPENDIX

I. SHAREHOLDERS' RIGHTS DIRECTIVE.

DIRECTIVE 2007/36/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 July 2007

on the exercise of certain rights of shareholders in listed companies

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 44 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) In its Communication to the Council and the European Parliament of 21 May 2003, entitled 'Modernising Company Law and enhancing Corporate Governance in the European Union — A Plan to Move Forward', the Commission indicated that new tailored initiatives should be taken with a view to enhancing shareholders' rights in listed companies and that problems relating to cross-border voting should be solved as a matter of urgency.
- (2) In its Resolution of 21 April 2004, the European Parliament expressed its support for the Commission's intention to strengthen shareholders' rights, in particular through the extension of the rules on transparency, proxy voting rights, the possibility of participating in general meetings via electronic means and ensuring that cross-border voting rights are able to be exercised.
- (3) Holders of shares carrying voting rights should be able to exercise those rights given that they are reflected in the price that has to be paid at the acquisition of the shares. Furthermore, effective shareholder control is a pre-requisite to sound corporate governance and should, therefore, be facilitated and encouraged. It is therefore necessary to adopt measures to approximate the laws of the Member States to this end. Obstacles which deter shareholders from voting, such as making the exercise of voting rights subject to the blocking of shares during a certain period before the general meeting, should be removed. However, this Directive does not affect existing Community legislation on units issued by collective investment undertakings or on units acquired or disposed of in such undertakings.
- (4) The existing Community legislation is not sufficient to achieve this objective. Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities focuses on the information issuers have to disclose to the market and accordingly does not deal with the shareholder voting process itself. Moreover, Directive 2004/109/EC of the European Parliament and of the Council of 15 December

2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market imposes on issuers an obligation to make available certain information and documents relevant to general meetings, but such information and documents are to be made available in the issuer's home Member State. Therefore, certain minimum standards should be introduced with a view to protecting investors and promoting the smooth and effective exercise of shareholder rights attaching to voting shares. As regards rights other than the right to vote, Member States are free to extend the application of these minimum standards also to non-voting shares, to the extent that those shares do not enjoy such standards already.

- (5) Significant proportions of shares in listed companies are held by shareholders who do not reside in the Member State in which the company has its registered office. Non-resident shareholders should be able to exercise their rights in relation to the general meeting as easily as shareholders who reside in the Member State in which the company has its registered office. This requires that existing obstacles which hinder the access of non-resident shareholders to the information relevant to the general meeting and the exercise of voting rights without physically attending the general meeting be removed. The removal of these obstacles should also benefit resident shareholders who do not or cannot attend the general meeting.
- (6) Shareholders should be able to cast informed votes at, or in advance of, the general meeting, no matter where they reside. All shareholders should have sufficient time to consider the documents intended to be submitted to the general meeting and determine how they will vote their shares. To this end, timely notice should be given of the general meeting, and shareholders should be provided with the complete information intended to be submitted to the general meeting. The possibilities which modern technologies offer to make information instantly accessible should be exploited. This Directive presupposes that all listed companies already have an Internet site.
- (7) Shareholders should, in principle, have the possibility to put items on the agenda of the general meeting and to table draft resolutions for items on the agenda. Without prejudice to different time-frames and modalities which are currently in use across the Community, the exercise of those rights should be made subject to two basic rules, namely that any threshold required for the exercise of those rights should not exceed 5 % of the company's share capital and that all shareholders should in every case receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda.
- (8) Every shareholder should, in principle, have the possibility to ask questions related to items on the agenda of the general meeting and to have them answered, while the rules on how and when questions are to be asked and answered should be left to be determined by Member States.
- (9) Companies should face no legal obstacles in offering to their shareholders any means of electronic participation in the general meeting. Voting without attending the general meeting in person, whether by correspondence or by electronic means, should not be subject to constraints other than those necessary for the verification of identity and the security of electronic communications. However, this should not prevent Member States from adopting rules aimed at ensuring that the results of the voting reflect the intentions of the shareholders in all circumstances, including rules aimed at addressing situations where new circumstances occur or are revealed after a shareholder has cast his vote by correspondence or by electronic means.
- (10) Good corporate governance requires a smooth and effective process of proxy voting.

Existing limitations and constraints which make proxy voting cumbersome and costly should therefore be removed. But good corporate governance also requires adequate safeguards against a possible abuse of proxy voting. The proxy holder should therefore be bound to observe any instructions he may have received from the shareholder and Member States should be able to introduce appropriate measures ensuring that the proxy holder does not pursue any interest other than that of the shareholder, irrespective of the reason that has given rise to the conflict of interests. Measures against possible abuse may, in particular, consist of regimes which Member States may adopt in order to regulate the activity of persons who actively engage in the collection of proxies or who have in fact collected more than a certain significant number of proxies, notably to ensure an adequate degree of reliability and transparency. Shareholders have an unfettered right under this Directive to appoint such persons as proxy holders to attend and vote at general meetings in their name. This Directive does not, however, affect any rules or sanctions that Member States may impose on such persons where votes have been cast by making fraudulent use of proxies collected. Moreover, this Directive does not impose any obligation on companies to verify that proxy holders cast votes in accordance with the voting instructions of the appointing shareholders.

- (11) Where financial intermediaries are involved, the effectiveness of voting upon instructions relies, to a great extent, on the efficiency of the chain of intermediaries, given that investors are frequently unable to exercise the voting rights attached to their shares without the cooperation of every intermediary in the chain, who may not have an economic stake in the shares. In order to enable the investor to exercise his voting rights in cross-border situations, it is therefore important that intermediaries facilitate the exercise of voting rights. Further consideration should be given to this issue by the Commission in the context of a Recommendation, with a view to ensuring that investors have access to effective voting services and that voting rights are exercised in accordance with the instructions given by those investors.
- (12) While the timing of disclosure to the administrative, management or supervisory body as well as to the public of votes cast in advance of the general meeting electronically or by correspondence is an important matter of corporate governance, it can be determined by Member States.
- (13) Voting results should be established through methods that reflect the voting intentions expressed by shareholders, and they should be made transparent after the general meeting at least through the company's Internet site.
- (14) Since the objective of this Directive, namely to allow shareholders effectively to make use of their rights throughout the Community, cannot be sufficiently achieved by the Member States on the basis of the existing Community legislation and can therefore, by reason of the scale and effects of the measures, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (15) In accordance with paragraph 34 of the Interinstitutional Agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I GENERAL PROVISIONS

Article 1

Subject-matter and scope

1. This Directive establishes requirements in relation to the exercise of certain shareholder rights attaching to voting shares in relation to general meetings of companies which have their registered office in a Member State and whose shares are admitted to trading on a regulated market situated or operating within a Member State.
2. The Member State competent to regulate matters covered in this Directive shall be the Member State in which the company has its registered office, and references to the ‘applicable law’ are references to the law of that Member State.
3. Member States may exempt from this Directive the following types of companies:
 - (a) collective investment undertakings within the meaning of Article 1(2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);
 - (b) undertakings the sole object of which is the collective investment of capital provided by the public, which operate on the principle of risk spreading and which do not seek to take legal or management control over any of the issuers of their underlying investments, provided that these collective investment undertakings are authorised and subject to the supervision of competent authorities and that they have a depositary exercising functions equivalent to those under Directive 85/611/EEC;
 - (c) cooperative societies.

Article 2

Definitions

For the purposes of this Directive the following definitions shall apply:

- (a) ‘regulated market’ means a market as defined in Article 4(1), point 14, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;
- (b) ‘shareholder’ means the natural or legal person that is recognised as a shareholder under the applicable law;
- (c) ‘proxy’ means the empowerment of a natural or legal person by a shareholder to exercise some or all rights of that shareholder in the general meeting in his name.

Article 3

Further national measures

This Directive shall not prevent Member States from imposing further obligations on companies or from otherwise taking further measures to facilitate the exercise by shareholders of the rights referred to in this Directive.

CHAPTER II

GENERAL MEETINGS OF SHAREHOLDERS

Article 4

Equal treatment of shareholders

The company shall ensure equal treatment for all shareholders who are in the same position with regard to participation and the exercise of voting rights in the general meeting.

Article 5

Information prior to the general meeting

1. Without prejudice to Articles 9(4) and 11(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, Member States shall ensure that the company issues the convocation of the general meeting in one of the manners specified in paragraph 2 of this Article not later than on the 21st day before the day of the meeting.

Member States may provide that, where the company offers the facility for shareholders to vote by electronic means accessible to all shareholders, the general meeting of shareholders may decide that it shall issue the convocation of a general meeting which is not an annual general meeting in one of the manners specified in paragraph 2 of this Article not later than on the 14th day before the day of the meeting. This decision is to be taken by a majority of not less than two thirds of the votes attaching to the shares or the subscribed capital represented and for a duration not later than the next annual general meeting.

Member States need not apply the minimum periods referred to in the first and second subparagraphs for the second or subsequent convocation of a general meeting issued for lack of a quorum required for the meeting convened by the first convocation, provided that this Article has been complied with for the first convocation and no new item is put on the agenda, and that at least 10 days elapse between the final convocation and the date of the general meeting.

2. Without prejudice to further requirements for notification or publication laid down by the competent Member State as defined in Article 1(2), the company shall be required to issue the convocation referred to in paragraph 1 of this Article in a manner ensuring fast access to it on a non-discriminatory basis. The Member State shall require the company to use such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Community. The Member State may not impose an obligation to use only media whose operators are established on its territory.

The Member State need not apply the first subparagraph to companies that are able to identify the names and addresses of their shareholders from a current register of shareholders, provided that the company is under an obligation to send the convocation to each of its registered shareholders.

In either case the company may not charge any specific cost for issuing the convocation in the prescribed manner.

3. The convocation referred to in paragraph 1 shall at least:

(a) indicate precisely when and where the general meeting is to take place, and the proposed agenda for the general meeting;

- (b) contain a clear and precise description of the procedures that shareholders must comply with in order to be able to participate and to cast their vote in the general meeting. This includes information concerning:
- (i) the rights available to shareholders under Article 6, to the extent that those rights can be exercised after the issuing of the convocation, and under Article 9, and the deadlines by which those rights may be exercised; the convocation may confine itself to stating only the deadlines by which those rights may be exercised, provided it contains a reference to more detailed information concerning those rights being made available on the Internet site of the company;
 - (ii) the procedure for voting by proxy, notably the forms to be used to vote by proxy and the means by which the company is prepared to accept electronic notifications of the appointment of proxy holders; and
 - (iii) where applicable, the procedures for casting votes by correspondence or by electronic means;
- (c) where applicable, state the record date as defined in Article 7(2) and explain that only those who are shareholders on that date shall have the right to participate and vote in the general meeting;
- (d) indicate where and how the full, unabridged text of the documents and draft resolutions referred to in points (c) and (d) of paragraph 4 may be obtained;
- (e) indicate the address of the Internet site on which the information referred to in paragraph 4 will be made available.

4. Member States shall ensure that, for a continuous period beginning not later than on the 21 day before the day of the general meeting and including the day of the meeting, the company shall make available to its shareholders on its Internet site at least the following information:

- (a) the convocation referred to in paragraph 1;
- (b) the total number of shares and voting rights at the date of the convocation (including separate totals for each class of shares where the company's capital is divided into two or more classes of shares);
- (c) the documents to be submitted to the general meeting;
- (d) a draft resolution or, where no resolution is proposed to be adopted, a comment from a competent body within the company, to be designated by the applicable law, for each item on the proposed agenda of the general meeting; moreover, draft resolutions tabled by shareholders shall be added to the Internet site as soon as practicable after the company has received them;
- (e) where applicable, the forms to be used to vote by proxy and to vote by correspondence, unless those forms are sent directly to each shareholder.

Where the forms referred to in point (e) cannot be made available on the Internet for technical reasons, the company shall indicate on its Internet site how the forms can be obtained on paper. In this case the company shall be required to send the forms by postal services and free of charge to every shareholder who so requests.

Where, pursuant to Articles 9(4) or 11(4) of Directive 2004/25/EC, or to the second subparagraph of paragraph 1 of this Article, the convocation of the general meeting is issued

later than on the 21st day before the meeting, the period specified in this paragraph shall be shortened accordingly.

Article 6

Right to put items on the agenda of the general meeting and to table draft resolutions

1. Member States shall ensure that shareholders, acting individually or collectively:
 - (a) have the right to put items on the agenda of the general meeting, provided that each such item is accompanied by a justification or a draft resolution to be adopted in the general meeting; and
 - (b) have the right to table draft resolutions for items included or to be included on the agenda of a general meeting.

Member States may provide that the right referred to in point (a) may be exercised only in relation to the annual general meeting, provided that shareholders, acting individually or collectively, have the right to call, or to require the company to call, a general meeting which is not an annual general meeting with an agenda including at least all the items requested by those shareholders.

Member States may provide that those rights shall be exercised in writing (submitted by postal services or electronic means).

2. Where any of the rights specified in paragraph 1 is subject to the condition that the relevant shareholder or shareholders hold a minimum stake in the company, such minimum stake shall not exceed 5 % of the share capital.
3. Each Member State shall set a single deadline, with reference to a specified number of days prior to the general meeting or the convocation, by which shareholders may exercise the right referred to in paragraph 1, point (a). In the same manner each Member State may set a deadline for the exercise of the right referred to in paragraph 1, point (b).
4. Member States shall ensure that, where the exercise of the right referred to in paragraph 1, point (a) entails a modification of the agenda for the general meeting already communicated to shareholders, the company shall make available a revised agenda in the same manner as the previous agenda in advance of the applicable record date as defined in Article 7(2) or, if no record date applies, sufficiently in advance of the date of the general meeting so as to enable other shareholders to appoint a proxy or, where applicable, to vote by correspondence.

Article 7

Requirements for participation and voting in the general meeting

1. Member States shall ensure:
 - (a) that the rights of a shareholder to participate in a general meeting and to vote in respect of any of his shares are not subject to any requirement that his shares be deposited with, or transferred to, or registered in the name of, another natural or legal person before the general meeting; and
 - (b) that the rights of a shareholder to sell or otherwise transfer his shares during the period between the record date, as defined in paragraph 2, and the general meeting to which it applies are not subject to any restriction to which they are not subject at other times.

2. Member States shall provide that the rights of a shareholder to participate in a general meeting and to vote in respect of his shares shall be determined with respect to the shares held by that shareholder on a specified date prior to the general meeting (the record date).

Member States need not apply the first subparagraph to companies that are able to identify the names and addresses of their shareholders from a current register of shareholders on the day of the general meeting.

3. Each Member State shall ensure that a single record date applies to all companies. However, a Member State may set one record date for companies which have issued bearer shares and another record date for companies which have issued registered shares, provided that a single record date applies to each company which has issued both types of shares. The record date shall not lie more than 30 days before the date of the general meeting to which it applies. In implementing this provision and Article 5(1), each Member State shall ensure that at least eight days elapse between the latest permissible date for the convocation of the general meeting and the record date. In calculating that number of days those two dates shall not be included. In the circumstances described in Article 5(1), third subparagraph, however, a Member State may require that at least six days elapse between the latest permissible date for the second or subsequent convocation of the general meeting and the record date. In calculating that number of days those two dates shall not be included.

4. Proof of qualification as a shareholder may be made subject only to such requirements as are necessary to ensure the identification of shareholders and only to the extent that they are proportionate to achieving that objective.

Article 8

Participation in the general meeting by electronic means

1. Member States shall permit companies to offer to their shareholders any form of participation in the general meeting by electronic means, notably any or all of the following forms of participation:

- (a) real-time transmission of the general meeting;
- (b) real-time two-way communication enabling shareholders to address the general meeting from a remote location;
- (c) a mechanism for casting votes, whether before or during the general meeting, without the need to appoint a proxy holder who is physically present at the meeting.

2. The use of electronic means for the purpose of enabling shareholders to participate in the general meeting may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.

This is without prejudice to any legal rules which Member States have adopted or may adopt concerning the decision-making process within the company for the introduction or implementation of any form of participation by electronic means.

Article 9

Right to ask questions

1. Every shareholder shall have the right to ask questions related to items on the agenda of the general meeting. The company shall answer the questions put to it by shareholders.
2. The right to ask questions and the obligation to answer are subject to the measures which Member States may take, or allow companies to take, to ensure the identification of shareholders, the good order of general meetings and their preparation and the protection of confidentiality and business interests of companies. Member States may allow companies to provide one overall answer to questions having the same content.

Member States may provide that an answer shall be deemed to be given if the relevant information is available on the company's Internet site in a question and answer format.

Article 10

Proxy voting

1. Every shareholder shall have the right to appoint any other natural or legal person as a proxy holder to attend and vote at a general meeting in his name. The proxy holder shall enjoy the same rights to speak and ask questions in the general meeting as those to which the shareholder thus represented would be entitled.

Apart from the requirement that the proxy holder possess legal capacity, Member States shall abolish any legal rule which restricts, or allows companies to restrict, the eligibility of persons to be appointed as proxy holders.

2. Member States may limit the appointment of a proxy holder to a single meeting, or to such meetings as may be held during a specified period.

Without prejudice to Article 13(5), Member States may limit the number of persons whom a shareholder may appoint as proxy holders in relation to any one general meeting. However, if a shareholder has shares of a company held in more than one securities account, such limitation shall not prevent the shareholder from appointing a separate proxy holder as regards shares held in each securities account in relation to any one general meeting. This does not affect rules prescribed by the applicable law that prohibit the casting of votes differently in respect of shares held by one and the same shareholder.

3. Apart from the limitations expressly permitted in paragraphs 1 and 2, Member States shall not restrict or allow companies to restrict the exercise of shareholder rights through proxy holders for any purpose other than to address potential conflicts of interest between the proxy holder and the shareholder, in whose interest the proxy holder is bound to act, and in doing so Member States shall not impose any requirements other than the following:

- (a) Member States may prescribe that the proxy holder disclose certain specified facts which may be relevant for the shareholders in assessing any risk that the proxy holder might pursue any interest other than the interest of the shareholder;
- (b) Member States may restrict or exclude the exercise of shareholder rights through proxy holders without specific voting instructions for each resolution in respect of which the proxy holder is to vote on behalf of the shareholder;
- (c) Member States may restrict or exclude the transfer of the proxy to another person, but this shall not prevent a proxy holder who is a legal person from exercising the powers conferred upon it through any member of its administrative or management body or any of its employees.

A conflict of interest within the meaning of this paragraph may in particular arise where the proxy holder:

- (i) is a controlling shareholder of the company, or is another entity controlled by such shareholder;
- (ii) is a member of the administrative, management or supervisory body of the company, or of a controlling shareholder or controlled entity referred to in point (i);
- (iii) is an employee or an auditor of the company, or of a controlling shareholder or controlled entity referred to in (i);
- (iv) has a family relationship with a natural person referred to in points (i) to (iii).

4. The proxy holder shall cast votes in accordance with the instructions issued by the appointing shareholder.

Member States may require proxy holders to keep a record of the voting instructions for a defined minimum period and to confirm on request that the voting instructions have been carried out.

5. A person acting as a proxy holder may hold a proxy from more than one shareholder without limitation as to the number of shareholders so represented. Where a proxy holder holds proxies from several shareholders, the applicable law shall enable him to cast votes for a certain shareholder differently from votes cast for another shareholder.

Article 11

Formalities for proxy holder appointment and notification

1. Member States shall permit shareholders to appoint a proxy holder by electronic means. Moreover, Member States shall permit companies to accept the notification of the appointment by electronic means, and shall ensure that every company offers to its shareholders at least one effective method of notification by electronic means.

2. Member States shall ensure that proxy holders may be appointed, and that such appointment be notified to the company, only in writing. Beyond this basic formal requirement, the appointment of a proxy holder, the notification of the appointment to the company and the issuance of voting instructions, if any, to the proxy holder may be made subject only to such formal requirements as are necessary to ensure the identification of the shareholder and of the proxy holder, or to ensure the possibility of verifying the content of voting instructions, respectively, and only to the extent that they are proportionate to achieving those objectives.

3. The provisions of this Article shall apply *mutatis mutandis* for the revocation of the appointment of a proxy holder.

Article 12

Voting by correspondence

Member States shall permit companies to offer their shareholders the possibility to vote by correspondence in advance of the general meeting. Voting by correspondence may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and only to the extent that they are proportionate to achieving that objective.

Article 13

Removal of certain impediments to the effective exercise of voting rights

1. This Article applies where a natural or legal person who is recognised as a shareholder by the applicable law acts in the course of a business on behalf of another natural or legal person (the client).
2. Where the applicable law imposes disclosure requirements as a prerequisite for the exercise of voting rights by a shareholder referred to in paragraph 1, such requirements shall not go beyond a list disclosing to the company the identity of each client and the number of shares voted on his behalf.
3. Where the applicable law imposes formal requirements on the authorisation of a shareholder referred to in paragraph 1 to exercise voting rights, or on voting instructions, such formal requirements shall not go beyond what is necessary to ensure the identification of the client, or the possibility of verifying the content of voting instructions, respectively, and is proportionate to achieving those objectives.
4. A shareholder referred to in paragraph 1 shall be permitted to cast votes attaching to some of the shares differently from votes attaching to the other shares.
5. Where the applicable law limits the number of persons whom a shareholder may appoint as proxy holders in accordance with Article 10(2), such limitation shall not prevent a shareholder referred to in paragraph 1 of this Article from granting a proxy to each of his clients or to any third party designated by a client.

Article 14

Voting results

1. The company shall establish for each resolution at least the number of shares for which votes have been validly cast, the proportion of the share capital represented by those votes, the total number of votes validly cast as well as the number of votes cast in favour of and against each resolution and, where applicable, the number of abstentions.

However, Member States may provide or allow companies to provide that if no shareholder requests a full account of the voting, it shall be sufficient to establish the voting results only to the extent needed to ensure that the required majority is reached for each resolution.

2. Within a period of time to be determined by the applicable law, which shall not exceed 15 days after the general meeting, the company shall publish on its Internet site the voting results established in accordance with paragraph 1.
3. This Article is without prejudice to any legal rules that Member States have adopted or may adopt concerning the formalities required in order for a resolution to become valid or the possibility of a subsequent legal challenge to the voting result.

CHAPTER III FINAL PROVISIONS

Article 15

Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 August 2009 at the latest. They shall forthwith communicate to the Commission the text of those measures.

Notwithstanding the first paragraph, Member States which on 1 July 2006 had in force national measures restricting or prohibiting the appointment of a proxy holder in the case of Article 10(3), second subparagraph, point (ii), shall bring into force the laws, regulations and administrative provisions necessary in order to comply with Article 10(3) as concerns such restriction or prohibition by 3 August 2012 at the latest.

Member States shall forthwith communicate the number of days specified under Articles 6(3) and 7(3), and any subsequent changes thereof, to the Commission, which shall publish this information in the *Official Journal of the European Union*.

When Member States adopt the measures referred to in the first paragraph, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 16

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 17

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 11 July 2007.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

M. LOBO ANTUNES

II. CHAPTER IA OF THE PROPOSED REVISION OF SHAREHOLDERS' RIGHTS DIRECTIVE.

Article 3a

Identification of shareholders

1. Member States shall ensure that intermediaries offer to companies the possibility to have their shareholders identified.
2. Member States shall ensure that, on the request of the company, the intermediary communicates without undue delay to the company the name and contact details of the shareholders and, where the shareholders are legal persons, their unique identifier where available. Where there is more than one intermediary in a holding chain, the request of the company and the identity and contact details of the shareholders shall be transmitted between intermediaries without undue delay.
3. Shareholders shall be duly informed by their intermediary that their name and contact details may be transmitted for the purpose of identification in accordance with this article. This information may only be used for the purpose of facilitation of the exercise of the rights of the shareholder. The company and the intermediary shall ensure that natural persons are able to rectify or erase any incomplete or inaccurate data and shall not conserve the information relating to the shareholder for longer than 24 months after receiving it.
4. Member States shall ensure that an intermediary that reports the name and contact details of a shareholder is not considered in breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision.
5. The Commission shall be empowered to adopt implementing acts to specify the requirements to transmit the information laid down in paragraphs 2 and 3 including as regards the information to be transmitted, the format of the request and the transmission and the deadlines to be complied with. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 14a (2).

Article 3b

Transmission of information

1. Member States shall ensure that if a company chooses not to directly communicate with its shareholders, the information related to their shares shall be transmitted to them or, in accordance with the instructions given by the shareholder, to a third party, by the intermediary without undue delay in all of the following cases:
 - (a) the information is necessary to exercise a right of the shareholder flowing from its shares;
 - (b) the information is directed to all shareholders in shares of that class.
2. Member States shall require companies to provide and deliver the information to the intermediary related to the exercise of rights flowing from shares in accordance with paragraph 1 in a standardised and timely manner.

3. Member States shall oblige the intermediary to transmit to the company, in accordance with the instructions received from the shareholders, without undue delay the information received from the shareholders related to the exercise of the rights flowing from their shares.
4. Where there is more than one intermediary in a holding chain, information referred to in paragraphs 1 and 3 shall be transmitted between intermediaries without undue delay.
5. The Commission shall be empowered to adopt implementing acts to specify the requirements to transmit information laid down in paragraphs 1 to 4 including as regards the content to be transmitted, the deadlines to be complied with and the types and format of information to be transmitted. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 14a (2).

Article 3c

Facilitation of the exercise of shareholder rights

1. Member States shall ensure that the intermediary facilitates the exercise of the rights by the shareholder, including the right to participate and vote in general meetings. Such facilitation shall comprise at least either of the following:
 - (a) the intermediary makes the necessary arrangements for the shareholder or a third person nominated by the shareholder to be able to exercise themselves the rights;
 - (b) the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for his benefit.
2. Member States shall ensure that companies confirm the votes cast in general meetings by or on behalf of shareholders. In case the intermediary casts the vote, it shall transmit the voting confirmation to the shareholder. Where there is more than one intermediary in the holding chain the confirmation shall be transmitted between intermediaries without undue delay.
3. The Commission shall be empowered to adopt implementing acts to specify the requirements to facilitate the exercise of shareholder rights laid down in paragraphs 1 and 2 of this Article including as regards the type and content of the facilitation, the form of the voting confirmation and the deadlines to be complied with. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 14a(2).

Article 3d

Transparency on costs

1. Member States shall allow intermediaries to charge prices or fees for the service to be provided under this chapter. Intermediaries shall publicly disclose prices, fees and any other charges separately for each service referred to in this chapter.
2. Member States shall ensure that any charges that may be levied by an intermediary on shareholders, companies and other intermediaries shall be non-discriminatory and proportional. Any differences in the charges levied between domestic and cross-border exercise of rights shall be duly justified.

Article 3e

Third country intermediaries

A third country intermediary who has established a branch in the Union shall be subject to this chapter.