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A. Analysis

The first Giovannini Report¹ identified national differences in the rules governing corporate actions (such as the offering of share options, or rights issues, etc.) as a potential barrier to efficient cross-border clearing and settlement. This was the case because corporate actions often required a response from the investor and this passing down and up of information, instructions and distributions regularly followed local customs and procedures. Consequently, entities providing securities settlement and custody generally needed to be rooted locally. Similar problems arose in the context of other types of corporate actions like the payment of dividends or cash accruals. Therefore, the report advocated the accelerated implementation of technical industry standards under the auspices of market associations.

In its second paper, the Giovannini Group acknowledged that the range of topics covered under Barrier 3 was effectively very broad². Besides the technical/operational issues³, there clearly was a legal aspect. For example, as to the moment when a purchaser was treated as having become the owner of a security for the purposes of corporate actions, some jurisdictions made reference to the trade date, others to the intended settlement date, yet another group to the actual settlement date.

The EU Commission itself included the legal aspects which had emerged in the context of Barrier 3 together with Barriers 13, 14 and 15 within the group of legal impediments to efficient cross-border clearing and settlement⁴ and mandated the Legal Certainty Group to deal with this issue⁵, which was called upon taking into account pre-existing legislation, in particular the Shareholders' rights directive (SRD, cf. *infra*), and to advise on the extent to which further harmonisation is needed⁶.

I. Scope

In its ongoing work, the Legal Certainty Group is called upon examining to what extent differences between Member States' legal frameworks cause inefficiencies of the cross-border exercise of corporate rights and by what means these discrepancies should be eliminated. The Legal Certainty Group at present works under the hypothesis that, from a legal perspective, Barrier 3 would be removed as soon as a cross-border investor is in a position *vis-à-vis* the issuer that is comparable to the position of a domestic investor⁷. Consequently, the goal is to eliminate all disadvantages which arise as a consequence of the intermediation of securities across borders of the Member States.

II. Subsidiarity and proportionality

The approach taken by the LCG in the analysis follows the common principles of the EU law, such as subsidiarity and proportionality. As a result, the proposed means are aimed to achieve minimal intervention necessary to achieve the goal of removing legal obstacles to cross-border corporate actions, and the approach taken in designing those means is based on functionality, rather than the intervention in the core of the national legal systems.

III. Evidence

1 First Giovannini Report, p. 47.

2 Second Giovannini Report, p. 10.

3 Cf. work of the CESAME Group on Barrier 3, http://ec.europa.eu/internal_market/financial-markets/clearing/cesame_en.htm.

4 Commission 2004 Communication, p. 25.

5 Mandate for the Legal Certainty Group, January 2005, p. 1, http://ec.europa.eu/internal_market/financial-markets/docs/certainty/mandate_en.pdf.

6 Note to the Chairman of the Legal Certainty Group, 19.09.2006, p. 2, http://ec.europa.eu/internal_market/financial-markets/docs/certainty/reply_note_en.pdf.

7 Cf. also Recital 5 of the SRD.

IV. Identification of leading questions

Two main issues are at the basis of inconsistencies:

- first, the diversity of methods to identify the person entitled to exercise corporate rights;
- second, the range of corporate actions which are available to that person, even in a cross-border holding scenario, needs to be identified and clarified.

B. The Advice of the Legal Certainty Group

I. Personal scope: the person entitled to exercise corporate rights

It is the key function of all securities to evidence the right and identify the entitled person. That was easy as long as certificates circulated amongst investors. In the world of book entries, the identification became less sharp.

1. Criteria for identification

On a purely domestic level, the mechanisms to identify the entitled person are generally supposed to work well; as soon as the identification of the entitled person requires looking across the border, things become evidently more complicated. Therefore, the identification of the person entitled to exercise the corporate rights is paramount for the solution of the legal aspects of Barrier 3.

As the EU only recently legislated in the field of corporate actions, the Legal Certainty Group started its deliberation of how to identify the person entitled to exercise the corporate rights by examining the framework regarding corporate actions within the EU. Also, the Unidroit draft Convention addresses the issue.

a. EU legal framework for shareholders rights

The Shareholders' Rights Directive (SRD)⁸ was formally adopted in July 2007. Currently, the Commission is assessing the need and appropriateness of further potential measures in this field, to complement the directive⁹.

i. Shareholders' Rights Directive

The Directive introduces minimum standards to ensure that shareholders of companies whose shares are traded on a regulated market have a timely access to the relevant information ahead of the general meeting and simple means to vote at a distance. It allows Member States to take additional measures to facilitate further the exercise of the rights referred to in the Directive.

The Directive features the following key provisions:

- Article 5: Minimum notice period of 21/14 days for most general meetings of listed companies and internet publication of the convocation and of the relevant documents;
- Article 7: Abolition of share blocking and introduction of a record date in all Member States which may not be more than 30 days before the general meeting;

⁸ Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_184/l_18420070714en00170024.pdf.

⁹ Fostering an appropriate regime for shareholders' rights, Third consultation document of the Services of the Directorate General Internal Market and Services, 30.04.2007, http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm (hereinafter "the Consultation Document").

- Article 8: Abolition of obstacles on electronic participation to the general meeting, including electronic voting;
- Article 9: Right of shareholders to ask questions, and obligation on the part of the company to answer questions;
- Articles 10, 11: Abolition of existing constraints on the eligibility of people to act as proxy holder and of excessive formal requirements for the appointment of the proxy holder;
- Article 14: Disclosure of the voting results on the company's internet site.

Though not explicitly dealing with the area of clearing and settlement in particular or post trading in general, the SRD's legal framework is a benchmark for any further work on the legal aspects of Barrier 3. First, as regards the material scope of the work (i.e., which rights are channelled to the entitled person and by which means, see *infra*). Second, the SRD contains a definition of the person entitled to exercise these rights. In the context of the SRD, this person is called the “shareholder”.

“Shareholder means the natural or legal person that is recognised as a shareholder under the applicable law”, SRD Article 2(b).

“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”, SRD Article 1(2).

Consequently, the person entitled to the rights under the SRD is the natural or legal person that is recognised as a shareholder under the law of the Member State in which the company has its registered office. This approach is supported by Recital 3 of the SRD.

“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.[...]”

ii. Consultation document on shareholders' rights

The consultation document on shareholders rights sets out a set of several draft recommendations¹⁰. Some of them relate immediately to the exercise of rights attached to securities. In particular in the framework of its Question 4¹¹, the paper makes reference to the person entitled to exercise corporate rights.

Section 4.2.2:

“Where a client is entitled to give instructions about the exercise of the voting right, Member States should ensure that financial intermediaries that are part of the chain of intermediaries between that client and the issuer either cast votes attached to shares in accordance with the clients' voting instructions or transfer the voting instructions to another intermediary higher up in the chain.”

Section 4.2.5:

Member States should ensure that intermediaries take the necessary measures to have the client's name registered in the register of companies which have issued registered shares. This obligation should not apply where the client objects to his name being registered.

¹⁰ The consultation is work in progress. The deadline for submitting comments on the draft recommendations has expired on 27 July 2007. The Commission is currently analysing the submissions and considering the way forward.

¹¹ Other proposed recommendations equally concern rights of the entitled person, however, there is no direct reference to that person that could be used for the current analysis, cf. Questions 2 and 3.2.3 of the Consultation Document.

iii. Transparency Directive

Under the Directive, all securities issuers have to provide annual financial reports within four months after the end of the financial year. Investors in shares receive more complete half-yearly financial reports. Those issuers who do not publish quarterly reports need to provide quarterly management statements. Bond issuers are also required to publish half-yearly reports. The Directive is also intended to improve the European dissemination of information on issuers, thus removing a barrier to cross-border investment.

The definition of shareholder applied by the Transparency Directive¹² differs from the one used in the *SRD*, cf. *supra*, though the original proposal for the *SRD* included an identical copy (deleting however [iii])¹³:

“ ‘Shareholder’ means any natural person or legal entity governed by private or public law that holds:

- (i) shares of the issuer in its own name and on its own account;*
- (ii) shares of the issuer in its own name, but on behalf of another natural person or legal entity”;*
- (iii) depository receipts, in which case the holder of the depository receipt shall be considered as the shareholder of the underlying shares represented by the depository receipts”.*

b. Approach taken by the Unidroit draft Convention

The issue of who is the beneficiary of the corporate rights is also addressed by the current version of the Unidroit draft Convention in its Articles 7(1):

"The credit of securities to a securities account confers on the account holder

(a) the right to receive and exercise the rights attached to the securities, including in particular dividends, other distributions and voting rights:

(i) where the account holder is not an intermediary or is an intermediary acting for its own account; and,

(ii) in any other case, if provided so by the non-Convention law;

(b) [...]"

c. Assessment

Developing a definition of the person entitled to exercise corporate rights probably starts from looking at two contrarian approaches:

First, the solution to the legal elements of Barrier 3 could work on the assumption that the person entitled to exercise corporate rights should always be to the account holder. This approach would have the great advantage, that the account holder is generally very easy to identify and that the

12 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, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_390/l_39020041231en00380057.pdf.

13 Article 2(c), Proposal for a directive on the exercise of voting rights, COM(2005)685 final, 05.01.2006, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0685en01.pdf.

definition does not make reference to any legal concepts but is rather built on a practical criterion which can be found uniformly in all EU jurisdictions. Furthermore, there would be an excellent accord between the work on Barrier 3 and the efforts to resolve Barrier 13, as the conceptual make up of the latter is entirely built on the account holder's position. However, applying this concept to Barrier 3 would not take into account that, on the one hand, the account holder is often not entitled in economic terms as he holds the securities for another person, and, on the other hand, that there is in many of the EU jurisdictions a direct legal relationship (“property”) link between the issuer and the person at the bottom end of the holding chain. For this reason, the account holder is not an ideal point of reference in the context of Barrier 3.

Second, the solution could build on identifying the person who is actually at the bottom end of the holding chain and has paid the price for the securities as being entitled to exercise corporate rights. This would certainly be a valid result in terms of governance of the issuing company and also reflect perfectly the underlying economic reality. However, this approach, as long as applied as an absolute principle, bears difficulties. On the one hand, this “bottom end person” sometimes cannot be identified for practical reasons; on the other hand, there are cases where this person is not interested in exercising the relevant corporate rights (but for reasons of corporate governance, the rights should not be unused); or, legal tradition has led to an underlying legal framework where regularly rights are exercised by persons that are not economically entitled (though, in most cases, they exercise the rights on the basis of instructions given by the person at the bottom end of the holding chain). Lastly, this criterion, in specific cases, might be extremely difficult to apply in a cross-border context.

Consequently, work on the legal aspects of Barrier 3 requires striking a balance between these two extreme concepts. All approaches taken by the legal instruments described above attempt to achieve this balance.

The SRD, in its Recital 3, takes a rather economic approach in determining who should be entitled to exercise the rights: the person who has paid the price for the shares (cf. *supra*). However, the SRD accepts the current differences between the definitions, in the different Member States, of the term “shareholder”, given that the technological infrastructure so far is not sufficiently harmonised to reflect elements of the legal analysis of a different jurisdiction. Insofar, the Council and the Parliament have opted for a limited approach to the issue of who is the person entitled to the relevant corporate rights. The precise definition of “shareholder” is left to the national law, cf. *supra*.

Difficulties in applying the definition of the SRD could for example arise in where jurisdictions recognise shareholders only in case they receive their title under a specific legal make up, whereas other jurisdictions identify the shareholder differently. This is especially the case of discrepancy between a legal framework which is based on direct property of the shareholder whereas other countries allow a split between legal title in shares and the beneficial ownership of them.

Example:

An investor in ABC shares is located in X-Country, whereas ABC-Company is located in Y-Country. In X-Country, a split between legal title and beneficial ownership is possible. Under the actual arrangements, the investor is beneficial owner whereas the legal title is with one of the custodians in the cross-border holding chain. The law of Y-country does not know the concept of beneficial ownership, and only the legal owner is recognised as shareholder.

Consequently, under specific circumstances, the SRD's fall back on national corporate law might lead to a result which is not covered by Recital 3.

The concept used in the Consultation Document refers to the “client of a financial intermediary”.

This approach is entirely based on the contractual relationship between two persons and bears neither an element of corporate or property law nor any economic reasoning. In the context of eliminating legal obstacles stemming from differences in the national legal provisions affecting corporate action processing, the concept of “client” does not appear to be sufficiently sharp.

The definition used in the Unidroit draft Convention comes to a partly different result. The method for identifying the entitled person refers to persons who are not intermediaries (and therefore do not necessarily hold for their own account) and intermediaries holding for their own account. In order to avoid the difficult issue of who is a shareholder in terms of the company law of each jurisdiction, it takes a rather economic point of view in making the holding for own account the decisive criterion. This leads to a result where the exercise of corporate rights is supposed to happen between the issuer and the person that is entitled in economic terms, regardless whether the jurisdiction of the issuer recognises the legal make up of the entitlement of the investor (legal or beneficial owner, etc). One could say that the Unidroit draft Convention reflects fairly well the reasoning of Recital 3 of the Shareholders' Rights Directive and does not fall back on the legal analysis of national company law.

However, Unidroit Article 7(1)(a-ii) addresses the issue that in some jurisdictions, an exercise of corporate rights by persons that do not hold for their own account is possible. Insofar there is an exception to the underlying economic approach. This is to recognise that in some jurisdictions intermediaries are entitled to exercise corporate rights *vis-à-vis* the issuer, for example in the case where they are registered as the legal owner of the securities and the person “that paid the price” is entitled either as a beneficial owner or on the basis of any other derived interest.

The definition contained in the Transparency Directive, though its wording differs from the Unidroit draft, comes to a very similar, however not identical, result. It equally adopts the economic approach (“holding for own account”) in its subparagraph [i], which fully corresponds to subparagraph [i] of the Unidroit definition. Then, its second subparagraph envisages the same legal reality as the second subparagraph of the Unidroit definition, namely the possibility of split between two persons: one person in the position to exercise the corporate rights while the other one is economically entitled. However, in detail both rules might come to different results in specific cases because the definition of the second subparagraph of the definition of the Transparency Directive is narrower, as the “split” is described by referring to a specific legal concept (“in the own name, but on behalf of another person”). There are legal concepts where the intermediary definitely holds in its own name but not “on behalf” of the person at the bottom end. “On behalf” could be read as having a legal connotation, in particular as referring to the legal concept of procurator or representation. But this is not necessarily the case, in particular in legal systems where account holders have merely an interest against the intermediary instead of one in the underlying asset. It is not clear why the definition contained in the Transparency Directive, in its second subparagraph, steps back from the approach used in the first subparagraph. “In its own name, but for the account of another person” would have been more stringent. However, the practical differences between the Unidroit definition and the one of the Transparency Directive are certainly marginal.

As regards subparagraph [iii] of the definition of the Transparency directive, the Legal Certainty Group follows the opinion of the drafters of the SRD¹⁴, that investors in depositary receipts should in principle also be entitled to determine how underlying shares are to be voted. However, the inclusion of receipt holders in the definition would not, of itself, necessarily lead to this result as the contents of issuing agreements on depositary receipts vary as far as voting rights are concerned and these differences usually also have an impact on the price of the receipts. Therefore, it seems not practicable to draw up a harmonised binding rule in respect of the holders of depositary receipts.

¹⁴ Proposal (footnote 13), p. 4.

d. Conclusion and proposal

Recital 3 of the SRD provides for a valid benchmark when developing a technique with a view to identifying the entitled person in the context of legal obstacles identified under Giovannini Barrier 3. However, there is agreement that it would be too ambitious to attempt harmonising the question of who is the shareholder in terms of corporate law and equally not sensible to attempt to always identify the person at the bottom end of the holding chain that bears the economic risk.

All three existing approaches described above (SRD, Transparency Directive, Unidroit) strike a practicable balance between cross-border compatibility and ex-ante certainty on the one hand and a neutral and functional approach on the other hand. All three concepts appear to leave the same broad level of flexibility to the domestic law. The SRD, however, might be more difficult to apply in practice, as it entirely refers to national legal concepts. Unidroit and the Transparency Directive take a basically identical, functional and economic approach, which appears to serve the aims of the work on Barrier 3 better than the one of the SRD. Which one is preferable is difficult to decide. The reference to the national legal framework (subparagraph [ii] in both definitions) seems to be more neutral and sharp in the Unidroit draft Convention. However, the definition of the Transparency Directive bears the advantage that it is already part of the *acquis communautaire* and that the use of identical definitions greatly improves the consistency of the EU legal framework.

Therefore, the Legal Certainty Group advises to use a definition built on the one contained in Article 2(1)(e) of the Transparency Directive (with the exception of the third subparagraph) in the context of the resolution of differences in national legal provisions affecting corporate action processing.

2. How to term the entitled person

Another issue is closely linked to the method of identification: it seems to be highly difficult to term this person in a way which properly reflects the underlying concept. In the present context, a handful of notions intended to catch the content of “person entitled to exercise the rights” can be found: account holder, client, investor, ultimate/last investor, shareholder, holder, proprietor, owner, beneficial owner, etc.

As the Legal Certainty Group tends to build its further considerations on a definition of the entitled person which stems from the Transparency Directive, it would be natural to adopt also the term used in that directive, which is “shareholder”. However, shareholder is a narrow concept relating only to one type of security. Moreover, shareholder is a legal concept of each national corporate law and its precise content varies between all EU jurisdictions. Furthermore, the notion does not reflect the functional, economic approach on which the definition should be based, in particular it does not cover holders of debt securities. Therefore, a different notion should be applied.

From the notions assembled above, some bear the identical defect: “proprietor”, “owner” and “beneficial owner” are all mirroring legal concepts that do not have exactly the same meaning throughout the EU jurisdictions, whereas “client” is too imprecise. “Account holder”, though being a functional term and very precise, would be conceptually incorrect in the present context (*cf. supra*). The remaining two terms, “investor” and “ultimate investor”, are both regularly used in the context of shareholders' rights. They reflect quite well the functional and economic reasoning adopted by the Legal Certainty Group while being conceptually absolutely neutral at the same time. “Ultimate investor”, however, bears the risk that, from a terminological point of view, one could

expect other investors to take part in the holding chain, which is not the case if “investor” is understood as being the person that bears the economic risk and having the economic benefits of the securities.

The term “investor” seems most suitable, bearing in mind that the aim of the Legal Certainty Group’s work on corporate actions consists in the analysis of the modified relations between the issuer and investor in securities held through intermediaries/account providers. The intermediary system in fact constitutes the “evidentiary system” that is needed after the disappearance of “negotiable paper instruments”. In case of the systems where securities are held through account provider, the issuer – investor relationship is substituted by a set of legal relationships, with various rights and obligations related to administration of this evidentiary system, which, although they in fact facilitate and streamline the process of communication between the issuer and the investor, are more complex from the legal point of view: the relationships between the issuer and account providers, and between the account providers and the investors /account holders.

Consequently, the Legal Certainty Group, in the context of the removal of differences in national legal provisions affecting corporate action processing (Barrier 3), advises to refer to the person entitled to exercise the corporate rights attached to securities as “the investor”.

II. Material scope: processing of corporate actions

1. Introduction

a. Corporate actions

b. Types of securities

c. Processing

d. Mandatory and contractual/optional processing of corporate actions

As a general rule, for practical and cost reasons, not all information published by the issuer and not all information or instructions given by the investor can be passed up or down by the account provider. A selection and determination have to be made and the cost aspect as well as the general discretion of the parties to a securities account agreement regarding the scope of obligations of the account provider have to be taken into account.

2. Analysis

a. The legal implication of the intermediaries' role in corporate actions

As a result of the interposition of the intermediaries, often multiple chains thereof, between the investor and the issuer, in order for the investors to exercise the rights and enjoy the benefits vested in their securities, assistance of the intermediary is required. Even in case of the legal systems which recognise the investor as the legal owner of securities, the very fact of holding the securities through a system of book entries, requires the intermediary to at least participate in the process of evidencing and identification of the investor vis-à-vis the issuer for the purpose of particular corporate events. A whole spectrum of activities/assistance by intermediaries in case of corporate

events is possible. From action as simple as issuing a certificate for the investor which the investor can show to the issuer in order to be entered on a list of shareholders for a particular corporate event, through providing for a channel of communication between the investor and the issuer (whether it is provided for partial or full-fledged communication, may vary from corporate event to corporate event), and ending on the actual exercise of investor's rights, including the decision-making (in those systems which attribute the legal ownership of securities to the intermediary, rather than the investor). Notwithstanding the fact that a number of the services offered by intermediaries in the context of corporate actions are value-added services, it is necessary to analyse the functions of intermediaries in corporate actions, in particular in case of the cross-border processing of corporate events, and to identify whether and within which scope certain actions/assistance by the intermediary is necessary for the investor to be able to enjoy his/her securities. Such actions/assistance may amount to legal duties of the intermediaries, in particular with regard to passing up and down of information between the issuer and the investor, which should be accepted in all Member States in order to remove any existing obstacles to effectively enjoy securities once an investor acquires them, bearing in mind that any such duties shall be constructed with regard to the principles of subsidiarity and proportionality of the EU Law (*cf. para AII above*).

b. Passing down information from the issuer to the investor

At the present time, there is no consistency between the EU Members state legislations regarding the information flows between the issuer, the account providers and the account holder. The extent of the obligations of account providers to pass down corporate information varies indeed significantly depending on in which jurisdiction it is situated. Hence, legal uncertainty results from this situation, which is particularly visible in case of cross-border security holdings. The role of the CSD and, in turn, all account providers in the holding chain in processing information down from the issuer to the investor needs to be defined. The overall solution of this issue necessitates measure from two angles, namely:

- Operational harmonisation: by which means is a piece of information passed down from a technical point of view. Which language is used in cross-border situations? Which are the time lines?
- Legal harmonisation: Which type of information should be unconditionally passed on and which type of information can be passed on depending on the arrangements made in the account agreement? Which are the liabilities in case of failure?

i. Operational issues: CESAME

In the framework of the CESAME initiative, private sector proposals co-ordinated by the European Credit Sector Association (ECSAs) and the European Central Securities Depositories Association (ECSDA) in co-operation with ESF, EALIC and FESE address the harmonisation of corporate actions processing from an operational point of view. In particular, in its Response¹⁵ to the Giovannini Report Barrier 3, ECSDA distinguishes the “announcement information” available in the market into two types:

- operational information, i.e. basic information that indicates that an event has been announced, its basic terms and how the issuer chooses to run the event;
- value added information, i.e. the information which is necessary to make a decision relating

¹⁵ The European Central Securities Depositories Association's Response to the Giovannini Report Barrier 3, Corporate Actions - Part 1 - Mandatory Distributions, 30 June 2005.

to the event, often contained in large legal documents¹⁶.

The basic assumption of ECSDA is that CSDs are best placed to play a pivotal role in the processing of the “operational information” since CSDs know who all holders (at the first level) are and, hence, are able to transmit the information to the first layer of the chain of ownership. The theory underlying this assumption is the “push” theory of information flows, applicable to all corporate actions and meeting information, in accordance to which as soon as the CSD receives the information, it shall push it to all its participants, rather than simply posting the information and waiting for users of the systems to retrieve it.

ECSDA focuses on the transmission of the “operational information” only (as “key information” needed at the start of the event) possibly in the form of global standards. However, their suggestion is that the operational information should also include a web link to other “value adding” information controlled by the issuer (e.g. offer documents).

The reasoning behind ECSDA’s proposal is however that CSDs can play a role in the information processing only to the extent that they receive the information themselves. The need arises for a cooperation by issuers that – where it does not occur spontaneously - can be only achieved by using regulation.

Based on recommendations and standards previously published, ECSAs issued in April 2007 a “ECSA-ECSDA set of common deliverables”¹⁷ on mandatory distributions¹⁸, applying to securities eligible in at least one CSD and listed on at least one official trading place. Albeit their principal focus is on information flows between issuers and CSDs, the set of common deliverables is of significant interest for the purposes of this analysis, also because principles drawn in connection with “mandatory distributions” may prove valid in relation to any other corporate actions.

Among the recommendations drawn up by ECSA and ECSDA, some acquire particular relevance in connection with the issues at hand, and namely the following:

- All issuers whose securities are held via a CSD must ensure their primary CSD is informed of the official details of a corporate event, at a minimum, as soon as the announcement has been made. This includes any official intention, change or confirmation of an event;
- Information from issuers to the CSD should be done in formatted form defined and used by the industry (such as the ISO 6166 and ISO 15022/20022 standards). In case of non-formatted text on the announcement by the issuer, the announcement should include a translation into English;
- At the same time, issuers should make the information available to all and at a minimum on a website including a summary of the event at least in English;
- Liability rests with the party that provides the information in the first instance;

16 ECSDA points out how the need for each type of information varies throughout the chain of ownership: while CSDs deal with the first type only (being their role in the market to facilitate processing to the highest efficiency level possible but not to make decisions about whether its clients should take part in the event or not), intermediaries will often need both, as do they need not only to process the event on behalf of their clients but also to make “value added information” available to their clients. On the other side, investors need to be very quickly provided with the basic information, but - when an action by them is needed – they may also require value added information in order to make take a decision on how to react.

17 ECSA, Harmonisation of Corporate Actions Processing in Europe: Giovannini Barrier 3, 30 April 2007.

18 The classification of events proposed by ECSA and ECSDA distinguishes between “distributions” and “reorganisation”: “distributions” mean events where the issuer delivers to security holders a particular benefit or “resource” (e.g. cash, securities, rights, etc) and the underlying holding entitling to the distribution is unaffected by the event (like in case of cash dividends or interest payments); while “restructurings” are events where the issuer replaces a security with another resource and the underlying holding and/or securities is affected by the corporate event (e.g. mergers, takeover bids. In the ECSAs/ECSDA classification, “general meetings” represent a category of events on their own. A further distinction is made between voluntary events (events in which holders of a security need to act if the event is to affect their holdings) and mandatory events (events that will occur without any action required by individual holders of the security and mandatory events with options (events that will occur without any action on the part of the holders of the security, but in relation to which the holders have some choice as to the type of benefit they may receive).

- All CSDs receiving this information should make the information available, without undue delay of receipt from the issuer, at a minimum to all their participants who have a direct holding or pending transaction in the corporate action security within the CSD at the time of the announcement;
- CSD should continuously inform the participants of any subsequent information on the event;
- The announcement should also be made available to any participant who obtains a new holding or is subject to a new transaction that will be affected by the event;
- There should be clear transparency between service providers and their clients on liability rules;
- If a reversal of an event is necessary, an announcement should be made by the CSD prior to processing and all aspects of the event should be reversed;
- The custodian banks and/or CSD members should inform at least their clients that have holdings or any pending transactions impacted by the event;
- The custodian banks and/or CSD members should continuously inform the participants of any subsequent information on the event;
- The custodian banks and/or CSD members announcement should be made as soon as possible following the issuer/CSD announcement.

ii. Legal aspects

The diversity of the range of information made available to investors by their account providers calls for a harmonisation of this aspect. Only after harmonisation, investors can be sure to receive the relevant information even in a cross-border holding arrangement. There are basically four legal issues at stake: first, the establishment of the catalogue of types of information that are to be channelled to the investor either on a mandatory basis or under contractual agreement; second, the possibility of establishing time limits for processing information; third, issues of liability in case of failure to process corporate information properly; and, fourth, considerations regarding cost allocation.

Types of information to be passed down

- Convocation of the shareholders' or bondholders' meeting
- Declaration of dividend or other distribution
- Granting of subscription rights for new shares or other securities
- Stock split
- Merger with another company
- Corporate restructuring
- Takeover bid of a third party
(mostly published by the acquirer) and statements relating hereto
- Report on class action
or other corporate law suit of shareholders against the issuer

- Ad-hoc statements
(in particular to prevent insider trading)
- Profit warning
- Informal statements on the business
- Business results, changes of business structure, strategy or management made public at a press conference, at road shows, etc.
- Voting results of shareholders' meeting
- New interest rate for floater (only bonds)
- Default situation (only bonds)
- Restructuring (bonds)

Not all types of information can be processed to the investors for reasons of practicability and cost.

Addressee of these rules

There are, in principle, two methods to formulate rules relating to the channelling of corporate information to the investor: either, to put the duty to deliver the information on the account provider or, to formulate a corresponding right of the investor to receive such information.

Time limits

There should be a positive rule on reception/delivery of information without undue delay.

Liability in case of failure

In the context of Barrier 13, the Legal Certainty Group has decided not to deal with questions of liability as they could be better addressed by national law.

Cost allocation

The Legal Certainty Group has taken the cost factor into account in the context of drawing up the list of mandatory processing of corporate information in order to avoid putting disproportional burden on intermediaries. Any further consideration regarding allocation of cost between the parties is outside the mandate of the present exercise.

iii. Proposal

The investor shall receive through the holding chain the following types of information from the issuer without undue delay:

1. ...
2. ...
3. ...

c. *Passing up information from the investor to the issuer*

Communication between the investor and the issuer of the securities may take place either directly or through an intermediary. Any investor may write a letter or send an e-mail to the company, its public relations department, its CEO or to any person he may deem appropriate and may make a complaint or request some action, e. g. to send the annual report or a press statement or to answer a specific question irrespective of whether or not such action or question/answer is necessary for, or even related to, the exercise of rights resulting from the securities of the issuer.

In many cases it may be easier or more convenient for the investor not to approach directly the issuer but to ask his depository bank, i.e. the provider of the securities account, to act on his behalf. The topic of this section is to determine when and under which circumstances the account provider is obliged to pass on the request of the investor.

The term “information” has to be understood in a broad sense as described above, but should not include in the present context the exercise of rights or instructions to exercise rights resulting from the securities held by the investor and credited to his securities account. As instructions are one of the elements that occur in the context of corporate rights, they addressed separately, cf. *infra*.

The section does however not cover information that has to be passed by the account holder to the issuer or third persons, in particular public authorities, in a context different from the corporate affairs of the issuer. In particular, the passing on of information on investors to tax authorities and similar obligations of intermediaries are not subject of Barrier 3.

Examples of “information” passed from the investor to the issuer are:

- comments, questions or criticism relating to the business, management or corporate governance of the issuer,
- questions relating to the exercise of rights resulting from the securities, e.g. purpose of a capital increase.

It can be said that “information” as defined above does not have to be passed up by the account provider to the issuer, neither outside a shareholders’ meeting nor within a shareholders’ meeting, even if the even if the account provider is prepared to exercise voting rights for the account investor. There is no legal or general contractual obligation. If an investor wants to ask questions and receive answers thereon before exercising his voting rights, he has to attend the meeting personally or to mandate a proxy. The proxy could be, of course, his account provider, if he offers such service. However, there seems to be no obligation to this effect.

The investor has no statutory right that pieces of information, questions, comments, etc. are passed on to the issuer through the holding chain. This is without prejudice to contractual arrangements in this regard.

d. *Exercise of rights of the investor against the issuer*

The consequence of the intermediated securities holding system is that account providers determine the ability of the investor to exercise his rights *vis-à-vis* the issuer. However, the exercise of corporate rights must happen, and consequently the account provider participates in one of the two following ways:

- either, the account provider exercises the respective right on behalf of the investor on the basis of an authorisation and instruction, or

- the account provider facilitates the exercise by the investor himself, e.g. by providing evidence of his shareholding, by enabling registration of the investor in the shares' register, or by transmitting acceptance declarations of the investor to the issuer or a third party.

Attending general meetings, voting, etc.

With respect to attending a shareholders' or bondholders meeting, including voting, tabling of questions, draft resolutions and making motions, there should be an obligation on the account provider to facilitate the exercise of these rights in case of need. This obligation mainly comprises the delivery of a piece of evidence regarding the position as a shareholder or bondholder, either to the investor or directly to the issuer. In some jurisdictions (Estonia, Bulgaria), the CSD is even bound to deliver a document identifying all investors to the issuer.

Another question is whether the intermediary should be obliged to exercise these rights on behalf of the investor. In most European jurisdiction, such obligation does not exist.

Exercise of corporate minority rights

in or prior to a shareholders' meeting

Challenge voting results of a shareholders' meeting

The account provider should be bound to provide evidence of the position of a shareholder. There seems to be no European country that obliges account providers to exercise this right on behalf of the investor.

Receive dividend or other distributions

It should be mandatory for account providers to collect dividends, interests or other distribution of profit or assets on behalf of the investor. Most jurisdictions provide for such obligation, except Lithuania and Bulgaria. In case the investor is in a position and wishes to collect the payments himself, the account provider should be bound to provide him with an evidence of his holdings for purposes of legitimation.

Exercise subscription or exchange rights

It should be mandatory for account providers to exercise subscription or exchange rights on behalf of the investor. Most jurisdictions provide for such obligation, except Lithuania and Bulgaria. In case the investor is in a position and wishes to exercise the rights himself, the account provider should be bound to provide him with an evidence of his holdings for purposes of legitimation.

Acceptance of a takeover-bid or other offer to buy the relevant shares

The account provider should have the duty to accept a takeover-bid or any other offer to buy the relevant shares on behalf of the investor, except where personal action of the investor is required.

Agree to reorganisation or restructuring of the company

Account providers should be obliged to facilitate the agreement of the investor to such measures by providing him with an evidence of his holdings for purposes of legitimation.

Call for early redemption of bonds resulting from a default

...

Initiate legal proceedings, class actions

Account provider should be obliged to facilitate the initialisation of legal proceeding or the participation in class actions by providing the investor with an evidence of his holdings for purposes of legitimation.

Enforcement of corporate rights

or other rights resulting from the securities through court action.

e. Conclusion/Proposal

The investor has the right that the following corporate rights are exercised by his account provider according to his instructions

1. ...
2. ...
3. ...

This is without prejudice to the possibility that the investor himself exercises the rights. In such case, the account provider is bound to facilitate the exercise by providing the necessary evidence of the position of the investor.

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