

LEGAL BARRIERS

GENERAL ISSUES

The elimination of Barrier 3 is related to the resolution of issues related to beneficial ownership as well as to the transfer of ownership.

Our work will be focusing first on operational issues related to the right to entitlement (which is not always aligned but which can be resolved based on ex and record date). However certain corporate actions or related processes imply some work and harmonization on the right to ownership (claims, proxy vote,...).

Overall, the successful elimination of Barrier 3 is inter-dependent on the elimination of other barriers (EU common Protocol, Settlement cycles, Legal, Fiscal). For example, on the fiscal side, withholding tax procedure is an additional issue and is not aligned in all markets.

NOTIFICATION PROCESS

The notification process is the process by which the event is announced and details of it communicated to the relevant actors in the chain. The notification starts from the issuer and flows down the chain of intermediaries.

Our Gap Analysis indicated that issuers are often constrained by national obligations regarding the communication of corporate events e.g. the obligation to use certain channels. However these obligations are rather old fashioned as they focus on communication via the press and paper communication. There is no obligation to disseminate information in a given format, legal prescriptions should be modified to allow electronic communication forms and often there are no clear liability rules beyond classic events.

A harmonised legal basis is needed to establish harmonised information and distribution processes from issuers to intermediaries.

DATES

Our gap analysis showed that record date is not a legal concept everywhere and that its definition varies. The same is true for ex date.

There is a lack of harmonized rules regarding which institution holds the responsibility for setting dates and for which type of dates.

The Payment Date requirement is also very heterogeneous. It can range from a payment within days to a payment period of up to 60 days. The time gap and payment period are sometimes legally fixed. They need to be harmonised across Europe.

DEMATERIALIZATION

Dematerialization (or immobilization with equivalent effect) is well advanced. However, some countries still do not have achieved full or quasi full dematerialization, often due to existing national legislation constraints (e.g. NL Giraal Effectenverkeer wet)

PAYMENT

The payment by cheques (related to tax voucher or equivalent element) is often based on the combination of the lack of dematerialization and the possibility for issuers to still mandate non electronic payment.

TAX ISSUES

The recommendation to pay as soon as possible after Record Date cannot be implemented fully because of varying withholding tax procedures. This may imply for example amendments in the company code and Tax Regulations (PL). There is no European law governing this issue and it has key implications in terms of market claims as well as in moving the payment date as close as possible to the record date.

Nota Bene:

We refer the Legal Certainty Group to ECSDA's first report of June 30, 2005 relating to its standards for the removal of Giovannini barrier 3