

LEGAL AND FISCAL CONSTRAINTS TO THE REMOVAL OF BARRIER 3

ECSAs FINDINGS

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. Concepts of ownership are diverse, rules of ownership vary from one legal system to the other.

As identified by the Legal Certainty Group, there is an absence of an EU wide framework for the treatment of interests in securities held with an intermediary. There should be new legislation about the legal effects of book entries.

The ECSA 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 dependent on the elimination of other barriers and more particularly Giovannini Barrier 13 (EU common Protocol, Settlement cycles, Legal, Fiscal). Furthermore, on the fiscal side, withholding tax procedures are an additional issue and are 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.

The ECSA 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

The ECSA 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 fixed by law. They need to be harmonised across Europe.

DEMATERIALIZATION

Dematerialization (or immobilization with equivalent effect) is well advanced. However, some countries have still not 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 continue to 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:

The ECSAs refer the Legal Certainty Group to ECSDA¹'s first report of June 30, 2005 relating to its standards for the removal of Giovannini barrier 3

The Commission welcomed this initiative and expressed its interest to be informed of such actions in the future. It was also reported that that stocktaking Report of the Commission's Fiscal Compliance Group was due to be published in March.

ECSDA findings

Barriers to Implementation

Mandatory Distributions-ECSDA

Standards 11-16 relating to Announcements: dissemination of information is not harmonized at European level; liability issues might arise when documents are translated into English.

Standards 24-25 relating to resources : tax processing (e.g. in Belgium) relating to cash distributions and market claims will need to be addressed

Market Claims- ECSDA

Standards 27-29 relating to entitlement: transfer of ownership rules need to be changed or clarified in some markets for this process to gain all benefits e.g. BE,FI,FR,GR,IT,ES, Lithuania

Standards 30-33 relating to raising claims: the legal certainty group should analyse possible fiscal and legal aspects associated with market claims.
Local regulations such as stock exchange rules will need to be taken into account and potentially changed.