Shareholding in EU:
Is "indirect holding" approach appropriate in achieving financial integration?

by
Georgios P. Kouretas*
Department of Business Administration
Athens University of Economics and Business
GR-10434
Athens, Greece

and

Christina I. Tarnanidou
Department of Business Administration
Athens University of Economics and Business
GR-10434
Athens, Greece

This version: 7 July 2012

Abstract

The purpose of this paper is to focus on the specific "shareholder's" concept of transparency. It considers that indirect securities holding systems limited the degree of "post-trading" transparency. The main concern is that, in the effort to satisfy the need for globalizing the markets, implementation of this particular system had the adverse effect the actual shareholders not to be registered as such in the official registries and registrations to be effected in the name of intermediaries, acting on their behalf. It considers that new EU legislative action should be taken to address the legal effects of securities holding, as this field is of utmost importance in completing securities markets integration. To this end, the paper proposes a new architecture of securities holdings' markets which takes into account, on the one hand, the need to facilitate cross border functioning of EU internal markets and, on the other, the need to satisfy an appropriate degree of transparency in the "post trading" field.

Keywords: Corporate governance, shareholder's transparency, E.U. legislation, MiFID, indirect holding approach.

JEL classification: K22, G32, G34

Preliminary draft: Please do not quote without the authors' permission. Comments are welcomed

*An earlier version of the paper was presented at the International Conference on "Improving Financial Institutions: The Proper Balance Between Regulation and Governance" and thanks are due to participants for valuable comments. Kouretas acknowledges financial support from a Marie Curie Transfer of Knowledge Fellowship of the European Community's Sixth Framework Programme under contract number MTKD-CT-014288, as well as from the Research Committee of the University of Crete under research grant #2257. We also thank without implicating Eva Banincova, Bonnie Buchanan, Miriam Garnier, Alberto Franco Pozzolo, Chris Redmond and Kenneth Spong for valuable comments and discussions.

**corresponding author: email: kouretas@aueb.gr.

1. Introduction

It is broadly argued that transparency is a key component in effecting EU financial integration not only in the area of capital markets law but also in the one relating to corporate law. It is of utmost importance for the proper functioning and stability of the European financial markets not to have legal uncertainty on who the shareholder is and how the shareholder's rights towards the issuing company can be exercised.

The principal of transparency has been broadly recognized in many aspects of the financial sector as reflected in a variety of EU directives, including "Transparency Directive" (2004/109/EC) that implements transparency in the area of periodic reporting, ongoing disclosure and disclosure of major shareholdings for issuers, "Prospectus Directive" ((2001/34/EC) that stipulates the particular issuer's and securities' information requirements that a prospectus has to fulfill in enabling investors to make informed investment decisions, "MiFID" (2004/39/EC) that focuses on transparency organizational requirements of investment firms, best execution and reporting conduct of business requirements, as well as pre-trade and post-trade transparency obligations of investment firms, "Market Abuse Directive" (2003/6/EC) that aims at protecting the markets from insider dealing and market manipulation, "Banking Consolidation Directive" (2006/48/EC) that imposes among others particular corporate governance obligations to credit institutions aiming at achieving transparent lines in their administrative and accounting procedures, "Capital Adequacy Directive" (2006/49/EC) that establishes particular reporting requirements on credit institutions and investment firms in effecting adequate levels of transparency with regard to their capital adequacy, "Accounting Directive" (78/660/EEC) and, specifically, its new rules on establishing obligations in the listed companies to

disclose an annual corporate governance statement (2006/46/EC), and last, but not least, "Shareholders Rights Directive" (2007/36/EC) that aims at solving cross border shareholding problems, mainly by seeking to address the following issue: "in case of securities holding systems where shares are held via chains of intermediaries acting across borders, who the shareholder is, or, put it differently, who is entitled to participate and vote in the shareholders' meeting".

The purpose of this paper is to focus on this specific "shareholder's" concept of transparency. It considers that the so called indirect securities holding systems limited the degree of "post-trading" transparency. The main concern is that, in the effort to fulfill the requirements for the integration of E.U. financial markets, implementation of this particular system has the adverse effect that the actual shareholders are not registered as such in the official registries and therefore registrations to be effected in the name of intermediaries, acting on their behalf. To this end, indirect holding patterns raise many issues not only on the shareholding functioning but also on the functioning of the capital markets as a whole. In this scope, the paper examines the appropriateness of indirect holding patterns. It considers that new EU legislative action should be taken to address the legal effects of securities holding, as this field is of utmost importance in finalizing the markets integration. To this end, the paper proceeds to propose a new architecture of securities holdings' markets which takes into account, on the one hand, the need to facilitate cross border functioning of EU internal markets and, on the other, the need to satisfy an appropriate degree of transparency in the "post trading" field.

The remainder of the paper is organized as follows. Section 2 presents the direct and indirect holding systems. In section 3 we discuss the transparency issues related to the property nature of book entry securities as "intermediated securities".

Section 4 presents the transparency issues related to the shareholders "register". In Section 5 the legal differences between the cash deposits and securities deposits are presented with our suggestions and concluding remarks given in Section 6.

2. Book entry securities: The direct and indirect holding systems

In today's securities markets, securities are held in a "book entry" form[1]. As securities are paperless, either dematerialized or immobilized, they are held through accounts that the intermediaries keep for their portfolios or the portfolios of their clients in the Official Central Securities Depositories (CSDs) or registries[2]. This electronic form of establishing property rights in securities arose as a consequence of globalization of financial markets. Trading, commerce and, generally, free movement of securities can be better achieved throughout the world if securities are allowed to cross borders without any restriction resulting to an expansion of the scope of potential "clients" to participate and invest in global financial markets.

Integration of securities markets has recently become an issue of great importance in implementing E.U. internal market in the financial sector. In this context, E.U. initiatives and relevant harmonization steps cover most aspects of capital markets, including E.U. passports on services, products, marketplaces, issuers, infrastructures, service providers etc. Currently substantial effort is given at the EU level to harmonize "post-trading" patterns. This issue refers not only to clearing and

[1] For the nature of securities as book entry securities see *European Financial Markets Lawyer Group,* Harmonization of the legal framework for rights evidences by book-entries in respect of certain financial instruments in the European Union, A report by European Financial Markets Lawyers EFML (Jun. 2003) p. 11; see also *Legal Certainty Group-LCG,* Second Advice of the Legal Certainty Group. Solutions to Legal barriers related to Post-Trading within the EU (August 2008), pp. 12-16.

[2] See *J. Benjamin*, Interests in Securities. A Proprietary Law Analysis of the International Securities Markets (2000) pp. 35 et seq.

settlement infrastructures[3] but also to securities holding in this modern book entry form[4].

Lack of harmonization in the securities holding sector has been characterized as one of the most serious remaining obstacles in achieving EU financial integration, mainly due to the fact that securities as book entry type of property are defined differently by national laws. However, it is not only the nature of book entry securities that is treated differently in national securities markets but also the holding systems themselves, as developed in each market.

In practice, such holding systems are distinguished in two main categories. The first category, as the more traditional one, refers to the "direct" or "transparent" systems, where securities are held at an end-investor level. From a shareholding's perspective, registered as shareholders in such systems, are the investors and not the intermediaries acting on their behalf[5]. These systems have the legal characteristics of the "regular deposit", i.e. the deposit in which the depositor retains the title of ownership over its deposited assets and, therefore, is entitled to exercise its property rights (as owner) over them not only towards the custodian (depositary) but also towards any third party (*erga omnes* effect)[6].

[3] See at http://ec.europa.eu/internal_market/financial-markets/clearing/index_en.htm

[4] See *European Commission Internal Market and Services DG. Financial Services Policy and Financial Markets*, Legislation on Legal Certainty of Securities Holding and Dispositions, Brussels DG Markets G2 MET/OT/acg D(2010) (the so called proposed "Securities Law Directive" (SLD)).

[5] Francisco J. Garcimartin Alferez, The UNIDROIT Project on Intermediated Securities: Direct and Indirect Holding Systems (2006), p. 3; see *European Financial Markets Lawyer Group,* op cit., pp. 4, 9, 12.

[6] *Roy Goode,* Security entitlements as Collateral and the Conflict of Laws in The Oxford Collocuim on the Collateral and Conflict of Laws, A special supplement to Butterwirths Journal of International Banking and Financial Law (1998), The Institute of Advanced Legal Studies, Oxford University (Faculty of law) and Allen & Overy, pp. 22 et seq.; *R. D. Guynn– N. J.Marchand*, Transfer of Pledge of Securities Held Through Depositories in "The Law of Cross Border Securities Transactions" (1999), Hans Van Houtte (ed.), p. 56 et seq.; *R. D. Guynn*, Modernizing Securities Ownership, Transfer and Pledging Laws (1996), Capital Market Forum, pp. 20, 21 et seq.

The second category consists of the "indirect" holding systems[7]. In this category, as an implication of the indirect holding of shares, i.e. the holding through a chain of intermediaries, an "irregular deposit" is established[8]. This irregular deposit scheme operates more or less as a bank or cash deposit. The intermediary, which is for example the custodian bank, holds in such system its clients' assets in a commingled manner (and not segregated per client) and is entrusted by its clients to make use of the deposited assets or to redeposit them. In effecting this intermediation status, the depositor sacrifices its ownership right over its assets, which passes to the custodian. Consequently, the custodian becomes in this case the owner of the deposited assets, on the only condition to retain at the depositor's disposal assets of the same quantity and quality and return them to the depositor upon the latter's demand. Following this second approach, it could be easily explained why as registered shareholders appear in the registries not the investors themselves, but the intermediaries acting on their behalf[9]. It is the intermediary that acts as the owner of the deposited shares in the context of the irregular deposit, regardless of the fact that it owes a duty to redeliver to the depositor shares of the same quantity and quality upon the latter's request.

---

[7] *Alferez,* op. cit., *Guynn-Marchand*, op. cit., p.p. 54-64, *Hal S. Scott- Philip A.Wellons*, International Finance: Transactions, Policy and Regulation (2002), pp. 943 et seq., *Ch. Bernasconi-R. Potok-G.Morton,* General Introduction: legal nature of interests in indirectly held securities and resulting conflict of law analysis, in Cross Border Collateral: Legal Risk and the Conflict of Laws (2002), *UNIDROIT*, The UNIDROIT Study Group on Harmonized Substansive Rules regarding Indirect Held Securities. Position Paper (2003), pp. 7-11, R. Potok (ed.) pp. 13-27, *Benjamin*, op. cit., p. 26-27.

[8] *Goode,* op. cit., *Guynn-Marchand*, op. cit., *Guynn*, op. cit. See also *Potok Richard*, Rapporteur's Summary p. 4 et seq., Cross Border Collateral: A conceptual framework for choice of law situations, p.10, in The Oxford Colloquium on the Collateral and conflict of Laws. A special supplement to Butterworths Journal of International Banking and Financial Law (1988). The Institute of Advanced Legal Studies, Oxford University (Faculty of Law) and Allen & Overy (ed.)

[9] Report of the High Level Group of company law experts on a modern regulatory framework for company law in Europe (2002), p. 54, Expert Group on Cross – Border Voting in Europe, p. 11 et seq. (http://www.wodc.nl), *R. C. Nolan,* Shareholder Rights in Britain, European Business Organization Law review 7 (2006), pp. 572-576, *Ch. I. Tarnanidou,* Special Rights of Shareholders of listed companies. Directive 2007/36/EC and the forthcoming national implementation (2009) (Greek edition), pp. 25, 74 et seq.

Considering the above characteristics of the indirect holding systems, it is apparent that the intermediaries' role as shareholders is nothing more but a pure reflection of the systems' architecture. Under this irregular deposit scheme, intermediaries act as owners of the shares, and are registered as such, i.e. as shareholders, in the official registries or CSDs.

It has been held that indirect holding systems are appropriate means of securities holding as they minimize the inherent administrative or other costs in the multi-tier chain of intermediation. The relevant argument is based on the fact that the intermediary, which is trying to access markets globally in the course of the provision of services (e.g. trading services, clearing services, settlement services, custody services, including proxy services, etc.) to its clients, can do so by using only one account per market, i.e. a commingled or an omnibus account[10] gathering securities for all of its clients. In this regard, it is not obliged to open separate accounts, i.e. at a client level, and undertake any relevant costs.

Despite the economic value of this argument, which is however not undisputable (see below s.3) considering the positive impact of technology in this area, the appropriateness of the indirect holding systems should be questioned for a series of reasons. As it will be stressed out in the following sections, the main argument with respect to these systems' disputed appropriateness is that they limit the degree of transparency needed not only from a shareholdings' perspective but also from a capital market's perspective.

[10] *Bernasconi Ch. - Potok R. – Morton,* op. cit., pp. 7, 20 et seq.

3. Transparency issues related to the property nature of book entry securities as "intermediated securities"

The term "intermediated securities" is used commonly to reflect the function of securities as book entry securities held by intermediaries in the environment of indirect holding systems[11]. By this meaning, intermediated securities are defined under the scope of the "irregular deposit" which as mentioned constitutes a core element in the functioning of these systems.

Under most jurisdictions, securities are defined as movable assets when issued and held in a paper form. This definition has been abandoned by the introduction of the book entry securities concpet. The recognition of their dematerialized nature of affected drastically their definition as a means of property[12].

In the EU markets book entry securities are defined differently by national laws. The more traditional definitions retained the concept of securities as movable assets or assets with equivalent legal functionality. However, under the recent approaches the book entry securities are treated legally as rights *in persona* or as entitlements than as movable assets, i.e. rights in *rem*[13]. It is apparent that such approaches were influenced not only by the paperless or book entry form of securities but also by the way securities are held, through intermediaries. Put it differently, as the securities are "intermediated securities" under the indirect holding concept, their substance in nature as well as the property rights in them are influenced by the irregular deposit that is established.

[11] *Alferez,* op. cit., p. 3.

[12] *Bernasconi-Potok-Morton,* op. cit., p. 7-8, *Guynn-Marchand,* op. cit., pp. 58-62.

[13] *Benjamin,* op. cit., p.p. 327-328, *Bernasconi-Potok-Morton,* op. cit., p. 25-27, *Scott-Wellons,* op cit., p.943. For a comparative analysis of the securities nature and the relevant holding patterns (direct/indirect) in EU countries, see *Financial Services Policy and Financial Markets. Financial Markets Infrastructures*, EU Clearing and Settlement. Legal Certainty Group. Questionnaire. Horizontal answers, Brussels MARKT/G2/MNCT D(2005).

Application of the irregular deposit had as a consequence a drastic transformation of legal rights in securities as "intermediated securities". In this new legal context, the investor-depositor loses under the irregular deposit its right in *rem,* i.e. its right to be the owner of the securities. This right passes to the intermediary as custodian and the investor-depositor retains only a right towards the intermediary the latter to maintain at the investor's disposal "intermediated securities" of the same quantity and quality. It is important to note that such legal approach became mandatory due to the fact that book entry securities cannot be held directly by the investors, but through intermediaries only. Therefore, the investor can no longer be treated as owner of the securities in the new environment of indirect holdings. In this environment the investor has only rights *in persona* in securities and not rights *in rem.* As a legal implication, investor's property in securities diminishes in nature. The investor does not retain any more "in its hands" the securities themselves but only a contractual right related to such securities that can be exercised exclusively towards the intermediary.

From an economic perspective this transformation of the property substance of securities has as an effect the investor's property to be exposed to risks related to the role of intermediary as a custodian. More specifically, the investor is exposed to the "custody risk", i.e. to the risk to lose its property rights in securities in case the custodian becomes insolvent and thus unable to "return" to the investor the "intermediated securities".

Therefore, it is apparent that indirect holding patterns exposes investors to custody risks not familiar to the type of services that custodian used to provide when securities were formed in a paper form or where securities are held through direct

holding systems. In the latter case, as the investor holds as owner book entry securities through intermediaries, it is not exposed to custody risks.

In their effort to face these risks, some jurisdictions introduced more stringent prudential requirements to the intermediaries. Others, adopted hard-coded priority rules giving legal privileges to investors over the intermediary's property, either in securities or other form, i.e. rights to the investors to be satisfied by such property prior to any other creditor of the intermediary in case of the latter's insolvency.

In this regard, indirect holdings had as a legal consequence the existence of the investor's rights in securities to be dependent on the credibility of the intermediation system. In case of the intermediary's failure to provide the promised custody services, the investor's rights in securities can be protected only if the legal system functions properly, i.e. the investor privileges are not exposed to any legal risk or uncertainty.

Hence, with respect to indirect holdings the investor is exposed not only to custody risk but also to legal risk, i.e. not to be regarded as a privileged creditor of the defaulting intermediary and, therefore, to be treated as one of the intermediary's non - privileged creditors under the *pari passu* principal.

Relevant to the nature of "intermediated securities" as rights or entitlements, is the definition of property rights over them, i.e. how the securities can be acquired or disposed or how a security interest can be created over them. In the indirect holding environment such rights can be exercised by relevant "credits" or "debits" to the account through which the "intermediated securities" are kept. But as the "intermediated securities" constitute a right or an entitlement in nature, the aforementioned property rights of disposition (e.g. sale, lending etc.) or security

interest (e.g. pledge, transfer outright etc.) cannot have as a subject matter the securities themselves but only the aforementioned right or entitlement in them[14].

For example, in case of collateral provided in "intermediated securities", both the collateral taker and the collateral giver are exposed to the custody risk related to the custodian, in the books/accounts of which the collateral is perfected. In this case, if the custodian defaults, the collateral taker undertakes the risk its exposure that the collateral intended to cover to be regarded as uncollateralized. Accordingly, the collateral giver undertakes in this case the risk to refinance its collateral obligation. In this regard, lack of legal certainty as regards "intermediated securities" deposits may affect negatively the economic value of "intermediated securities" as a means of collateral financing.

4. Transparency issues on the shareholders "register"

The concept of shares as "intermediated securities" is reflected in the books of the registries or CSDs where shares are held. It has been argued that as shares are held in accounts that are kept through one or more intermediaries in the multi-tier chain, linked in its upper tier level with each registry or CSD, it is difficult in practice to find the actual investor, by streamlining the chain to the end-account, i.e. the one that the intermediary keeps not for other intermediaries but for the investor itself. It is also held that as the chain of intermediaries crosses borders and is linked to different laws and jurisdictions, there is legal uncertainty on the identity of the actual investor[15].

For these reasons, indirect holdings recognize as shareholders the intermediaries acting on the investors behalf. However this approach confirms the

[14] See *Benjamin,* p.p. 26-27, *Scott-Wellons,* p.p. 942-943, *Gynn,* p.p. 21 et seq., *Bernasconi-Potok-Morton,* p.p. 13 et seq.

[15] *Benjamin,* p. 26, *Bernascioni-Potok_Morton*, p.p. 7, 8, 18, 20, 27-28, *Gynn Marchand,* p.p. 58-62.

lack of transparency in such indirect systems where the investor loses not only its ownership status, as pointed out in Section 2, but also its shareholders status.

As a corollary of this situation, it became an issue who should be entitled to exercise corporate rights, the investor or the intermediary. In order to address these issues, national legal systems developed the following potential alternative schemes[16]. The first alternative approach acknowledges the right to the intermediary to designate end-investors as shareholders. Systems that adopt such approach do not abolish in total the direct relationship between the investors and the issuing company. Upon the designation by the intermediary of the actual investor, shareholding status "returns" to the investor and by operation of law has a retroactive effect. In some cases, such investors are designated, in a more informal manner, as pure holders (not necessarily as shareholders) of the entitlement to control the voting right as well as other rights, for example dividend rights, directly towards the issuing company. In this set up, the legal entitlement of the actual investor to vote is recognized without the need of making any fundamental changes in the company law regime related to shares as "intermediated securities".

This proposed scheme could not regarded of an undisputed value, since the investors' protection, i.e. the recognition of their rights as shareholders to the issuing company, is closely dependent on the proper exercise by the intermediary of the above "designation right". Consequently, if the intermediary does not exercise such right, despite the investor's contrary demand, the investor will not be "legalized" to exercise its shareholding entitlement. Hence, this specific approach is not considered to be of ensuring efficient conditions of transparency in the exercise of shareholding rights. Needless to say that the proper functioning of systems that operate under such

[16] Expert Group on Cross-Border Voting in Europe, p. 19 et seq.

approach in globalized markets presupposes coherent supervisory action across the boards and respective costs.

The second alternative approach refers to even less transparent solutions. More specifically, it is based on the notion that the actual investor is given a power of attorney by the intermediary that is entitled to vote. By this approach, although the legal entitlement to vote remains in the hands of the intermediary the latter acquires the right to give a power of attorney to the investor to vote on shares held on its behalf. A supplement to this approach is the one referring to the right of the investor to instruct the intermediary to vote in accordance with particular instructions of the investor. In this case, the investor does not exercise voting rights itself. Such rights remain to the intermediary[17].

It is worth noting that this alternative approach and its twofold parts have been adopted by the Shareholders Rights Directive (art.13)[18]. The Directive admits "proxy voting" as well as "split voting" without any limitations only if relevant said rights are exercised by a registered as shareholder intermediary acting in the course of its business on behalf of others. In this case and on the condition that the applicable law permits so, any split voting is regarded as being exercised by the intermediary on behalf of others. Therefore, jurisdictions that implemented said split voting rule ensure that split vote cast, i.e. votes in part in favor, votes in part against and in part abstentions, have a valid effect.

However, it is ambiguous whether this Directive fulfilled successfully its aim, as reflected in its preamble, to raise any legal barrier on cross border shareholding at an EU level and to encourage the investors' participation in the general assembly as a

[17] For a legal analysis of the mentioned approach from an English perspective, see *R.C.Nolan,* Shareholder Rights in Britain, European Business Organization Law Review 7 (2006), pp. 321-326.

[18] For an analysis of article 13 of Shareholders Rights Directive, see *Tarnanidou,* pp. 83-95.

means of good corporate governance practice in listed companies. The reason is that the Directive refers to a rather limited scope of shareholders' rights, i.e. to the participation in the general assembly and to cast voting. Thus, it leaves outside from its scope all other shareholders' rights, including reception of dividends, splits etc. It is also apparent that the Directive does not refer to other types of "intermediated securities", such as bonds, but only to shares, which means that legal uncertainty still exists with regard to other securities holders' rights in the environment of such indirect holdings.

Moreover, the Directive does not provide answers as to the treatment of shareholders' rights in other EU holding systems that do not operate purely as indirect[19]. Moreover, a series of questions arise due to the modern trend of interactions and links between the securities holding systems (mainly CSDs). For example, in case of links between indirect and direct holding systems how can such shareholding or other securities holding rights be accommodated? What will happen if a direct system does not permit intermediaries to be registered as shareholders when they act on behalf of their clients? Would the direct holding system be entitled under the scope of EU harmonization to impose its transparency rules on shareholders "registry" by forcing the intermediaries to disclose the real investors and register them as shareholders in their registers? Which will be the appropriate measures in case the intermediary does not comply with the above obligations? How indirect holding systems and the direct ones can be accommodated in the EU markets considering that they are contradictory in essence? (i.e. the indirect holding systems permit registered to be the intermediaries acting on behalf of others, while the direct holding systems

[19] *Tarnanidou,* op sit.

prohibit such concept and impose registration to be effected at an end investor's level).

These are a few of the questions and legal issues that arose with regard to the impact of indirect holdings to the shareholdings aspects of registration. As these questions cannot be answered by the aforementioned alternatives, the problem of transparency in the field of shareholding rights remains open.

5. Cash deposits and securities deposits: Legal differences

Cash deposits have been one of the traditional banking services. In the course of their business, banks intermediate in the money markets, by accepting deposits on the one hand and by providing loans on the other. In this context, cash deposits have been regarded as one of the most typical forms of irregular deposit.

The question is whether this intermediation activity has a functional equivalence in the securities market. In other words, are banks or investment companies entitled to accept deposits under the irregular deposit concept?

MiFID hesitated to accept this concept. This has to be attributed to the nature of securities. More specifically, MiFID provides that the investment firm is entitled to use investor's securities only on the latter's consent. The legal implication of this approach is that an initial regular deposit can be transformed to an irregular deposit upon the investor's consent. This approach stems from the fact that irregular deposit cannot be in principle adopted in case of securities due to their specific nature as a means of property comprising not only property rights but also corporate/shareholding rights.

In view of the above, it remains an issue under investigation whether indirect holding systems provide sufficient legal certainty and stability to the financial markets

as to the irregular deposits risks to which the investors are exposed considering that intermediation in the field of securities is not of the same profession and culture with regard to banking services.

6. Policy suggestions and concluding remarks

This paper analyzed the issue of whether indirect holding systems are appropriate in ensuring transparency in relation to shareholding rights. Non registration of the end investors as shareholders in the official registries, as a concept of indirect holding, gives a misleading impression as to the actual shareholding status in E.U. Either from a business perspective, lack of transparency in the securities field brings E.U. markets to a competitive disadvantage towards others, mainly those operating as "transparent systems" (e.g. China).

In solving such problems further regulatory initiatives should be elaborated at an E.U. level. Said initiatives should focus on the legal restitution of the investor's role as a shareholder. Considering it as a prerequisite in achieving E.U. integration, the investor should have the interest not only to invest but also to act as a shareholder. Put it differently, how can an investor feel as a shareholder if it is not recognized by the system as such. Therefore, E.U. intervention should aim at establishing a more transparent market structure which will encourage investors' recognition as shareholders. This approach should be regarded as of high importance in achieving shareholders' activism[20] and more efficient corporate governance conditions.

In this context harmonization should focus, on the so-called registration function. As a function establishing shareholding rights, registration should have a

[20] For the issues of shareholders passivity as an adverse side of shareholders activism see *inter alia* *Dirk Zetzsche*, Shareholder Passivity, Cross-Border Voting and the Shareholders Rights Directive, Heinrich-Heine-Universität Düsseldorf – Juristische Fakultät – Arbeitspapiere des Instituts für Unternehmensrecht (IUR), 2008, mainly p.34 et seq.

harmonized definition at an E.U. level so as to reflect the actual shareholders in the relevant registries and not the intermediaries acting on their behalf. In this context a new "direct concept" should be elaborated in the sphere of securities, mainly on the basis of a definition of a "direct registration" concept.

A key component in this task force should be technology. As information processing has been fully developed in recent years, financial markets could make use of technology in gapping any lack of information and transparency in securities field. In this context, a new EU rule policy should be elaborated so as registration data, i.e. information on "who the actual shareholder is", could be transmitted by the market factors (e.g. traders, markets, systems etc.) to the registries or CSDs where securities are kept. Furthermore, technology as a transmission means could support intermediaries to disclose to the registries their clients as shareholders in a codified manner so as to protect any confidentiality conditions of such clients' data when registration arises as a result of streamlining the multi-tier chain of intermediaries.

It has to be noted that this direct registration can be effected regardless of the particular nature of the securities holding system. As "straight through processing" (STP) in registrations can in modern markets be implemented without affecting the securities holding status, direct registration appears as a solution compatible to all systems concerned.

Put it in another more conceptual dimension, technology could be used in transforming functionally or at least legally the indirect model to a more direct one. This could be achieved not necessarily by imposing the concept of direct holding to the markets but by imposing more transparent conditions in the registration process. Even in case of an indirect model, an intermediary should be obliged to transmit to the official CSDs or registries the actual shareholders' data. Intermediaries should not be

permitted to be registered as shareholders when they act on behalf of others. Direct registration, even if not necessarily being based on a direct holding, could ensure a more transparent concept of "post trading" at an EU level. Needless to say that coordination of such direct registry concept could be easily implemented by market factors as technology provides sufficient means of common protocols and data transmission tools in enabling harmonized solutions in EU. Practically, this means that even if omnibus accounts are kept for the purposes of clearing or settlement at a local or EU cross border level, registration should be segregated at an end investor level in terms of restoring the abolishment of the direct relationship between the investor and the issuing company.

From a legal perspective, direct registration should be perceived as the tool minimizing regulatory costs arising from the lack of transparency in the securities holding field. Based on technology direct registration should be defined as the process that brings the investor to a legal position as if it holds the securities itself, i.e. without the use of intermediation. This fictitious disintermediation concept should be adopted as a legal mechanism in effecting transparency in the shareholding field without affecting the status of the securities holding systems *per se*. In this context, direct registration should be elaborated as a "harmonization dogma" by stating the following: "*regardless of the nature of the securities holding system as direct or indirect, any securities for which a registration at a segregated-investor's level is effected, should be deemed to be held directly for the investor under the concept of a regular deposit*".

This doctrine could have a twofold positive effect. On the one hand, investors as registered shareholders will not be exposed to any custody risks inherent to indirect patterns. Given that direct registration will be perceived as the legal equivalence of

transforming an irregular deposit to a regular one, any custody risk inherent to irregular deposits will be removed. In this regard, the proposed dogma will contribute to the investors' safety and enhance the financial system's credibility. On the other hand, this fictitious transformation of an irregular deposit to a regular one could reduce the financial costs for the intermediaries under the assumption that custody risk and relevant capital requirements are directly connected.

In this context direct registration should be taken into account in the EU process of harmonizing "post trading" environment as a whole. Focusing on the financial crisis problem, direct registration could be treated as a tool in eliminating any related risks in the clearing or settlement EU infrastructures even operating locally or cross border (e.g. T2S[21]). As any securities holding or custody services will be subject to the direct registration concept they could be unbundled from other type of post trading services (e.g. clearing or settlement) and relevant risks (e.g. credit risks, settlements risks etc.). This may lead to a more effective risk assessment and prudential regulation for the benefit of all market factors including traders, clearers, settlers and infrastructures (ccps, clearing houses etc.).

In summing up a new architecture of securities holding system should be adopted in EU by elaborating a concept of direct registration, i.e. registration of all the actual shareholders in the registries. This concept has to be regarded as of utmost importance in achieving EU integration as it will promote transparency in all systems regardless of their particular nature (direct/indirect) and at the same time enhance investors' protection and financial confidence and effectiveness. Focusing on the financial crisis of the recent years, it has to be noted that such crisis cannot be solved purely by continuing to impose regulatory requirements to the financial factors but

[21] For T2S (Target2-Securities) see at www.ecb.int/index.en.html...

rather by improving the markets structuring. Direct registration can be such an improvement.

Therefore, legal reaction should be accelerated. By delaying to improve efficiency of the available infrastructures mainly by utilizing all the advantages that technology offers, the markets accept the additional cost of higher risk coverage. But is this cost affordable in the globalized environment where modern markets are utilizing efficiently technology for their legal protection?

References

Alferez Francisco J. Garcimartin, The UNIDROIT Project on Intermediated Securities: Direct and Indirect Holding Systems (2006)

Benjamin Joanna, Interests in Securities. A Proprietary Law Analysis of the International Securities Markets (2000)

Bernasconi Ch. - Potok R. – Morton G., General Introduction: legal nature of interests in indirectly held securities and resulting conflict of law analysis, p. 7 in Cross Border Collateral: Legal Risk and the Conflict of Laws (2002), R. Potok (ed.)

Expert Group on Cross – Border Voting in Europe, http://www.wodc.nl

European Financial Markets Lawyer Group, Harmonization of the legal framework for rights evidences by book-entries in respect of certain financial instruments in the European Union, A report by European Financial Markets Lawyers EFML (Jun. 2003)

European Commission Internal Market and Services DG. Financial Services Policy and Financial Markets, Legislation on Legal Certainty of Securities Holding and Dispositions, Brussels DG Markets G2 MET/OT/acg D(2010)

Financial Services Policy and Financial Markets. Financial Markets Infrastructures, EU Clearing and Settlement. Legal Certainty Group. Questionnaire. Horizontal answers, Brussels MARKT/G2/MNCT D(2005)

Goode Roy, Security entitlements as Collateral and the Conflict of Laws in The Oxford Collocuim on the Collateral and Conflict of Laws, A special supplement to Butterwirths Journal of International Banking and Financial Law (1998), The Institute of Advanced Legal Studies, Oxford University (Faculty of law) and Allen & Overy, p.p. 22 et seq.

Guynn R. D. – Marchand N. J., Transfer of Pledge of Securities Held Through Depositories in The Law of Cross Border Securities Transactions (1999), Hans Van Houtte (ed.), p. 56 et seq.

Guynn R. D., Modernizing Securities Ownership, Transfer and Pledging Laws (1996), Capital Market Forum, pp. 10, 33-35 and 43

Legal Certainty Group – LCG, Second Advice of the Legal Certainty Group. Solutions to Legal barriers related to Post-Trading within the EU (August 2008)

Nolan Richard C., Shareholder Rights in Britain, European Business Organization Law Review 7, 2006, pp. 549-588

Potok Richard, Rapporteur's Summary p. 4 et seq., Cross Border Collateral: A conceptual framework for choice of law situations, p.10, in The Oxford Colloquium on the Collateral and conflict of Laws. A special supplement to Butterworths Journal of International Banking and Financial Law (1988). The Institute of Advanced Legal Studies, Oxford University (Faculty of Law) and Allen & Overy (ed.)

Report of the High Level Group of company law experts on a modern regulatory framework for company law in Europe (Brussels, 4 November 2002)

Scott Hal S. – Wellons Philip A., International Finance: Transactions, Policy and Regulation (2002)

Tarnanidou Ch. I., Special Rights of Shareholders of listed companies. Directive 2007/36/EC and the forthcoming national implementation (2009) (Greek edition), pp. 25, 74

UNIDROIT, The UNIDROIT Study Group on Harmonized Substantive Rules Regarding Indirectly Held Securities. Position Paper (Aug. 2003)

Velasco Julian, The Fundamental Rights of Shareholder. Legal Studies Research Paper No. 05-16, vol. 40, U.C. Davis law Review, No. 2, pp. 407-467, 2006

Zetzsche Dirk, Shareholder Passivity, Cross-Border Voting and the Shareholders Rights Directive, Heinrich-Heine-Universität Düsseldorf – Juristische Fakultät – Arbeitspapiere des Instituts für Unternehmensrecht (IUR), 2008.