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**THE IDENTIFICATION OF SHAREHOLDERS IN THE  
NEW EUROPEAN REGULATORY FRAMEWORK**

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# Chapter 1

## SHAREHOLDER IDENTIFICATION AND THE EU PATH TOWARDS CORPORATE GOVERNANCE HARMONIZATION

### 1.1 Introduction

#### 1.1.1 *Intermediated holding of securities and shareholding disclosure*

Over the last three to four decades, paper circulation of securities became too slow and cumbersome to ensure the smooth functioning of constantly developing financial markets, where the number of transactions in securities and the geographical distances between investors increase by the day. Nowadays, in all major jurisdictions the transfer of securities traded on the stock exchange takes place in the form of debits and credits on accounts maintained by intermediaries. At the core of settlement systems lies a single central securities depository (CSD), which serves the function of holding one account for every issuer and one for every intermediary participating to the central detention system. At the moment of the issuance, securities are debited in the account of the issuing company and credited in the accounts of the intermediaries participating to the CSD (i.e. the first-tier intermediaries). If they do not hold such securities in their own interest, participants shall then credit the securities in the accounts of their clients, who in turn shall credit the securities in the accounts of their own clients. This process is repeated until the securities are finally credited in the account of the end investor, that is the person who invested his financial resources in such securities and therefore has an economic stake in them. The issues stemming from intermediated holding systems will be discussed in detail later. However, it is easily understood that the existence of a single CSD coupled with the plurality of investors confers a typical pyramidal shape to the system for securities safekeeping<sup>1</sup>. With specific regard to shares of listed companies, a chain of intermediaries operating as accounts providers

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<sup>1</sup> ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 714; CIAN, M. (2007), p. 647.

separate the shareholders (or, in case of indirect holding systems, the beneficial owners of the shares) from the issuer.

The intermediated holding system responds to the new needs of modern financial markets, as it allows fast electronic settlement to take place. However, the fact that shares are held through multiple layers of intermediaries drastically reduces the transparency of the ownership structure of listed companies. There are two main reasons for this. First off, as it will be discussed later, all securities held in accounts opened with a single intermediary are usually registered in one aggregated account under the name of the intermediary itself (omnibus account). This means that any link of the holding chain has a monopoly on the identifying data of its clients, so the information about the identity of end investors usually remains with the last intermediaries in the chain (i.e. last-tier intermediaries). Second off, some jurisdictions, although allowing for registered shares, do not require the share register of companies to be updated in order for ownership to be transferred. Some other jurisdictions only require that the register be updated to the extent that legal ownership is transferred, while no such requirement is in place for beneficial ownership. In consequence, shares may very well be transferred from one investor to the other without the knowledge of the issuer.

With a view to limit the effects of shareholding opacity, all major jurisdictions have implemented a set of rules addressing shareholding disclosure. In the actual economic framework, where the success of intermediated holding systems keeps growing, the benefits stemming from shareholding disclosure are mainly two. On the one hand, shareholding disclosure raises managers' awareness in the actual set of economic interests underlying share ownership, allowing them to better carry out their duties as the shareholders' agents<sup>2</sup>. On the other hand, in case of disclosure to the financial

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<sup>2</sup> This first advantage of shareholding disclosure may be better understood by referring to the principal-agent approach to corporate governance. The fundamental principal-agent relationship in corporate governance establishes between managers and shareholders and, more in general, between those who decide about the company's management without owning its assets and those who own the company's assets but do not participate in their management. Shareholders are the firm's owners and, therefore, the residual claimants on the firm's assets. However, they do not know how to manage them in such a way as to maximize their value as an open-ended stream of profits. Managers are in charge of managing those assets, although they are not residual claimants. Consequently, managers are induced to enjoy the company's assets under management rather than maximizing their value (Pacces, 2012, pp. 25-26). Therefore, the primary objective of corporate governance would be to alleviate the conflict of interest between managers and asset owners, by spurring the former to engage in managerial activities aimed at maximizing the investments of the latter.

market, the public of investors is enabled to make informed assessments of firms' value, as the market will incorporate the value of identifying data in the share price. Provisions addressing shareholding disclosure can be divided into two groups. A first group requires shareholders who own a relevant stake in the company to actively communicate their holdings. On the other hand, a second group of provisions sets the procedures through which shareholders, regardless of the stake they hold, can be detected by issuers or by other interested parties (such as minority shareholders or proxy solicitors). The first set of rules is usually referred to as "relevant ownership disclosure", while the second one is usually referred to as "shareholder identification". This paper analyzes shareholder identification in the context of the new regulatory framework of the European Union. While EU rules on relevant ownership disclosure have existed since 1988<sup>3</sup>, the EU lawmaker has addressed shareholder identification for the first time just in 2017<sup>4</sup>. In order to better understand the reasons for implementing shareholder identification at a European level, it is necessary to briefly describe the possible effects of shareholder identification on corporate governance and the EU lawmaker's approach to corporate governance issues.

### 1.1.2 *Shareholder identification and corporate governance in the EU*

In general, the rules on shareholding disclosure have mainly focused on relevant ownership disclosure. The detection of shareholders owning a large stake in the

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The principal-agent approach has often been used to explain the shareholder oriented corporate governance model (developed in the US and the UK) which has prevailed over the managerialist model (developed in the US until the '60), the State oriented model (developed in France, Italy and Japan) and the labour oriented model (developed in Germany). According to two American scholars (Hansmann and Kraakman, 2001, pp. 466-468), the triumph of the shareholder-oriented model over its competitors would have sanctioned the end of history for corporate law, as regulations and practices of corporate governance had progressively developed in the direction of shareholder primacy. However, the global financial crisis that broke out in 2007 has shed light on the weaknesses of the shareholder-oriented model. The problem will be further discussed in the following paragraphs.

<sup>3</sup> The Council Directive 88/627/EEC of December 12, 1988, first introduced some basic disclosure duties for relevant shareholders of listed companies. The Directive 2004/109/EC of December 15, 2004 (i.e. the Transparency Directive) readdressed the issue by providing the general rule that disclosure duties arise from the crossing of specific voting thresholds. The system of relevant thresholds was then confirmed by the Directive 2013/50/EU of October 22, 2013 (i.e. the Transparency Directive II), which extended the definition of relevant ownership and provided for new methods of calculating the relevant thresholds, with a view to stop abusive forms of empty voting.

<sup>4</sup> *Directive 2017/828/EU of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.* OJ L 132/2017. pp. 1-25. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0828&from=en>.

company is particularly important for the markets in that it allows to understand who has an influence in the company's management, thus facilitating the monitoring of blockholders' use and abuse of control power. Furthermore, ownership disclosure allows investors to understand the nature of significant shareholders, which is essential information for investors to assess whether it is convenient for them to invest in the equity of a certain company<sup>5</sup>.

On the other hand, holdings below the relevant thresholds have no direct influence over the management. If rules on relevant ownership disclosure were to be applied to smaller shareholdings as well, compliance with disclosure duties would result in an information overflow to the market which could entail a number of meaningless communications. Investors in the market would then have to discern information which is relevant for their investing decisions from information which is totally irrelevant. In consequence, investing decisions would become slower and financial information less reliable. The efficiency of securities trading in the stock market would therefore be severely hampered.

However, there may well be other reasons why shareholder identification could be beneficial from a corporate governance perspective. Shareholder identification is a technical aspect of corporate governance and technicalities can be used differently depending on the substantial purpose that is to be reached. With this regard, the EU lawmaker has framed shareholder identification in a shareholder-empowering approach to corporate governance. This is proven by the fact that the new EU rules on shareholder identification are contained in a piece of legislation precisely aimed at encouraging long-term shareholder engagement. As it will be discussed later, EU law has progressively strengthened the position of shareholders in corporate governance, although in recent years shareholder empowerment has gone hand in hand with greater corporate social responsibility<sup>6</sup>. In keeping with this shareholder-oriented approach,

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<sup>5</sup> Empirical studies have demonstrated that the identity of key shareholders is an essential piece of information to determine the value of a specific firms: depending on their nature, of relevant shareholders can have very different goals in term of risk appetite and time distribution of future cash flows (Enriques, Gargantini and Novembre, 2010, p. 720). By collecting information about the identity of significant shareholders, investors are enabled to determine whether the company's management is likely to pursue the objectives that would better staisfy his own interests. If not, the investor is going to invest his financial resources elsewhere.

<sup>6</sup> WILLIAMS, C.A. (2018), p. 905. See paragraph 1.2.5.

the Directive 2017/828/UE has shaped shareholder identification as a means at the disposal of issuers for the facilitation of contacts between companies and shareholders. Shareholder identification should be used for the establishment of a permanent dialogue between issuers and shareholders, which is not limited to corporate actions or to mandatory issuer-disclosure. Aside from the cases where corporate governance disclosure is requested by law, managers should engage in investor relations with identified shareholders, even on an informal basis. Investor relations may contribute to lowering information asymmetries, irrespective of any (forbidden) selective disclosure of inside information. Furthermore, the enhancement of investor relations increases the level of issuer-disclosure on corporate governance, allowing shareholders to collect additional information on how managers are conducting the business<sup>7</sup>. Shareholders are therefore encouraged to act as “aware watchdogs” and to exercise their auditing powers both against the management and against controlling blockholders. The facilitation of contacts between ownership and management pushes the latter towards the adoption of sustainable pro-shareholder policies, determining a decrease in the first essential layer of agency costs<sup>8</sup>. Moreover, the improvement of the corporate dialogue shall be perceived in the capital markets as well, making the company more attractive to a larger number of potential investors and overall improving its competitiveness.

Having acknowledged that EU law designates a specific role for shareholder identification in corporate governance, a preliminary study on the evolution of EU regulation is essential to fully understand the nature of the connection between corporate governance and shareholder identification. Therefore, the first chapter of this work will analyze how the European approach to corporate governance and to shareholders’ rights has evolved over the years. The second chapter will then focus on the EU shareholder identification rules and on how the new shareholder identification procedure may actually improve the effectiveness of corporate governance in listed companies. Lastly, the third chapter will analyze the key role of shareholder identification in the context of general meetings of shareholders and will make some

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<sup>7</sup> WILLEMAERS, G.S. (2011), pp. 123-125.

<sup>8</sup> BOSETTI, L. (2017), p. 40.

assumptions on how the implementation of the new EU rules may lead to the improvement of the current systems for shareholder enfranchisement.

## 1.2 The evolution of EU regulation on corporate governance

### 1.2.1 *The Fifth Draft Directive and its historic relevance*

Harmonization of corporate governance in the EU is not simply a legal issue: it is a gradual process that seeks to soften the differences between local systems and national markets, leading to a greater comparability of companies established across Member States. Uniform corporate governance rules are essential for taking mindful investment decisions, since they allow market players to better judge the companies they want to invest in. Moreover, greater harmonization reduces significantly the risk of forum shopping, which is encouraged by the right of companies to establish in countries where convenient regulations provide for inadequate protection of shareholders and other investors. It is no exaggeration to claim that a uniform corporate governance framework is necessary for the development of a single European market, which is the original objective of the European project.

The first attempt by the European Communities to come up with common corporate governance rules dates back to October 9, 1972, when the European Commission submitted to the Council the proposal for a Fifth Company Law Directive on corporate governance (known as the “Original Proposal”).

The aim of the proposal was to coordinate the laws of Member States related to the organizational structure of public limited companies<sup>9</sup> and to the powers and obligations of their organs. The EC considered harmonization of national laws as a tool to afford an equal protection to both the interests of shareholders and the interests of other stakeholders (generally referred to as «others»)<sup>10</sup>. Moreover, the coordination

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<sup>9</sup> Public limited companies were considered to carry on cross-frontier activities much more than other forms of company. This is the reason why the coordination of laws related to public limited companies was prioritised. More precisely, the proposal related to: the *Aktiengesellschaft* in Germany, the *société anonyme* in Belgium, in France and in Luxembourg, the *società per azioni* in Italy, the *naamloze vennootschap* in the Netherlands.

<sup>10</sup> COMMISSION OF THE EUROPEAN COMMUNITIES (1972), p. 6: «Whereas so that the protection afforded to the interests of members and others is made equivalent, the laws of the Member States relating to the structure of sociétés anonymes and to the powers and obligations of their organs must be coordinated».

of national laws was intended to create the legal environment for competing public limited companies in the internal market.

In spite of its remarkable purpose, the Original Proposal contained some provisions whose adoption would have determined a substantial rupture with the legal traditions of many Member States. First off, the Original Proposal embraced the German model of corporate governance, suggesting the adoption of a mandatory two-tier board structure. The European Commission argued that in the administration of a company there should be a clear division between the function of management and the function of supervision; therefore, the separation of the supervisory body from the management board would help discerning the responsibilities of the active directors «*who manage the business*» from those of the passive directors «*who confine themselves to supervision*»<sup>11</sup>. Second off, the Original Proposal suggested that public limited companies employing more than 500 workers must afford their involvement in the supervisory board. Employees' co-determination is another essential feature of the German model of corporate governance (*Mitbestimmung*)<sup>12</sup>. For these reasons, a large number of Member States embracing the one-tier model of corporate governance did not welcome the proposal for a fifth Company Law Directive, which had been considered to be excessively influenced by Germany's legal framework<sup>13</sup>. Moreover, the need for a basic revision of the Original Proposal became clear as the United Kingdom joined the European Economic Community in 1973<sup>14</sup>.

In 1983, the European Commission delivered an Amended Proposal for a Fifth Company Law Directive<sup>15</sup>. Additional but marginal amendments were later adopted in 1990 and 1991<sup>16</sup>. These further interventions aimed at finding a compromise

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<sup>11</sup> COMMISSION OF THE EUROPEAN COMMUNITIES (1972), pp. 6-7.

<sup>12</sup> For further information, see DE LUCA, N. (2006), p. 130.

<sup>13</sup> Some critics of the 5th Draft Directive can be found in CONLON, T.P. (1975), pp. 348-359; VISENTINI, B. (1977), pp. 543-545.

<sup>14</sup> Traditionally, the UK corporate governance model differs significantly from the German one. In British public companies, both the function of management and the function of supervision are usually exercised by the same board of directors (one-tier board structure) appointed by the shareholders. The employees are excluded from the management. This is because the vast majority of UK public companies are mainly financed through shareholdings (equity financing) rather than through bank loans and financial houses, which is the typical case in continental Europe. See CONLON, T.P. (1975), p. 351; DINE, J. (1989), p. 547.

<sup>15</sup> COMMISSION OF THE EUROPEAN COMMUNITIES (1983).

<sup>16</sup> COMMISSION OF THE EUROPEAN COMMUNITIES (1990); COMMISSION OF THE EUROPEAN COMMUNITIES (1991).

between two opposite needs: on the one hand, the necessity of making the Draft Directive more pleasant for Member States; on the other hand, the will to ensure the uniform adoption of basic principles considered as key elements for proper harmonization. The best way to reach such compromise was to ease the mandatory range of the Original Proposal without disrupting its original framework, and that is the road the European Commission decided to follow. Therefore, despite the repeated claim that a two-tier board structure would result in a clearer distinction between management and supervision, the Amended Proposal gave to Member States the option to provide for a one-tier board structure or to allow the founders of a company to choose between a two-tier and a one-tier board model. Furthermore, the Amended Proposal tackled the problem of employee co-determination in a dual manner: on the one hand, it increased the threshold for compulsory participation of workers<sup>17</sup>; on the other hand, it expressed the principle that employee co-determination could be assured not only by mandatory participation in the supervisory board, but also by other equivalent means specifically provided by the Directive<sup>18</sup>. As a consequence, Member States could freely opt for any of the different co-determination mechanisms available. The big advantage of such an approach lied in the fact that employee co-determination would no longer imply the compulsory participation of workers' representatives in the supervisory body: companies may enforce employee participation mechanisms without bearing any interference of workers in the decision-making processes concerning corporate governance.

In spite of the different amendments, it seems that the project for the adoption of a Fifth Draft Company Law Directive has definitely faded. The reasons for this can be found both in the everlasting unwillingness of Member States to adopt employee co-determination and in the fact that the two-tier board system was considered unsuitable

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<sup>17</sup> Co-determination became mandatory only where the company employs more than 1000 workers. The threshold identified by the Original Proposal amounted to 500 workers.

<sup>18</sup> COMMISSION OF THE EUROPEAN COMMUNITIES (1983), p.7: *«In respect of companies employing on average a number of persons which equals or exceeds the number fixed in accordance with paragraph 1, the Member States shall provide for employee participation in the appointment of members of the supervisory organ in accordance with Articles 4b or 4c. However, as an alternative to employee participation in accordance with these Articles, Member States may provide for employee participation through a body representing the company's employees in accordance with Article 4d or through collectively agreed systems in accordance with Article 4».*

for small and medium-sized companies<sup>19</sup>. However, the experience of the Fifth Draft Directive has a great historic significance. Interestingly enough, at the beginning of the new millennium, many Member States had spontaneously adopted some provisions of the Fifth Draft Directive as they proceeded to reform national corporate governance legislations, despite the fact that such a draft regulation did not bind them by any means<sup>20</sup>. This is proof that, despite the substantial failure of the Fifth Draft Directive, Member States have embraced the fundamental idea of providing for shared corporate governance principles, carrying on the project undertaken by Europe. Moreover, both the original and the amended proposals for a Fifth Draft Directive contained significant provisions regarding shareholders' meetings and shareholders' rights<sup>21</sup>, many of which were later introduced in the Shareholder Rights Directive. The Fifth Draft Directive had been the first attempt from European regulators to ever consider shareholders as the main corporate governance actors. A small digression is necessary to introduce the matter.

### 1.2.2 *The reasons for shareholder empowerment: rational apathy as a consequence of management's overpower*

The fundamental problem of corporate governance lays on the need to build and maintain an efficient relationship between those who manage the company and those who own the economic interest in the management. Depending on the ownership structure of a company, the above-mentioned problem can be seen in a different light.

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<sup>19</sup> As a matter of fact, the existence of two distinct corporate organs could result in unbearable costs for smaller-sized companies, especially for those with highly concentrated ownership. This is a really common case in continental Europe.

<sup>20</sup> One of the main examples would be Italy. The company law reform implemented through *d.lgs 17 gennaio 2003, n.6* has allowed statutes of Italian *società per azioni* to opt for the adoption of three alternative systems of administration and control: the peculiar Italian "traditional system", the German two-tier board system or the Anglo-Saxon one-tier board system (*Codice civile*, Article 2380). Actually, the Italian reform of Company Law simply adopted the provision of the Fifth Draft Directive according to which companies can choose between a one-tier system and a two-tier system. It is useful to point out that the Italian "traditional" system of administration and control is considered by comparative law to be a peculiar type of one-tier board system, given that the general meeting of shareholders appoints the members of both the management and the supervisory board (respectively known as the *consiglio di amministrazione* and the *collegio sindacale*). See ALLEGRI, V. et al. (2011), pp. 209-210; GALGANO, F. (2013), p. 303.

<sup>21</sup> Among the different provisions regarding shareholders' powers, the Fifth Draft Company Law Directive tried to simplify the procedure for convocation of the general meeting (Article 24), to encourage shareholders' participation to the meetings by strengthening proxy solicitations (Article 28), to prevent shareholders' conflicts of interests (Articles 34 and 35), and to strengthen shareholders' right to access information about issues covered by the GM (Article 31).

In some countries, such as the United States, the majority of the companies have a highly dispersed ownership. The traditional issue of the separation between ownership and control, identified by Berle and Means in 1932<sup>22</sup>, is at the basis of the most classic of agency problems in all of corporate governance literature. The main goal of regulators is thus to alleviate the conflict of interest between multiple small shareowners and powerful managers, preventing abuses that could be encouraged by the incapability of shareholders to react. Such a task had been traditionally assigned to the board of directors as the institution capable of engaging in a permanent dialogue with the managers on behalf of shareholders. On the other hand, the majority of listed company in continental Europe have a dominant shareholder, usually an individual or a family, who controls the majority of the voting rights. Controlling blockholders have the power to select the managers and to influence the management's decisions due to the large size of the stake they own in the company. Besides, controlling shareholders often use pyramidal ownership, dual classes of shares, shareholder agreements and other similar tools in order to exercise control without owning the related amount of cash flow rights. As a consequence, an additional layer of agency problems arises in closely held companies, because the interests of controlling blockholders might differ from those of minority shareholders. The fundamental problem of corporate governance in companies with concentrated ownership is thus to provide for a system of counterbalances that prevents controlling shareholders from abusing their power to the detriment of the company and the minority shareholders<sup>23</sup>. Traditionally, the board of directors has been considered to be the optimal place where to mitigate the interests of different shareholders, as long as the composition of the board and the corporate practices adopted allow to exercise an effective control on managers who conduct the business mainly in the controlling shareholder's interest.

It can be argued that corporate governance traditionally depicts the board of directors as the ideal institution to alleviate the agency problems arising between the different corporate actors. The main task of the board of directors would be to hire and monitor top management on behalf of shareholders. However, in the optic of developing efficient corporate governance structures, the idea that boards are always capable of

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<sup>22</sup> BERLE, A. and MEANS, G. (1932).

<sup>23</sup> ENRIQUES, L. and VOLPIN, P. (2007), p. 117; MASULIS, R.W., PHAM, P.K. and ZEIN, J. (2015), p. 131.

fairly representing the interests of shareholders at the institutional level is misleading. Regardless on the actual ownership structure of the different companies, there is the serious danger that boards will bond with management, whom they interact with regularly, or with the controlling shareholder, who has the ultimate power to appoint and remove them. The adoption of a two-tier board system reduces such risk (as the Fifth Draft Directive suggested) but does not prevent it. As a matter of fact, despite the benefits that the distinction between management and supervision provides, the members of supervisory boards are generally excluded from the decision-making process. Talking about their controlling powers, supervisory boards can only react to a managerial lack of due diligence, but they cannot take action in order to prevent managers from undertaking inconsiderate actions. This leads to a decrease of the quality of supervisory actions<sup>24</sup>. Moreover, in companies with concentrated ownership, the dominant shareholder ultimately selects the members of the supervisory board who then appoint the directors. As a consequence, supervisors may refrain from undertaking the actions needed to prevent managerial abuses to the personal benefit of the controlling shareowner, given the connection they have with the latter and their rational apprehension of being removed from the board<sup>25</sup>.

In spite of the considerations above, when the EU policymaker adopted the final version of the Fifth Draft Directive, national legal systems still embraced the idea that the board of directors is suitable for ensuring an optimal interaction between “principals” (i.e. the shareholders) and “agents” (i.e. the managers). The board was considered to be the place where the conflict between the interests of corporate actors is mitigated, resulting in a better allocation of resources, a greater financial efficiency and, ultimately, the increase of shareholder value. Proof of this is the fact that, at the time, national laws protected shareholders by enhancing their rights to sell and sue<sup>26</sup>. The voice of shareholders was indeed restricted to a few decisions for which the approval by the general meeting was requested by law or by the company’s Articles<sup>27</sup>.

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<sup>24</sup> JUNGSMANN, C. (2006), p. 452.

<sup>25</sup> The risk may be reduced even further with the implementation of a co-determination mechanism. However, co-determination raises multiple issues of its own and the history of the Fifth Draft Directive showed that national legislators are really skeptic about the introduction of such a feature of corporate governance.

<sup>26</sup> ENRIQUES, L. and VOLPIN, P. (2007), p. 126.

<sup>27</sup> MUKWIRI, J. and SIEMS, M. (2014), p. 56. For a comparative overview, see SIEMS, M. (2008), pp. 152-153.

The general meeting was thus reduced to be a mere ratifier of decisions that had already been taken by the board<sup>28</sup>. As a result, shareholders were not stimulated to make the utmost use of their administrative rights in order to influence the entrepreneurial conduct of the company. This was especially true for those shareholders who owned only a small fraction of the share capital and were not bound by any shareholder agreement. In fact, the costs that shareholders had to face in order to participate to the general meeting and exercise their rights went way beyond the benefits that the exercise of such rights would have produced for the shareholders themselves. Corporate governance literature gave to this issue the name of “rational apathy”, as shareholders have a logical reason for not participating to the investee company’s managerial decisions. The problem of rational apathy can thus be identified as a consequence of the management’s overpower in comparison with the general meeting.

Furthermore, shareholders’ rational apathy was encouraged by the low quality of top-down channels of information. For example, the original text of Article 2392, paragraph 2 of the Italian *Codice civile* provided for the principle according to which directors must supervise the overall conduct of the management. Without the shade of a doubt, the directors’ duty of supervision entailed the right of shareholders to be informed; however, the legal vacuum on the matter and the general nature of the directors’ duty made it impossible to recognize the actual content of the shareholders’ right. As a consequence, directors proceeded to disclose company-related information to shareholders by submitting the balance sheet and the reports to the general meeting, which was generally held only once a year<sup>29</sup>. The flow of information from directors to shareholders was thus too sporadic and circumstantial, making shareholders

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<sup>28</sup> For example, before the reform of 2003, the Italian civil code allowed the general meeting to exercise managerial powers in very limited occasions: either it was cases specifically admitted by the company’s Articles, or it was cases when the directors themselves decided to submit certain decisions to the approval of the general meeting. Any form of interference from the general meeting in the management of the company was therefore limited to specific business decisions. See *Codice civile*, Article 2364, n. 4, before the amendments made by *d.lgs. 17 gennaio 2003, n. 5* and *d.lgs. 17 gennaio 2003, n.6*.

In Germany, despite the numerous provisions aimed at empowering the supervisory board, the 1965 Stock Corporation Act (*Aktiengesetz*) confirmed the principle laid down by the 1937 Corporation Law, according to which the board of managers is the sole corporate body to be in charge of the company’s business (Kessler, 1938, pp. 656-657) and any interference of the general meeting is restricted to specific decisions provided for by the law or by the company’s Articles. See ALLEGRI, V. et al. (2010), p. 207.

<sup>29</sup> VISENTINI, B. (1982), p. 124.

insensitive to managerial events and jeopardizing the fiduciary relationship between the board and the ownership, given that the first was not capable of properly representing the interests of the latter because of the meager communication mechanisms.

The problem of disclosure gets even more delicate in relation to companies whose securities are traded on financial markets because of the need to protect not only the actual shareholders but also the whole public of investors, whose confidence in the market shall not be undermined. When it comes to listed companies, disclosure of information is crucial for preserving the casual link between the events concerning the issuer and the market value of its shares, so that the fluctuation of the latter actually depends on the economic performance of the company. In other words, the high traceability of company-related information intensifies the nexus between the issuer and its shares, ensuring the intrinsic value of listed securities and preventing them from transforming into abstract values without any connection to the issuer's economic results. This is an essential condition to ensure that the market remains true to its nature and does not turn into a betting parlor where to trade abstract values relying on the mere existence of the market itself. It can be said that (correct) information disclosure is the cornerstone of any efficient financial market: the more efficient the informational mechanism of the market is, the higher the confidence of investors in the market is going to be. At the time of the Fifth Draft Directive proposal, the meager development of financial markets in most of the Member States hampered the adoption of proper safeguards aimed at making the information as thorough and accessible as possible. Moreover, the lack of harmonized rules on European financial markets hindered the free flow of capital and the full provision of investment services throughout the European Community. A mandatory set of minimum rules was thus necessary to ensure that transparent, clear and thorough information would be disclosed to the public in a well-timed manner, so that both actual and potential investors would be enabled to consider the consequences of their investment decisions. In addition, the more harmonized such set of rules had been, the more achievable the ideal of a single capital market in Europe would have gotten.

### 1.2.3 *The High Level Group of Company Law Experts and the Action Plan of 2003*

The Fifth Draft Directive has been the first attempt by European regulators to reach a sustainable solution to the abovementioned problems, encouraging the exercise of shareholders' rights in an informed manner and reducing the gap between their interests and the managers'. The goal was to smoothen the weaknesses of the board-centered corporate governance models adopted by the majority of States in continental Europe, but the lack of sensitivity towards the different legal traditions of such States doomed the Draft Directive to failure. Nevertheless, the Fifth Draft Directive strongly influenced the following development of European Company Law because it proposed a shift in the balance of power between boards and shareholders in favor of the latter. Shareholder empowerment was identified as the direction in which European Union should move when regulating corporate governance matters, supporting the view that active and informed shareholders will ensure an efficient system of checks and balances between the different organs of the company. Such a view was backed up by Member States as well: proof of this is that, despite the different amendments to the Fifth Draft Directive that came in succession, the provisions on shareholders and general meeting were only marginally amended.

Moving in the direction the Fifth Draft Directive pointed out, the European Commission, in the person of the Commissioner for Internal Market Frits Bolkestein, established a team of commercial law experts on September 4, 2000. This team was the High Level Group of Company Law Experts. Originally created to assist the Commission in the reform of the takeover bid regulation, the High Level Group was later given the wider task to identify the primary topics that should be faced in order to proceed with the utter modernization of EU Company Law. The High Level Group produced the consultative document *A Modern Regulatory Framework for Company Law in Europe*<sup>30</sup> on the first months of 2002. Member States acknowledged the opinions expressed in the document with so much conviction that the ECOFIN Council further extended the tasks of the High Level Group at the informal reunion held in Oviedo, on April 13, 2002<sup>31</sup>. Once the deadline for presenting observations on the

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<sup>30</sup> HIGH LEVEL GROUP OF COMPANY LAW EXPERTS (2002a).

<sup>31</sup> The memorandum entitled «*Preparation of the informal meeting of EU Economics and Finance Ministers*» of April 11, 2002 anticipated that «*the Commissioner will tell the meeting that, in response*

public consultation expired, the High Level Group, in the person of Professor Jaap Winter, submitted to the Commission its final document: the *Report on a Modern Regulatory Framework for Company Law in Europe*, which was released on November 4, 2002<sup>32</sup>.

The work of the High Level Group conceived shareholder empowerment as the keystone of a new framework for corporate governance, following the path the Fifth Draft Directive had taken. In the Final Report, the High Level Group crystallized the opinions already expressed in the consultative document, which envisioned shareholders as the ideal watchdogs for monitoring the conduct of executive directors. Shareholders are indeed the most affected by the company's economic performance, as they ultimately bear the business risk connected to the company's entrepreneurial activity and they act as residual claimholders. The Report then addressed the phenomenon of rational apathy, which was efficiently summarized as follows: «*From the viewpoint of a single shareholder, it may frequently seem appropriate to sell his shares if he is dissatisfied with – or lacks confidence in – incumbent management, rather than try to change things within the company. However, this “rational apathy” may prove very disadvantageous if adopted as a general attitude among shareholders. Reliance on shareholders performing this role presupposes that it is, indeed, possible for shareholders to influence the decisions of the company and, in addition, appears attractive for them to do so*»<sup>33</sup>. In particular, the High Level Group stressed the negative effects produced by minority shareholders' apathy in listed companies, taking into account the ownership structure of the majority of European companies; the Report upheld the idea that, in closely held companies, minority shareholders would be more suitable to act as watchdogs, given that the management usually aligns with the interests of controlling shareholders.

In the attempt to climb off the wall of rational apathy, the High Level Group realized that Member States' regulatory frameworks often underestimated the role of the general meeting in corporate governance and refrained shareholders from taking any

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*to the Barcelona European Council Conclusions, the Commission will ask the High Level Group of Company Law Experts (see IP/01/1237) to look at additional corporate governance issues, including the role of non-executive directors and of supervisory boards; management remuneration; and the responsibility of management for the preparation of financial information».*

<sup>32</sup> HIGH LEVEL GROUP OF COMPANY LAW EXPERTS (2002b).

<sup>33</sup> HIGH LEVEL GROUP OF COMPANY LAW EXPERTS (2002b), p. 47.

initiative to monitor the managerial activity. Therefore, the final Report suggested to recover the central position that the general meeting used to have in corporate governance. The idea was to rediscover the general meeting as a mechanism that allows shareholders to collect information from the management and to discuss it thoroughly with the board and other shareholders. An efficient general meeting, both in terms of high traceability of the information and low participatory costs, is an essential condition for shareholders to properly carry out their role as aware watchdogs because it provides them with the data needed to carefully judge the managers' decisions<sup>34</sup>. This improves significantly the influence of the ownership on companies and encourages single shareholders to exercise their administrative rights, regardless of the small amount of share capital they hold. The High Level Group recommended to this end the extension of disclosure requirements, the adoption of higher transparency standards, the enhancement of pre-meeting information, the reduction of costs concerning participatory and voting mechanisms, the development of remote participation procedures and the improvement of voting *in absentia*<sup>35</sup>. The final Report claimed that the most efficient way to enforce such recommendations would be through IT facilities, taking advantage of the new tools that technological progress had to offer<sup>36</sup>.

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<sup>34</sup> HIGH LEVEL GROUP OF COMPANY LAW EXPERTS (2002a), p. 18.

<sup>35</sup> It is worth giving a few examples. The Report suggested to entrust listed companies with the mandatory publication of an annual document certifying the corporate governance rules the company complied with. Moreover, the High Level Group recommended the creation of a specific section on the websites of listed companies, in which all shareholder-related materials should be published. Taking into account the increase in number of shares held, the Report suggested to provide for greater disclosure duties on institutional investors, so that ultimate owners could acquaint themselves with the investment policy and the corporate governance rules adopted by the entity they entrusted with their own financial resources.

Particular issues arose in relation to cross-border voting. The High Level Group wanted to encourage shareholders in Member States or outside the EU to vote on shares in a listed company in another Member State. However, it was taken into account that, in cross-border situations, shares are typically held through chain of intermediaries. The identification of the person entitled to exercise the voting rights on shares held through the chain was thus considered crucial.

Moreover, the Report suggested to introduce by regulation a special investigation procedure, which would allow a qualified percentage of shareholders to entrust a third party (usually an administrative or judicial entity) with the task to shed light on the managers' conduct, improving the quality of shareholders' control on the management.

<sup>36</sup> The High Level Group was well aware of the fact that, at the time the Report came out, the technological progress was still at an early stage. Therefore, suggesting the mandatory adoption of electronic facilities to allow remote voting would have turned out to be inappropriate. Rather than imposing the use of modern technology, the High Level Group simply facilitated it: in the end, the choice whether adopting electronic facilities or not was left to the companies.

Learning from the mistakes committed by the European regulator with the Fifth Draft Directive, the High Level Group backed up the conclusions of the *Comparative Study of Corporate Governance Codes Relevant to the European Union and its Member States*, published on behalf of the European Commission by Weil, Gotshal & Manges LLP on January 2002. The Study claimed that there is no need for the adoption of an EU corporate governance code and that guidance about corporate governance best practices should rather develop spontaneously under the influence of market forces<sup>37</sup>. Backing up the arguments of Weil, Gotshal & Manges LLP, the High Level Group discarded the idea of a mandatory corporate governance code in favor of the introduction of a “comply or explain” rule: any Member State should designate one particular corporate governance code with which companies subject to their jurisdiction can comply<sup>38</sup>; as an alternative, companies shall explain the reasons why their practices differ from those recommended by the designated code<sup>39</sup>. The “comply or explain” formula was seen as the best way to ensure uniform practices of corporate governance without disrespecting the differences between Member States’ legal frameworks.

Just like the Fifth Draft Directive had done before, the Report of the High Level Group further emphasized the need for the enforcement of shareholder empowerment mechanisms in order to balance out the dominant influence of directors in corporate decision-taking processes. In the end, the need for a corporate governance reform gravely came to light with the break-down of some of the most relevant companies both in the United States and in Europe. Failures of this caliber reflected the incapability of shareholders to protect themselves from abuses by the managers or the controlling shareholders, who treated company resources as their own at the expenses of those who ultimately bore the risks for their selfish actions<sup>40</sup>. The collapse of two

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<sup>37</sup>GREGORY, H. and WEIL, GOTSHAL & MANGES LLP (2002), p. 81.

<sup>38</sup>DEWING, I.P. and RUSSELL, P.O. (2004), p. 306.

<sup>39</sup>HIGH LEVEL GROUP OF COMPANY LAW EXPERTS (2002b), p. 73.

<sup>40</sup>The financial scandals occurred in the very first years of the twenty-first century followed different patterns depending on the ownership structure of the companies involved. In companies with diffused ownership, managers manipulated earnings and favored accounting irregularities to inflate the stock price and gain from their equity options holdings. This is what happened in most of the US insolvent companies. For example, Enron broke down in 2001 after the value of its shares unexpectedly collapsed within a few months. The failure was due to the directors being engaged in a series of accounting tricks intended to counterfeit the balance sheet of the company. The company appeared thus to be in great economic health and directors gained profits from the fake representation of financial results in the accounting documents.

of the biggest American corporations (Enron and WorldCom, in 2001), in addition with other financial scandals that deeply shook the investors' confidence in the financial market, led to the reaction of the US Congress which adopted the Sarbanes-Oxley Act, signed by President G.W. Bush on July 30, 2002. Despite its elaborate provisions, the Sarbanes-Oxley Act fits perfectly in the legal tradition of the United States, where policymakers always preferred to focus on regulating the financial markets rather than interfering with the companies' inner practices<sup>41</sup>. This is completely coherent with the principles of free market economy that American economic literature has always endorsed: a set of rules identifies the legal boundaries to the market, within which the single operators are utterly free to move without being disturbed by any interference from the public authorities. The Sarbanes-Oxley Act therefore enforced a set of measures aimed at enhancing the transparency of financial markets and the truthfulness of financial information<sup>42</sup>, so that the deeply shaken confidence in the US capital market could be promptly restored.

In the old country, similar failures occurred shortly thereafter. Such collapses demonstrated that the common corporate governance system in Europe resulted in an imbalance between the managing powers of directors (generally expressing controlling shareholders' will) and the monitoring powers of shareholders. In fact, the lack of practices encouraging shareholder activism contributed to the growth of the phenomenon of "rational apathy", which ultimately relegated the general meeting to the role of a ratifier and transformed shareholders into anonymous backers deprived of their voice. Boards took advantage of this situation by committing a series of irregularities in favor of controlling shareholders. The by-product of such abuses happened to be the break-down of some of the most important European companies to the detriment of powerless shareholders and creditors. Many significant collapses occurred in Germany, e.g. Balsam, Bankgesellschaft Berlin, Hypo-Bank, Flowtex and

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On the other hand, the collapse of closely held companies was generally a consequence of the expropriation of both shareholders and creditors by the controlling shareholders, who used the company resources for their personal interests. For example, Parmalat was declared insolvent in December 2003 after that the Tanzi family transferred to itself a great amount of the company resources to be invested on the other businesses directly owned by the family members. The Tanzis then concealed the fraud by counterfeiting accounting documents, so that the flow of resources towards the Tanzi family would have gone unnoticed. For a more detailed analysis on the case, see ENRIQUES, L. and VOLPIN, P. (2007), pp. 123-125.

<sup>41</sup> The Securities Act (1933) and the Securities and Exchange Act (1934) offer two great examples.

<sup>42</sup> CAMMARATA, S. (2004), pp. 273-275.

Comroad, where 98,6% of sales were faked. Outside of Germany, some of the most outstanding failures have been Ahold in the Netherlands and Parmalat in Italy<sup>43</sup>. As a consequence, Member States definitely lost faith in the board-centered corporate model, whose weaknesses had already been detected by the Fifth Draft Directive and then thoroughly examined by the final report of the High Level Group.

Europe reacted to these awful scandals with the Communication from the European Commission *Modernizing Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, published on May 21, 2003<sup>44</sup>. The Communication was a response to the Report of the High Level Group and dictated the guidelines for the future policy of Europe on corporate governance issues. The Action Plan had two main objectives: on the one hand, strengthening shareholders rights and the protection of third parties; on the other hand, fostering the efficiency and the competitiveness of European businesses. As opposed to US regulators, who mainly focused on financial markets, the European Commission believed that corporate governance practices adopted by single European companies needed harmonization in the direction of shareholder empowerment, with a view to achieve the aforementioned goals. The harmonizing effort would have given a boost to the development of an integrated capital market because it would have encouraged the adoption of virtuous corporate governance practices by listed companies, ensuring a high level of protection to investors whose regained confidence would have improved the overall competitiveness of European businesses.

Moving on to the practical aspects, harmonization of corporate governance could not be achieved at the national level; European regulators had therefore to intervene pursuant to the subsidiarity principle laid down in Article 5 of the EU Treaty<sup>45</sup>. On the other hand, the proportionality principle<sup>46</sup> and the need to minimize the impact of EU rules on national jurisdictions pushed for limiting European regulation on corporate

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<sup>43</sup> HELLWIG, H.J. (2007), p. 418.

<sup>44</sup> EUROPEAN COMMISSION (2003).

<sup>45</sup> *Treaty on the European Union*, Article 5, Paragraph 3.1: «Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level».

<sup>46</sup> *Treaty on the European Union*, Article 5, Paragraph 4: «Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties».

governance to a few essential rules that were commonly acknowledged by the single legal systems. The Action Plan attempted to conciliate these two opposite needs by opting for a “fully integrated approach”<sup>47</sup>: the European Union would have laid down the essential principles for the various issues of corporate governance that needed to be modernized, leaving the single Member States free to enforce such principles in the most suitable way for their company laws. In other words, the fully integrated approach allowed European company law to address different aspects of corporate governance (e.g. shareholder activism, transparency requirements, shareholders’ rights, composition of boards, directors’ remuneration, institutional investors, accounting standards etc.) without disregarding the variety of corporate models adopted throughout Europe. Moreover, the Action Plan acknowledged the assumption that the adoption of an EU-wide corporate governance code was actually unnecessary, as the Comparative Study of Weil, Gotshal & Manges LLP firstly pointed out and the Final Report of the High Level Group later confirmed. In this line of thinking, the European Commission claimed that the corporate governance codes analyzed by the *Comparative Study* of 2002 showed a remarkable degree of convergence and that the existence of multiple corporate governance code was not perceived as a difficulty by issuers<sup>48</sup>.

Despite the various aspects of corporate governance it covered, the Action Plan identified with precision the direction towards which the European harmonization of corporate governance rules has to move. And that is shareholder empowerment. The need for a more shareholder-oriented legal framework had already been pointed out by the High Level Group. The events that followed the financial scandals highlighted that shareholders had to recover a key role in corporate governance: as the Action Plan claimed, *«shareholders own companies, not management - yet far too frequently their rights have been trampled on by shoddy, greedy and occasionally fraudulent corporate behavior. A new sense of proportion and fairness is necessary»*<sup>49</sup>. Therefore, the

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<sup>47</sup> EUROPEAN COMMISSION (2003), p. 12: *«A self-regulatory market approach, based solely on non-binding recommendations, is clearly not always sufficient to guarantee the adoption of sound corporate governance practices. Only in the presence of a certain number of made-to-measure rules, markets are able to play their disciplining role in an efficient way. In view of the growing integration of European capital markets, a common approach should be adopted at EU level with respect to a few essential rules and adequate co-ordination of corporate governance codes should be ensured»*.

<sup>48</sup> EUROPEAN COMMISSION (2003), p. 11.

<sup>49</sup> EUROPEAN COMMISSION (2003), p. 7.

harmonizing efforts should have focused on the reduction of legal and regulatory barriers to shareholder engagement and on facilitating shareholders' evaluation of the governance of companies<sup>50</sup>. The guidelines of the Action Plan aimed at empowering shareholders by both extending the range of shareholders' rights and revisioning the prerogatives of the board. The connections between the different corporate organs are indeed relational: the weakening of one organ results in the strengthening of the others and vice versa. Moreover, the European Commission emphasized the need to enhance disclosure requirements on corporate governance matters, for the purpose of both allowing investors to assess the convenience of different investing options and facilitating shareholders to play the role of aware watchdogs from within the company.

#### 1.2.4 *The Shareholders' Rights Directive and the challenge of shareholder identification*

Among the different guidelines proposed by the Action Plan of 2003, policymakers prioritized the enhancement of transparency requirements and the development of a common capital market. The memory of the financial scandals was still fresh and the confidence of investors had to be rebuilt as quickly as possible in order to restore the efficiency of the capital market and to promote the overall competitiveness of European businesses. The need for a regulatory action was therefore particularly felt in those two fields. The European policymaker therefore adopted two pieces of legislation: the *Directive 2004/39/EC on markets in financial instruments* (MiFID)<sup>51</sup> and the *Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market* (Transparency Directive)<sup>52</sup>.

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<sup>50</sup> RUGGIERO, E., PANZIRONI, V. and CARRARA, C. (2004), p. 40.

<sup>51</sup> *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC*. OJ L 145/2004, p.1-44. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=IT>.

<sup>52</sup> *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 and amending Directive 2001/34/EC*. OJ L 390/2004, p. 38-57. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0109&from=EN>.

Despite the significant innovations that the MiFID and the Transparency Directive brought about, the EU still missed a modern piece of legislation aimed at reconsidering corporate governance rules in the light of the recommendations put forward by the High Level Group and the European Commission. After a long legislative process articulated in three consultative documents published by the Internal Market Directorate General of the European Commission<sup>53</sup>, the formal adoption of the Directive on shareholders' rights was finally declared by the Press Release document published on June 12, 2007. The *Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies*<sup>54</sup> was meant to be the arrival point of the long path towards shareholder empowerment that the Fifth Draft Directive had taken more than thirty years before. The provisions of the Directive on shareholders' rights aimed at encouraging shareholder activism, with view to tear down the barrier of "rational apathy" that had led to a wrong allocation of powers between corporate governance players<sup>55</sup>, ultimately causing the failures that brought the European economy to its knees at the beginning of the twenty-first century. The Directive on shareholders' rights therefore strove for empowering the general meeting, with view to reduce the gap between the management and the corporate body expressing the will of the ownership. In order to do this, the new directive fostered the exercise of shareholders' rights by both reducing the related costs and facilitating the participation to the meeting.

The regulatory efforts mainly focused on the reduction of the technical costs faced by shareholders who wanted to cast their votes on the draft resolutions submitted to the general meeting (voting costs). Voting is indeed the best means at the disposal of shareholders to influence the company's management and the existence of any barrier to the exercise of voting rights inevitably results in the increase of shareholder passivity. The matter is particularly severe for investors who do not reside in the Member State in which the company has its registered office, since it is particularly

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<sup>53</sup> INTERNAL MARKET DIRECTORATE GENERAL (2004); INTERNAL MARKET DIRECTORATE GENERAL (2005); INTERNAL MARKET DIRECTORATE GENERAL (2007).

<sup>54</sup> *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*. OJ L 184/2007, p. 17-24. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0036&from=EN>.

<sup>55</sup> *Directive 2007/36/EC of 11 July 2007*, Recital 3: «effective shareholder control is a prerequisite to sound corporate governance and should, therefore, be facilitated and encouraged».

hard for them to physically attend the general meeting with view to collect the relevant information and to personally cast their votes (cross-border voting)<sup>56</sup>. The Directive on shareholders' rights thus provides that any shareholder has the right to appoint a proxy holder who attends the general meeting and casts votes in his name (proxy voting)<sup>57</sup>. The European regulator also takes in consideration that the utter liberalization of proxy voting through the abolition of both legal and statutory barriers is likely to determine an increase of agency costs, given that the proxy holder may exercise the voting rights in order to satisfy his personal interest rather than the interest of the shareholder on behalf of whom he should act. With view to prevent the rise of any conflict of interests between the shareholder and the proxy holder, the Directive on shareholders' rights provides for a restricted list of requirements that Member States may impose for the eligibility of a certain person to be appointed as proxy holder<sup>58</sup>. In addition to proxy voting, the Directive on shareholders' rights provides for the possibility for shareholders to vote by correspondence or by electronic means<sup>59</sup>. Such forms of voting enable shareholders to directly cast their votes without physically attending the general meeting. It is interesting that the Directive on shareholders' rights does not bind Member States to adopt a regulatory mechanism for casting votes by correspondence or by electronic means, but it only requires Member States to not hinder companies from doing so<sup>60</sup>. Therefore, in the absence of national regulations that provide for compulsory voting mechanisms, the single listed companies ultimately decide whether allowing their shareholders to cast their votes at a distance and the company's Articles autonomously regulate the voting procedure in the way that better fits the specific needs of the company.

In spite of the enforcement of common rules for lessening the burdens related to voting procedures, the original text of the Directive on shareholders' rights did not mandate custodians' and depositaries' cooperation as to the exercise of shareholders' rights. This is actually the Achilles' heel of the first Directive on shareholder rights: the Directive on shareholders' rights addressed the issue of voting costs from the point of

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<sup>56</sup> *Directive 2007/36/EC of 11 July 2007*, Recital 5.

<sup>57</sup> *Directive 2007/36/EC of 11 July 2007*, Article 1, paragraphs 1 and 2.

<sup>58</sup> *Directive 2007/36/EC of 11 July 2007*, Article 10, paragraph 3. The choice whether enforcing any or all of the requirements provided for by the Directive falls on the single Member States.

<sup>59</sup> *Directive 2007/36/EC of 11 July 2007*, Article 8, paragraph 1 and Article 12.

<sup>60</sup> POMELLI, A. (2017), p. 258.

view of the direct relationship between the investors and the company, without taking into consideration the depository chains that usually interpose between the two. As a matter of fact, in the majority of cases voting rights are exercised at the intermediary level and the voting instructions coming from the end investor need to travel up the chain of custodians in order to reach the issuer. Because of the lack of an economic stake in the shares, intermediaries are generally unwilling to endorse the exercise of their customers' voice via the release of voting entitlements or proxy cards<sup>61</sup>. The passivity of intermediaries thus results in a major hurdle that hinders shareholder activism. The problem gets even more severe in relation to cross-border settings, as the different national regulations and the meager development of standardized may cause further obstacles to the transmission of information from one link of the chain to the other. The only provision of the Directive on shareholders' rights that tackles the intermediary problem is Article 13, which nonetheless addresses the issue only partially. In fact, the provisions laid down in Article 13 only apply to indirect holding systems, where the intermediary is recognized as the legal owner of the shares and acts in the course of a business on behalf of his clients, or the beneficial owners. Therefore, no provision whatsoever is laid down with respect to direct holding systems, where the distinction between legal and beneficial shareholders does not exist. Furthermore, Article 13 merely focuses on the formal aspects of the relationship between the issuer and the legal shareholder (that is, the intermediary) and does not mandate by any means the actual cooperation of intermediaries with view to facilitate the exercise of shareholders' rights on behalf of the end investors.

Many authors<sup>62</sup> agreed that the core of the intermediary problem consisted in the fact that the length and inefficiency of the chain of intermediaries prevents companies from identifying the beneficial shareowners in the interest of whom the rights attached to the shares shall be exercised. Regardless of the different holding systems provided for by national laws, issuers have always struggled with identifying the ultimate owners of their shares. In fact, the obsolete communication mechanisms used by the chains of custodians prevent issuers from getting essential information about their ownership structure with the right timing. As a result, when the general meeting occurs, the issuer

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<sup>61</sup> ZETZSCHE, D. (2008), p. 327.

<sup>62</sup> ZETZSCHE, D. (2008), pp. 331-332; MASOUROS, P.E. (2010), p. 196; XIANGXING HONG, F. (2009), p. 126.

is not in the condition to know the identity of those who ultimately own the rights that the Directive on shareholders' rights seeks to enhance. For instance, the record date-based shareholder authentication mechanism provided for by Article 7 of the Directive on shareholders' rights follows from the awareness that issuers cannot identify with precision those who are entitled to vote at the moment of the general meeting without inhibiting the transfer of shares for a certain period of time prior to the date of that very same meeting<sup>63</sup>. In other words, the record date-based mechanism adopted by the European regulator is the expression of a 'second best' scenario<sup>64</sup>, as Article 7 of the Directive on shareholders' rights suggests when providing that Member States do not have to apply the record date mechanism to companies that are able to identify their shareholders from an up-to-date register on the day of the general meeting<sup>65</sup>.

The problem of shareholder identification also reflects on the procedures aimed at facilitating the transmission of pre-meeting information from the issuer to the beneficial owners. In fact, since the ultimate decision regarding the voting direction rests with the end investor, it is crucial to ensure that the information concerning the meeting reaches the actual shareholders, so that they can examine the documentation related to the meeting and determine how to exercise the rights attached to their shares. Therefore, in order for shareholders to be able to instruct the cast of an informed vote, an efficient system is required that secures the flow of the pre-meeting information from the issuer down to the end investor<sup>66</sup>. The top-down communication system is considered to be efficient only if it allows end investors to obtain all the meeting-related information at a certain date prior to the meeting: if this is not the case, end investors will not have sufficient time to come up with a well-informed decision on which is the voting direction that better fits their interests<sup>67</sup>. In this regard, the original text of the Directive on shareholders' rights provided for a "pull" communication system, meaning that the general meeting notice and all the related information are disseminated through a publication accessible to all end investors (method of

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<sup>63</sup> GARGANTINI, M. (2012), p. 350.

<sup>64</sup> CALVOSA, L. (2011), p. 356; DE LUCA (2010b), p. 330.

<sup>65</sup> *Directive 2007/36/EC of 11 July 2007*, Article 7, paragraph 2, subparagraph 2.

<sup>66</sup> See MASOUIROS, P.E. (2010), p. 197.

<sup>67</sup> MONTALENTI, P. (2011), p. 688.

“dissemination”)<sup>68</sup>. Pull systems differ from the so-called “push” communication mechanisms, where the proxy packet containing the meeting-related information is forwarded to each end investor. Obviously, push systems work efficiently only if combined with a thorough identification mechanism that usually requires the cooperation of the chain of intermediaries. In fact, push mechanisms are usually applied in those countries whose legal systems provide for an indirect shareholding system, under which intermediaries are registered in the corporate books as the legal owners of the shares and proxy materials cannot be directly forwarded to the end investors by the company<sup>69</sup>. However, over the last decades, many countries providing for direct holding systems have enforced rules requiring the participation of intermediaries in the transmission of information to shareholders, with view to introduce in their legal systems the typical benefits of push mechanisms<sup>70</sup>. As a matter of fact, despite the costs that both companies and intermediaries must face to identify every investor to whom the proxy packet must be forwarded, the push method strongly encourages shareholder activism because it eliminates the first layer of voting costs for shareholders, that is, information costs. On the other hand, the method of dissemination provided for by Article 5 of the Directive on shareholders’ rights requires shareholders to take action in order to acquire the information that the issuer has made accessible. The need for such an action leads to the increase of information costs for shareholders, who then remain captive of rational apathy. It is arguable that Article 5 is coherent with the policy of the Directive on shareholders’ rights, which initially tackled the problem of cost reduction from the point of view of the direct relationship between the issuer and the end investors regardless of the chains of

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<sup>68</sup> More precisely, Article 5 of the Directive on shareholders’ rights mandates Member States to require companies to issue the convocation of the general meeting «in a manner ensuring fast access to it on a non-discriminatory basis». For this purpose, companies must use medias «*as may reasonably be relied upon for the effective dissemination of information to the public throughout the Community*». Moreover, companies have to post on their websites the convocation and all the other information relevant to the meeting. The information must be made available on the website for a continuous period of time beginning not later than on the twenty-first day before and including the day of the general meeting.

<sup>69</sup> Major examples would be the UK and the US.

<sup>70</sup> For instance, in Germany, the convocation of the general meeting has to be forwarded to the banks and the associations of shareholders at least twenty-one days before the meeting, whether they voted in the last meeting or they requested such communications to the company (*Aktiengesetz*, §125). Then, the banks that have custody of bearer shares on behalf of shareholders of the company at the twenty-first day prior to the meeting or that are entered in the share register as the legal owners of nominee shares must submit to such shareholders the information obtained from the company (*Aktiengesetz*, §128).

custodians that interpose between the two. However, the extra effort that shareholder must make to access pre-meeting information gives rise to a major hurdle to shareholder activism that could have been prevented by mandating the cooperation of the chain of intermediaries. Besides, when the Directive on shareholders' rights was adopted, the European policymaker was well aware of the weaknesses of the dissemination method, as Article 5.2.2 enables companies to inform shareholders about the convocation of the meeting through a push communication system, as long as two requirements are met: first, companies must have an up-to-date register that enables them to identify the names and addresses of their shareholders as the information starts flowing from the issuer towards the end investors; second, companies are bound to send the convocation to each registered shareholder with no exception whatsoever.

This evidence highlights that the original text of the Directive on shareholders' rights failed to achieve its purpose (the encouragement of shareholder activism) with respect to the identification and the authorization of shareholders at the level of the chain of intermediaries. The Directive on shareholders' rights indeed depicted shareholder identification as a requirement for the eligibility to exercise certain shareholders' rights<sup>71</sup> but no common regulation concerning the identification mechanism was laid down, as the identification process kept being an exclusive matter of national regulation. This regulatory void, in addition with the lack of cooperation from intermediaries, severely hindered the dialogue between companies and their shareholders in a cross-border setting. Furthermore, the lack of common rules on shareholder identification ultimately prevented intra-shareholder communication, as minority shareholders did not have the means to reach out to one another with view to establish alliances that are essential for the eligibility to exercise certain rights, at least where percentage thresholds are provided for by national laws<sup>72</sup>. In conclusion, the

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<sup>71</sup> *Directive 2007/36/EC of 11 July 2007*, Articles 7, paragraph 4; Article 8, paragraph 2; Article 9, paragraph 2; Article 12; Article 13, paragraph 3.

<sup>72</sup> For instance, according to Article 6 of the Directive on shareholders' rights, Member States can provide that the right to put new items on the agenda of the general meeting and the right to table new draft resolutions on items already included in the agenda shall be exercised only by shareholders who hold a minimum stake in the company. Such minimum stake can be held either by a single shareholder or by more shareholders gathered in an alliance and it must not exceed the threshold of 5% (which is still a very high percentage, especially if we consider how dispersed the ownership of listed companies can actually get).

lack of interest of the European policymaker towards the issue of shareholder identification jeopardized the main objective of erasing the scourge of rational apathy.

#### 1.2.5 *A need for reform: from shareholder activism to shareholder engagement*

Just fourteen months after the adoption of the Directive on shareholders' rights, Lehman Brothers Holding Inc. declared bankruptcy. The ruinous collapse of one of the biggest financial institutions worldwide was then found to be just the peak of a huge iceberg that hid the breakdown of the US housing market, which was deeply connected to the financial sector. The economic crisis that followed swept the globe, almost bringing world financial markets to a halt<sup>73</sup>. Over the last decade, a heap of studies and researches has tried to identify the causes of the global financial crisis, drawing various conclusions. In truth, as many authors wisely pointed out, the global financial crisis is a really complicated phenomenon and its cause can be identified in a combination of legal, economic, social and cultural factors: families, investors, mortgage lenders, brokers, banks and other financial operators (such as rating agencies) contributed all to the rise of this worldwide financial fiasco that ultimately affected the global economy. Despite the different issues involved, a nearly universal consensus formed among regulators and opinion makers that corporate governance was again at fault.

The financial crisis worked as a catalyst for regulatory initiatives on corporate governance matters. In the United States, the Shareholder Bill of Rights Act of 2009<sup>74</sup> submitted to the US Senate contained the Congressional finding that a «*central cause*» of the economic crisis was a «*widespread failure of corporate governance*». Meanwhile, in Europe, the *de Larosière* Report of the High-Level Group on Financial Supervision<sup>75</sup> claimed that corporate governance was «*one of the most important failures of the global financial crisis*». It is worth underlining that all of the experts that strove for determining if and to what extent corporate governance failures played a role in the outburst of the crisis ended up pointing their fingers at the phenomenon of managerial short-termism. Professor Lyne L. Dallas (2012) defined short-termism

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<sup>73</sup> The events that led to the financial crisis are exposed at: <http://www.consob.it/web/investor-education/crisi-finanziaria-del-2007-2009>.

<sup>74</sup> S. 1074; 111<sup>th</sup> Congress (2009).

<sup>75</sup> HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU (2009).

as «*the excessive focus of corporate managers [...] on short-term results [...] and a repudiation of concern for long-term value creation and the fundamental value of firms*»<sup>76</sup>. Short-termism was indeed found to be the driving force hiding behind a group of unethical managerial behaviors that contributed to the eruption of the financial crisis: during the first years of the new millennium, managers often undertook excessive risks in order to increase the current stock prices, without taking into consideration the consequences of their actions on the long-term health of the companies they ran<sup>77</sup>.

The rash behavior adopted by top managers during the financial crisis spurred regulators and legal scholars to engage in a debate over the involvement of shareholders in publicly held companies. The EC Green Paper of 2011 on the EU corporate governance framework<sup>78</sup> highlighted that an evident paradox existed at the core of EU corporate governance: despite the fact that corporate governance mechanisms cannot work without active shareholders who engage with companies and hold the management to account for its performance, there was evidence that the majority of shareholders in EU listed companies were passive<sup>79</sup>. In fact, the heavy damages caused by managerial short-termism could have been avoided, or at least limited, if shareholders had effectively engaged with the companies they invested in, with view to align the managerial activities with the primary objective of long-term corporate sustainability. The problem of rational apathy thus came back to trouble the minds of European policymakers, as the provisions of the Directive on shareholders' rights proved themselves to be an insufficient stimulus for the encouragement of shareholder activism<sup>80</sup>. Therefore, the further enhancement of shareholder activism was generally considered to be the proper way forward, in the best interest of both the markets and the EU policymakers. On the one hand, a greater involvement of shareholders in the company could prevent reckless managerial behaviors like those

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<sup>76</sup> DALLAS, L.L. (2012), p. 268.

<sup>77</sup> Such behaviors include decreasing discretionary expenses, under-investing in long-term assets, taking on excessive risk to maximize short-term earnings, investing in assets with hidden risks and taking on excessive debt to bolster short-term firm profits or portfolio returns, taking advantage of controlled information to fool the markets through signal jamming behavior, and using short-term trading strategies that ignore the fundamental value of firms. See DALLAS, L.L. (2012), pp. 268, 312.

<sup>78</sup> EUROPEAN COMMISSION (2011).

<sup>79</sup> EUROPEAN COMMISSION (2011), p.3.

<sup>80</sup> Paragraph 1.2.4.

that harshly undermined the dependability of financial markets during the crisis. On the other hand, the paradox of corporate governance regulation highlighted by the Green Paper of 2011 could have ended up frustrating the efforts made by EU law over the last forty years<sup>81</sup> in order to restore a shareholder-centered corporate governance framework.

However, the evidence from the financial crisis supported that, even where shareholders actually engaged in the governance of investee companies, they ended up supporting the short-term policies adopted by managers<sup>82</sup>. Thus, rather than acting as a cure for the illness of rational apathy, shareholder activism turned out to be an additional failure of corporate governance that led to the financial crisis. Different studies and reports on the financial crisis came to this conclusion. For instance, the *de Larosière* Report of 2009 claimed that, in the run-up to the crisis, the legal and economic environment pushed financial institutions to act in a short-term perspective, favoring greater profits over credit quality and prudence. Such a situation influenced shareholders and investors, who then became accustomed to «*higher and higher revenues and returns on equity which hugely outpaced [...] real economic growth rate*»<sup>83</sup>.

The acknowledgement that shareholders are not suitable for mediating between the interests of the management and those of the company deeply shook the beliefs of policymakers on EU corporate governance rules. Until then, the evolution of EU regulation on corporate governance matters had always moved towards a shareholder-centered model, as the strengthening of shareholders' voice was generally favored over the extension of executive directors' managerial powers. Nobody had ever questioned the enforceability of the shareholder theory, according to which the main objective of any company is to maximize the value of the investments on equity made by shareholders, who are the actual owners of the business. However, the evidence from the financial crisis showed that the unshakeable faith on the shareholder theory was actually based on a serious misconception: that is, the idea that shareholders always

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<sup>81</sup> Paragraphs 1.2.1, 1.2.2, 1.2.3 and 1.2.4.

<sup>82</sup> MUKWIRI, J. and SIEMS, M. (2014), p. 60.

<sup>83</sup> HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU (2009), p. 30. The *de Larosière* Report also lists some of the elements that contributed to the creation of an environment characterized by such a short-term orientation: the system of corporate incentives, low interest rates, the new accounting rules, etc.

act in the interest of the company and that, because of this, they are the ideal subjects to guarantee the efficiency of the system of checks and balances that an efficient model of corporate governance depends on<sup>84</sup>. Some doubts about the real value of the shareholder theory were also put forward after the financial scandals of the early 2000s<sup>85</sup>. Nevertheless, in that case the economic environment suffered a series of individual breakdowns that had no connection one with the other, in spite of their dimensions. On the other hand, the financial crisis of 2008 revealed massive systemic problems throughout the financial services industry and stressed the absolute need for stricter auditing rules in the interest of the stakeholders and the society overall<sup>86</sup>. The concept of “corporate social responsibility”<sup>87</sup> became much more relevant, along with the spread of the idea that large companies and financial institutions have a major responsibility that goes beyond the interests of their owners. In conformity with the neo-Keynesian approach to corporate social responsibility<sup>88</sup>, law experts and opinion makers started evaluating the chance to develop new models of corporate governance capable of assuring a greater involvement of stakeholders. Despite the fact that the European policymaker had never turned his nose up at the active participation of stakeholders in corporate governance<sup>89</sup>, the European Commission was well aware that the excessive attraction to short-term profits would have jeopardized the European path towards corporate governance harmonization, which was based on the idea that shareholder activism is the best tool to guide the managers towards the adoption of good governance practices in the long-term interests of the company. However, in order to maintain the shareholders at the center of the corporate governance framework, the regulatory reaction to the crisis could not consist in a further enhancement of shareholders’ rights. Quite the opposite, there was the need to invest shareholders with greater responsibility, guiding their decisions towards the

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<sup>84</sup> DIGNAM, A. (2013), p. 688.

<sup>85</sup> See, for example, O’ROURKE, A. (2002).

<sup>86</sup> See BAINBRIDGE, S.M. (2012), p. 10.

<sup>87</sup> EUROPEAN COMMISSION (2001), p. 7: *«Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders»*.

<sup>88</sup> The neo-Keynesian approach to CSR was a big advocate of the fact that, in order for CSR to be effective, companies must consider not only the interests of shareholders, but also those of other stakeholders.

<sup>89</sup> As already mentioned in Paragraph 1.2.1, the different versions of the Fifth Draft Directive provided for the adoption of a co-determination mechanism, along the same lines as the German model.

fulfillment of the company's best interests in the long-term. In other words, the core problem of corporate governance was not identified in the lack of shareholder activism anymore, but in the lack of "appropriate" shareholder engagement.

With the Green Paper on the corporate governance of financial institutions<sup>90</sup>, the European Commission listed a series of topics that needed to be discussed in order to «*motivate shareholders to engage in a dialogue with the financial institution and monitor senior management's decision-making, as well as to consider the long-term viability of the financial institutions*»<sup>91</sup>. One year later, the Green Paper on the EU corporate governance framework gave a definition of shareholder engagement, which was identified as a relevant issue not only to financial institutions, but to the generality of listed companies<sup>92</sup>: «*Shareholder engagement is generally understood as actively monitoring companies, engaging in a dialogue with the company's board, and using shareholder rights, including voting and cooperation with other shareholders, if need be to improve the governance of the investee company in the interests of long-term value creation*»<sup>93</sup>. Based on these assumptions, it is possible to determine the reach of shareholder engagement in relation to the old-fashioned concept of shareholder activism. While the term "activism" simply recalls the different forms of shareholder participation to corporate governance, the term "engagement" can be considered as a specification of the former, meaning that it selects the forms of activism that shareholders should actually prioritize, with a view to ensure a sustainable economic growth of the company in the long-term<sup>94</sup>. In short, the European Commission turns the temporal investment horizon of equity holders into a discriminating factor to distinguish between "appropriate" and "inappropriate" forms of shareholder participation to corporate governance. On the one hand, the Green Paper favors the forms of activism that allow shareholders to engage in a permanent dialogue with the management in the interest of long-term growth; on the other hand, it scorns the forms of activism excessively focused on short-term results, which are seen as a danger to

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<sup>90</sup> EUROPEAN COMMISSION (2010).

<sup>91</sup> EUROPEAN COMMISSION (2010), p. 16.

<sup>92</sup> EUROPEAN COMMISSION (2011), p. 3.

<sup>93</sup> EUROPEAN COMMISSION (2011), p. 11.

<sup>94</sup> EUROPEAN COMMISSION (2011), p. 2. This is one of the main objectives of the Green Paper of 2011, which is a response to the objectives laid down by the G20 Finance Ministers and Central Bank Governors Communiqué of 5 September 2009.

the business world as a whole (or, at least, to the extent to which it turns to the risk capital market). Therefore, despite the assumption that investors are free to opt for a short-term-oriented investment strategy<sup>95</sup>, the Green Paper emphasizes the need to make shareholders more responsible, persuading them to favor long-term investments on equity and encouraging them to play the role of active watchdogs with view to align the managers' activity with the objectives of long-term sustainability and long-term value creation.

The goal of investing the shareholders with more responsibility is not an easy one to achieve. The Green Paper tried to identify some of the issues on which the regulatory efforts must focus in order to encourage shareholder engagement. Traditionally, corporate governance has been perceived as a mechanism to mitigate conflicts between the essential corporate actors, namely the shareholders and the managers<sup>96</sup>. The evidence from the financial crisis and the issues emphasized by the Green Paper highlighted the need to extend the enforcement of corporate governance rules to all the different bodies which interpose between the issuer and the ultimate investors who bear the business risk (intermediaries, institutional investors, proxy advisors, etc.)<sup>97</sup>. As a matter of fact, these entities play an essential role in the functioning of corporate governance, as they influence the dialogue between the issuers and the ultimate investors. The efficient cooperation between shareholders and managers in the long-term interests of the company therefore depends on the reliability of intermediate bodies (i.e. the agents) called upon to efficiently represent the interests of the end investors (i.e. the principals) at the institutional level. As a consequence of this extension, the concept of corporate governance ends up incorporating a layering of agency problems which need to be faced by regulators in order to ensure a permanent cooperation between the different corporate actors in the interest of long-term sustainability and economic growth<sup>98</sup>.

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<sup>95</sup> EUROPEAN COMMISSION (2011), p. 12.

<sup>96</sup> HORN, L. (2012), p. 84.

<sup>97</sup> EUROPEAN COMMISSION (2011), pp. 12-15.

<sup>98</sup> For instance, the lack of disclosure of the engagement policies adopted by institutional investors, as well as the unknowability of the investment strategies adopted by asset managers, could hamper the dialogue between the beneficial shareholders and the company, therefore producing a negative effect on the first essential layer of agency problems concerning the relationship between managers and shareholders.

Furthermore, the European Commission realized that the enhancement of long-term shareholder engagement cannot be achieved merely by regulatory means: the phenomenon of short-termism is mainly a cultural one. As a matter of fact, in the run-up to the financial crisis, corporate governance literature with its excessive emphasis on shareholder value encouraged shareholders to adopt short-term investing decisions for the sake of greater returns on equity. In addition, as the Green Paper pointed out, the developments in capital markets have progressively focused on the trading function and facilitated faster and more efficient trading. For instance, innovations such as the high-frequency trading and the automated trading<sup>99</sup> are used to process a great deal of orders with the exclusive help of information technology (straight-through processing). This means that the decisions regarding the time, the price and the financial instruments subject to the orders placed on the market are made by computers on the basis of IT algorithms, regardless of any human interaction. Because of their full computerization, these innovative techniques can be used to process a massive amount of orders at the same time, with the result that the trading temporal horizon is usually very short (up to a few thousandth of a second) in comparison with the total volume of the orders<sup>100</sup>, most of which never even get carried out.

This evidence highlights that, in the decades preceding the financial crisis, investors' culture has progressively turned to short-termism<sup>101</sup> and underestimated the consequences that an excessive focus on short-term results may produce for both investee companies and real economy. However, changing the cultural beliefs of the whole investor community is a very hard task to achieve. The principle according to which shareholders are free to adopt the investment strategies that better fit their interests regardless of the temporal horizon cannot be questioned. Moreover, short-term investors have never stopped being around, as they provide indispensable liquidity that contributes to the correct functioning of capital markets<sup>102</sup>. The goal of the Green Paper is not to suppress short-termism, but to sensitize investors, and in particular shareholders, to the damages that an excessive attention to short-term value

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<sup>99</sup> EUROPEAN COMMISSION (2011), p. 12.

<sup>100</sup> EREDE, M. and SANDRELLI, G. (2013), p. 956.

<sup>101</sup> For details, see MASOUROS, P.E. (2013). This author identified the breakdown of the Bretton Woods monetary order in the early 1970s as the main trigger for the paradigm shift in equity investor culture.

<sup>102</sup> WINTER, J.W. (2011), p. 378.

creation may cause not only to the investee company, but also to the economic environment and to the community as a whole, enhancing their propensity to active forms of long-term engagement. It goes without saying that hard law alone cannot achieve such an ambitious objective, which requires a change in shareholders' perception of the legal position resulting from their investments on equity. A great tool for realizing this change in investors' culture would be soft law. With this regard, it is worth remembering that soft law anticipated the contents of the Green Paper. In fact, in 2010 the British Financial Reporting Council published the UK Stewardship Code<sup>103</sup>, whose purpose is to improve «*the quality of the engagement between institutional investors and companies to help improve long-term returns to shareholders and the efficient exercise of governance responsibilities*»<sup>104</sup>. The Green Paper often refers to the UK Stewardship Code, as the European Commission looked up to it as the reference text for defining the concept of shareholder engagement.

To sum up briefly, the dramatic economic scenario that followed the financial crisis pushed law experts and regulators to question the bases of the shareholder theory. Despite the utmost need to modernize corporate governance, the European policymaker wanted to preserve the progress made over the last forty years in the direction of corporate governance harmonization and shareholder empowerment. The Green Papers published in 2010 and 2011 therefore reaffirmed the primary importance of shareholder activism to the functioning of corporate governance. However, in the interest of long-term sustainability and long-term value creation, the European Commission distinguished between “appropriate” and “inappropriate” forms of activism based on the temporal horizon adopted by investors. The ultimate goal of the Commission is to encourage shareholders to develop an ownership sentiment that drives them towards shareholder engagement. Rather than acting like simple lenders of capital, shareholders should behave as responsible owners of the company they invested in. Not any kind of shareholder activism is desired; good owners should behave in a way that contributes to the long-term viability of the company. Shareholders who adopt such behavior will interpret shareholder rights more as shareholder responsibilities<sup>105</sup> and will actively exercise their supervisory powers with

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<sup>103</sup> FINANCIAL REPORTING COUNCIL (2010).

<sup>104</sup> FINANCIAL REPORTING COUNCIL (2010), p. 1.

<sup>105</sup> See MADSEN, M.B. (2018), p. 151.

view to establish a perpetual dialogue with the management on the most relevant corporate governance themes. Two essential conditions have to be met for such an ambitious objective to be fulfilled. First, the legal concept of corporate governance must be extended, including all the intermediate bodies whose activities influence the dialogue between managers and shareholders, resulting in the swelling of agency costs. Second, investors' culture must evolve to become more sensitive to long-term results. This is in the interest of both the company and the shareholders themselves as long-term engagement increases returns on equity in the long-period without disturbing the functioning of capital markets. This second condition cannot be fulfilled through regulation alone<sup>106</sup> and requires shareholders to spontaneously adjust their approach to corporate governance issues.

### 1.3 Shareholder engagement and the new role of shareholder identification

The global financial crisis worked as a catalyst for reconsidering the role of shareholders in corporate governance. In the Green Paper on the EU corporate governance framework, the European Commission embraced the idea that shareholders should behave as responsible owners of the companies they invested in, which means they should actively engage with the company in the interest of long-term viability and long-term value creation. The long-term investment horizon is the common feature that allow to include all such different forms of activism in the same notion of “appropriate” shareholder engagement<sup>107</sup>. In brief, the European Commission took the view that corporate governance rules must foster shareholder engagement. Being a technical aspect of corporate governance, shareholder identification mechanisms can thus serve the purpose to facilitate the dialogue between shareholders and companies, fostering the interaction between the two.

When the European Commission published the Green Paper on the EU corporate governance framework, about two thirds of Member States had already enforced mechanisms that allowed national issuers to identify their domestic holders. However,

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<sup>106</sup> MUKWIRI, J. and SIEMS, M. (2014), p. 63.

<sup>107</sup> In the Green Paper of 2011 on EU corporate governance framework, the European Commission emphasizes the idea that not all forms of activism are desired by defining shareholder engagement as “appropriate”. This is evidence that the European Commission wants to make a clear distinction between “good” shareholder engagement and other “bad” forms of shareholder activism, which are usually focused on short-term results.

national rules on shareholder identification became obsolete due to the increasing interdependence of European capital markets and to the increasing interest of foreign investors in the equity of domestic companies<sup>108</sup>. It is not a case that the need for the introduction of a uniform shareholder identification mechanism was firstly felt not by the European policymaker, but by all the entities holding an interest in the efficient functioning of the capital market, such as companies, public authorities and investors. On April 5, 2011, the European Commission launched a wide-ranging public consultation on the EU corporate governance framework. At its closure on July 22, 2011, the consultation had received a total of 409 answers from a huge range of professional representatives, citizens and public authorities. The Green Paper feedback statement reported that about three quarters of respondents who expressed a preference on question n° 20 of the Green Paper regarding shareholder identification looked with favor at the introduction of an EU shareholder identification mechanism<sup>109</sup>. However, despite the fact that the vast majority of stakeholders strongly supported the adoption of a tool to help issuers identify their shareholders in a cross-border setting, opinions on how such identification mechanism should work varied significantly from one respondent to another. As a matter of fact, only a few respondents spoke out in favor of a fully-fledged EU system of shareholder identification. On the other hand, a substantial group held that, rather than introducing a new identification system, the EU should ask Member States to mutually recognize their national identification mechanisms<sup>110</sup>, whose efficiency had already been proved. Finally, quite a lot of respondents claimed that the Transparency Directive already offered a good insight to issuers into their shareholder base, and that efforts, if any, shall focus on lowering the thresholds for notifications of major holdings<sup>111</sup> with view to widen the range of shareholders whose identities must be disclosed. Aside from the discussion on the identification system, diverging views were also expressed on whether the information

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<sup>108</sup> According to the *Observatoire de l'Épargne Européenne* (OEE), the percentage of market capitalization of shares held by foreign investors has gone up from 10% in 1975 to 44% in 2011. This statistic refers to the stock markets of UK, France, Germany and Spain, which were the four Member States with the largest market capitalization and the largest number of listed companies at the end of 2011. See OBSERVATOIRE DE L'ÉPARGNE EUROPÉENNE (2012), pp. 20, 33.

<sup>109</sup> DIRECTORATE GENERAL INTERNAL MARKET AND SERVICES (2011), p. 15. The percentage of respondents who expressed a preference on the above-mentioned question was also pretty consistent (about 58% of total respondents).

<sup>110</sup> MALBERTI, C. (2016), p. 9.

<sup>111</sup> *Directive 2004/109/EC of 15 December 2004*, Article 9.

about shareholders' identity should only be disclosed to the issuer or to shareholders as well. In fact, if enabled to access the information about the identity of other investors, shareholders might be able to cooperate with each other in order to coordinate their supervisory powers and to engage in an equal dialogue with the management. However, many retail investors who participated to the public consultation expressed concerns on the protection of their privacy<sup>112</sup>. In particular, owners of bearer shares expressed the will to protect the anonymity of their investments. The European Parliament confirmed the concerns of retail investors and claimed that bearer shareholders should have the right not to see their identity disclosed.

On December 12, 2012, the European Commission published the Action Plan on European company law and corporate governance, aimed at developing an EU «*modern legal framework for more engaged shareholders and sustainable companies*»<sup>113</sup>. With this Communication, the European Commission tried to identify the proper ways forward on EU company law and corporate governance, taking into consideration the answers submitted during the public consultation. With regard to shareholder identification, the Action Plan supported with great emphasis the introduction of a uniform identification mechanism in the EU. The opinion according to which the mutual recognition of national identification mechanisms would offer issuers a sufficient insight on their ownership structure was discarded, since «*the existing tools are either not detailed enough or lack the necessary cross-border dimension*»<sup>114</sup>. The European Commission thus undertook to «*propose, in 2013, an initiative to improve the visibility of shareholdings in Europe as part of its legislative work program in the field of securities law*»<sup>115</sup>. Despite the opinion of the majority of respondents to the public consultation differed significantly, the support of the Commission for the adoption of a uniform identification system is coherent with the objectives laid down in the introduction to the Action Plan. In particular, the Commission identified three main lines of action: enhancing transparency, engaging shareholders and supporting companies' growth and competitiveness. For the first line

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<sup>112</sup> DIRECTORATE GENERAL INTERNAL MARKET AND SERVICES (2011), p. 15.

<sup>113</sup> EUROPEAN COMMISSION (2012).

<sup>114</sup> EUROPEAN COMMISSION (2012), p. 7.

<sup>115</sup> *Ibid.*

of action to be carried out, «*companies should be allowed to know who their shareholders are [...] so that a more fruitful dialogue on corporate governance matters can take place*»<sup>116</sup>.

Overall, the Action Plan depicts shareholder identification as a tool to foster the interaction between shareholders and issuers, since «*additional information about who owns shares in a listed company can improve the corporate governance dialogue between the company and its shareholders*»<sup>117</sup>. But what kind of dialogue should shareholders and issuers engage in? What kind of specific advantages can corporate governance get from the improved dialogue between companies and their shareholders?

As we mentioned before<sup>118</sup>, the European Commission identified in the lack of appropriate shareholder engagement the biggest failure of corporate governance in the run-up to the financial crisis. The Green Paper on the EU corporate governance framework emphasized the need to invest shareholders with an ownership sentiment that encourages them to engage with the company and to supervise the management's activity in the interest of long-term viability and long-term value creation. Moreover, empirical studies demonstrated that shareholder engagement on corporate governance issues is not only creating value for shareholders, but contributes to a significant improvement of the governance, operating performance, profitability and efficiency of the investee companies<sup>119</sup>. The establishment of a fluid and permanent dialogue between issuers and shareholders should thus work as an incentive for shareholder engagement. The constant interaction with the issuers and its bodies spurs shareholders to develop an ownership sentiment which drives them towards responsible and long-term oriented behavior. For instance, dialoguing with managers about corporate governance matters might offer to shareholders a better insight in managerial activities. If the management discusses with the ownership on a regular basis, shareholders will eventually consider the debated issues as 'personal' problems that

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<sup>116</sup> EUROPEAN COMMISSION (2012), p. 4.

<sup>117</sup> EUROPEAN COMMISSION (2012), p. 7.

<sup>118</sup> See Paragraph 1.2.5.

<sup>119</sup> A study by Dimson, Karakas and Li (2015) analyzed the positive effects of shareholder engagement in environmental, social and economic matters. As far as corporate governance is concerned, the cumulative abnormal return of a successful engagement over a year after the initial engagement averaged +7,1%. See DIMSON, E., KARAKAS, O. and LI, X. (2015), p. 3254.

are directly connected to their investments. The persistent dialogue with the management will thus push shareholders to identify themselves with the company and to exercise their supervisory powers in order to align the management's activity with the long-term interests of the company itself.

In the optic of the European Commission, improving the dialogue between shareholders and issuers is the best way to encourage shareholders to commit to appropriate long-term engagement. Consequently, since it plays a major role in the establishment of such dialogue, the Commission ultimately sees shareholder identification as an incentive for shareholder engagement. In the post-crisis corporate governance framework, shareholder identification is a tool for encouraging the appropriate forms of shareholder activism. This new role of shareholder identification is totally coherent with the Green paper of 2011 and with the Action Plan of 2012, whose second line of action commits to the enhancement of shareholder engagement<sup>120</sup>.

The EU lawmaker attempted to carry out the objectives put forward by the Action Plan of 2012 with the *EU Directive 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement*. The next chapter will analyze this new piece of European legislation in detail, taking a close look at the legal measures aimed at fostering shareholder engagement through shareholder identification.

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<sup>120</sup> EUROPEAN COMMISSION (2012), p.4.

## Chapter 2

# THE NEW EUROPEAN MECHANISM FOR SHAREHOLDER IDENTIFICATION

### 2.1 Introduction

From its very beginning, the EU path towards corporate governance harmonization has pivoted on the intent to enhance the role of shareholders in corporate governance by alleviating the causes of rational apathy. The Fifth Draft Directive, the Report of the High Level Group, the Action Plan of 2003 and the first Directive on shareholders' rights all pointed in the same direction<sup>1</sup>. The global financial crisis can be considered as the turning point of this harmonization process. Empirical evidence showed that, when they actually exercised their 'voice', shareholders often supported high risk-taking managerial policies for the sake of short-term results. This pushed policymakers and law experts around the world to shift the focus from general shareholder activism to specific long-term shareholder engagement. In both the Green Paper of 2011 and the Action Plan of 2012, the European Commission suggested that shareholders should responsibly engage in corporate governance with the aim to promote long-term sustainability and long-term value creation<sup>2</sup>.

The *EU Directive 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement*<sup>3</sup>, also known as the second Directive on shareholders' rights (hereinafter, the "Directive"), can be considered as the first great effort of the EU lawmaker to drive investors' culture towards the "appropriate" forms of engagement. The Directive attempts to fulfill this ambitious goal through two main lines of action:

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<sup>1</sup> Paragraphs 1.2.1, 1.2.2, 1.2.3 and 1.2.4.

<sup>2</sup> Paragraph 1.2.5.

<sup>3</sup> *Directive 2017/828/EU of 17 May 2017*.

- First, the Directive copes with the weaknesses of the Directive 2007/36/EC, as it removes some of the hurdles to shareholder activism that the amended Directive did not deal with<sup>4</sup>.
- Second, the Directive introduces a great deal of provisions aimed at investing shareholders with more responsibility, pushing them to engage in the company as responsible owners would do and to adopt a long-term investment horizon, which is essential to ensure the sustainability of the investee company in the long period<sup>5</sup>.

### 2.1.1 *A troubled legislative history*

The main objective of the Directive, that is the enhancement of shareholder engagement, is an extremely delicate matter. For such a purpose to be fulfilled, a compromise must be found between two opposite needs:

- On the one hand, the lawmaker cannot forgo the principle according to which shareholders can freely choose how to exercise the rights attached to their shares. If he did, the right of ownership would then suffer an unacceptable limitation. Such a necessity was particularly felt in countries like the United Kingdom. As a matter of fact, there is a long-standing tradition in English law of shares being regarded as the property of the shareholder to do as they wish<sup>6</sup>; this includes exercising the rights attached to their shares as they like, or even not exercising them at all<sup>7</sup>.
- On the other hand, in order to ensure the efficiency of the capital markets and a sustainable economic growth throughout Europe, shareholders must commit to appropriate forms of engagement with the investee companies. By analyzing companies' long-term prospects and engaging on that basis, shareholders fulfill an important social function, as they help companies to take decisions that will contribute to their long-term success<sup>8</sup>. Empirical studies have demonstrated

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<sup>4</sup> Paragraph 1.2.4.

<sup>5</sup> For instance, Chapter 1b of the Directive provides that institutional investors and asset managers should publicly disclose an engagement policy and that they should explain on an annual basis how such policy has been implemented.

<sup>6</sup> *Pender v Lushington* (1877), LR 6 Ch D 70 (Ch D).

<sup>7</sup> PAYNE, J. (2010), p. 210.

<sup>8</sup> EUROPEAN COMMISSION (2014a).

that shareholder engagement on corporate governance may generate an average of +7-8% cumulative abnormal stock return over a year<sup>9</sup>. Therefore, the lawmaker must attempt to influence the shareholders' perception of the legal position resulting from their investments on equity, pushing them to prefer the forms of "appropriate" shareholder engagement that ultimately benefit the investee companies and the economy as a whole.

The conflict between these two opposite but legitimate needs is the main reason why the Directive had such a troubled legislative history<sup>10</sup>. In fact, the text of the original proposal adopted by the European Commission<sup>11</sup> was then broadly amended by the draft European Parliament legislative resolution adopted by the Committee on Legal Affairs<sup>12</sup>. The Committee suggested to enhance not only shareholder engagement, but also the active participation of all stakeholders in corporate governance<sup>13</sup>. With specific regard to the encouragement of long-term shareholder engagement, the draft resolution recommended to mandate the adoption of mechanisms aimed at promoting shareholding on a long-term basis, such as loyalty dividends, loyalty shares, and additional voting rights. The political argument that took place in the Committee on Legal Affairs reflected on the plenary sitting. In fact, the final text adopted by the EU Parliament<sup>14</sup> differed significantly from the text of the draft resolution. In particular, the provisions aimed at encouraging stakeholder activism and those that suggested the mandatory adoption of pro-shareholder engagement mechanisms were removed<sup>15</sup>. The position adopted by the EU Parliament created an impasse that lasted for over eighteen months. During this period, the EU Parliament and the Council took part in a trialogue<sup>16</sup> with view to reach a compromise between their different viewpoints. Even

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<sup>9</sup> DIMSON, E. & KARAKAS, O. & LI, X. (2015). Active Ownership. *Review of Financial Studies*. 28. p. 3225-3268.

<sup>10</sup> STABILINI (2017).

<sup>11</sup> EUROPEAN COMMISSION (2014b).

<sup>12</sup> COMMITTEE ON LEGAL AFFAIRS (2015).

<sup>13</sup> For instance, the draft European Parliament legislative resolution provided that employees should be entitled, via their representatives, to express a view on the remuneration policy before it is submitted to the vote of shareholders.

<sup>14</sup> EUROPEAN PARLIAMENT (2015).

<sup>15</sup> In fact, many Member States still prefer a shareholder-oriented corporate governance model and are not in favor of the involvement of stakeholders in the decision-taking processes. These are the same reasons that led to the failure of the Fifth Draft Directive on Company Law, which was discussed in paragraph 1.2.1.

<sup>16</sup> A trialogue consists in a series of informal tripartite meetings attended by representatives of the European Parliament, the Council and the Commission. Owing to the *ad hoc* nature of such contacts,

though the trialogue did not bring the expected results, an agreement between the representative of the two legislative bodies was finally reached in December 9, 2016<sup>17</sup>. The EU Parliament and the Council proceeded to the adoption of the final text in May 17, 2017 and the Directive was then published in the EU Official Journal in May 20<sup>18</sup>.

### 2.1.2 *The result of a difficult compromise*

The final text of the Directive can be considered as the offspring of a compromise between different viewpoints on the most controversial issues related to shareholder engagement. In fact, regardless of any formal definition, there is not a common agreement on what kinds of conduct adopted by shareholders are to be regarded as appropriate forms of shareholder engagement. From the point of view of the European Commission, it seems that the only feature that all forms of appropriate engagement have in common is long-termism<sup>19</sup>. Some forms of engagement might be considered as appropriate in some Member States and as inappropriate in others, because corporate governance frameworks adopted throughout the EU vary significantly one from the other. Cultural differences therefore play a huge role in defining the concept of “appropriateness”.

In addition, the objective of enhancing shareholder engagement requires the mutual cooperation of many different entities. National lawmakers, market regulation authorities, companies, boards, CSDs, intermediate accountholders, institutional investors, asset managers, proxy advisors and beneficial shareowners must all play a part in driving investors’ culture towards appropriate shareholder engagement. The regulatory discipline of shareholder engagement must therefore mediate between the different interests involved, as the above-mentioned entities provide for different services and pursue disparate goals. For instance, it may be in the best interest of end investors to individually receive, via the intermediaries, shareholder information from the company that is necessary to exercise the rights flowing from securities; nonetheless, intermediaries might reply that the automatic transmission of information

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no standard format of representation has been laid down. For further information about the matter, see [http://ec.europa.eu/codecision/stepbystep/glossary\\_en.htm](http://ec.europa.eu/codecision/stepbystep/glossary_en.htm).

<sup>17</sup> COUNCIL OF THE EUROPEAN UNION (2016).

<sup>18</sup> MULA, L. (2017).

<sup>19</sup> With this regard, see the critical analysis of EREDE, M. and SANDRELLI, G. (2013), pp. 933, 950.

to all shareholders would be unduly expensive for them and that the publication of such information through “dissemination” methods already ensures a sufficient level of engagement. The public consultation that followed to the adoption of the Green Paper on EU corporate governance framework was indeed meant to collect opinions from the different stakeholders, with view to identify the way forward that could compromise best between the interests involved<sup>20</sup>. For that same purpose, the EU Commission also sent a questionnaire to the European Company Law Experts Group<sup>21</sup> regarding the Member State framework on the issues analyzed in the Impact Assessment of 2014<sup>22</sup>. This way, Member States could express their viewpoints on such issues, as the Company Law Experts Group is composed of Member State representatives. Moreover, the Commission conducted a number of technical discussions with experts from different groups of stakeholders, in an attempt to gather more detailed and technical information about the practical impact of the proposed regulatory options on these specific groups<sup>23</sup>. This evidence highlights that the EU policymaker took into serious consideration all the opinions of different stakeholders, with view to adopt a set of rules that would maximize the level of shareholder engagement without unduly sacrificing the interests of any stakeholder. Protecting the multiple interests involved is also the best way to obtain from stakeholders the level of cooperation that is necessary to drive shareholders’ culture towards appropriate long-term engagement.

The next paragraph will take a close look at the legal discipline of shareholder identification provided by the Directive. The EU lawmaker depicts shareholder identification as a technical tool for the enhancement of shareholder engagement. Consequently, the most critical passages of the discussion on shareholder engagement reflected on the discipline of shareholder identification. The compromises adopted by the EU lawmaker will be accurately analyzed and discussed.

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<sup>20</sup> Paragraph 1.3.

<sup>21</sup> The European Company Law Experts Group is a Commission Expert Group which provides advice to the Commission on the preparation of Company Law and Corporate Governance measures. See the official website: <https://europeancompanylawexperts.wordpress.com/>.

<sup>22</sup> EUROPEAN COMMISSION (2014a), p.7.

<sup>23</sup> EUROPEAN COMMISSION (2014a), p.8.

## 2.2 General traits of the EU Directive 2017/828: between tradition and innovation

The EU pursue the same objective that the European harmonization process has attempted to fulfill in almost fifty years, that is the enhancement of the role of shareholders in corporate governance. It is arguable that the provisions of the Directive fit in the traditional pattern of EU corporate governance regulation. However, it is also noteworthy that, to some extent, the Directive approaches corporate governance issues in a way the EU lawmaker has never done before. The innovative spirit of the Directive pushes law experts to look at EU corporate governance from a different perspective. The Directive can therefore be depicted as a bridge between past and future of EU corporate governance regulation.

### 2.2.1 *The extension of the concept of corporate governance*

Traditionally, the EU lawmaker has tackled corporate governance issues from the perspective of the direct relationship between issuers and shareholders. Over the years, aside from the attempts to empower certain stakeholders (such as employees)<sup>24</sup>, the European regulator has depicted corporate governance as a mechanism to alleviate the agency problems between shareholders and managers, or between minority and dominant shareholders<sup>25</sup>. The only subjects of EU corporate governance rules were thus managers and shareholders; indeed, they were considered to be the only relevant corporate governance actors. Such narrow perception of corporate governance mechanisms is arguably the major weakness of the first Directive on shareholders' rights. In fact, many authors<sup>26</sup> pointed out that the provisions of the Directive 2007/36/EC solely focus on the relationship between shareholders and issuers and do not mandate the cooperation of intermediaries as to the exercise of shareholders' rights. The Directive 2007/36/EC consequently failed to achieve its purpose to facilitate the exercise of shareholders' rights in a cross-border setting, as its provisions did not address by any means the chain of intermediaries that maintain the securities accounts on behalf of the beneficial shareowners. This made it impossible for the

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<sup>24</sup> Paragraph 1.2.1.

<sup>25</sup> Depending on the ownership structure of companies. See paragraph 1.2.2.

<sup>26</sup> ZETZSCHE, D. (2008), p. 327; MASOUROS, P.E. (2010), p. 198.

information related to shareholders' rights to travel up and down the holding chain in a fluid and efficient manner<sup>27</sup>.

After the outburst of the financial crisis, the shift of focus from shareholder activism to shareholder engagement spurred the EU lawmaker to deal with its past missteps. In fact, the new Directive on shareholders' rights increases significantly the number of subjects of EU corporate governance regulation. As a matter of fact, the level of agency costs linked to the relationship between the issuer and its shareholders (first layer of agency costs) actually depends on the costs of activities and services provided by the different entities that interpose in such relationship. Therefore, the corporate governance issue ends up incorporating a stratification of agency costs. It goes without saying that managers, as representatives of the company, must carry out their activities in the best interests of shareholders. However, in order to align the management's activity to the interests of the ownership, institutional investors have to act in the best interest of ultimate investors; asset managers must act in the best interest of those whose assets they manage; proxy advisors must carry out their research and advising activities in a way that better fits the interests of the beneficiaries of voting recommendations; intermediate accountholders and central securities depositories must ensure the fluid transmission of information both upwards and downwards the holding chain, with view to facilitate the dialogue between issuers and beneficial shareholders. The smaller the agency costs at the inferior levels are, the more efficient the primary relationship between issuers and shareholders will be. All of the above-mentioned entities therefore play an essential role in ensuring the efficiency of corporate governance practices. Because of this, there is no reason for them not to be included within the number of subjects of EU corporate governance regulation.

Last but not least, the extension of the concept of corporate governance promotes a higher level of cooperation between issuers, shareholders and the new corporate governance actors for the sake of long-term sustainability and long-term value creation. Thus, such extension plays a fundamental role in changing the culture in the European corporate sector towards a more sustainable long-term investment perspective<sup>28</sup>.

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<sup>27</sup> Paragraph 1.2.4.

<sup>28</sup> Paragraph 1.2.5.

### 2.2.2 *From soft law to hard law*

Undoubtedly, EU has mainly adopted a soft law-based approach to corporate governance. From a European perspective, a soft-law based approach is particularly convenient for two reasons. First, it allows the development of a European set of rules without directly affecting the different legal systems of Member States. In fact, over the course of the years, hard law has faced a number of difficulties in the European regulatory process<sup>29</sup>, as Member States are quite reluctant to allow the mandatory introduction of supranational rules in their legal systems, especially when it comes to company law or corporate governance matters. The Fifth Draft Directive and the Takeover Bids Directive are two vivid examples of this. Second, although soft law rules do not provide for enforcement mechanisms or sanctions in case of noncompliance, it can be argued that an enforcement mechanism does exist when soft law regulation applies the ‘comply or explain’ principle<sup>30</sup>. Over the course of the years, the European Commission and its expert groups have taken every chance they had to emphasize the efficiency of the ‘comply or explain’ framework in corporate governance. In 2002, the High Level Group of Company Law Experts suggested listed companies to include in their annual corporate governance statement «*a reference to a national code of corporate governance with which the company complies or in relation to which it explains deviations*»<sup>31</sup>. In 2011, the Green Paper of the European Commission on corporate governance framework maintained that «*surveys among companies and investors show that most of them consider ‘comply or explain’ approach as an appropriate tool in corporate governance*»<sup>32</sup>. The position of the European Commission on the ‘comply or explain’ mechanism is completely understandable because, when it comes to soft law, the principle of ‘comply or explain’ constitutes a fully-fledged enforcement mechanism. In fact, companies and shareholders covered by the ‘comply or explain’ mechanism must disclose the deviations from the behavior recommended by the specific piece of soft law and the actual reasons for the adoption of such deviations<sup>33</sup>.

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<sup>29</sup> MADSEN, M.B. (2018), p. 155.

<sup>30</sup> *Ibid.*

<sup>31</sup> HIGH LEVEL GROUP OF COMPANY LAW EXPERTS (2002b), p. 47.

<sup>32</sup> EUROPEAN COMMISSION (2011), p. 18.

<sup>33</sup> MADSEN, M.B. (2018), p. 153.

The new Directive on shareholders' rights did not deny that the 'comply or explain' approach can actually be very useful for the purpose to enhance long-term shareholder engagement. On the contrary, Chapter 1b of the Directive attaches great importance to the 'comply or explain' rule when it comes to regulating the agency relationships between beneficial owners, institutional investors, asset managers and proxy advisors. However, the Directive shows its innovative spirit as it favors a hard-law based approach for regulating certain aspects of corporate governance. In fact, even though they allow for more flexibility, soft law provisions are not capable of leading to a level playing field for shareholder engagement in Europe. On the other hand, the adoption of a hard law-based approach allows the EU lawmaker to enforce a uniform legal system, under which corporate governance actors have the legal obligation to fulfill certain duties for the sake of long-term sustainability and long-term economic growth. This is the only reasonable way to drive investors' culture towards shareholder engagement, regardless of the cross-border setting in which the different corporate governance actors operate. It has already been said that hard law alone cannot fulfill such an ambitious task<sup>34</sup>. But no one has ever questioned that hard law is an essential step forward in that direction.

In particular, the Directive took a prescriptive stance towards the issue of shareholder identification. The EU lawmaker took into serious consideration the weaknesses of a soft law-based approach and concluded that the problem of shareholder identification can be effectively tackled only by hard law provisions. As has already been said, many of the respondents to the public consultation that followed the publication of the Green Paper on the EU corporate governance framework were reluctant to the introduction of a fully-fledged European identification mechanism. In fact, the majority of respondents maintained that regulatory efforts from the European Union should have restricted themselves to allowing the mutual recognition of the different identification systems enforced by Member States<sup>35</sup>. The option of mutual recognition would have enlarged the number of identified shareholders in cross-border scenarios when the existing national identification systems had proved effective. However, as the European Commission pointed out, such option «*would only partially solve the*

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<sup>34</sup> Paragraph 1.2.5.

<sup>35</sup> Paragraph 1.3.

*problem of shareholder identification as not all shareholders would be covered, but only shareholders who hold their shares under a disclosure-friendly jurisdiction»*<sup>36</sup>. Some respondents argued that the mutual recognition of national identification systems would have promoted the implementation of existing market standards spontaneously created by the industry, such as the *Market Standards on Corporate Actions Processing*<sup>37</sup> and the *Market Standards for General Meetings*<sup>38</sup>. But many Member States do not have a legal basis for such standards in their legislation. The implementation of market standards in these Member States would thus have been slow and ineffective<sup>39</sup>.

The core issue is that certain Member States do not have any incentive to increase the level of transparency of equity holdings in listed companies. As soft law proved to be incapable to create incentives of this kind, the EU lawmaker opted for a stricter regulation of the identification process, with view to overcome the difficulties determined by the diverse national approaches to the matter of shareholder identification. In fact, the introduction by hard law of a uniform identification system that requires action from intermediaries gives to every listed company in the European Union the right to know the identity of its shareholders, regardless of both the intermediaries' will to cooperate in the identification process and the cross-border setting in which the identification process must be carried out.

## **2.3 The EU Directive 2017/828 and shareholder identification**

### *2.3.1 The issues arising from central detention systems and the EU definition of intermediaries*

Paragraph 3 of Article 1 of the Directive adds a new Chapter 1a to the original text of the Directive 2007/36/EC. This Chapter is called «*Identification of shareholders, transmission of information and facilitation of exercise of shareholder rights*» and it shall apply to «*intermediaries*»<sup>40</sup>. As a matter of fact, the shift from securities being held directly to a situation in which securities are held via intermediaries produced

<sup>36</sup> EUROPEAN COMMISSION (2014a), pp. 67-68.

<sup>37</sup> CORPORATE ACTIONS JOINT WORKING GROUP (2012).

<sup>38</sup> JOINT WORKING GROUP ON GENERAL MEETINGS (2010).

<sup>39</sup> EUROPEAN COMMISSION (2014a), Brussels. p.67.

<sup>40</sup> *Directive 2017/828/EU of 17 May 2017*, Article 1, paragraph 1, Point (c).

conflicting outcomes. On the one hand, transfer and settlement of shares became faster and more efficient. On the other hand, the practice of intermediated securities gave birth to new legal and practical problems. In fact, shareholders need the cooperation of intermediaries in order to both communicate with the issuer and to exercise the rights attached to their shares. With regard to shareholder identification, issuers must rely on intermediaries' notices in order to map their shareholder base. A small digression is necessary to introduce the matter.

The most sophisticated economic systems have acknowledged for a long time the weaknesses of paper-based detention mechanisms, where shares are embodied in a piece of paper that is transferred in accordance with the rules on credit instruments. Two techniques were developed to deal with the problem of too much paper. One was to immobilize a global note, which represents the entire issue of shares from one single company. The global note is then held by a central securities depository (from now on, the CSD) who holds for one or more intermediaries, who then hold either for investors or for other intermediaries<sup>41</sup>. The records of the intermediaries are electronic. Trading and settlement can therefore take place swiftly between intermediaries. Immobilization is the technique that has been used by Germany. Here, a central detention system has been developed since 1937, when the *Gesetz über die Verwahrung und Anschaffung von Wertpapieren* (commonly known as *DepotG*) was adopted<sup>42</sup>. The practice of issuing a global note (*Sammelurkunde*) representing all of the shares deposited with the same bank (*Wertpapiersammelbank*) was legally acknowledged in 1972, with the introduction of a new § 9a in the *DepotG*<sup>43</sup>. With the prospect of unifying the multiple German stock markets, the different *Wertpapiersammelbanken* were then gathered in a single company acting as a CSD, which nowadays goes under the name of *Clearstream* and is a wholly owned subsidiary of *Deutsche Börse Group*<sup>44</sup>. The *Sammelurkunde* represents a global issuance of fungible securities. All shareholders are considered to be co-owners of the

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<sup>41</sup> GULLIFER, L. (2010), p. 2.

<sup>42</sup> CIAN, M. (2007), pp. 641-642.

<sup>43</sup> *DepotG*, § 9a (1): «Der Verwahrer hat ein Wertpapier, das mehre Rechte verbrieft, die jedes für sich in vertretbaren Wertpapieren einer und derselben Art verbrieft sein könnten (*Sammelurkunde*), einer Wertpapiersammelbank zur Verwahrung zu übergeben [...]».

<sup>44</sup> For a better understanding of the evolution of the German central detention system, see DE LUCA, N. (2007), pp. 185-219.

same *Sammelurkunde* and every one of them may dispose of their own share of rights embodied in the single document<sup>45</sup>. Transactions usually take place through specific orders (*Aufträge*) coming from the single shareholders<sup>46</sup>. The addressees are the custodian banks, who then transmit such orders to *Clearstream*, who in turn proceeds to settle the accounts of the banks participating to the central detention system in accordance with the orders received<sup>47</sup>. Many authors<sup>48</sup> pointed out that the technique of immobilization realizes a softer form of dematerialization: the physical document still exists, yet it cannot be materially transferred from one investor to the other. Therefore, shareholders are not required to exhibit the embodying certificates in order for them to exercise their rights over the company (dematerialization *lato sensu*).

Another technique was to dematerialize shares. In this case, the root of titles becomes nothing more than an electronic entry on the books of a central operator, such as the French *Euroclear* or the Italian *Monte Titoli s.p.a.* This technique therefore implies the utter suppression of embodying certificates (dematerialization *stricto sensu*). Practically speaking, transfers of dematerialized securities follow a very sophisticated procedure, which varies significantly from country to country<sup>49</sup>. It is in the interest of this work to provide a broad description of such procedures, putting emphasis on the common traits of the different national systems.

In general, legislation only allows authorized intermediaries to entry the register of the CSD. Intermediaries in the holding chain must forward the sell and purchase orders coming from their clients to the CSD<sup>50</sup>. After that the orders to settle have been received, the CSD proceeds to credit the shares on the account of the intermediary who holds for the purchaser and to debit the same number of shares on the account of the

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<sup>45</sup> EINSELE, D. (2005), p. 251.

<sup>46</sup> The *Allgemeine Geschäftsbedingungen der Clearstream Banking AG* (Clearstream Banking Luxembourg's General Terms and Conditions) has typified such orders. The orders of transfer are called *Wertpapierübertrage*.

<sup>47</sup> DE LUCA, N. (2007), pp. 205-206.

<sup>48</sup> DE LUCA, N. (2007), pp. 185-186; LENER, R. (1989), p. 20; SPADA, P. (1986), p. 626; PARTESOTTI, G. (1987), p. 606.

<sup>49</sup> For a detailed description of how the transfer procedure of dematerialized shares works in Italy, see DE LUCA, N. (2007), pp. 344-348.

<sup>50</sup> Usually, a telematic platform managed by the CSD automatically combine sell and purchase orders forwarded by intermediaries on behalf of their clients. Therefore, the orders coming from the purchaser and the seller meet each other although the two end investors have never actually concluded an agreement. See CIAN, M. (2010), p. 82; DE LUCA, N. (2007), p. 344.

intermediary who holds for the seller (securities settlement)<sup>51</sup>. Once the CSD has settled the accounts of its participants, the first-tier intermediaries proceed to settle the accounts of the end investors or the accounts of the intermediaries for whom they hold<sup>52</sup>. In the latter case, the second-tier intermediaries then settle the accounts of the end investors or the accounts of the third-tier intermediaries, and so on until the shares are credited on the account of the end investor opened with the final-tier intermediary ('pay-out' of securities). The law of many Member States provides that the shares issued by listed companies must be dematerialized and must enter the central depository system. By 1998, Italian law provided for the mandatory dematerialization<sup>53</sup> of both listed and widely-held securities<sup>54</sup>. In France, a regime of compulsory dematerialization for both listed and non-listed securities was introduced by law already in 1981<sup>55</sup>. As a result of the growing success of intermediated securities holding systems, shares of listed companies are nowadays held through complex chains of intermediaries which significantly reduce the insight of issuers into their ownership structures. Two small digressions are necessary to introduce the matter.

First, intermediaries involved in the custody of securities usually gather all the shares belonging to their clients (or to their clients' clients) in a pooled account held by the intermediary of which they are a client. These accounts are commonly referred to as "omnibus accounts". Enriques, Gargantini and Novembre (2010) argue that *«by means of the omnibus accounts, securities may be disposed of more efficiently because the pooling minimises the number of credits and debits required to settle the transactions. Where securities are transferred among the clients of the same intermediary, the latter can record all the required book entries, thereby internalising the settlement without the involvement of the intermediaries (including the CSD) higher up in the chain.<sup>5</sup> Omnibus accounts reduce the overall settlement costs, but they also make the whole system less transparent when it comes to the issuers' and market's ability to know the*

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<sup>51</sup> This is true only if the alienor and the purchaser hold their shares through different intermediaries whose accounts are opened with the CSD. Otherwise, the transfer of shares simply requires the modification of the accounts opened with the common intermediary and with the potential sub-intermediaries. In this second case, no action whatsoever is needed from the CSD. See STAGNO D'ALCONTRES, A. and DE LUCA, N. (2017), pp. 448-450.

<sup>52</sup> CAMPOBASSO, G.F. (2012), p. 235.

<sup>53</sup> *D. lgs 24 giugno 1998, n. 213*, Article 28.

<sup>54</sup> Articles 2-bis and 108 of *Regolamento Consob 14 maggio 1999, n. 11971* lay down the conditions necessary in order for securities to be classified as widely-held.

<sup>55</sup> *Loi de finance n° 81-1160 du 30 décembre 1981*. Article 94-II. See MAFFEI, A. (2005), p. 237.

*identity and interests of securities owners: these are only accessible to the intermediaries that maintain accounts on behalf of investors»<sup>56</sup>. The lack of insight into the structure of the holding chain aside from the first-tier intermediary is usually referred to as “no-look-through” principle<sup>57</sup>.*

Second, the share register is considered to be the primary source of information about the ownership structure of a company. However, despite the obligations of keeping and updating, the share register does not depict with precision the actual shareholder base of companies. There are multiple reasons for this. First, in countries whose legislations provide for indirect holding systems, there is a strict distinction between legal ownership and equitable ownership. In the UK, for instance, only the legal owner has the right to be registered as a member of the company<sup>58</sup>. On the other hand, the equitable owner of the shares is not identified as a member of the investee company, even though he is the ultimate beneficiary of the rights attached to the shares<sup>59</sup>. There is therefore the need to ensure that such rights will be exercised in the best interest of the beneficial owner. In the UK, the concept of a trust has been used to find a solution to this problem: the legal owner acts as a trustee on behalf of the end investor. If the holding chain has more than one intermediary, then the first-tier intermediary acts as a trustee on behalf of the second-tier intermediary, who in turn acts as a trustee on behalf of the end investor. Regardless of how long the holding chain is, a string of hierarchically-arranged trusts safeguard the interest of the final investor. Without a doubt, indirect holding systems offer some critical advantages<sup>60</sup>. Nevertheless, they make it harder for companies to know the identity of their beneficial shareholders, as only legal owners are registered as members on the books of the company and the practice of omnibus accounts prevents the company from identifying the persons on behalf of whom the participants of the CREST system operate. It follows that, if no

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<sup>56</sup> ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 714.

<sup>57</sup> GARGANTINI, M. (2012), p. 15.

<sup>58</sup> *Companies Act* 2006, Section 112 (2).

<sup>59</sup> Even though indirect share ownership is widespread in the UK, end investors may request to directly access the CREST system. In this case, end investors obtain the right to be recorded in the issuer's register as members of the company. This is called ‘personal membership’. See EUROCLEAR UK (2018).

<sup>60</sup> For instance, indirect holding systems make it easier to identify the person who can legitimately exercise shareholders' rights. Furthermore, they make informative duties less burdensome to comply with for companies. See: GARGANTINI, M. (2012), pp. 27-28.

identification procedure is activated, companies will only know the identity of the first-tier intermediaries, who are the owners of the accounts opened with the CSD.

Second, even in some countries where direct holding systems are in place, the share register does not offer a faithful picture of the ownership structure of the company. The peculiarity of direct holding systems is that there is no strict distinction between legal ownership and beneficial ownership. The end investor is identified as the actual shareowner and holds the legal title in the shares. However, transfer of shares usually occurs regardless of the fact that the name of the purchaser is recorded on the share register of the investee company. With this regard, the Italian case is emblematic. As has already been said, Italian law provides the mandatory dematerialization of listed shares, which are embodied in electronic entries on the books of *Monte Titoli s.p.a.*<sup>61</sup>. Article 2355 paragraph 5 of the Italian *Codice civile* provides that any transactions of dematerialized shares close when the purchased shares are entered in the designated accounts. In case of registered shares<sup>62</sup>, the electronic entry of dematerialized shares produces the same legal effects as the endorsement of paper-based certificates<sup>63</sup>. According to the most influential interpretation of this disposition of law, the relevant entry that closes a transaction of dematerialized shares occurs at the first level of the holding chain. In other words, the transfer becomes effective as soon as the CSD proceeds to settle the accounts of the first-tier intermediaries<sup>64</sup>. The next intermediaries in the holding chain must then comply with the obligation to settle the accounts of the persons on behalf of whom they hold<sup>65</sup>. At the end of this ‘pyramidal’ system, the final-tier intermediary proceeds to credit the account of the purchaser<sup>66</sup>, although the transfer has already taken place<sup>67</sup>. The purchaser therefore becomes the owner of the

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<sup>61</sup> At the moment, *Monte Titoli s.p.a.* is still the only person who is authorized to provide CSD services in Italy.

<sup>62</sup> It has to be kept in mind that, according to Italian law, listed companies may only issue in bearer form a particular class of shares (the so-called *azioni di risparmio*) that do not invest their owners with the right to vote at the general meeting.

<sup>63</sup> Joint provisions of *Codice civile*, Article 2354, paragraphs 6-7 and Article 2355, paragraph 5. See CAMPOBASSO, G.F. (2013), p. 272; GALGANO, F. (2013), p. 209; GINEVRA, E. (2014), p. 312; LUCANTONI, P. (2012), p. 140; SPADA, P. (1999), p. 417.

<sup>64</sup> CARDARELLI, M.C. (2001), p. 322; CIAN, M. (2001), p. 306; LIBONATI, B. (1999), p. 129.

<sup>65</sup> *D. lgs. 24 febbraio 1998, n. 58*, Article 83-*quater*.

<sup>66</sup> ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 714.

<sup>67</sup> Obviously, the law provides that companies are under legal obligation to update their share register in conformity with the data forwarded by intermediaries (*d. lgs. 24 febbraio 1998, n. 58*, Article 83-*undecies*). However, the update of the share register is not an essential requirement for the conclusion of share transactions.

shares at the ‘settlement’ date<sup>68</sup> rather than at the ‘pay-out’ date<sup>69</sup>. Thus, the investor acquires the legal title in the purchased shares regardless of the fact that the share register (*libro soci*) has been updated<sup>70</sup>. In addition to the above considerations, it is arguable that the update of the share register is not an essential condition for shareholders to exercise the rights attached to their shares. Article 32 of *d. lgs. 24 giugno 1998, n. 213* indeed provides that, once dematerialized shares have been entered in the designated account, the accountholder acquires the entitlement to exercise the rights attached to them<sup>71</sup> regardless of any adjustments in the share register. Based on these assumptions, different authors<sup>72</sup> claimed that the share register of Italian listed companies has lost most of its informative value and that, nowadays, the entry of the shareholder in the share register is optional. Every single shareholder indeed has the right to decide whether the information regarding his identity and his participation to the share capital shall be entered in the share register.

This evidence highlights that, since the share register cannot faithfully depict the shareholder base of listed companies, the information about the identity of shareholders is usually held within the chain of intermediaries that characterizes the modern detention systems<sup>73</sup>. Therefore, issuers who want to know who their shareholders are must cooperate with the intermediaries in the holding chain. Most national legislations thus adopted very articulated shareholder identification processes aimed at providing companies with a full knowledge of their ownership structures at a specific time. Moreover, some of these legal processes proved to be highly efficient,

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<sup>68</sup> ‘Settlement’ date is the day on which a trade must be settled by transferring the actual ownership of a security to the buyer, against necessary payment for the same.

<sup>69</sup> ‘Pay-out’ date is the day on which the purchased shares are credited in the account of the buyer opened with the last-tier intermediary.

<sup>70</sup> GINEVRA, E. (2014), pp. 309, 311-312.

<sup>71</sup> In the attempt to align the provisions of *d. lgs. 24 giugno 1998, n. 213* with the interpretation that has been given to Article 2355 paragraph 5 of the *codice civile*, it may be argued that the buyer of the shares is entitled to exercise the rights attached to them from the day when the CSD enters the purchased shares in the account of the first-tier intermediary (‘settlement’ date). The first-tier intermediary will then settle the account of the second-tier intermediary, and so on until the shares are credited in the buyer’s account opened with the last-tier intermediary (‘pay-out’ of shares). Therefore, the entitlement of the buyer to exercise the rights flowing from the purchased shares does arise before than the settlement of the account of the buyer himself. However, the entry of the purchased shares in the account of the buyer is key to ensure that intermediaries comply with their obligation under Article 31 of *d. lgs. 24 giugno 1998, n. 213*, according to which intermediaries must issue entitling certificates upon request of the shareholder who is willing to exercise (either directly or by proxy) the rights attached to his shares.

<sup>72</sup> DE LUCA, N. (2007), p. 369; MINERVINI, G. (2005), p. 5.

<sup>73</sup> ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 714.

as they mandate the active cooperation of the intermediaries in the holding chain and they provide for severe sanctions in case of noncompliance. However, national identification processes cannot be fully enforced if the holding chain consists of one or more third-country intermediaries. The scope of national regulations is inevitably delimited by the national geographic borders. In addition, the coordination between different identification processes is pretty cumbersome to achieve on a voluntary basis, as the regulatory approach to the issue of shareholder identification varies significantly from one country to the other.

Despite their effectiveness, national identification processes do not fulfill their purpose in an economic setting where cross-border investments are constantly increasing. The new Directive on shareholders' rights thus provides a common legal framework that allows companies to identify their shareholders regardless of the cross-border dimension of the holding chain. The new EU identification process indeed provides some basic legal obligations that all intermediaries who are holding shares of EU listed companies must comply with. This way, the Directive leads to a level playing field across the European Economic Area and gets over the problem of limited territorial effects of national regulations. On closer inspection, not only does the harmonization of intermediaries' legal duties protect the private interest of companies in knowing the identity of their members, it also leads to the development of a common capital market. It is therefore arguable that the Directive falls within the scope of capital market regulation, although the norms are expressed as corporate governance standards<sup>74</sup>.

In order to determine the actual scope of the new EU shareholder identification mechanism, it is necessary to determine what entities fall into the legal definition of an "intermediary". The Directive defines an intermediary as «*a person, such as an investment firm [...], a credit institution [...], and a central securities depository [...], which provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons*»<sup>75</sup>. It is noteworthy that such definition includes a list of persons that the law considers to be intermediaries. However, this list has merely illustrative purposes. The legal definition of 'intermediaries' indeed focuses on the type of services that a person

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<sup>74</sup> PACCES, A. (2017), pp. 23-24.

<sup>75</sup> Directive 2017/828/EU of 17 May 2017, Article 1, paragraph 2, point (b).

provides. Regardless of its traits, a person must fall into the legal category of intermediaries as long as it provides services of safekeeping of shares, administration of shares or maintenance of securities accounts.

Chapter 1a of the new Directive on shareholders' rights shall also apply to intermediaries that have neither their registered office nor their head office within the territory of the European Economic Area<sup>76</sup>. In fact, third-country intermediaries are subject to the obligations the Directive provides for, as long as they supply their services «*with respect to shares of companies that have their registered office in the Union and the shares of which are admitted to trading on a regulated market situated or operating within the Union*»<sup>77</sup>. The Directive therefore claims some extraterritorial effects, as foreign entities have to comply with a legal text whose provisions, in principle, do not reach beyond the borders of the European Economic Area<sup>78</sup>. The reason for this is pretty straightforward: as the volume of foreign investments is constantly increasing, the probability that the chain of intermediaries comprises one or several foreign persons is getting higher. Thus, the extension of the Directive legal effects to foreign entities is absolutely necessary to ensure that the shareholder-related information is transmitted through the holding chain without any interruption.

### 2.3.2 *The procedural models of shareholder identification: comparative aspects*

The legal discipline of shareholder identification varies significantly from country to country. In general, legal approaches to the issue of shareholder identification trace back to three general models.

The first model identifies the issuer's initiative as the drive behind the identification process. The identification procedure indeed starts with the issuer's identification request, which is then repeated down the holding chain until it reaches the final-layer

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<sup>76</sup> Directive 2017/828/EU of 17 May 2017, Article 3e.

<sup>77</sup> Directive 2017/828/EU of 17 May 2017, Recital 12.

<sup>78</sup> The extraterritorial effects of the Directive are similar to the effects of the US Sarbanes-Oxley Act, which has been one of the first pieces of legislation on corporate governance matters whose scope of application is wider than national boundaries. The extraterritorial effects of the Sarbanes-Oxley Act met with intense criticism from Europe. Hellwig (2007) argued that «*this criticism often overlooked the fact that the intended legislative measure was to address aspects which have at least potential effects on the US financial markets*». This very same logic can be used to justify the extraterritorial effect of the amended Directive on shareholders' rights.

intermediary who holds the information about the end investor. While this model makes it more complex to manage the process as every phase of it requires the issuer's initiative to get going, it also enables the issuer to cherry-pick the guiding lines of the inquiry, with view to optimize the ratio between costs and benefits<sup>79</sup>.

Such an approach to shareholder identification is usually adopted by countries that provide for an indirect holding system<sup>80</sup>, such as the UK. According to Section 793 of the 2006 Companies Act, public companies incorporated in the UK have the right to give notice to any person who is interested in the company's shares<sup>81</sup>. Companies may require the person to whom the notice is addressed to state whether he currently has an interest in the issuer's shares and to eventually disclose any further interest in the shares he might know of<sup>82</sup>. This investigatory procedure may be exploited by public companies also to obtain information about the identity of both the beneficial owners and the intermediaries who hold the shares on behalf of them. Section 793 of the Companies Act indeed provides that the companies' notices may request the addressees to disclose *«the identity of persons interested in the shares in question»*<sup>83</sup>. By referring to these dispositions of law, it is possible to understand how the identification procedure in the UK works. Usually, the issuer who wants to obtain information about the identity of the beneficial owners of its shares is going to send a notice to the legal owners whose personal data is recorded in the company's register

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<sup>79</sup> GARGANTINI, M. (2012), pp. 77-78.

<sup>80</sup> The reason for this is very simple. The peculiarity of such holding systems lies in the strict distinction between legal ownership and equitable ownership. As a consequence, companies usually maintain direct relations only with the first-layer intermediaries (no-look-through principle). The first-layer intermediaries could be either the persons authorized to enter the CSD records, like in the UK, or even the CSD itself. For instance, in the US the DTC owns about 80% of the shares it holds (shares 'held in street name'). See LATELLA, D. (2003), p.773; KLAUSNER, M. and ELFENBEIN, J. (1999), p. 353.

<sup>81</sup> *Companies Act 2006*, Section 793 (1). The notice may also be addressed to a person whom the company has *«reasonable cause»* to believe to be interested or to have been in the company's shares at any time during the last three years. This provision means that public companies do not have to prove the existence of an interest in the company's shares in order to exercise the right provided by section 793. In addition, Section 793 also provides that companies have the power to give notice to any person whom the company knows, or has a reasonable cause to believe, *«to have been interested in the company's shares at any time during the three years immediately preceding the date on which the notice is issued»*.

<sup>82</sup> *Companies Act 2006*, Section 793 (2), (3) and (4). The inquiry may also cover the interests in the shares that the addressee or a third party might have had during the three years immediately preceding the date when the notice was issued.

<sup>83</sup> *Companies Act 2006*, Section 793 (5). Moreover, Paragraph 6 of Sec. 793 provides that if the addressee is a person who held an interest in the company's shares at any time during the previous three years, the notice may request him *«to give particulars on the identity of the person who held that interest immediately upon his ceasing to hold it»*.

of members. The legal owners will then report to the issuer the identity of the persons on behalf of whom the company's shares are held. After that the relevant information has been received, the issuer will send notices to the persons whose identity have been disclosed by the legal owners, asking them if they hold the shares in their own interest or in the interest of third persons. In the latter case, the addressees are under legal obligation to report to the issuer the identity of the persons on behalf of whom they hold. The same procedure is repeated all the way down the holding chain, until the company's notices reach every final-layer intermediary, who will then transmit to the company the information concerning the beneficial investors. To put it simply, the issuer sends a cascading set of notices, tracing ownership from the registered position of an intermediary through to the ultimate beneficial owner. Each party in the holding chain is required to provide information about the identity of the person on whose behalf they hold the shares<sup>84</sup>. Interestingly enough, the inquiry provided for by section 793 of the Companies Act aims at identifying whoever holds (or has held at any moment during the last three years) an interest in the company's shares. Therefore, even when shares are held through a nominee, issuers must be granted full access to the information about the investors who, in the end, bear the economic risk related to the shares<sup>85</sup>.

If the person to whom a notice under section 793 is addressed fails to give the issuer the information he required, the issuer may apply to the court of law<sup>86</sup>. After assessing the lack of compliance with the disclosure rules under section 793, the judge has the power to promulgate an order that severely restricts the rights attached or related to the shares concerned by the notice. In particular, a court order under section 794 may produce one or more of the following effects: making any transfer of the restricted shares void, depriving the restricted shares of the voting rights attached to them, preventing any issuance in right of the restricted shares or in pursuance of an offer

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<sup>84</sup> COMPUTERSHARE INVESTOR SERVICES PTY LIMITED (2015), pp. 20-21.

<sup>85</sup> Rather than focusing on the concept of "shareholdership", Section 793 of the 2006 Companies Act focuses on the concept of "interest in the shares". This is the reason why, to some extents, the UK shareholder identification mechanism is more efficient than the systems adopted by other countries in continental Europe, such as Germany and Italy. In effect, German and Italian companies have the power to only identify the owners of their (registered) shares. In consequence, in case of nominee accounts, companies will not have the power to acquire information about the identity of the end investors if the nominee claims to be the actual owner of the shares. The issue of fiduciary ownership will be furtherly discussed in paragraph 2.4.3.3. See *SECONDO, R.* (2011b), pp. 50-51.

<sup>86</sup> *Companies Act 2006*, Section 794 (1).

made to their holder, preventing the payment of any sums due from the company on the restricted shares (including the payment of dividends)<sup>87</sup>. The severe effects produced by such restrictions highlight that, in case of non-compliance with the disclosure rules in section 793, the person who failed to comply may be utterly deprived of all rights and benefits over the company. The system of sanctions provided for by sections 794 and 797 therefore works as a strong incentive for full disclosure<sup>88</sup>.

The second model shifts the focus from the right of the issuer to the legal duties of the intermediaries in the holding chain. As a matter of fact, the process unfolds as the intermediaries comply with the disclosure duties provided by law. The issuer plays a very residual role. In some jurisdictions, the issuer's request gets the identification procedure going. From then on, the intermediaries are under legal obligation to transmit the request down to the final-tier intermediary who holds the end investor's data, which then travels up the chain of intermediaries to the CSD and then the issuer. Such a model is adopted by Italian law. Article 83-*duodecies* of *d. lgs. 24 febbraio 1998, n. 58* provides that listed companies incorporated in Italy<sup>89</sup> who have adopted enabling by-laws can request intermediaries to disclose their shareholders at any time. The disclosure request coming from the issuer is sent to the intermediaries through the CSD<sup>90</sup>. From a practical point of view, the issuer presents the disclosure request to the CSD, who then submits it to the intermediaries who hold the company's shares in accounts opened with the CSD<sup>91</sup>. The intermediaries then submit the disclosure request to their clients, so the identification procedure continues all the way down the holding chain. As the disclosure request flows from the CSD to the single links of the holding chain, each intermediary shall comply with a dual obligation: on the one hand, it shall submit the disclosure request to the next intermediaries who own *omnibus* accounts on behalf of their clients; on the other hand, it shall disclose the identity of clients who opened an account in their own name<sup>92</sup>.

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<sup>87</sup> *Companies Act 2006*, Section 797 (1).

<sup>88</sup> SECONDO, R. (2011b), p. 54.

<sup>89</sup> More specifically, Article 83-*duodecies* applies to companies incorporated in Italy whose shares are admitted to trading in either an Italian or another EU Member State's stock market or multilateral trading facility (MTF).

<sup>90</sup> *D. lgs. 24 febbraio 1998, n. 58*. Article 83-*duodecies*, paragraph 1.

<sup>91</sup> GARGANTINI, M. (2012), pp. 74-75.

<sup>92</sup> The information regarding the identity of shareholders may be transmitted either directly to the issuer or to the previous intermediary in the holding chain.

In other countries, the identification procedure does not require any action at all from the issuer. Indeed, the disclosure obligations arise *ipso facto* from the very modification of the records on the accounts opened with the intermediaries<sup>93</sup>. This is the model adopted by legal systems where, unlike Italy, the share register has kept a pivotal role in tracing the ownership of listed companies' shares.

For example, over the last eighteen years the legal discipline of the German *Aktienregister* has gone through a modernization process<sup>94</sup>, as a result of which the informative value of the *Aktienregister* has improved drastically. It is therefore arguable that the German *Aktienregister* has evolved very differently from the Italian *libro soci*. In Italy, the update of the share register is not an essential condition for the new shareholders to exercise the rights attached to their shares<sup>95</sup>. Moreover, any shareholder is in principle free to decide whether the data related to his identity and his participation to the share capital shall be entered in the share register<sup>96</sup>. Companies incorporated in Italy must therefore bear the risk that the share register provides incomplete information. In Germany, on the contrary, only the owners of registered shares whose data has been entered into the *Aktienregister* are granted shareholder rights over the issuer<sup>97</sup>. In addition, the share register of German companies always provides complete information. Indeed, all registered shares shall be entered into the *Aktienregister* stating the name, date of birth and address of the shareholder, as well as the number of shares he owns<sup>98</sup>. Furthermore, shareholders are obligated to provide the essential information for updating the share register<sup>99</sup>, otherwise their right to vote will be suspended<sup>100</sup>. It has also to be said that, in order to ensure full transparency in the interest of both the issuer and the market, the lawmaker pointed out that shares issued by listed companies shall never be registered in the name of a third party in place of the actual owner (*Dritteintragung*)<sup>101</sup>.

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<sup>93</sup> GARGANTINI, M. (2012), p. 88.

<sup>94</sup> It may be argued that such process began in 2001 with the adoption of the *Der Regierungsentwurf zum Namensaktiengesetz (NaStraG)* which, among others, provided for the conversion of the paper-based *Aktienbuch* into the electronic *Aktienregister*. See SECONDO, R. (2011a), p. 80.

<sup>95</sup> Paragraph 2.3.1.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Aktiengesetz*, § 67 (2), sentence 1. See CLEARSTREAM (2018).

<sup>98</sup> *Aktiengesetz*, § 67 (1), sentence 1.

<sup>99</sup> *Aktiengesetz*, § 67 (1), sentence 2.

<sup>100</sup> *Aktiengesetz*, § 67 (2), sentence 3.

<sup>101</sup> However, in case of non-listed companies it is still possible to register a third party in place of the actual owner of the shares. With this regard, it has to be said that *dritteintragung* differs from beneficiary

Having said that, it is possible to describe the German identification procedure, which is an automated process based on the standardized transmission of shareholder data from the banking system to the issuers, with view to keep the *Aktienregister* updated on a daily basis. The process is triggered by any transactions of registered shares held through the central detention system. As has already been said, the *Wertpapierübertrage* coming from the end investors are forwarded up the holding chain from the custodian banks to the CSD (*Clearstream*). The CSD then proceeds to settle the accounts of the transaction banks (first-tier intermediaries) participating to the central detention system<sup>102</sup>. The transaction banks will then settle the accounts of the persons for whom they hold. The settlement operations are repeated by every link of the holding chain, at the end of which the shares are credited on the account of the purchaser opened with the custodian bank (last-tier intermediary). After that all settlements have taken place, a notice containing all relevant data (shareholder name, address, date of birth, number for the issuer, numbers of shares, date of purchase or sale) is automatically forwarded to *Clearstream* and from *Clearstream* to the issuer, who is under legal obligation to update the *Aktienregister*<sup>103</sup> in conformity with the communications received. *Clearstream* should receive on a daily basis all notices related to share transactions that have been settled at that date. Any entry is routed through *Clearstream*'s CASCADE-RS application, with which custodian banks and registrars directly interact<sup>104</sup>.

Similar to German law, the French legal system subordinates the exercise of shareholder rights to the previous entry of the shareholder's identifying data onto the share register. It is noteworthy that the distinction between *titres nominatifs purs*<sup>105</sup>

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ownership (*Vollrechtstreuhand*). In case of *dritteintragung*, there is a third party who acts as the registered holder, but the legal owner preserves all ownership rights over the shares. On the contrary, in case of beneficiary ownership, the trustee acts as both the registered holder and the legal holder of the shares, notwithstanding the fact that the trustee shall exercise all shareholder rights in the best interest of a third party (that is, the beneficial owner).

<sup>102</sup> According to § 24 (2) of the *DepotG*, «Mit der Eintragung des Übertragungsvermerks im Verwahrungsbuch des Kommissionärs geht, soweit der Kommissionär Verfügungsberechtigt ist, das Miteigentum auf den Kommittenten über, wenn es nicht nach den Bestimmungen des bürgerlichen Rechts schon früher auf ihn übergegangen ist».

<sup>103</sup> T2S TASKFORCE ON SHAREHOLDER TRANSPARENCY (2011), pp. 45-52.

<sup>104</sup> CLEARSTREAM (2018).

<sup>105</sup> The peculiarity of *actions nominatives purses* is that they are only entered into an account opened with the issuer. Thus, no authorized intermediary holds the shares on behalf of the end investor. In case of share transfer, the ownership of *actions nominatives purses* is transferred by entering the purchaser's identifying data onto the issuer's share register. See CACEIS INVESTOR SERVICES (2015) *Le guide de*

and *titres nominatifs administrés*<sup>106</sup>, which is a typical trait of French securities regulation, is irrelevant with respect of listed shares. Indeed, just like (listed and non-listed) bearer shares<sup>107</sup>, listed registered shares must be held as *actions administrées*, since they cannot be legitimately transferred if not by means of authorized intermediaries<sup>108</sup>. With regard to listed registered shares, issuers are under legal obligation to update their share register at the end of every settlement day, in conformity with the information provided by the intermediaries through *bordereaux de références nominatives (BRN)*. A *BRN* is a standardized notice providing information about the identity of the persons who took part to a specific share transaction<sup>109</sup>. Within the second trading day following the negotiation, the intermediaries with which the accounts of the seller and the purchaser are opened shall send the *BRN* to the CSD, who then forwards it to the issuer<sup>110</sup>. The issuer updates the share register within the end of the trading day following the date when the *BRN* has been received<sup>111</sup>.

Some specific rules are also provided with regard to disclosure of non-resident investors who own shares issued by French companies. Indeed, French law allows foreign investors to deposit their shares with foreign intermediaries that are not part of the French brokerage system<sup>112</sup>. Foreign investors are granted the right to vote at the general meeting of the investee company as long as their shares are held with a global custodian that acts as an *intermédiaire inscrit*<sup>113</sup>. To be classified as such, the global custodian shall declare that he holds the shares in a *compte-conservateur* opened with

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*l'actionnaire au nominative pur*. Available from : [https://www.abc-arbitrage.com/wp-content/uploads/2016/05/Guide\\_actionnaire\\_nominatif\\_ABCA\\_2015.pdf](https://www.abc-arbitrage.com/wp-content/uploads/2016/05/Guide_actionnaire_nominatif_ABCA_2015.pdf). [Accessed: 23<sup>rd</sup> September 2018].

<sup>106</sup> In case of *actions nominatives administrées*, the shares are also entered into an account opened with a professional intermediary, who is in charge of managing the account opened with the issuer (*Décret n° 83-359 du 2 mai 1983*, Articles 1 and 4). If registered shares are held through an intermediary, the transfer of the ownership will result from the registration of the purchased shares in the buyer's account (*Code monétaire et financier*, Article L431-2). However, the update of the share register is an essential condition for the purchaser to exercise the rights attached to the shares.

<sup>107</sup> Paragraph 2.4.2.

<sup>108</sup> DE LUCA, N. (2007), p. 229.

<sup>109</sup> *Code monétaire et financier*. Article L211-19.

<sup>110</sup> *Règlement général de l'Autorité des marchés financiers*. Article 322-55, paragraph 1.

<sup>111</sup> *Règlement général de l'Autorité des marchés financiers*. Article 322-55, paragraph 2.

<sup>112</sup> *Code de commerce*. Article L228-1, paragraph 7. See SECONDO, R. (2011c), p. 54.

<sup>113</sup> This means that, if the shares are simply entered in the account of a foreign intermediary that does not qualify as a global custodian, then the non-resident shareowners will not be granted the right to vote.

himself on behalf of a third party<sup>114</sup>. Moreover, in case of a general meeting and upon request of the issuer, the global custodian shall also draw up the list of *non-résidents administrés* who are willing to exercise their voting rights either directly or by proxy<sup>115</sup>.

French law enforces the above-mentioned disclosure rules through a particularly severe system of sanctions. Article L228-3-3 of the *Code de commerce* indeed provides that, if an intermediary who holds the shares on behalf of a third party either refuses to provide the identifying data about the end investors requested by the company or provides incorrect information, the shares registered in the name of the *intermédiaire inscrit* will be deprived of the voting rights attached to them until such intermediary rectifies the information about the shareholders' identities. Moreover, the payment of the corresponding dividends will be deferred until the date when such rectification occurs.

It is arguable that French and German laws offer the strongest protection to the issuers' interest in shareholding disclosure. Intermediaries must indeed transmit the information about the identity of end investors to the issuer (through the CSD) on a daily basis and in an automated manner.

### 2.3.3 *The EU identification mechanism: the issuer's right to shareholder disclosure. Critical aspects.*

The second of the above-mentioned procedural models of shareholder identification clearly inspires the EU Directive 2017/828. The EU identification mechanism is activated by the issuer's request. From then on, the identification procedure unfolds automatically as the intermediaries comply with the cascading obligations provided by law. According to Article 3b of the amended Directive on shareholders' rights, companies who comply with specific requisites<sup>116</sup> have the right to request the intermediaries to disclose the identity of their shareholders. However, such a right suffers a significant limitation. In fact, Member States have the option to provide for companies having a registered office in their territory to be only allowed to request the

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<sup>114</sup> *Code de commerce*. Article L228-1, paragraph 8.

<sup>115</sup> *Code de commerce*. Article L228-2-3, paragraphs 1 and 2.

<sup>116</sup> Companies must have their registered office in a Member State and their shares must be admitted to trading on a regulated market situated or operating within a Member State.

identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage is determined by the single Member States, but it shall not exceed 0.5% of the total share capital (or of the total amount of voting rights)<sup>117</sup>. This legal barrier to the issuers' right to request disclosure of their shareholders may jeopardize the transmission of shareholder-related data in a cross-border setting depending on the implementing acts adopted by Member States. In effect, a percentage such as 0.5% of the total share capital is very high, especially for listed companies with dispersed ownership. Thus, if Member States opt for the introduction of such a threshold in their legal systems, listed companies will be prevented from knowing the identity of a significant cut of their shareholder base.

Even though Member States can opt either for not introducing any threshold to shareholder identification or to introduce a smaller threshold than 0.5%, the very fact that the Directive allows Member States to limit the issuers' right to disclosure raises some interesting questions. Why did the EU lawmaker allow Member States to adopt such a strong limitation to shareholder disclosure? How can such a restrictive measure be consistent with the objective to facilitate the dialogue between issuers and shareholders? In order to give a satisfying answer, it must be kept in mind that the Directive is the result of a difficult compromise between the legal traditions of different Member States. Proof of this is that the original proposal of the European Commission did not provide for any limitation to the issuer's right to disclosure<sup>118</sup>, as the restrictive threshold has been introduced after that the proposal was discussed within the Council and the EU Parliament. Indeed, the issuer's interest to access shareholders' information inevitably clashes with the investors' interest to remain anonymous and not all Member States decided this conflict of interests in favor of full disclosure. Evidence from the ESMA's Report on shareholder identification and communication systems may help to better understand this matter.

The results of the ESMA's Report<sup>119</sup> show that the legal systems of many EU countries<sup>120</sup> do not allow companies to request shareholder disclosure. Instead, issuers

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<sup>117</sup> *Directive 2017/828/EU of 17 May 2017*, Article 3a, paragraph 1.

<sup>118</sup> EUROPEAN COMMISSION (2014b), p. 17.

<sup>119</sup> EUROPEAN SECURITIES AND MARKETS AUTHORITY (2017b).

<sup>120</sup> Austria, Czech Republic, Denmark, Lithuania, Luxembourg, Latvia, Malta, Poland, Portugal, Slovak Republic.

receive information about the identity of their shareholders only at or around the time of general meetings or other corporate actions<sup>121</sup>. Disclosure, far from being the content of a legal right, is depicted by such legal systems as a requisite for the efficient unwinding of specific corporate actions, e.g. the general meeting or the distribution of dividends. In Luxembourg, the issuer may only receive information about shareholders who actually indicated the intention to attend the general meeting, so no full disclosure is provided. In the case of Belarus, no identification system is even in effect. Other countries<sup>122</sup> provide for other types of limitations around the issuer's ability to initiate the identification procedure. Aside from the reluctance of Member States, the enforcement of a full disclosure identification mechanism may also have resulted in the swelling of costs intermediaries had to face in order to collect the necessary information and to coordinate their respective activities with view to ensure the efficiency of communication channels throughout the holding chain. Indeed, in the run-up to the adoption of the Directive, most intermediaries (together with a minority of issuers) repeatedly asserted that the costs arising from the introduction of a fully-fledged EU identification mechanisms would have outweighed the benefits<sup>123</sup>.

On the other hand, it has to be said that the option for Member States to limit the issuers' right to disclosure may significantly restrict the scope of the new EU-wide identification mechanism. As a matter of fact, if a large number of Member States opt for forbidding issuers to identify shareholders who hold 0.5% of the share capital (or a slightly lower percentage), then the shareholder identification system provided by the Directive will be of no use apart from allowing the identification of the few shareholders who hold a percentage of share capital between 0.5% (or the lower percentage adopted by Member States' legislations) and the threshold for notification of major holdings. The EC Directive on transparency requirements indeed provides that shareholders of listed companies must notify the issuer of the proportion of voting rights they hold due to the acquisition or disposal of shares or other listed financial instruments provided with voting rights<sup>124</sup>. The threshold for the notification of major holdings introduced by the Transparency Directive amounts to 5% of all voting rights

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<sup>121</sup> EUROPEAN SECURITIES AND MARKETS AUTHORITY (2017b), p. 19.

<sup>122</sup> Greece, Finland, Ireland.

<sup>123</sup> DIRECTORATE GENERAL INTERNAL MARKET AND SERVICES (2011), p. 15.

<sup>124</sup> *Directive 2004/109/EC of 15 December 2004*, Article 9, paragraph 1.

in the general meeting of the issuer<sup>125</sup>. However, in implementing the Transparency Directive into their respective legal systems, many Member States lowered such threshold drastically. For instance, the threshold for the notification of major holdings amounts to 3% in Italy<sup>126</sup>, Germany, Spain and the UK<sup>127</sup>. In France, the enacting threshold amounts to 5%, but the issuers' by-laws may lower this threshold down to 0.5%.

Looking at this evidence, it is arguable that the EU shareholder identification mechanism will only affect a small segment of shareholders, while most retail investors will be exempted from disclosure. Therefore, it is reasonable to claim that, rather than introducing a uniform identification system throughout Europe, the best way forward would have been to simply lower the thresholds for the notification of major holdings. Some respondents to the public consultations that followed the Green Paper of 2011 had proposed such solution<sup>128</sup>, but the EU lawmaker rejected it. Moreover, the enforcement of an EU-wide identification mechanism entails some major costs in terms of coordination of both Member States' legal systems and intermediaries' inner and outer practices. The costs arising from the implementation of the Directive may therefore outweigh the benefits, as the new identification mechanism may actually affect only a few shareholders. The decrease of thresholds for the notification of major holdings would have been a much simpler solution and may have led to a better ratio between costs and benefits.

However, according to major holding regulations across Europe, the shareholders are under legal obligation to notify their holdings to the issuer only when the percentage of share capital (or of the total amount of voting rights, depending on the specific national rules) represented by the shares they own goes beyond or below specific

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<sup>125</sup> ANNUNZIATA, F. and VENTUROZZO, M. (2017), p. 402.

<sup>126</sup> Joint provisions of *d. lgs. 24 febbraio 1998, n. 58*, Article 120, paragraph 2 and *Regolamento Consob 14 maggio 1999, n. 11971*, Article 117. The 3% threshold may be temporarily reduced by CONSOB with view to protect investor and to ensure the efficiency of the market of corporate control (Article 120 paragraph 2-bis). Moreover, the recent *d. lgs. 16 ottobre 2017, n. 148* introduced a new paragraph 4-bis in Article 120, according to which shareholders who acquire specific proportions of the share capital (10%, 20%, 25% or above) must notify the issuer not only of the acquisition, but also of the objectives they intend to pursue within the next 6 months. This way, the issuer obtains information not only about the identity of the shareholder, but also about the investment strategy he plans to undertake.

<sup>127</sup> EUROPEAN SECURITIES AND MARKETS AUTHORITY (2017a).

<sup>128</sup> DIRECTORATE GENERAL INTERNAL MARKET AND SERVICES (2011), p. 15.

thresholds that are determined by law<sup>129</sup>. If none of such legal thresholds are crossed, any variations in the percentage of share capital owned will not have to be communicated to the issuer. On the other hand, the introduction of a fully-fledged identification mechanism that sets off at the issuer's will allows European listed companies to know the exact percentage of share capital owned by each of their shareholders at a specific time. This may be one of the main reasons that pushed the EU lawmaker to introduce an EU-wide identification mechanism, in spite of the costs that the enforcement of such a mechanism will inevitably produce.

To conclude, it must be kept in mind that the threshold for the issuer's right to disclosure is elective: Member States may decide to not enforce any threshold at all or to exempt from disclosure only the shareholders who own a very small percentage of the total share capital<sup>130</sup>. The efficiency of the new mechanism of shareholder identification will thus depend on the way the Directive will be implemented by Member States.

#### 2.3.4 *The EU identification mechanism: the coordination of intermediaries' activities*

The Directive provides that, upon the issuer's request, intermediaries are under legal obligation to disclose the identity of the shareholders on behalf of whom they maintain securities accounts. Forasmuch as the shares of listed companies are held through complex chains that involve multiple intermediaries, the European legal framework must ensure the coordination of intermediaries' activities, with view to enable the fluid transmission of shareholders' data to the issuer.

##### 2.3.4.1 The principles inspiring the coordination techniques

In the post-financial crisis framework, shareholder identification has been perceived as a technical instrument for the encouragement of long-term shareholder

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<sup>129</sup> For example, in Italy such thresholds respectively amount to 3% (except for SMEs), 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66,6% and 90% (joint provisions of Article 120 of *D. lgs. 24 febbraio 1998, n.58* and Article 117 of *Regolamento Consob 14 maggio 1999, n. 11971*).

<sup>130</sup> The introduction of some sort of limitation for the issuer's right to know the identity of its shareholders may be beneficial as well. In fact, an inquiry aimed at collecting information about the identity of all shareholders upon request of the issuer may be too expensive and time-consuming, especially in case of listed companies with highly dispersed ownership.

engagement<sup>131</sup>. This is confirmed by Article 3a Paragraph 4 of the amended Directive on shareholders' rights, according to which *«the personal data of shareholders shall be processed [...] in order to enable the company to identify its existing shareholders in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company»*. In other words, the purpose of the identification process is to engage issuers and shareholders in a permanent and direct dialogue, which is essential for increasing the level of shareholder engagement in listed companies<sup>132</sup>. The legal techniques for coordinating the different intermediaries' activities must therefore be coherent with the main reason for the introduction of an EU-wide shareholder identification mechanism, that is the enhancement of shareholder engagement. For this reason, the coordination mechanism provided by the Directive embraces two basic principles for the transmission of shareholders' data: celerity and full availability of the information. Indeed, the enforcement of these two principles may enable the issuer to swiftly obtain accurate information about the identity of its shareholders and to engage in a higher quality dialogue with them, especially when cross-border settings are considered.

#### 2.3.4.2 Transmission of shareholders' data through the holding chain

The principle of celerity is enunciated by Article 3a, Paragraph 2 of the amended Directive on shareholders' rights, according to which *«Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity»*. The Directive does not set a specific date for the transmission of shareholders' data to the issuer, so the discretion of Member States is preserved. However, it is arguable that the principle of celerity entails that the information should be forwarded in the shortest possible time.

If the holding chain is made up of multiple intermediaries, the request of the issuer (or of a third party nominated by the issuer) must be promptly transmitted from the top-layer intermediaries to the bottom-layer intermediaries, until it reaches the intermediary who actually maintains a securities account on behalf of the end investor.

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<sup>131</sup> Paragraph 1.3.

<sup>132</sup> *Ibid.*

The information regarding shareholder identity is then transmitted by the final-layer intermediary directly to the issuer<sup>133</sup>. This last provision is a direct expression of the principle of full availability of the information about the identity of shareholders. Indeed, issuers and intermediaries do not know, in principle, the identity of the single links the holding chain consists of. On the one hand, the majority of shares of European listed companies have been dematerialized, so the source of titles is a mere electronic record on the registers of the CSD with which the shares are issued<sup>134</sup>. Usually, the issuer does not have any legal relationship with the intermediaries whose accounts are opened with either the CSD<sup>135</sup> or the previous intermediaries. Therefore, since there is no direct relationship between the issuer and the intermediary who has the information about the final investor, the disclosure request must be transmitted down the holding chain from one intermediary to the other, as only the previous intermediary has a direct relationship with the next link of the holding chain. However, the intermediary with which the end investor's account is opened is fully aware of the identity of the issuer from whom the disclosure request has come. Thus, there is nothing stopping him from forwarding the relevant information directly to the issuer. The direct transmission of the information about the identity of shareholders reduces the costs and the time necessary for the identification process to get to completion. Moreover, the direct transmission also allows the company to obtain the information about shareholders' identity directly from the intermediary who holds the shares on behalf of the end investor. This prevents the risk of the information being altered in the course of the transmission, so the issuer is protected from the risk of getting unreliable data.

Member States may provide for the right of the issuer *«to request the CSD or another intermediary or service provider to collect the information regarding shareholder identity, including from the intermediaries in the chain and to transmit the information to the company»*<sup>136</sup>. The decision whether enforcing such provision is left to Member

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<sup>133</sup> Directive 2017/828/EU of 17 May 2017, Article 3a, paragraph 3.

<sup>134</sup> Paragraph 2.3.1.

<sup>135</sup> This is not always true. In countries where indirect holding systems are in place, the intermediaries who have been authorized to enter the CSD register are recorded as the legal owners of the shares they hold. As a consequence, they are the only persons legally entitled to exercise the rights flowing from the shares. However, even in these cases, the issuer does not have a direct relationship with the bottom-layer intermediaries who hold the information related to the identity of the beneficial owners. See paragraph 2.3.1.

<sup>136</sup> Directive 2017/828/EU of 17 May 2017, Article 3a, paragraph 3.

States. Issuers who commit the inquiry into the ownership structure to the CSD will be relieved of the task of sending the disclosure request to each intermediary who is holding shares of the company in a securities account opened with the CSD. On the other hand, this option may entail greater costs, as the charges levied on the issuer will be calculated in relation to the costs incurred by both the intermediaries to deliver shareholders' data and the CSD to overall manage the identification process.

Member States may also provide for the right of issuers to request intermediaries to disclose the information related to the next intermediary in the holding chain<sup>137</sup>. The companies incorporated in countries who opt for the enforcement of this provision will thus be granted the right to obtain the information related to any link of the holding chain, regardless of the existence of any legal relationship between the intermediary concerned by the request and the issuer. As a consequence, other than collecting the information necessary for mapping their shareholder base, companies will also be enabled to reconstruct the actual framework of the shareholding chain based on the data forwarded by intermediaries.

Lastly, it has to be said that the Directive goes right to the source of the problem arising from national provisions that could jeopardize the fluid transmission of shareholders' data through the holding chain. As a matter of fact, a great number of legal, contract, regulatory or administrative hurdles may prevent the information about the identity of shareholders to fluidly travel through the holding chain. For instance, jurisdictions that grant large protection to the right to privacy may enforce provisions that prevent intermediaries from disclosing the identity of the investors for whom they hold. Furthermore, a deposit agreement concluded by any end investor and his intermediary may enforce contractual limitations to the transmission of shareholders' data. Such hurdles get even bigger when cross-border settings are considered, due to the differences between national jurisdictions. Article 3a of the Directive solves this problem once and for all by providing that *«an intermediary that discloses information regarding shareholder identity in accordance with the rules laid down in this Article is not considered to be in breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision»*<sup>138</sup>.

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<sup>137</sup> *Ibid.*

<sup>138</sup> *Directive 2017/828/EU of 17 May 2017*, Article 3a, paragraph 6.

This way, intermediaries in the holding chain are exempted from any legal or contractual responsibility that may arise from the transmission of shareholders' data in conformity with the EU legal provisions about shareholder identification. The Directive allows for no exception to this rule, so EU law grants intermediaries absolute exemption from responsibility. The legal protection the Directive grants to intermediaries shall thus prevail on any national provision, due to the rules regarding the resolution of conflicts between EU law and national laws<sup>139</sup>.

#### **2.4 Improving the dialogue between issuers and shareholders: the transmission of relevant information**

As has already been said, shareholder identification is aimed at the establishment of a direct dialogue between issuers and shareholders. The more straightforward such dialogue is, the easier it will be for issuers to involve shareholders in corporate decisions, with view to drive investments on equity towards the objectives of long-term sustainability and long-term value creation. However, if the role of intermediaries were limited to the shareholder identification process, the intermediated securities holding system and the cross-border dimension of the equity market would still clog communication channels. Therefore, the Directive invests intermediaries with major responsibility with regard to the transmission of relevant information from issuers to shareholders and vice versa. This way, the Directive has shelved the narrow perspective on corporate governance embraced by the original text of the Directive on shareholders' rights<sup>140</sup>, as intermediaries get to be considered as full-fledged corporate governance actors whose cooperation is essential for the functioning of corporate governance mechanisms.

The Directive calls for action from the intermediaries with view to reduce the costs of the agency relationship between the issuer (and his representatives, that is the managers) and the shareholders. The active involvement of intermediaries in the

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<sup>139</sup> According to the principle of primacy of EU law, any norms of European law always take precedence over any norms of national law, including, to some extents, the constitutions of Member States. The principle of primacy of EU law has been developed over the years by the EU Court of Justice. Indeed, from the date of his establishment, the Court of Justice has claimed the power to innovate the EU legal system through judicial decisions. The principle of primacy is now commonly identified as a general principle of EU law. Some of the most important cases that contributed to the development of the principle under question are: ECLI:EU:C:1964:66 and ECLI:EU:C:1978:49.

<sup>140</sup> Paragraph 1.2.4.

transmission of relevant information may also be analyzed in light of the agency theory: intermediaries can indeed be identified as “agents” of both the companies and the shareholders, who in turn play the role of “principals”. At least two agency problems arise from the transmission of relevant information through the holding chain. On the one hand, the information coming from the issuer must reach as many shareholders as possible and the transmission should be prompt enough to allow shareholders to obtain all the benefits that may flow from the received information<sup>141</sup>. This is the purpose of the legal discipline of top-down communication channels. On the other hand, all information regarding the eligible position of shareholders shall reach the issuer in due time to allow the efficient management and the proper unwinding of corporate actions. The Directive copes with this second problem by laying down the basic discipline of bottom-up communication channels.

This Chapter will only focus on top-down communication channels, as the regulation of bottom-down channels is deeply related to the issue of determining who is entitled to exercise the rights flowing from the shares in relation to specific corporate actions. This problem will be furtherly discussed in Chapter 3<sup>142</sup>, with specific regard to the processes aimed at identifying the investor entitled to vote in the upcoming general meeting. In this case, rather than allowing the issuer to map its shareholder base at any given moment, the identification procedure is meant to make sure that the issuer knows with precision who are the persons authorized to cast their votes in relation to the specific general meeting that is about to take place. Time then becomes a main factor for determining the role of shareholder identification, since the inquiry aims at identifying who are the actual shareowners at the specific date from which the acquisition of the issuer’s voting shares no longer provides the purchaser with the entitlement to vote in the next general meeting (i.e. the “record date”)<sup>143</sup>.

Nevertheless, it has to be pointed out that, regardless of the direction in which the flow of information is oriented, the Directive lays down a general principle that shall apply to all forms of communication between issuers and shareholders: «*Where there is more*

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<sup>141</sup> For instance, in case of the pre-meeting information, shareholders must receive all the relevant information at a certain date prior to the meeting, so that they will have sufficient time to come up with a well-informed decision on which is the voting direction that better fits their interests.

<sup>142</sup> Paragraph 3.5.

<sup>143</sup> Paragraph 3.2.2.

*than one intermediary in a chain of intermediaries, information [...] shall be transmitted between intermediaries without delay, unless the information can be directly transmitted by the intermediary to the company or to the shareholder or to a third party nominated by the shareholder»<sup>144</sup>. This means that, whenever direct communication channels are impassable, the steps necessary for the relevant information to travel up and down the holding chain shall be minimized<sup>145</sup>. Direct communication is considered to be the best-case scenario, and any approximation to it is preferable than the information being bounced from one link of the holding chain to the other (chain approach). Minimizing the forms of intermediated communication helps the relevant information to promptly reach the final addressee. Moreover, it prevents the information from being altered during the transmission process.*

#### 2.4.1 *The EU discipline of top-down communication channels*

With regard to the top-down communication channels, Article 3b of the Amended Directive provides that *«Member States shall ensure that the intermediaries are required to transmit the following information, without delay, from the company to the shareholder or to a third party nominated by the shareholder:*

- (a) the information which the company is required to provide to the shareholder [...]*
- (b) where the information referred to in point (a) is available on the website of the company, a notice indicating where on the website that information can be found»<sup>146</sup>.*

Therefore, the Directive does not expunge the “pull” method that was adopted by the original text of the Directive on shareholders’ rights<sup>147</sup>. However, in order to ensure that the relevant information actually reaches as many shareholders as possible, the Directive provides that companies who enforced “pull” communication channels must transmit to any shareholder a notice indicating the digital location of the information. Such provision reduces engagement costs, as shareholders do not have to take action in order to collect the information disseminated by the issuer. Moreover, not only does

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<sup>144</sup> Directive 2017/828/EU of 17 May 2017, Article 3b, paragraph 5.

<sup>145</sup> The same principle applies to the EU identification procedure, since Article 3a of the Directive provides that, as the disclosure request reaches the end of the holding chain, the final-layer intermediary must disclose directly to the issuer any information related to the investors on behalf of whom it holds. See paragraph 2.3.4.2.

<sup>146</sup> Directive 2017/828/EU of 17 May 2017, Article 3b, paragraph 1.

<sup>147</sup> Paragraph 1.2.4.

the notice have to indicate the website in which the information has been disseminated, it also must point out «*where on the website that information can be found*». It therefore seems that, in order to comply with the provision, the notice must contain the indication to the active web page in which the information has been published. That being said, the only effort shareholders have to make is to type into their computers or smartphones the web address specifically mentioned.

Article 3b of the Amended Directive also provides that «*Member States shall require companies to provide intermediaries in a standardised and timely manner with the information [...] or the notice*»<sup>148</sup>. The standardization of the information ensures the respect of the principle of equal treatment of shareholders. Standardization also works as an incentive for shareholder engagement, as it enables shareholders to compare the received material and it encourages them to share their opinions on the best way to exercise the rights flowing from their shares. This is one step forward in the direction of the model of ‘shareholder democracy’<sup>149</sup>, which had already been emphasized by the EC Action Plan of 2003<sup>150</sup>. Moreover, standardization relieves intermediaries from the burden of manually revising the information as it travels down the holding chain. As a matter of fact, the lack of standardization jeopardizes the efficiency of top-down communication channels in many Member States. For example, Italian law does not lay down a standardized format for pre-meeting information. In consequence, when “push” communication channels are in place<sup>151</sup>, the usual procedure for intermediaries is to manually modify the information published by the issuer before sending it to the next link of the holding chain<sup>152</sup>. Such a practice makes the transmission procedure slow and costly. Given the issues arising from too little standardization, it is arguable

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<sup>148</sup> *Directive 2017/828/EU of 17 May 2017*, Article 3b, paragraph 2.

<sup>149</sup> The term shareholder democracy relates to the different ways in which shareholders can influence a company’s course of life, even against the goals or self-interest of incumbent management and board members.

<sup>150</sup> EUROPEAN COMMISSION (2003), pp. 15-16.

<sup>151</sup> In effect, with regard to pre-meeting information, Article 125-bis of the *d. lgs 24 febbraio 1998, n.58* provides that the notice regarding the meeting shall be communicated to all shareholders through “dissemination” (“pull” method). Nevertheless, the practice of transmitting the notice down the holding chain to the final investors is pretty common and it is usually included in the contractual tasks of the intermediaries. See GARGANTINI, M. (2012), pp. 138-139.

<sup>152</sup> With this regard, it is noteworthy that self-regulation already faced the hurdles determined by the lack of standardization. Indeed, the three most important Italian trade associations representing the interests of issuers and intermediaries (*ABI, Assonime* and *Assosim*) have agreed on the adoption of a standardized notice for the transmission of pre-meeting information (MT 260) with view to improve the efficiency of top-down communication channels. See *ABI, ASSONIME and ASSOSIM* (2011), pp. 2-3.

that the enforcement of the Directive in all Member States will make it easier for the relevant information to flow automatically down the holding chain, leading to quicker communication procedures and lower communication costs, which means greater efficiency. On the other hand, the provision according to which information must be transmitted «*in a timely manner*» adds emphasis on the idea that the transmission of data through the holding chain should occur in the shortest possible time. The more time shareholders have to examine the received material, the higher the chance that they will exercise their rights in a conscious and informed manner, without being influenced by the management or the persons controlling the company.

It is noteworthy that the Directive has acknowledged the fact that the transmission of information through the holding chain (chain approach) is in fact a second-best solution. Indeed, the interference of intermediaries in the transmission process impedes any form of direct contact between issuers and shareholders, determining the increase of agency costs and causing shareholders to refrain from engaging with the company. Whenever it is possible, companies and shareholders shall thus communicate directly with each other, regardless of any form of interposition. In the light of the above, the Directive provides that Member States shall not require intermediaries to take part in the transmission process whenever companies proceed to send the relevant information (or the notice indicating where the information can be found, in case of “dissemination”) to every single shareholder personally<sup>153</sup>.

#### 2.4.2 *The barriers to direct communication: comparative aspects*

Despite the fact that the amended Directive on shareholders’ rights expresses a clear preference for the adoption of direct communication mechanisms, the laws of Member States do a poor job in reducing the interference of intermediaries in the dialogue between issuers and shareholders.

First of all, it must be pointed out that issuers are prevented to communicate directly with their final investors whenever indirect holding systems are in place. As has already been said, the main feature of such systems is the strict distinction between legal and equitable ownership<sup>154</sup>. Only the legal owners have the power to be

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<sup>153</sup> Directive 2017/828/EU of 17 May 2017, Article 3b, paragraph 3.

<sup>154</sup> Paragraph 2.3.1.

registered as shareholders in the share register of the issuer. In consequence, only the legal owners are entitled to exercise the rights flowing from the issuer's shares and to lay legal claims against the issuer. On the other hand, any claims of the end investors should in general lie only against their own intermediary, with no look-through to upper-tier intermediaries or the issuer (no-look-through principle)<sup>155</sup>. This means that, from the perspective of the issuer, the final addressee of corporate notices and proxy materials is the legal owner. The information is then transmitted by the intermediaries down to the beneficial owners. In order to ensure that the legal owners exercise the rights attached to the shares in the interest of the end investors, every link of the holding chain acts as a trustee of the next link in the direction of the beneficial owner<sup>156</sup>. In consequence, there is no legal relationship between the issuer and the beneficial owners, or between intermediaries who do not appear as consecutive links of the holding chain. This means that the relevant information coming from the issuer must be transmitted from one intermediary to the other, until it reaches the beneficial owner. In other words, the transmission process must necessarily involve all of the intermediaries who take part to the holding chain; it is not possible for the information to travel from the legal owners directly to the beneficial owners<sup>157</sup>, or between intermediaries who do not appear as consecutive links of the holding chain. This evidence highlights that, where indirect holding systems are in place, there is no way to enforce direct communication channels between issuers and beneficial owners by law<sup>158</sup>.

On the other hand, countries that enforce direct holding systems have not acknowledged the distinction between legal and equitable ownership: the end investor has the rights to be recorded as a shareholder in the issuer's share register. In consequence, the end investor is entitled to directly exercise the rights flowing from the shares and to lay legal claims against the issuer. However, when direct holding systems are in place, the direct communication between issuers and shareholders

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<sup>155</sup> MACFARLANE, B. and STEVENS, R. (2010), pp. 46-48.

<sup>156</sup> Paragraph 2.3.1.

<sup>157</sup> This is true except where the holding chain has only three links: the issuer, the legal owner and the beneficial owner. However, the odds that the legal owner directly acts as a trustee of the beneficial owner are very low.

<sup>158</sup> However, it must be kept in mind that, in some cases, end investors have the right to be recorded as members in the issuer's share register, making it possible for the issuer to directly communicate with them. See footnote n° 60.

presupposes the existence of an up-to-date share register on the day when the relevant information is forwarded. The legal systems of some Member States have already enforced provisions that enable companies to be daily updated on their shareholder base. For instance, German law provides that the CSD must report to the issuer the settlements of any given trade concerning registered shares<sup>159</sup>. This communication occurs on a daily basis<sup>160</sup>. French law provides that CSD participants must communicate to the CSD the holdings of their clients, who are then forwarded to the issuer through BRN messages<sup>161</sup>. This process also occurs on a daily basis<sup>162</sup>. However, the utter exclusion of intermediaries from the communication process presupposes that the issuer has the ability to directly communicate with all his shareholders. This might not be the case of companies who are incorporated in Germany or France, as both legal systems allow companies to issue shares both in bearer and in registered form<sup>163</sup>.

In Germany, issuers of bearer shares have no direct visibility of their investors outside of substantial shareholder disclosure requirements<sup>164</sup>. On the other hand, the French bearer shares market is much more transparent than the German one. In France, bearer shares are held within the CSD (Euroclear France) in either the beneficial owner's name (for French-resident holders) or under the registered intermediary's name (for foreign investors)<sup>165</sup>. Issuers' by-laws may provide for the right of the company to request disclosure of the information related to either the beneficial owners (in case of French-resident holders) or the *intermédiaires inscrits* (in case of foreign investors)<sup>166</sup>. Once the request has been received, the CSD produces a list containing the information about the holders of *titres au porteur identifiable* (TPI list)<sup>167</sup>. The list is based on the information sent by the CSD participants (that is, the intermediaries who hold the issuer's bearer shares in accounts opened with the CSD). The CSD must then send the

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<sup>159</sup> T2S TASKFORCE ON SHAREHOLDER TRANSPARENCY (2011), pp. 45-52.

<sup>160</sup> Paragraph 2.3.2.

<sup>161</sup> T2S TASKFORCE ON SHAREHOLDER TRANSPARENCY (2011), pp. 80-98.

<sup>162</sup> Paragraph 2.3.2.

<sup>163</sup> In France, except where else provided by the issuer's by-law, each shareholder is free to decide in what form their shares shall be issued. The form of the shares might be later modified through a specific communication sent to the issuer. See GARGANTINI, M. (2012), p. 24.

<sup>164</sup> COMPUTERSHARE INVESTOR SERVICES PTY LIMITED (2015), pp. 16-17.

<sup>165</sup> COMPUTERSHARE INVESTOR SERVICES PTY LIMITED (2015), pp. 14-15.

<sup>166</sup> *Code de commerce*, Article L228-2, paragraph I.

<sup>167</sup> T2S TASKFORCE ON SHAREHOLDER TRANSPARENCY (2011), pp. 80-98.

TPI list to the issuer not later than five working days after that the relevant information has been collected<sup>168</sup>. Moreover, once the above-mentioned procedure has been completed, the issuer has the right to ask the persons registered in the TPI list whether they hold for themselves or on behalf of a third party. In the latter case, the intermediary who has been asked must disclose the identity of the person on behalf of whom he holds. The information about the end investor is transmitted directly to the intermediary who holds the *compte-titres* in which the bearer shares are registered<sup>169</sup>, who then forwards such information to the issuer<sup>170</sup>.

However, notwithstanding the above, even French issuers do not have a full insight into the identities of bearer shareholders. The vast majority of accounts holding bearer shares issued by French companies are indeed registered in the name of a third party, so the company interested in the identity of bearer shareholders must send to every person identified on the TPI list a disclosure request concerning the beneficial owners' data, in conformity with Article L228-2 of the *Code de commerce*. Because of this, the disclosure process of bearer shareholders is usually long, costly and complex<sup>171</sup>. Indeed, the only alternative option would be to commit the whole procedure to *Euroclear France*, which of course would entail greater costs, as the charges levied on the issuer will be calculated in relation to the costs incurred by both the intermediaries to deliver shareholders' data and the CSD to overall manage the identification process. Moreover, despite the legal requirements, some intermediaries do not respond to the disclosure request or only disclose their immediate client information, which may not be the beneficial owner. For instance, Swiss and Belgian banks usually do not disclose their clients' data due to confidentiality issues<sup>172</sup>. It is therefore arguable that the coexistence of bearer and registered shares hampers the direct communication between issuers and shareholders because of the difficulties that the identification procedure faces when it comes to disclosing the identity of bearer shareholders.

In contrast to France and Germany, Italian law limits drastically the power of listed companies to issue bearer shares. According to the general rule, fully paid-up shares

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<sup>168</sup> *Code de commerce*, Article L228-2, paragraph I.

<sup>169</sup> *Code monétaire et financier*, Articles L211-3 and L542-1.

<sup>170</sup> Joint provisions of *Code de commerce*, Article L228-2, paragraph II and *Code monétaire et financier*, Article L211-3.

<sup>171</sup> COMPUTERSHARE INVESTOR SERVICES PTY LIMITED (2015), pp. 14-15.

<sup>172</sup> T2S TASKFORCE ON SHAREHOLDER TRANSPARENCY (2011), p. 94.

may be issued either in registered or in bearer form. The decision about the form of shares rests with the shareholder, unless otherwise provided in the company's by-laws or in special laws<sup>173</sup>. Despite this provision, special laws<sup>174</sup> provide that company's shares must be assigned to a specific person. Therefore, the issuance of bearer shares is only allowed in the few cases provided by special dispositions of law<sup>175</sup>. With regard to listed companies, only the so-called *azioni di risparmio* may be issued in bearer form. According to article 145 of *d. lgs. 24 febbraio 1998, n. 58*, the owners of *azioni di risparmio* are devoid of the right to vote at the general meeting<sup>176</sup>. The portion of share capital represented by *azioni di risparmio* shall not be taken into account when determining whether the quorums for both the validity of the general meeting and the validity of the related resolutions have been achieved<sup>177</sup>. Moreover, the portion of share capital embedded in *azioni di risparmio* shall not be considered when calculating the thresholds for the exercise of minority shareholders' rights<sup>178</sup>. The peculiar discipline laid down by article 145 of *d. lgs. 24 febbraio 1998, n. 58* prevents the owners of *azioni di risparmio* from exercising any direct influence whatsoever on the management of the company. That does not mean that the law does not protect the interests of the owners of *azioni di risparmio*<sup>179</sup>. However, although they might interact with the investee company, the owners of *azioni di risparmio* never actively

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<sup>173</sup> *Codice civile*, Article 2354, paragraph 1.

<sup>174</sup> *R.d.l. 25 ottobre 1942, n. 1148*, converted in *l. 9 febbraio 1942, n.46*.

<sup>175</sup> Practically speaking, aside from the *azioni di risparmio*, only the shares of investment companies with fixed share capital (*Sicaf*) and those of investment companies with variable share capital (*Sicav*) may be issued in bearer form.

<sup>176</sup> *D. lgs. 24 febbraio 1998, n.58*, Article 145, paragraph 1.

<sup>177</sup> *D. lgs. 24 febbraio 1998, n.58*, Article 145, paragraph 6. On the other hand, the owners of *azioni di risparmio* are invested with specific economic privileges as provided for by the company's by-laws. Because of these peculiarities, the *azioni di risparmio* perfectly fit the interests of small private savers, who do not want to interfere in the company's management and are only interested in the economic returns of their investments. See GRAZIANI, A., MINERVINI, G. and BELVISO, U. (2007), p. 319.

<sup>178</sup> *D.lgs. 24 febbraio 1998, n. 58*, paragraph 6, which refers to the rights provided for by *codice civile*, Articles 2367, 2393, paragraphs 5 and 6, 2393-bis, 2408, paragraph 2 and 2409, paragraph 1.

<sup>179</sup> Quite the contrary, the legal protection of the interests of the owners of *azioni di risparmio* is pretty intense. Indeed, Article 146, paragraph 1, letter *b*) of *d. lgs 24 febbraio 1998, n. 58*, provides that any resolution of the general meeting that might jeopardize the rights attached to the *azioni di risparmio* shall be approved by the special meeting of the owners of *azioni di risparmio*. In general, the owners of *azioni di risparmio* interact with the management of the investee company through their common representative, who is elected by the special meeting (*d. lgs 24 febbraio 1998, n. 58*, Article 146, paragraph 1, letter *a*)). Other than having the same powers and duties as the common representative of bondholders, the common representative of the owners of *azioni di risparmio* has the right to attend the general meeting and to contest the meeting resolutions (*d. lgs 24 febbraio 1998, n. 58*, Article 147, paragraph 3). In addition, the company shall keep the common representative informed on any corporate activity that might have a repercussion on the stock value of the *azioni di risparmio*.

engage with it, because they only have economic interests in their shares<sup>180</sup>. Therefore, from a practical point of view, companies have very little interest in identifying the members of this particular class of shareholders.

In the light of the above, it is arguable that all voting shares of listed (and non-listed) companies incorporated in Italy shall be issued in registered form<sup>181</sup>. However, there are still some major hurdles that prevent Italian companies from accurately identifying their shareholders with administrative rights. First, for the reasons explained above<sup>182</sup>, the share register does not offer a faithful representation of the company's shareholder base. Therefore, companies wishing to collect information on their ownership structure have to rely on the identification procedure provided for by article 83-*duodecies* of *d. lgs. 24 febbraio, 1998, n. 58*<sup>183</sup>. Nonetheless, there is no denying that the legal discipline of shareholder identification in Italy offers great protection to the investors' interest for anonymity by significantly reducing the companies' insight into their shareholder base. A great number of legal provisions stands in support of this allegation. First, according to paragraph 1 of article 83-*duodecies*, only listed companies who adopted enabling by-laws have the power to send the disclosure request that gets the identification procedure going<sup>184</sup>. Second, article 83-*duodecies* provides for the right of shareholders to be exempted from the identification procedure<sup>185</sup>. Such an exemption only requires an express declaration<sup>186</sup> of the shareholder's will to ban the disclosure of his identifying data<sup>187</sup>. Moreover, without

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<sup>180</sup> The owners of *azioni di risparmio* might only have an indirect influence in the management of the company. This is the case, for example, of a resolution of the general meeting that has not been approved by the special meeting of the owners of *azioni di risparmio* (*d. lgs 24 febbraio 1998, n. 58*, Article 146, paragraph 1, letter *b*)).

<sup>181</sup> GALGANO, F. (2013), p. 206; STAGNO D'ALCONTRES, A. and DE LUCA, N. (2017), pp. 450-451.

<sup>182</sup> Paragraph 2.3.1.

<sup>183</sup> Paragraph 2.3.2.

<sup>184</sup> This is one of the main differences between the Italian law and the legal discipline of shareholder identification in the majority of EU Member States, where the law directly provides for the right of all listed companies to identify their shareholders. In some countries (such as Germany), by-laws may limit the company's right to identify its shareholders, which nonetheless shall never be precluded. For example, German companies' by-laws may prevent companies from identifying all shareholders whose shares only represent a portion of the share capital that does not overcome a specific threshold.

<sup>185</sup> Paragraph 4 of Article 83-*duodecies* provides that companies shall issue a specific notice reporting to the public that the identification procedure is ongoing. This way, any shareholder wishing to be exempted from the procedure is given the chance to communicate such intention before that the issuer's disclosure request reaches the final-layer intermediary (that is, the intermediary with which the securities account in the name of the shareholder is opened).

<sup>186</sup> Such declaration shall be addressed to the final layer-intermediary.

<sup>187</sup> *D. lgs 24 febbraio 1998, n. 58*, Article 83-*duodecies*, paragraph 1.

prejudice to the legal discipline of relevant participations<sup>188</sup>, the exemption may be obtained regardless of the portion of the company's share capital owned by the shareholder. However, it has to be said that this hurdle to shareholder identification has been overcome by way of interpretation. Legal doctrine indeed noticed that, if any shareholder had the power to prohibit the transmission of his identifying data to the issuer, the principle according to which all listed shares (except for the *azioni di risparmio*) must be registered in the name of a specific person would be nullified. In fact, as all listed shares (including the *azioni di risparmio*) are legally bound to enter the central detention system, such principle is actually meant to ensure the transparency of ownership structures, given that all share transactions are completed by simply updating the *omnibus* accounts opened with the CSD<sup>189</sup>. Therefore, article 83-*duodecies* must be interpreted as meaning that only the owners of *azioni di risparmio* shall be granted the power to be exempted from the identification procedure<sup>190</sup>. Third, the discipline laid down by article 83-*duodecies* refers to the formal concept of 'shareholders', which only identifies the owners of the shares from a legal perspective. Therefore, the identification procedure only enables the issuer to collect the identifying data of the ultimate accountholders. In case of nominee accounts, the identity of the ultimate beneficiary of the shares remains secret<sup>191</sup>, since he does not own any shares from a legal standpoint<sup>192</sup>. It has also to be mentioned that the original term for transmitting the identifying data to the issuer (ten market days from the presentation of the disclosure request)<sup>193</sup> has been extended to twenty market days by secondary regulation<sup>194</sup>. Because of such a long term, many share transactions may take place during the time in between the presentation of the disclosure request and the moment when the communications regarding shareholders' identity coming from the intermediaries finally reach the issuer. In consequence, the identifying data

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<sup>188</sup> Joint provisions of *d. lgs. 24 febbraio 1998, n. 58*, Article 120 and *Regolamento Consob 14 maggio 1999, n. 11971*, Article 117.

<sup>189</sup> Paragraph 2.3.1.

<sup>190</sup> DE LUCA, N. (2010a), p. 260; SECONDO, R. (2011a), p. 79.

<sup>191</sup> GARGANTINI, M. (2012), p. 92. With regard to the inability of companies to identify the beneficiary of a trust, see LENER, R. (2002).

<sup>192</sup> On the contrary, British law allows companies to request information about any person having an interest in their shares, regardless of the identity of the legal owner. See paragraph 2.3.2.

<sup>193</sup> *D. lgs. 24 febbraio 1998, n.58*, Article 83-*duodecies*, paragraph 2.

<sup>194</sup> *Provvedimento Consob-Banca d'Italia del 13 agosto 2018 – Disciplina delle controparti centrali, dei depositari centrali e dell'attività di gestione accentrata ("provvedimento unico sul post-trading")*, Article 49, paragraph 5, letter b).

of shareholders collected by the intermediaries during the identification procedure may overlap, since the moment of the acquisition of relevant data depends on the length and the structure of the single holding chains<sup>195</sup>.

In conclusion, despite the different holding systems and the different grades of legitimacy of bearer shares, Member States' legislations do not offer a sufficient degree of protection in relation to the interest of issuers to directly communicate with their shareholders.

#### 2.4.3 *Possible solutions to the lack of direct communication channels in light of the amended Directive on shareholders' rights*

Given that national laws proved themselves to be not suitable for enhancing direct communication channels between issuers and shareholders, the best way forward probably lies in the enforcement of the new EU rules. As has already been said, issuers cannot transmit notices and other relevant information directly to their shareholders if they cannot rely on an up-to-date share register on the day when such transmission takes place. In other words, the efficiency of direct communication channels depends on the reliability of the shareholder identification system. The implementation of the new EU rules on shareholder identification will thus represent a huge step forward in the desired direction. With this regard, the introduction of a fully-fledged shareholder identification procedure that sets off at the will of the issuer clearly shows that the EU lawmaker has preferred the issuer's interest in shareholder transparency over the investors' interest in anonymity. Such innovation is particularly relevant for countries like Austria, Czech Republic, Denmark, Portugal and others, where issuers usually

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<sup>195</sup> An example may help to clear things out. Let's assume that investor A holds financial instruments through holding chain X and investor B holds through holding chain Y. A orders his intermediary in X to sell 100 shares of company  $\Omega$  and, on the same day, B orders his intermediary in Y to purchase the same number of shares of the same company. Ten days before the placement of such orders,  $\Omega$  presented to the CSD a disclosure request under Article 83-*duodecies* of *d. lgs. 24 febbraio 1998, n. 58*. Holding chain X is shorter than holding chain Y and communication channels of X are more efficient than those of Y. Thus, the information related to clients of the intermediaries in X reach  $\Omega$  in only 5 days from the presentation of the disclosure request. On the other hand, the information related to clients of the intermediaries in Y reach  $\Omega$  in 15 days. In Italy, securities settlements usually take place on the third day after the negotiation (T+3 rule). Thus, the transfer of shares from A to B is settled on the thirteenth day after the presentation of the disclosure request. The end result is that the intermediaries in X will identify A as the owner of 100 shares of  $\Omega$  and, at the same time, the intermediaries in Y will identify B as the owner of the same number of shares.

receive information about the identity of their shareholders only at the time of general meetings or of other corporate actions<sup>196</sup>.

#### 2.4.3.1 The EU Commission implementing Regulation 2018/1212 and the value of intermediation

The potential benefits that might stem from the implementation of the amended Directive on shareholders' rights have already been examined<sup>197</sup>. However, it goes without saying that the fulfillment of the legislative policy in favor of shareholder transparency depends on how Member States will actually implement the new EU rules in their respective legal systems. A major risk is that, due to the generic nature of the Directive<sup>198</sup>, Member States may adopt divergent implementing rules. This may lead to an increase of legal uncertainties between national boundaries, which is exactly what the EU lawmaker was trying to prevent. The main purpose of the Directive is indeed to enhance shareholder engagement on a cross-border scale through the harmonization of national rules on very delicate and technical aspects of corporate governance, such as shareholder identification and intermediated shareholding<sup>199</sup>.

In the attempt to provide for uniform conditions for the implementation of the Directive, the EU lawmaker empowered the European Commission to adopt implementing acts that would further specify the content of the new rules on shareholder identification<sup>200</sup>, transmission of information<sup>201</sup> and facilitation of the exercise of shareholders' rights<sup>202</sup>. In particular, the implementing acts should determine minimum standardization requirements as regards formats to be used and deadlines to be complied with. According to the text of the Directive, *«empowering the Commission to adopt implementing acts allows those requirements to be kept up*

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<sup>196</sup> EUROPEAN SECURITIES AND MARKETS AUTHORITY (2017b), p. 19.

<sup>197</sup> Paragraphs 2.3.3 and 2.3.4.

<sup>198</sup> Article 288 of the Treaty on the Functioning of the European Union provides that *«a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods»*. The indirect effect of EU directives on Member States is an expression of the general principle of proportionality, pursuant to which *«the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties»* (Treaty on the European Union, Article 5).

<sup>199</sup> Paragraph 1.3. See also paragraph 2.2.1.

<sup>200</sup> Directive 2017/828/EU of 17 May 2017, Article 3a, paragraph 8.

<sup>201</sup> Directive 2017/828/EU of 17 May 2017, Article 3b, paragraph 6.

<sup>202</sup> Directive 2017/828/EU of 17 May 2017, Article 3c, paragraph 3.

*to date with the market and supervisory developments and to prevent diverging implementations of the provisions across Member States»<sup>203</sup>.*

On September 3, 2018, the Commission fulfilled its obligations under the Directive by adopting the implementing Regulation 2018/1212<sup>204</sup>. It is interesting that, with regard to top-down communication channels, this new set of rules seems to reconsider the idea that direct communication between issuers and shareholders always equals to the best-case scenario. It is indeed arguable that the gradual process of financial market integration and the development of high-frequency trading facilities have improved liquidity in European equity markets, leading to an increase of dispersed ownership in European listed companies<sup>205</sup>. Therefore, it gets particularly hard (and costly) for issuers to identify the final addressees of every single corporate notice. This is especially true if, rather than regarding general meetings or other specific corporate actions, such notices are aimed at fulfilling “secondary” needs of the management, such as improving investor relations. Moreover, even assuming that the issuer is actually able to track every shareholder down, there is a high chance that share transactions will take place before the issuer’s notice reaches its destination. The European Commission thus concluded that, rather than forcing the issuers to rely on direct communication channels, the best way forward is to improve the transmission of information between intermediaries. As has already been said<sup>206</sup>, intermediation plays a pivotal role in the transfer of shares, as it allows fast electronic settlements to take place. The information about the identity of final investors is usually held within

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<sup>203</sup> Directive 2017/828/EU of 17 May 2017, Recital 47.

<sup>204</sup> Commission Implementing Regulation 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights. OJ L 223/2018. pp.1-18. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1212&from=EN>.

<sup>205</sup>The OECD Corporate Governance Factbook of 2017 shows that, in many EU countries, dispersed ownership in listed companies had an upward trend. For example, only 25% of large cap German companies had large block holders by 2012. Nowadays, the ownership structure of German listed companies is quite dualistic, as most of the shares listed in DAX are broadly distributed. In Spain, 66% of total listed companies are not controlled by single persons or families. Moreover, total free float climbed from 42,9% to 43,4% in 2015. In the Netherlands, the largest shareholder held less than 10% of voting rights in 62% of listed companies by 2010.

This evidence suggests that, even though the paradigm of stock ownership in continental Europe is still firmly represented by concentrated ownership (Italy, France, Belgium, etc.) recent changes in ownership patterns point in the opposite direction. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2017), pp. 12-14.

<sup>206</sup> Paragraph 2.3.1.

the holding chains, as it is proven by the fact that no shareholder identification procedure can be activated if intermediaries do not cooperate. Intermediaries have to be considered essential corporate governance actors in all developed economic systems. Minimizing their role in the dialogue between issuers and intermediaries seems therefore pretty problematic and, to a certain extent, impossible.

Article 2, paragraph 3 of the implementing regulation provides that *«the transmissions between intermediaries shall be made in electronic and machine-readable formats, which allows for interoperability and straight-through processing»*. The reference to the interoperability of the transmissions implies that the formats used by intermediaries shall deploy international applied standards. With this regard, the implementing Regulation explicitly refers to the International Organization for Standardization (ISO), which has already developed various standards on document management and information transfer systems<sup>207</sup>. The Commission has also ensured a minimum level of legal standardization by identifying a list of requirements as regards the formats of some specific messages, such as the issuers' shareholder disclosure requests, the intermediaries' responses and the meeting notices<sup>208</sup>. In addition, the implementing regulation provides for specific deadlines that intermediaries must comply with when transferring relevant information. More specifically, the intermediary receiving information from the issuer (including shareholder disclosure requests) shall transmit it to the next link of the holding chain *«without delay and no later than by the close of the same business day as it received the information»*. In case the intermediary receives the information after 4 p.m. during its business day, the transfer shall occur *«no later than by 10 a.m. of the next business day»*<sup>209</sup>. Where the relevant shares are transferred after that the transmission process has already begun, any intermediary in the holding chain shall transmit the information *«to the new shareholders in its books, according to end of day positions on each business day»*. In case the relevant information refers to specific corporate actions, the transmission process shall be repeated for every change of position in the relevant shares, until the record date<sup>210</sup>.

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<sup>207</sup> The ISO browsing platform is available from: <https://www.iso.org/obp/ui/> - home.

<sup>208</sup> Commission Implementing Regulation 2018/1212 of 3 September 2018, Annex.

<sup>209</sup> Commission Implementing Regulation 2018/1212 of 3 September 2018, Article 9, paragraph 2, subparagraph 2.

<sup>210</sup> Commission Implementing Regulation 2018/1212 of 3 September 2018, Article 9, paragraph 2, subparagraph 3.

In conclusion, the implementing Regulation emphasizes the role of intermediation in the dialogue between issuers and shareholders. The communication channels between intermediaries shall be fully automated (straight-through processing) and shall be made in fully standardized formats. Automatization, standardization and interoperability are the three legs that allow the information to fluidly flow through the holding chain. In addition, the strict deadlines provided for by article 9 of the implementing Regulation maximize the speed of the transmission procedure.

#### 2.4.3.2 Are bearer shares on the verge of extinction?

One of the major hurdles to direct communication channels is bearer shares. The issues arising from the ownership and detention of bearer shares have been discussed in the previous paragraphs<sup>211</sup>. However, there is still one question that remains unanswered: is it possible for national provisions in favor of bearer shares to coexist with the new EU rules in favor of shareholder disclosure?

The critical point is that, except for a few minor differences, the transfer procedure remains pretty much the same in case of both bearer shares and registered shares. In all modern central detention systems, the transfer of listed shares indeed takes place in the forms of debits or credits on accounts held by intermediaries<sup>212</sup>, regardless of the form in which the shares have been issued<sup>213</sup>. Therefore, the main difference between bearer and registered shares does not consist in the transfer procedure, but in the fact that bearer shareowners usually remain anonymous. This evidence highlights that national provisions in favor of bearer shares inevitably collide with the objectives pursued by the amended Directive on shareholders' rights.

The poor interest of the European policymaker in bearer shares is proven by the fact that the new EU rules on shareholder identification do not make any distinction between forms of shares and do not reserve any special treatment for bearer shareholders. The provision under article 3a paragraph 1 of the Directive, according to which issuers shall be granted the power «*to identify their shareholders*», shall therefore apply to bearer shareholders as well. In addition, bearer shareholders cannot

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<sup>211</sup> Paragraph 2.4.2.

<sup>212</sup> Paragraph 2.3.1. See also ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 713.

<sup>213</sup> DE LUCA, N. (2010b), p. 331.

sue their intermediaries for having disclosed their identifying data upon request of the issuer, since article 3a paragraph 6 of the Directive provides that intermediaries who transmit information about the identity of their clients in accordance with the European rules on shareholder identification are to be considered not in breach of any legal, contractual or administrative provision whatsoever. In light of the above, it is arguable that national laws in favor of bearer shares cannot prevent issuers from requesting disclosure of bearer shareholders' identifying data pursuant to article 3a of the Directive. Given the actual European framework on shareholder transparency, it seems that the only legal limit to shareholder disclosure may consist in the threshold under article 3a paragraph 1 of the Directive, the implementation of which is left, first, to the single Member States and, second, to the single companies<sup>214</sup>.

To conclude, it is arguable that bearer shares are destined to decline as a reaction to European regulatory pressure. With this regard, evidence from Member States already points to a gradual decrease in issuance and detention of bearer shares. For example, the German lawmaker recently repealed § 24 of the *Aktiengesetz*<sup>215</sup>, according to which corporate by-laws might provide for the right of shareholders to convert the form of their shares<sup>216</sup>. Moreover, it is interesting to notice that some of the most important companies listed in the German stock market opted for issuing only registered shares<sup>217</sup>. In Italy, only a special category of shares – the *azioni di risparmio* – is allowed to be issued in bearer form, along with the shares of investment companies with either fix or variable share capital<sup>218</sup>. In France, the issues arising from bearer shares are mitigated by the national rules on shareholder disclosure, which allow issuers to acquire information about the identity of the owners of *titres au porteur identifiable*<sup>219</sup>.

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<sup>214</sup> Paragraph 2.3.3.

<sup>215</sup> *Aktienrechtsnovelle 2016 vom 22 Dezember 2015. BGBl I S. 2565.*

<sup>216</sup> On the other hand, §23 (3) of the *Aktiengesetz* is still in force. According to this provision, the issuer's by-laws shall determine whether shares are to be issued in bearer or registered form.

<sup>217</sup> Major examples are Siemens AG, Deutsche Bank AG, Allianz SE, Deutsche Telekom AG and BASF SE. See DE LUCA, N. (2010b), p. 327.

<sup>218</sup> Paragraph 2.4.2.

<sup>219</sup> *Ibid.*

### 2.4.3.3 Fiduciary share ownership and shareholder transparency

Generally speaking, fiduciary ownership can be defined as the situation where a person gives control over an asset (it could be shares or any other goods) in which he has a substantial interest to a third party (nominee), who consequently obtains the power to act *erga omnes* as if he were the actual owner. The key element of any fiduciary relationship is that the person owning the substantial interest actually believes that, when exercising the ownership rights over the controlled assets, the other part of the agreement will look after such interest rather than his own<sup>220</sup>. As far as this work is concerned, it has to be said that national rules on shareholder disclosure have always struggled to tackle the problem of fiduciary share ownership. It often happens that the nominee agrees to be registered as a shareholder in place of the equity investor who owns a substantial interest in the shares. Such practice may be used for the specific purpose to conceal the identity of end investors. This is obviously the case where the nominee addresses himself as the actual shareholder, so the fiduciary relationship is not brought to the attention of the issuer. However, it is also possible that, despite admitting the existence of a fiduciary bond, the nominee refuses to disclose the identity of the end investor to whom he has a contractual obligation of confidentiality<sup>221</sup>.

Fiduciary ownership is a very complicated matter and gives birth to many different questions that have often been answered differently by lawmakers, courts of law and legal doctrine. As far as this work is concerned, it is noteworthy that the UK shareholder identification procedure is the only one that grants issuers full insight into the identity of end investors. According to section 793 of the Companies Act, issuers have the power to request disclosure of the identity of any person having an interest in their shares<sup>222</sup>. Therefore, if specifically addressed by a notice under section 793, nominees are under legal obligation to disclose the identity of the person to the benefit of whom shares are held and managed. In case of refusal, the rights flowing from the relevant shares get sterilized<sup>223</sup> and the nominee commits a criminal offence<sup>224</sup>. On the other hand, none of the disclosure regimes adopted by major countries in continental

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<sup>220</sup> GINEVRA, E. (2012), p. 90.

<sup>221</sup> DE LUCA, N. (2013), p. 659.

<sup>222</sup> Paragraph 2.3.2.

<sup>223</sup> *Companies Act 2006*, Sections 794 and 797. See paragraph 2.3.2.

<sup>224</sup> *Companies Act 2006*, Section 795.

Europe allow for a full investigation into the identity of end investors, especially when fiduciary relationships come into play<sup>225</sup>.

Such a deep difference in shareholder disclosure rules is easily explained by the fact that the British jurisdiction has acknowledged the concept of a trust<sup>226</sup> since ancient times. Such concept implies the possibility to split the same ownership right over a certain asset (trust fund) into a “legal” ownership and a “beneficial” ownership. The legal owner is the nominee (*rectius*, the trustee), who nonetheless is under an obligation<sup>227</sup> to exercise the property right he holds in the best interest of a third party, that is the beneficial owner (the beneficiary)<sup>228</sup>. From the perspective of share detention mechanisms, the concept of a trust is what underlies the functioning of indirect holding systems, as each intermediary holds on trust for the next intermediary until one gets to the end investor<sup>229</sup>. Therefore, it is no surprise that the concept of a trust underlies the identification procedure as well. Section 793 of the Companies Act indeed focuses on the substantial concept of “interest in the shares”, meaning that issuers are granted the power to investigate the identity of all persons who have an interest of any kind in their shares, including and especially beneficial owners. On the other hand, countries who come from a tradition of civil law have historically adopted a rigid concept of a property right: if an ownership right does exist, there can only be one person who holds and uses it in his own interest. As a consequence, disclosure regulations in continental Europe focus on the formal concept of “shareholdership”<sup>230</sup>, meaning that only legal owners of the shares are concerned by the identification procedure<sup>231</sup>.

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<sup>225</sup> SECONDO, R. (2011b), pp. 51-53; SECONDO, R. (2011c), p. 62; GARGANTINI, M. (2012), p. 92.

<sup>226</sup> Such concept has been developed over the centuries by the courts of common law and now underlies all rules that fall within the category of trust law.

<sup>227</sup> Depending on the cases, such obligation arises either from a trust agreement or from a disposition of law.

<sup>228</sup> MACFARLANE, B. and STEVENS, R. (2010), pp. 34-38.

<sup>229</sup> Paragraph 2.3.1.

<sup>230</sup> GARGANTINI, M. (2012), p. 92; SECONDO, R. (2011b), p. 51; SECONDO, R. (2011c), p. 55.

<sup>231</sup> Interestingly enough, there are cases where national jurisdictions call for disclosure of the identities of other people than those in whose names the shares are registered. For example, French issuers are granted the power to collect information about the identity of both non-resident owners of registered shares and bearer shareholders. In these cases, the global custodian (*intermédiaire inscrit*) in whose name the shares are registered is indeed under a duty to the requesting issuer to disclose the identity of the persons on behalf of whom the shares are held. However, the aforementioned cases have nothing to do with fiduciary ownership, as the *intermédiaire inscrit* merely acts as a registered holder, meaning that non-resident investors and bearer shareholders maintain the legal ownership in the shares.

If national systems do not efficiently tackle the problem of fiduciary ownership, neither does the new EU shareholder identification mechanism. Article 3a of the Directive only refers to the right of issuers to identify their “shareholders”, who shall most probably be referred to as the owners of the issuer’s shares from a legal standpoint. With this regard, EU law does not provide for a uniform definition of shareholder, so national jurisdictions are left to determine who are the persons actually concerned by the EU identification procedure. Furthermore, the solution to the problems arising from fiduciary ownership cannot be found in the provision laid down by paragraph 6 of article 3a, as such rule only applies to persons that fall within the definition of an “intermediary” under article 1. To put it simply, the identity of the end investor is safe from disclosure whenever national laws identify the person holding the shares on his behalf (who may also fall within the European definition of an “intermediary”) as the formal owner of such shares.

The evidence just presented has shown that both national and European rules on shareholder disclosure do not properly protect the issuer’s interest in knowing who is hiding behind the legal owner of the shares. It is therefore arguable that the best way to enhance transparency of fiduciary ownership would be to better define what fiduciary ownership actually is and what purposes it may serve. There is a general agreement that fiduciary ownership (and, in particular, fiduciary share ownership) shall not be aimed at fulfilling an illegal interest of the beneficiary<sup>232</sup>, such as hiding assets from creditors and public authorities, as well as concealing his identity from the issuer whenever disclosure is necessary. However, assuming that a legitimate purpose does exist, the core of the matter is to determine the extent to which the obligation of confidentiality (which is typical of fiduciary agreements) operates. In other words, it has to be determined the cases where the obligation of confidentiality allows nominees to refuse disclosure of beneficiaries’ identities. Such problem has been addressed very differently by national jurisdictions and courts of law. This work will restrict the analysis to the Italian case.

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<sup>232</sup> For example, an interest worth of protection would be that of an investor living abroad who gives control over the shares he owns to a nominee living where the investee company is incorporated. This way, the nominee obtains the power to exercise shareholder rights on behalf of the end investor who is unable to directly protect his own interests over the investee company.

The Italian lawmaker has tackled the issues arising from fiduciary ownership since 1942. Indeed, article 1 of *r.d. 29 marzo 1942, n. 239* provides that all fiduciary companies<sup>233</sup> who have assigned in their own name shares belonging to third parties are under a legal duty to disclose the identity of the actual share owners<sup>234</sup>. However, the interpretation by the courts have stripped the aforementioned provision of its substance. In a very relevant legal case<sup>235</sup>, the judge concluded that the obligation of confidentiality is an essential trait of fiduciary relationships and the disclosure obligation under article 1 of *r.d. 29 marzo 1942, n. 239* shall be complied with only when tax laws are concerned<sup>236</sup>.

In brief, the contrast between regulation and case law makes it even harder to outline both prerogatives and limits of fiduciary ownership. The lawmaker should therefore take initiative and adopt new rules that better describe the legal paradigm of fiduciary ownership. In particular, the law should make it sparkling clear that nominees are not bound by the obligation of confidentiality whenever third parties (such as creditors, public authorities and, of course, issuers) have a legitimate interest in knowing the identity of beneficiaries.

To conclude, with specific regard to corporate relations, some authors claimed that, regardless of the existence of a specific disposition of law providing so<sup>237</sup>, issuers must be granted the power to request for the disclosure of beneficiaries' identities. This is especially true in cases where knowing the identity of the person bearing the economic risk of shares is particularly important<sup>238</sup>. The most emblematic case would be the exercise of voting rights, as higher transparency standards would help prevent forms of empty voting. It is therefore arguable that, in case of refusal to disclose the identity of the beneficiary, the issuer may prevent the nominee from exercising voting rights,

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<sup>233</sup> The activity of fiduciary companies is regulated by *l. 23 novembre 1966, n. 39*. Fiduciary companies cannot acquire ownership of shares registered in their own name. Moreover, when asking the issuer to enter their name onto the share register, fiduciary companies usually declare that they act as mere nominees, therefore admitting the existence of a third party owning a substantial interest in the shares. This is called "transparent" fiduciary ownership. See GINEVRA, E. (2012), p. 224.

<sup>234</sup> DE LUCA, N. (2013), p. 660.

<sup>235</sup> *App. Trieste, 15 gennaio 2004*.

<sup>236</sup> Such a thesis has also been supported by some important authors. See DI MAIO, F. (2001).

<sup>237</sup> DE LUCA, N. (2013), p. 662.

<sup>238</sup> GINEVRA, E. (2012), pp. 195-208.

even though he is identified by intermediaries' communications as the person legally entitled to exercise such rights at the record date<sup>239</sup>.

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<sup>239</sup> DE LUCA, N. (2010b), pp. 335-336.

# Chapter 3

## SHAREHOLDER IDENTIFICATION AND THE ENTITLEMENT TO VOTE

### 3.1 Introduction

#### 3.1.1 *Shareholder identification from a dynamic perspective*

The analysis that has been put forward in Chapter 3 showed that the EU lawmaker established a deep connection between shareholder identification, shareholder engagement and corporate governance of listed companies. More precisely, EU law has clearly defined the role of shareholder identification as a technical tool of corporate governance. Recital 6 of the new Directive on shareholders' rights indeed claims that *«the personal data of shareholders should be processed to enable the company to identify its existing shareholders in order to communicate directly with them, with a view to facilitating [...] shareholder engagement with the company»*. In addition, shareholder engagement is described as *«one of the cornerstones of the corporate governance model of listed companies»*<sup>1</sup>. In light of the above, it is arguable that the Directive goes as far as to determine what is the best distribution of powers between corporate actors for an efficient corporate governance model in listed companies.

Notwithstanding the results of this study so far, it must be pointed out that this work would be incomplete if it were restricted to the analysis of the shareholder identification procedure. As has already been said<sup>2</sup>, the shareholder identification mechanism that article 3a of the Directive provides for empowers listed issuers all around the European Economic Area to map their shareholder basis whenever they wish so<sup>3</sup>. However, it is not sure that the benefits stemming from shareholder

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<sup>1</sup> Directive 2017/828/EU of 17 May 2017, Recital 14.

<sup>2</sup> Paragraph 2.3.3.

<sup>3</sup> Any shareholder identification request that is sent to intermediaries in accordance with Article 3a should nonetheless be aimed at the purpose of enhancing shareholder engagement, as the management should process shareholders' personal data for no reason other than fulfilling the specific interest that the new cross-border identification mechanism protects.

identification in terms of enhanced shareholder engagement would counterbalance the costs of the disclosure procedure. On the one hand, shareholder identification covers holdings below the relevant thresholds for ownership disclosure. Therefore, the management may not be willing to bear the costs of a procedure that involves a great number of intermediaries just to collect information about shareholders who have no direct influence in corporate decisions. With this regard, the rules on mandatory disclosure of share ownership above certain thresholds<sup>4</sup> may be more than enough to fulfill the management's corporate governance purposes. On the other hand, it is questionable whether shareholder identification would enhance market efficiency. Despite the fact that it increases the level of market transparency, shareholder identification may flood the equity market with poor-value information, especially when the disclosed holdings are particularly small<sup>5</sup>. Furthermore, shareholder disclosure may reveal to the public the investment strategies of small investors, leading to free-riding by other shareholders on the investment research efforts borne by active investors<sup>6</sup>.

The point is that a thorough study on the matter of shareholder identification must take into account specific corporate actions and situations where the issuer's interest in knowing the identity of its shareholders comes into play. In other words, it is now time to examine shareholder identification from a dynamic point of view and to analyze how the technicalities of shareholder disclosure actually interact with substantial aspects of corporate governance. In particular, this chapter is going to focus on the

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With this regard, it is arguable that Member States may provide for the obligation of issuers to publicly explain the reasons why they issued a shareholder identification request. A similar obligation is in force in Italy, since Article 83-*duodecies* of *d. lgs. 24 febbraio 1998, n. 58* provides that companies who sent an identification request to the CSD must publish a notice explaining the reasons for doing so.

<sup>4</sup> *Directive 2004/109/EC of 15 December 2004*, Articles 9-16; *Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market*, *Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading* and *Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC*. GU L 294/2013. pp. 13-27. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0050&from=EN>. Article 1, numbers 7), 8), 9), 10) and 11).

<sup>5</sup> ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 729.

<sup>6</sup> ENRIQUES, L., GARGANTINI, M. and NOVEMBRE, V. (2010), p. 730.

relationship between shareholder identification and the most relevant of all corporate actions, which is the general meeting of shareholders.

### 3.1.2 *The value of shareholder identification in the context of the general meeting of shareholders*

The importance of shareholder identification in corporate governance grows exponentially as general meetings approach<sup>7</sup>. Shareholder identification indeed allows issuers to verify the correspondence between the person attending the meeting and exercising voting rights and the person to whom the applicable laws have granted the status of a “shareholder”. This way, the voting owner is granted the power to exercise his rights against the company when the time comes for it. Shareholder identification also ensures the correct functioning of general meetings, as it eliminates the risk of persons casting votes without having the corresponding right. Furthermore, in the days leading up to the general meeting, the collection of shareholders’ data acquires a significant strategic value for the company, since it allows the management to identify the persons who are entitled participate to the meeting and to determine the voting power of every single participant<sup>8</sup>. In other words, shareholder disclosure enables the company to make reasonable predictions on the odds of approval for meeting resolutions and, in consequence, on the voting outcome of the general meeting.

It is noteworthy that, whenever general meetings are concerned, shareholder identification has a twofold task. Not only does the transmission of shareholders’ data allow for greater participation to the meeting, it also alleviates the burdens borne by the company for the efficient unwinding of the corporate action. However, the actual influence of shareholder identification procedures in corporate governance depends on the legal criterion used for determining who are the persons legally entitled to attend the meeting and to cast votes. This is especially true if, based on the legal criterion used, the owner of shares at the date of the meeting may not be entitled to exercise the voting rights attached to such shares.

The next paragraph is going to focus on the traits and functioning of the EU legal criterion for determining shareholder enfranchisement, i.e. the “record date” system.

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<sup>7</sup> GARGANTINI, M. (2012), pp. 123-124.

<sup>8</sup> RENNEBOOG, L. and SZILAGYI, P. (2013), p. 330.

It will then be analyzed one peculiar problem stemming from the use of record dates, commonly referred to as “empty voting”. Finally, the last part of this chapter will focus on the procedures for the transmission of information about the identity of entitled shareholders, which will be analyzed from both a national and a cross-border perspective.

## 3.2 The record date mechanism

### 3.2.1 *Reasons and advantages of the record date system*

The EU lawmaker has adopted the so-called “record date” as a uniform criterion to determine who are the persons entitled to vote in the general meetings of European listed companies. The first Directive on shareholders’ rights indeed provides that *«the rights of a shareholder to participate in a general meeting and to vote in respect of his shares shall be determined with respect to the shares held by that shareholder on a specified date prior to the general meeting»*<sup>9</sup>. Therefore, the record date may be defined as the date, prior to the general meeting, in which the persons who are identified by national jurisdictions as legal shareholders are granted the entitlement to vote in the general meeting that is about to take place. Moreover, the single persons identified as shareholders at the time of the record date may only exercise as many voting rights as the number of voting shares they held at that same date. In consequence, any share transfer that may be settled after the expiration of the record date is totally irrelevant to the entitlement to exercise voting rights in the upcoming general meeting.

From a political standpoint, the reasons for setting a record date ahead of the general meeting are pretty straightforward. On the one hand, there is the need to ensure that corporate actions do not interfere with trading activities in financial markets. This is for the benefit of both market efficiency and shareholder engagement. On the other hand, it is essential to make sure that issuers are given a reasonable time to efficiently arrange the general meeting. In the past years, the by-laws of most European companies used to prohibit the transfer of shares in the days leading up to the general

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<sup>9</sup> *Directive 2007/36/EC of 11 July 2007*, Article 7, paragraph 2.

meeting. In some cases, such a practice was explicitly enforced<sup>10</sup> or allowed<sup>11</sup> by national jurisdictions. The practice of share blocking was considered to be a compromise solution between the interest of the issuer to identify in advance the shareholders entitled to vote in the imminent meeting, on the one hand, and the will to prevent any form of decoupling between ownership and voting rights, on the other hand<sup>12</sup>. However, the blocking of shares was a big disincentive to equity investments, since such practice exposed shareholders to greater market risk associated with their investments on shares. The right to sell is indeed one of the most efficient tools that investors have to reduce the risk connected with their equity investments, as it is proven by the fact that market operators usually react to share price fluctuations by selling their shares<sup>13</sup>. In many cases, the increase of market risk determined by share blocking was so large that it outweighed the potential benefits stemming from the exercise of voting rights. This is the reason why many investors (and, in particular, institutional investors)<sup>14</sup> decided to not exercise their voting rights in companies that prohibited share transfers on the days leading up to the general meeting, regardless of the interest that they might have had in the items on the meeting agenda<sup>15</sup>. To put it simply, the blocking of shares was a major disincentive to both equity investments and shareholder participation in general meeting<sup>16</sup>.

In light of the above, it is arguable that the practice of share blocking hampers the correct functioning of corporate governance mechanisms, as it refrains shareholders from exercising their voice when the time comes for it. A legal reform in Europe was necessary with view to increase the level of shareholder involvement in decision-

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<sup>10</sup> See, for instance, the text of Article 2370 of the Italian *Codice civile* before the legislative reform of 2003.

<sup>11</sup> In Italy, the text of Article 2370 of *Codice civile* after the reform of 2003 provided that by-laws might require shareholders willing to cast their votes in the next general meeting to deposit their share certificates within a certain date prior to the meeting. With regard to dematerialized or centrally held shares, the former text of Article 83-*sexies* of *d.lgs 24 febbraio 1998, n. 58* provided that by-laws might require the owners of the accounts in which company's shares were registered on the issuer deadline to not sell such shares until the meeting was over.

<sup>12</sup> GARGANTINI, M. (2012), p. 169.

<sup>13</sup> WINTER, J.W. (2000), p. 414.

<sup>14</sup> It is no secret that the apathic behavior of institutional investors has been a major reason for the introduction of a record date-based mechanism for enfranchisement. Indeed, the system of mandatory blocking of shares deterred institutional investors from voting. Such lost votes thus leveraged the voting power of other shareholders in an artificial way. See CLOTTENS, C. (2012), p. 31; POMELLI, A. (2017), p. 257.

<sup>15</sup> LIBONATI, B. (2002), p. 463; MONTALENTI, P. (2004), p. 179.

<sup>16</sup> GARGANTINI, M. (2012), pp. 160-164.

making processes. The conflict between the interest of investors in removing all restrictions to share transfer and the interest of issuers in preventing the decoupling of ownership and voting rights has been thus solved by the EU lawmaker in favor of the former<sup>17</sup>. With this regard, article 7 of the Directive on shareholders' rights prohibits national jurisdictions from banning or allowing companies to ban share transfer on the days prior to the general meeting<sup>18</sup>. Therefore, the adoption of a record date system allows investors to freely trade shares in the equity markets even when a general meeting is approaching. The investor who purchases shares after the expiration of the record date is aware of the fact that he will not be entitled to exercise the rights flowing from the purchased shares in the upcoming general meeting, so the market eventually reduces the share price by the economic value of benefits stemming from the exercise of voting rights<sup>19</sup>.

Besides encouraging the active involvement of shareholders in corporate decision making, the record date system makes it easier for the issuer to efficiently arrange the upcoming meeting, as it allows the issuer to determine the list of persons entitled to vote before that the general meeting takes place. The time gap between the identification of the persons entitled to vote and the general meeting produces numerous advantages, at least from an operational standpoint. On the one hand, the record date creates a time frame within which intermediaries can easily transmit all meeting-related communications from the persons entitled to vote to the issuer and vice versa. On the other hand, the record date system prevents investors who purchased shares after the record date from claiming their right to vote in the upcoming general meeting. In conclusion, the adoption of a record date substantially increases the organizational efficiency of listed companies as it allows to overcome the major difficulties of systems where the persons entitled to vote must be identified on the very same date of the meeting<sup>20</sup>.

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<sup>17</sup> SECONDO, R. (2011d), pp. 19-20.

<sup>18</sup> *Directive 2007/36/EC of 11 July 2007*, Article 7, paragraph 1, letter (a).

<sup>19</sup> GARGANTINI, M. (2012), pp. 9-10.

<sup>20</sup> For a full analysis of such difficulties, see GARGANTINI, M. (2012), pp. 176-181.

### 3.2.2 *The decoupling of share ownership and voting rights*

As it has been discussed in the previous paragraph, the record date mechanism brings about some major advantages, such as greater shareholder involvement in decision making processes and more efficient general meeting arrangements. However, it has to be said that, as a mechanism for shareholder enfranchisement, the record date system is actually a second-best solution<sup>21</sup>. The Directive on shareholders' rights enforces a record date mechanism because the EU lawmaker has acknowledged the fact that companies would not be able to efficiently arrange general meetings if the list of enfranchised shareholders were determined on the same day when the meeting takes place. Setting a record date seems therefore to be the only acceptable compromise between the need to grant issuers the power to identify enfranchised shareholders ahead of the meeting, on the one hand, and the need to prevent any form of share blocking ahead of the meeting, on the other hand<sup>22</sup>.

One of the natural effects of the record date mechanism is the (potential) decoupling of share ownership and voting rights. If shares are traded between the record date and the general meeting, the buyer (that is, the new share owner) will not be able to participate to the meeting and to cast votes, as such rights will be attributed to the seller (that is, the person who owned the shares as of the record date)<sup>23</sup>. This means that, if he wants to vote in the upcoming meeting, the investor must necessarily acquire share ownership before that the record date expires. The problem gets even more complicated when considering the fact that, usually, shares are not credited on the account of the buyer on the same day of the purchase. In most countries, including Italy, clearing and settlement operations are completed within the third market day after the transaction<sup>24</sup> (T+3 rule). In consequence, if he wants to vote in the next general meeting, the investor will have to buy the shares within the end of the ninth market day prior to the meeting itself. The day from which the acquisition of the issuer's shares no longer provides the purchaser with the entitlement to vote in the next general meeting is usually referred to as the "ex-date"<sup>25</sup>.

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<sup>21</sup> CALVOSA, L. (2011), p. 356; DE LUCA (2010b), p. 330.

<sup>22</sup> DE LUCA, N. (2010b), pp. 318-319.

<sup>23</sup> CIAN, M. (2012), p. 117; FURGIUELE, L. (2015), p. 136; GARGANTINI, M. (2011), p. 639.

<sup>24</sup> LUCANTONI, P. (2012), p. 145; SIMMONS, M. and DALGLEISH, E. (2006), p. 85.

<sup>25</sup> GARGANTINI, M. (2012), pp. 9-10.

In the light of this theoretical analysis on causes and effects of the record date system, it is arguable that such mechanism is in itself a peculiar kind of shareholder identification. However, the major difference between the shareholder identification procedure and the record date mechanism is that, while the former is aimed at providing a real picture of the actual shareholding structure, the latter is designed to identify the persons who owned the shares as of the relevant date for shareholder enfranchisement, regardless of any following change in share ownership. The timeline of share transfers is thus a major factor for determining who is qualified to vote. With this regard, Gargantini (2009) claimed that, whenever a record date is set, the issue of shareholder identification shall be understood in a diachronic and not merely synchronic sense<sup>26</sup>.

### 3.3 Empty voting

Despite the benefits it brings about, the record date mechanism can be easily misused due to its peculiar functioning. This paragraph will focus on one particular issue that may arise from a record date system: empty voting.

“Empty voting” occurs whenever the voting of shares does not couple with the underlying economic interest of such shares<sup>27</sup>. This determines a deviation from the one share-one vote rule<sup>28</sup>, according to which the voting power of any shareholder shall be determined in proportion to share ownership and, thus, to his level of equity risk-bearing<sup>29</sup>.

Empty voting can be achieved through a series of different methods (hedging through short selling and derivatives, circular or pyramidal group holding structures, tunneling techniques and so on)<sup>30</sup>. The introduction of a record date system creates further scope

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<sup>26</sup> GARGANTINI, M. (2009), p. 24.

<sup>27</sup> The term “empty voting” was coined by HU, H.T.C. and BLACK, B. (2006a). See also HU, H.T.C. and BLACK, B. (2006b). These two important works look into causes, methods, implications and possible remedies of new vote buying, which entails both empty voting and hidden (morphable) ownership.

<sup>28</sup> The one share-one vote rule is generally considered to be a bedrock principle of corporate governance, as it allows the outcome of corporate voting to better reflect the common interest of substantial shareholders.

<sup>29</sup> GEENS, K. and CLOTTENS, C. (2010), p. 4.

<sup>30</sup> This work restricts the analysis to the correlation between record date systems and empty voting. For a fully-fledged study on the different methods and effects of empty voting, see CLOTTENS, C. (2012), pp. 2-5; HU, H.T.C. and BLACK, B. (2006a), pp. 828-832 and 858; KAHAN, M. and ROCK, E. (2008), pp. 1255-1267.

for empty voting by allowing for the possibility of buying shares before the record date and selling them between the record date and the general meeting (record date capture)<sup>31</sup>. However, as has already been said<sup>32</sup>, a greater scope for empty voting is the necessary price to be paid for the enforcement of a mechanism for shareholder enfranchisement that, on the one hand, allows issuers to determine the amount and distribution of voting rights ahead of the meeting and, on the other hand, forbids any requirement for share blocking<sup>33</sup>. What is troublesome about the modern record date system, besides from sporadic cases where the seller may exercise voting rights in place of the buyer, is the fact that investors may intentionally take unfair advantage of record date capture and thus increase their influence on corporate voting to the detriment of the company<sup>34</sup>. To better understand the influence of empty voting in corporate governance, it is useful to take a closer look into some of the possible methods for abusing of the rules on shareholder enfranchisement.

One practice that may reveal an abuse of the record date rules is vote trading. Empirical literature has proved the existence of an active market for votes in the US and the UK equity market. In particular, it has been pointed out that the volume of voting trades generally increases as the record date approaches<sup>35</sup>. It is likely that a similar market for votes exists in the Italian equity market as well, due to the introduction of record date mechanism by *d. lgs. 27 gennaio 2010, n. 27*<sup>36</sup>. One of the main reasons for voting trades lies in the fact that voting rights are not valued the same by all shareholders. Generally speaking, the value assigned by a single shareholder to his voting rights is determined by two main factors: the number of voting shares he owns and the level of benefit he may achieve from meeting resolutions. In other words, the more an investor approaches the majority of voting rights, the more he will be interested in collecting extra votes<sup>37</sup>. In consequence, outside shareholders with little interest in voting may

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<sup>31</sup> ČULINOVIĆ-HERC, E. and ZUBOVIĆ, A. (2015), pp. 142-143.

<sup>32</sup> Paragraph 3.2.2.

<sup>33</sup> SECONDO, R. (2011d), pp. 18-19.

<sup>34</sup> DE LUCA, N. (2010b), p. 333.

<sup>35</sup> CHRISTOFFERSEN, S.E.K. et al. (2007), pp. 2909-2911. This work highlights that voting rights are usually traded through stock lending. The lending market has been proven to be the efficient venue for voting trades, as it allows investors to better leverage the effects of record date capture. With this regard, see also HU, H.T.C. and BLACK, B. (2006a), pp. 832-835.

<sup>36</sup> *D. lgs. 24 febbraio 1998, n.58*. Article 83-*sexies*, paragraph 2. As has already been said when, all record date mechanisms inevitably create scope for the decoupling of voting rights and economic rights.

<sup>37</sup> This conclusion has been drawn by Hu and Black (2006a, pp. 852-853), who used the “oceanic” Shapley value (Milnor and Shapley, 1978) as a measure of the probability that a voter will be pivotal

leverage the effects of record date capture by lending their shares<sup>38</sup> to insiders in the period that goes from the days preceding the expiration of the ex-date to the days following the expiration of the record date. This way, outsiders can sell their shares at a price that incorporates the economic value of voting rights and then purchase equivalent shares at a price that is reduced by that same value<sup>39</sup>. Such a practice may be detrimental to shareholder engagement, as it refrains small shareholders from bearing the costs to participate in the meeting and to vote in their best interest. This is especially true when individual shareholders assume that the profits made out of share lending outweigh the benefits from corporate voting. Moreover, inside investors may leverage the quest for profits of outsiders to artificially increase their voting power in the general meeting through share borrowing. The aggregation of voting rights that follows is harshly detrimental to corporate governance<sup>40</sup> in cases where the borrower has a negative economic interest in the shares in which he votes<sup>41</sup>. Indeed, record date capture creates perverse incentives to vote against the interest of the company, because the shareholder as of record date (that is, the borrower) can profit from a (provoked) sudden drop of the share price to buy shares in the market at a discount in order to

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for the adoption of meeting resolutions. They further claimed that the value assigned to individual votes decreases as the substantial shareholder approaches absolute control and disappears once control is achieved.

<sup>38</sup> It is worth remembering that, despite the name, stock lending actually entails a transfer of shares from the lender to the borrower. The borrower becomes the legal owner of the shares, but the underlying economic risk remains with the lender, since the borrower is under legal obligation to return an equivalent number of shares at the closing date or at the issuer's request.

<sup>39</sup> Therefore, outsiders can make a profit equal to the economic value of voting rights attached to lent shares.

<sup>40</sup> On the contrary, some authors (Christoffersen et al., 2007) emphasized that vote trading and aggregation of votes may be beneficial to corporate governance in cases where vote trading is driven by asymmetric information. Minority shareholders would like to exercise the voting rights attached to their shares, but they do not have the means to collect the information necessary to make the best voting decisions in their own interest. According to this line of thought, the vote market cures the inefficiency that arises when votes are distributed differently from the information on how to vote them. Transactions in votes reduces scope for rational apathy by aggregating more voting rights in the hands of investors more willing and more able to vote them properly. Empirical evidence shows that asymmetric information is the driving force behind vote trading in the UK.

However, the argumentation summarized above is not fully persuasive because it seems to be based on overoptimistic assumptions. On the one hand, it is unlikely that investors lend their shares for voting purposes. It seems that, in general, lenders merely seek to make a profit from share lending, regardless of how lent shares will be voted by the borrower. On the other hand, in order for information aggregation to improve corporate governance efficiency, it is essential that borrowers have a positive economic interest in borrowed shares. This does not happen to be always true, as the Henderson Investment example illustrates.

<sup>41</sup> This is the case of insider shareholders holding a short net position in the shares of the investee company.

return them to the lender (who ultimately bears the whole economic risk in the shares)<sup>42</sup>.

Such a strategy was followed in the Henderson Land incident. In 2006, Henderson Land offered to buy the 25% minority interest in an affiliated company (Henderson Investment). Most minority shareholders favored the buyout, causing the share price of Henderson Investment to increase. However, Henderson Investment had its main headquarters in Hong Kong, where the law provided that the buyout could be blocked by a negative vote of at least 10% of floating shares. To everybody's surprise, a great percentage of floating shares were voted against the buyout and the share price of Henderson Investment dropped as soon as the voting outcome was disclosed to the market. It is likely that some hedge funds borrowed Henderson Investment shares before the ex-date, voted against the buyout to the detriment of the company, and then sold those shares short, thus profiting from their private knowledge that the buyout would be defeated<sup>43</sup>. It has even been argued that all of this could be fault of a single hedge fund. In light of the empirical evidence above, it is useful to distinguish different levels of empty voting. Partial empty voting is less problematic because enfranchised shareholders still bear some economic risk in their shares, even though such risk is not proportional to the number of votes cast. In some cases, empty voting can be even beneficial to corporate governance, as it cures the inefficiency that arises when votes are distributed differently from the information on how to vote them. In this light, empty voting reduces scope for rational apathy by aggregating more voting rights in the hands of investors more willing and more able to use them properly<sup>44</sup>. On the other hand, negative voting by shareholders who have no incentive at all to exercise their voting rights in the best interest of the company represents a much bigger threat to corporate governance efficiency and welfare creation<sup>45</sup>.

To conclude, it has to be said that the issue of empty voting may get even more serious in jurisdictions where indirect holding systems are in place, such as the UK. British law starts from the presumption that all rights attaching to shares are held by, and are exercisable by, the registered holder, by virtue of being registered as a member of the

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<sup>42</sup> CLOTTENS, C. (2012), p. 5.

<sup>43</sup> HU, H.T.C. and BLACK, B. (2006a), p. 834.

<sup>44</sup> CHRISTOFFERSEN, S.E.K. et al. (2007), pp. 2926-2927.

<sup>45</sup> GUERRERA, F. (2017), p. 205; HU, H.T.C. and BLACK, B. (2006b), pp. 1027- 1029.

company. On the other hand, trust law has been used to explain the rights of the underlying account holder (beneficial owner). However, this trust does not alter the fact that only the register holder enters in a legal relationship with the company. It is the legal owner who has the right to vote in the meeting, while the benefits stemming from the exercise of voting rights should flow to the beneficial owner. It follows that, where shares are held through an intermediary, the intermediary has little incentive to engage in the governance of the company since the advantages of doing so will flow to the beneficial owner. Conversely, the beneficial owner has an economic incentive to act but no right to do, as against the company at least<sup>46</sup>. Some of the problems related to the functioning of indirect holding systems will be discussed further on<sup>47</sup>.

### 3.4 Tackling empty voting

#### 3.4.1 *US and European approaches in comparison*

In the United States, the peculiar functioning of the custodial ownership system further aggravates the negative consequences of empty voting<sup>48</sup>. In order to reduce the discrepancy of voting rights and economic rights determined by post record date trades, American case-law has developed two different orientations. In some cases, the courts of law have claimed that, unless the parties agree otherwise, the investor who bought shares in the period between the record date and the general meeting has the right of obtaining an authorization to vote to be issued by the seller<sup>49</sup>. Despite the fact that many different court decisions agree on this solution, the issuance of an authorization to vote in favor of the buyer seems unfeasible. First, it is particularly hard for the buyer to identify the counterparty of a share transfer in the financial market<sup>50</sup>. Second, empirical evidence shows that it is usually the beneficial owner who sells the shares, while the record owner does not take any direct action. In such cases,

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<sup>46</sup> PAYNE, J. (2010), pp. 187-188.

<sup>47</sup> Paragraph 3.5.1.

<sup>48</sup> KAHAN, M. and ROCK, E. (2008), pp. 1248-1270.

<sup>49</sup> *Commonwealth Assoc. v. Providence Health Care, Inc.*, 641 A.2d 155 (Del. Ch. 1993); *Kurz v. Holbrook*, No. 5019-VCL (Del. Ch., Feb.9, 2010); *EMAK Partners, LLC v. Kurz*, Consol. Nos. 64, 2010 and 85, 2010 (Del. Supr., April 21, 2010).

<sup>50</sup> Given the fact that the parties of a share transaction in the market cannot be easily identified, Winter (2000, p. 420) claimed that, from a practical standpoint, investors do not use the right to be issued with an authorization to vote, even though there is nothing stopping them from using it.

the seller shall first request the registered holder to be issued with an authorization to vote and then he shall transfer such authorization to the buyer<sup>51</sup>. This procedure may be long, complex and costly, depending on the length and the efficiency of the holding chain.

Other times, the US courts of law have argued that, in case of post record date trades, the seller shall act as a trustee of the buyer, meaning that he shall use the voting rights attaching to transferred shares in the best interest of the buyer. If the seller does not fulfill his duties as a trustee, the buyer can seek compensation for damages in a court of law<sup>52</sup>. This second case-law orientation seems to be more feasible than the former, but the problem lies in the fact that it is very hard to identify the parties of any transfer of listed shares. In most cases, the buyer does not know who sold him the shares: the transaction happens automatically when the different orders to trade are coupled by the service platform, so all counterparties operating in the financial market can be easily interchanged. Therefore, it is impossible to identify the entitled investor who has a fiduciary obligation toward the actual shareholder. In any case, it is arguable that US case-law tackles the issue of empty voting by focusing on the contractual relationship between the seller and the buyer, notwithstanding the fact that only the legal owner of the shares as of the record date is entitled to participate in the upcoming meeting and to cast votes<sup>53</sup>.

European countries did not embrace the American approach to the problem of empty voting. Even in the UK, where trust law has been used to explain the rights of beneficial owners as against the company, there is no such thing as a trust bounding the parties of a post record date trade. This is due to the current British rules on share transfer and settlement. Indeed, the transfer of equitable share ownership occurs when CREST proceeds to instruct the issuer or the registrar on how to update the register of

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<sup>51</sup> WILCOX, J.C., PURCELL, J.J. and CHOI, H.-W. (2007), pp. 10-25.

<sup>52</sup> *In Re: Giant Portland Cement Co.*, 21 A.2d 697 (26 Del. Ch. 32 1941); *Len and Cook Composites and Polymers Co. v. Fuller and CS Acquisition Inc.*, Civil Action No. 15352 (Del. Ch. 1997). In the latter case, the court even claimed that the buyer shall be granted the power to directly cast the votes attaching to the purchased shares. If this were to happen, the company would be under obligation to cancel the votes eventually cast by the record owner. However, it is practically impossible for the company to clearly identify the record owners whose votes shall be cancelled. If this case-law were to be settled, it could therefore create further scope for overvoting, because the same shares would often be voted by both the registered holder and the equitable owner. This is the main reason why most of US listed companies did not take this court decision as a reference to innovate their practices concerning general meetings and corporate voting. See KAHAN, M. and ROCK, E. (2008), p. 1264.

<sup>53</sup> *Salt Dome Oil Corp. v. Schenk*, 41 A.2d 583, 589 (Del. 1945).

members. But the transmission of updating instructions inevitably comes after the settlement of the accounts of CREST participants who hold on behalf of the seller and the buyer, respectively<sup>54</sup>. This means that, in the period that goes from the share trade settlement to the update of the register of members, nobody is identifiable as the equitable owner of the transferred shares<sup>55</sup>. Rather than focusing on the inner relationships between the parties of post record date trades, EU Member States tackled the problem of empty voting by reducing the time gap between the record date and the general meeting<sup>56</sup>.

The first Directive on shareholders' rights gives to national jurisdictions the freedom to determine how much time has to pass between the identification of enfranchised shareholders and the general meeting. It is only provided that the record date shall not lie more than 30 days before the general meeting and that a single record date shall apply to all companies incorporated in the same Member State. However, a Member State may set two record dates which respectively apply to companies which have issued bearer shares and to companies which have issued registered shares, provided that only one record date shall apply to companies which have issued both types of shares<sup>57</sup>. Despite the fact that the time difference may amount up to 30 days, the vast majority of Member States have set the record date pretty close to the general meeting<sup>58</sup>.

In the United States, the record date is usually thirty to sixty days ahead of the general meeting. This is due to the complicated system of custodial ownership. Under US proxy rules, all listed companies are required to solicit proxies and provide proxy statements for all meetings of shareholders (proxy solicitation)<sup>59</sup>. Given that proxy materials have to reach each beneficial owner on an individual base, companies shall

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<sup>54</sup> SECONDO, R. (2011b), p. 40.

<sup>55</sup> GARGANTINI, M. (2012), pp. 295-296.

<sup>56</sup> CLOTTENS, C. (2012), pp. 30-34.

<sup>57</sup> *Directive 2007/36/EC of 11 July 2007*, Article 7, paragraph 3.

<sup>58</sup> In France, the record date lies on the second trading day before the general meeting. In the UK, each company sets his own record date, which shall never lie more than forty-eight hours prior to the meeting. In Germany and in Croatia, the record date lies on the sixth day prior to the meeting. The record date may be set twenty-one days ahead of the meeting only in case of bearer shares. In Italy, the record date lies on the seventh trading day prior to the meeting. In Spain and in Greece, the record date is set anywhere up to five days before the meeting. In Belgium, the time gap between the record date and the meeting amounts to fourteen days. Only in Romania the record date is allowed to be set up to thirty days ahead of the meeting. See EUROPEAN SECURITIES AND MARKETS AUTHORITY (2017b), p. 28.

<sup>59</sup> *NYSE Listed Company Manual*, Rule 402.04; *The Nasdaq Stock Market Rules*, Rule 5620(b).

first launch an inquiry into the exact number of beneficial owners, with view to determine the number of proxies and other solicitating materials that are necessary to supply such materials to such beneficial owners<sup>60</sup>. It is not necessary for the company to launch an inquiry into the identity of beneficial owners, given that proxy materials must be forwarded to beneficial owner by banks and brokers<sup>61</sup>. The US system does not allow the issuer to acquire full knowledge about the identity of beneficial owners, since the regulatory framework requires brokers and banks to disclose to a company the identity of only those beneficial owners who do not object to such disclosure<sup>62</sup>. Investors who object are known as “objecting beneficial owners” (OBOs) in contrast with “non-objecting beneficial owners” (NOBOs)<sup>63</sup>. Compliance with the proxy rules in the United States simply requires more time. Therefore, it is necessary to set the record date several days before the meeting, otherwise voting instructions and proxies would not arrive in time. However, the wide time gap that separates the record date from the general meeting creates further scope for empty voting, as there is more time for shares to be transferred without the corresponding voting rights.

Another notable feature of the US system is that the meeting agenda is usually not disclosed on the record date. Even the record date itself is usually not disclosed beforehand<sup>64</sup>. All this has several disadvantages: institutional investors cannot recall shares with view to voting on specific agenda items, the board of directors can strategically set the record date with the purpose of influencing the outcome of the voting process, and activist shareholders may apply empty voting to agenda items they have proposed, given that other shareholders will be unable to predict the actual content of the meeting agenda<sup>65</sup>. With view to improve the overall functioning of general meeting, section 213 (a) of the Delaware General Corporation Law has been reformed in 2009<sup>66</sup>. The new disposition of law allows the use of two separate record dates: a first record date for determining who is entitled to receive proxy material in

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<sup>60</sup> *Code of Federal Regulations*, Title 17, § 240, rules 14a-13, 14b-1 and 14b-2.

<sup>61</sup> *Code of Federal Regulations*, Title 17, § 240, rule 14b-2(b)(1)(i).

<sup>62</sup> *Code of Federal Regulations*, Title 17, § 240, rule 14a-13.

<sup>63</sup> COUNCIL OF INSTITUTIONAL INVESTORS (2010), pp. 3-5.

<sup>64</sup> CLOTTENS, C. (2012), pp. 32-33.

<sup>65</sup> HU, H.T.C. and BLACK, B. (2006a), p. 715; KAHAN, M. and ROCK, E. (2008), p. 1270.

<sup>66</sup> With this regard, it is noteworthy that the vast majority of US listed companies are incorporated under the laws of Delaware, since Delaware jurisdiction is considered to be the most company-friendly of all the States.

the context of a proxy solicitation, and a second record date, closer to the general meeting, for determining who is entitled to vote (“bifurcated” record dates)<sup>67</sup>. This second record date may even lie on the very same day of the meeting. With this regard, it is interesting that the US lawmaker substantially allowed the suppression of the record date system just two years after that such system had been introduced in the Europe<sup>68</sup>.

The fact that, in most European countries, the record date is set on a day that is pretty close to the general meeting significantly reduces the use of empty voting. The closer the record date to the general meeting, the less room there will be for investors to abuse of the effects of record date capture. However, an overreduction of the time gap between record date and the general meeting may lead to undesired collateral effects. In order for any record date system to work efficiently, the time gap between the record date and the general meeting should be wide enough to allow all relevant information to be fully transmitted from the end investors to the issuer and vice versa. This is especially true in cases where the relevant information has to travel either all the way up or all the way down the holding chain (chain approach). With view to make sure they dispose of a sufficient number of days to transmit all relevant communications to the issuer, it is standard practice that intermediaries set a date prior to the meeting within which they must receive all requests for meeting participation and/or voting decisions from their clients<sup>69</sup>. This further date is usually referred to as the “cut-off date”<sup>70</sup>. The problem is that each intermediary usually sets his own cut-off date, on the basis of an estimate of the time necessary to process relevant data and pass it to the next level of the holding chain. If the record date is too close to the general meeting, the cut-off date set by the final-layer intermediary may lie on a day prior to the record date itself<sup>71</sup>. If this is the case, beneficial investors are called to make voting decisions and to prove their entitlement to vote before the relevant date for shareholder enfranchisement. In consequence, an investor who became a shareholder after the cut-off date, but before the record date, may not be granted the power to participate to the

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<sup>67</sup> COMMITTEE ON CORPORATE LAWS OF THE ABA SECTION OF BUSINESS LAW (2009), p. 156.

<sup>68</sup> DE LUCA, N. (2010b), p. 317.

<sup>69</sup> SIMMONS, M. and DALGLEISH, E. (2006), p. 338.

<sup>70</sup> UNANYANTS-JACKSON, E. (2007), p. 80.

<sup>71</sup> GARGANTINI, M. (2012), p. 179.

meeting and to decide how to vote his shares, although he appears to be the entitled shareholder as of the record date.

### 3.4.2 *The EU approach: tackling empty voting through enhanced disclosure*

Both the approach of the US lawmaker and the approaches of the different EU Member States to the problem of empty voting have significant disadvantages and downsides. It is therefore arguable that another legal strategy must be adopted to reduce the negative effects of empty voting. There is general agreement that the best way to tackle empty voting is transparency and disclosure. It is widely known that the acquisition or the alienation of certain thresholds of voting rights in a listed company triggers the duty of the holder to notify the company of the proportion of voting rights he holds<sup>72</sup>. The company is then under obligation to disclose that same information to the public. From a generic perspective, empty voting is attractive as long as it is not disclosed to the market. Disclosure of empty voting (and especially negative voting) would spur activist investors to engage in new techniques for increasing their corporate influence without harming the governance of investee companies<sup>73</sup>. As has already been said, there is a whole lot of different methods that may be used to achieve empty voting, apart from record date capture. If disclosure duties were to be extended to investors who hold (directly or indirectly) financial instruments with an economic effect similar to the holding of shares, the market would dispose of sufficient information to spot the existence of net short positions in the company that may lead to negative voting<sup>74</sup>. On the other hand, the enhancement of disclosure duties is a great way to prevent cases of hidden ownership. “Hidden ownership” occurs whenever an investor has economic ownership that disclosure rules do not cover<sup>75</sup>. However, hidden ownership may include informal voting rights, so the investor is entitled to vote as if he were a formal shareholder. This situation is described as hidden “morphable” ownership<sup>76</sup>. Just like empty voting, hidden ownership may be intentional. There is empirical evidence that investors are motivated to evade disclosure if they intend to take over a company and

<sup>72</sup> Directive 2004/109/EC of 15 December 2004, Article 9, paragraph 1.

<sup>73</sup> ČULINOVIĆ-HERC, E. and ZUBOVIĆ, A. (2015), p. 160.

<sup>74</sup> ČULINOVIĆ-HERC, E. and ZUBOVIĆ, A. (2015), pp. 152-153.

<sup>75</sup> Just like the term “empty voting”, also the term “hidden ownership” was coined by HU, H.T.C. and BLACK, B. (2006a).

<sup>76</sup> HU, H.T.C. and BLACK, B. (2006a), p. 826.

want the takeover bid to come as a surprise when they acquire the controlling block<sup>77</sup>. Indeed, if the market recognized the investor's inclination for a takeover, the share price of the company would increase. This is because, after the launch of the takeover, the bidder shall never offer less than the market price of the shares<sup>78</sup>. By holding his portfolio through different forms of indirect holdings, such as equity swaps and fiduciary agreements, the intended bidder might conceal the economic stake he has in the company until he obtains the controlling block<sup>79</sup>.

The course taken by the EU legislator over the last few years clearly aims towards enhanced transparency and disclosure. The Transparency Directive<sup>80</sup>, as amended by Directive 2013/50/EU<sup>81</sup> extends disclosure rules to include both direct and indirect holdings of financial instruments with an economic effect that is equal to the holding of shares, whether physically- or cash-settled<sup>82</sup>. In order to determine the amount of indirect voting rights attached to each financial instrument, thresholds triggering the disclosure duties under Article 9 are now to be calculated by reference to «*the full notional amount of shares underlying the financial instrument*»<sup>83</sup>. In cases of financial instruments which only confer a right to a cash settlement, «*the voting rights are calculated on a "delta-adjustment" basis by multiplying the notional amount of underlying shares by the delta of the financial instruments*»<sup>84</sup>. In the interest of full transparency as regards the nature of the different holdings, the notification by the holder shall separately disclose the number of holdings of shares and the number of holdings of financial instruments, respectively<sup>85</sup>. This way, the investor community is

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<sup>77</sup> With this regard, an important court case in Germany (*Schaeffler Group v. Continental AG*) has been analyzed into detailed by ZETZSCHE, D. (2009), pp. 118-127. Zetzsche concluded that EU law shall mandate the disclosure of hidden (morphable) ownership, as defined by Hu and Black (2006a).

<sup>78</sup> This situation is usually described as shareholders gaining their "takeover premium". See ČULINOVIĆ-HERC, E. and ZUBOVIĆ, A. (2015), p. 149.

<sup>79</sup> ZETZSCHE, D. (2009), pp. 120-121.

<sup>80</sup> Directive 2004/109/EC of 15 December 2004.

<sup>81</sup> Directive 2013/50/EU of 22 October 2013.

<sup>82</sup> Directive 2013/50/EU of 22 October 2013, Article 13, paragraph 1.

<sup>83</sup> Directive 2013/50/EU of 22 October 2013, Article 13, paragraph 1a.

<sup>84</sup> *Ibid.*

<sup>85</sup> The implementation of Article 13 of the amended Transparency Directive differs in EU Member States. In general, it is possible to identify two groups. A first group of States (including Austria, Bulgaria, Spain and Italy) are of the view that disclosure pertaining to Article 13 should be treated separately from disclosure duties arising under Article 9. On the other hand, a second group of States (including Belgium, Germany, France, Netherlands and Great Britain) prescribes that, for the calculation of relevant thresholds under Article 9, investors are under obligation to aggregate voting rights from shares and voting rights from other financial instruments.

provided with a deeper insight into the nature of the position of the notifying holder. In consequence, the public of investors can make better predictions about how the holder will exercise his voting power, either direct or indirect<sup>86</sup>. With specific regard to empty voting, the Transparency Directive specifies that only long positions shall be taken into account for the calculation of voting rights. It is forbidden to net off long positions with short positions relating to the same underlying issuer<sup>87</sup>. It is also provided that, even though the holder has already notified the voting rights underlying financial instruments, such voting rights shall be notified again when the holder has purchased the underlying shares and such acquisition results in a total number of voting rights reaching or exceeding the thresholds under Article 9<sup>88</sup>. This way, the investor community is kept updated about changes in the nature of relevant holdings. The Transparency Directive also tackles the problem of empty voting through the practices of stock lending and share borrowing, which may also occur in the period between the record date and the general meeting<sup>89</sup>. Article 10 provides that the notification duties under Article 9 shall apply to any person or legal entity which is entitled to acquire, to dispose of or to exercise voting rights held by third parties *«under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question»*<sup>90</sup>. In order for this provision to result applicable, a time requirement (temporary transfer) and an economic requirement (transfer for consideration) shall be met. Therefore, disclosure duties under the Transparency Directive shall not apply when shares are lent for free. It is arguable that this legal provision is meant to distinguish between “good” and “bad” forms of empty voting. Where the price charged for the lent shares is zero, the reason for the short-term transaction may lie in information asymmetries<sup>91</sup>, so small shareholders who are actually interested in their voting rights have incentives to gratuitously transfer their shares to activist investors who have more information about how to vote them properly<sup>92</sup>. This leads to the concentration of voting rights in the

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<sup>86</sup> ČULINOVIĆ-HERC, E. and ZUBOVIĆ, A. (2015), p. 151.

<sup>87</sup> Directive 2013/50/EU of 22 October 2013, Article 13, paragraph 1a.

<sup>88</sup> Directive 2013/50/EU of 22 October 2013, Article 13a, paragraph 2.

<sup>89</sup> Paragraph 3.3.

<sup>90</sup> Directive 2013/50/EU of 22 October 2013, Article 10, letter (b).

<sup>91</sup> CHRISTOFFERSEN, S.E.K. et al. (2007), pp. 2909-2911.

<sup>92</sup> Paragraph 3.3.

hands of few activist investors, who are capable of taking fully-informed voting decisions. On the other hand, in most cases where shares are lent for a consideration, share lenders merely intend to seek a profit from short-term transfers and have no voting purposes whatsoever<sup>93</sup>. Activist investors with a negative interest in the company could take advantage of such a situation to collect voting rights from small shareholders seeking for profits and then use them to the detriment of the company<sup>94</sup>. To put it simply, the joint provisions of Article 9 and Article 10 (b) of the Transparency Directive have two main effects. On the one hand, such provisions allow for the optimal allocation of voting rights which may follow to share lending practices. If free lending of shares had to be disclosed, the costs of compliance with disclosure duties might refrain small shareholders from lending their shares and activist investors from borrowing them. In consequence, the shares held by minority investors would probably remain unvoted, leading to increased levels of rational apathy. On the other hand, Articles 9 and 10 (b) reduce the scope for negative voting by requiring the disclosure of share lending for consideration<sup>95</sup>.

In conclusion, the EU rules on shareholder disclosure make for a fully-integrated legal regime which aims at tackling empty voting in all (or, at least, most) of its possible forms and manifestations. The proposal of Hu and Black (2006a, pp. 864-886) to reform the shareholder disclosure system in the United States wants to achieve a similar result<sup>96</sup>. However, ownership disclosure rules only apply at the crossing of the

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<sup>93</sup> HU, H.T.C. and BLACK, B. (2006a), p. 857.

<sup>94</sup> GARGANTINI, M. (2012), p. 270.

<sup>95</sup> It is noteworthy that the amending Directive of 2013 did not address Article 10 of the Transparency Directive. The EU lawmaker therefore missed the opportunity to specify who, between the lender and the borrower, is obliged to disclose the transaction. This question has divided Member States for a long time.

In Germany, the amendment of Article 25 of the *Wertpapierhandelsgesetz* led to the conclusion that both the lender and the borrower shall comply with disclosure duties. In France, EU laws had been originally interpreted as meaning that the disclosure duties remain with the lender. However, the French lawmaker has introduced a new disclosure requirement in Article L225-126 of the *Code de commerce*. According to this new provision, if a person holds more than 0.5% of voting rights by virtue of an agreement which gives him the duty to resell or return the respective shares to the assignor, that person is obliged to communicate the total number of voting rights he temporarily holds to both the issuer and the *Autorité des marchés financiers*. In the UK, the Disclosure and Transparency Rules provide that the duty to notify lies with the borrower (FSA Handbook, DTR 5.2). In Italy, paragraph 2 of Article 118 of *Consob* Regulation 11971/1999 provides that, when the shares are subject to security lending or contango transactions, the disclosure duties lie both with the borrower and the lender, although there are some exceptions under paragraph 3 of Article 119.

<sup>96</sup> Hu and Black disapprove the shareholder disclosure system under SEC Rule 13d-1, which is based on the filing of Schedules 13D and 13G and applies to 5% shareholders. In particular, the two authors claimed that disclosure under Schedules 13D and 13G is based on “beneficial ownership” as defined by

relevant thresholds prescribed by law. Empty voting may occur even below such thresholds, although it will have a lower impact on the voting outcome. In these cases, the rules on shareholder identification may help to reduce the externalities arising from negative voting. By triggering an identification procedure, the company can collect accurate information about the distribution of equity holdings as of the day of the general meeting. Shareholder identification therefore allows the company to verify the actual ratio of votes cast and underlying share ownership and to identify potential conflicts of interests on the part of enfranchised investors<sup>97</sup>. In short, although shareholder identification does not prevent empty voting, it does reveal forms of decoupling that might create scope for it. Moreover, it is conceivable that investors who are aware that an identification procedure is ongoing would refrain from engaging in empty voting, given that the outcome of the procedure may shed a light on bad voting practices.

### 3.5 The transmission of information about the identity of entitled shareholders

The main reason for the introduction of a record date lies in the need to allow the company to efficiently organize the general meeting. In order to do so, the company must draw up a list of entitled shareholders in due time before the meeting. However, the complex functioning of central detention systems and the large use of omnibus accounts, where the shares of several holders are indistinctively registered, lead to a situation in which intermediaries have a monopoly on the identifying data of shareholders<sup>98</sup>. More precisely, any link of the holding chain has a monopoly on the identifying data of its clients, so the information about the identity of end investors

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SEC, which focuses on voting ownership rather than economic ownership. In consequence, the disclosure system does not cover OTC derivatives, such as cash-settled equity swaps, and hedging agreements which might create scope for empty voting. Moreover, other authors (Giglia, 2016) focused on the issues arising from Schedule 13G, which is a short-form filing option and requires less information than the 13D. Indeed, the choice between the 13D or the 13G often comes down to a subjective factor: the self-professed passivity of the investor. One risk is that truly activist investors may claim their passivity with view to avoid full disclosure of their positions under Schedule 13D.

On the other hand, the shareholder disclosure system based on SEC Rule 16a-1(a), which applies to 10% shareholders, is actually based on economic ownership. However, this provision does not cover share borrowing and lending positions which affect voting ownership.

In light of these (and other) assumptions, Hu and Black propose the adoption of an “integrated ownership disclosure” regime, which should be based on a uniform definition of “economic” beneficial ownership and should cover share borrowing and stock lending practices.

<sup>97</sup> GARGANTINI, M. (2012), p. 328.

<sup>98</sup> GARGANTINI, M. (2012), p. 217.

usually remains with the final-layer intermediaries<sup>99</sup>. In view of the above, it is arguable that the efficiency of the record date system depends on whether the information about the identity of shareholders as of the record date reaches the issuer in due time before the meeting. Therefore, an introductory study on the transmission techniques up the holding chain (bottom-up communications) is essential to better understand how the record date system has been implemented in the different European jurisdictions.

### 3.5.1 *Issues arising from indirect holding systems*

First of all, it has to be said that bottom-up transmission techniques differ significantly depending on the specific traits of holding systems. In case of indirect holding systems, only the legal shareholder as of the record date is entitled to vote. This is the case of the UK system, which starts from the presumption that all of the rights attaching to the shares are exercisable by the legal owner (the intermediary), by virtue of being registered as a member on the books of the company<sup>100</sup>. The legal system therefore provides for some techniques aimed at enfranchising beneficial owners who might want to exercise the voting rights attaching to the shares they indirectly hold.

First, the beneficial owner may instruct the intermediary to vote on his behalf. British courts of law have recognized the right of beneficial owners to instruct their intermediaries for a long time<sup>101</sup>. The 2006 Companies Act has strengthened the position of beneficial owners by providing that, where an intermediary is holding shares for more than one investor, then the rights attaching to such shares (included voting rights) need not to be voted in the same way<sup>102</sup>. This means that the registered holder can split his holdings and use the votes attaching to the shares in different ways, with view to accommodate the diverging wishes of all underlying investors. In any case, if the holding chain is made up of several intermediaries, voting instructions shall be passed from one intermediary to the other until it reaches the member of the company (chain approach). With this regard, the system of indirect holdings and the

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<sup>99</sup> Paragraphs 2.3.1 and 2.3.2.

<sup>100</sup> This is because the legal owner is a party to the articles of the company. *Companies Act* 2006, Section 33.

<sup>101</sup> *Kirby v. Wilkins* [1929] 2 Ch 444, 454 per Romer J.

<sup>102</sup> *Companies Act* 2006, Section 152, paragraph 1.

complexity of the holding chain may be detrimental to this method of enfranchising beneficial owners. The issuer is not requested to verify whether there is a discrepancy between the votes cast by the registered holder and the voting instructions coming from beneficial owners. To tell the truth, the company does not even have to verify whether the shareholder is holding his shares in his own interest or on behalf of others. The onus of verification of both the identity of the beneficial owner and the voting instructions is on the intermediary<sup>103</sup>.

Despite the clear benefits that such a solution brings about<sup>104</sup>, there have been problems in practice with this method of enfranchising beneficial investors. First, there is no legal provision which requires the intermediaries to seek instructions as to how the shares should be voted. It is the beneficial investors who shall take the initiative to give voting instructions to their intermediaries. This may result in a strong impediment to the active involvement of beneficial investors in the governance of the company. Second, the legal system starts from the presumption that intermediaries are in a better position than the company to verify the identity of beneficial investors. Although this may be true in theory, the widespread use of omnibus accounts and the application of the no-look-through principle make it impossible for the registered holder to verify instructions received all the way down the holding chain<sup>105</sup>. Instead, votes are usually passed up the holding chain without the registered holder being able to identify the ultimate beneficiary and the ultimate origins of voting instructions.

As an alternative to casting instructed votes, the intermediary may delegate to the beneficial owner (or to a third party nominated by the beneficial owner) the voting rights attaching to its shares. The 2006 Companies Act has strengthened and extended the ability of registered holders to appoint a proxy. First, Section 324 has provided that all shareholders shall be granted the right to appoint a proxy and that such right cannot be overridden by the articles of the company<sup>106</sup>. Second, all shareholders are given the

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<sup>103</sup> PAYNE, J. (2010), p. 198.

<sup>104</sup> Since the burden of verification must be borne by the intermediary, the company is utterly excluded from any flaws in the voting process. Therefore, in case of misuse, non-compliance or loss of voting instructions, the beneficial investor who gave such instructions can never question the validity of decisions adopted by the company in the general meeting. Any claim relating to the flaw and use of voting instructions shall be made against the closest intermediary, who in turn can sue the next intermediary, and so on up the holding chain.

<sup>105</sup> HAINSWORTH, A. (2007), pp. 11-15.

<sup>106</sup> *Companies Act 2006*, Section 324, paragraph 1.

ability to appoint multiple proxies in relation to a specific meeting, provided that each proxy is appointed to vote different shares held by the same shareholders<sup>107</sup>. This allows every beneficial owner to vote his shares according to his wishes. Usually, proxies are appointed for one specific meeting. In alternative, the registered holder may vest a proxy voting agency with a permanent power of attorney, if requested to do so by the beneficial owner<sup>108</sup>.

A series of practical problems arise from this second method for enfranchising beneficial investors. Whereas the transmission of voting instructions does not involve the company, the transmission of appointments of proxies inevitably does, since the company shall allow proxies appointed by the registered holders to participate in the meeting and to cast votes. Therefore, the law provides that any company has the power to set a deadline prior to the meeting within which all appointments of proxies shall be received (issuer deadline). Such a deadline shall never lie more than forty-eight hours ahead of the meeting<sup>109</sup>. It is interesting that the maximum term of forty-eight hours before the meeting not only applies to the issuer deadline, but also to the record date<sup>110</sup>. This means that, in most cases, the record date and the issuer deadline are particularly close. In some cases, the two dates may even overlap. This situation leads to a series of practical issues. Indeed, in response to the introduction of an issuer deadline, any intermediary in the holding chain is usual to set a term within which they shall receive all appointments of proxies from their clients (cut-off date). The cut-off date is based on an estimation from the single intermediary of the time necessary to pass the appointments of proxies to the next level in the holding chain. The longer and the more complex the chain, the further away from the issuer deadline the cut-off date will be set. The result of such a system is that, sometimes, not only does the cut-off date set by the final-tier intermediary precede the issuer deadline (as it should), it also precedes

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<sup>107</sup> *Companies Act 2006*, Section 324, paragraph 2.

<sup>108</sup> According to Section 145 of the 2006 Companies Act, registered holders may delegate a nominated person to exercise all or any specified rights attaching to its shares on a permanent basis. Usually, the nominated person is either the beneficial owner or a third party nominated by the beneficial owner. However, the system under Section 145 raises some practical problems. Indeed, the nominated person can never replace the registered holder as a member of the company, so the relationship of the company is with the registered holder alone. The registered holder thus remains the only person capable of enforcing the delegated rights against the company, which is shielded from any claims eventually coming from the nominated persons.

<sup>109</sup> *Companies Act 2006*. Section 327, paragraph 2.

<sup>110</sup> *Uncertificated Securities Regulations 2001*, Section 41, paragraph 1.

the record date<sup>111</sup>. If this is the case, the beneficial investor who purchased the company's shares in the period between the cut-off date and the record date will be unable to request his intermediary to be appointed as a proxy. The problem gets even worse in cases where the intermediary sets a single cut-off date (ahead of the record date) for receiving both appointments of proxies and voting instructions<sup>112</sup>. As a consequence of this practice, investors shall lodge votes before the time for determining who is entitled to vote actually comes. Needless to say, the record date system then loses all meaning.

In addition to this, the practice of cut-off dates could create scope for overvoting. As has already been said, any custodian sets its own cut-off date, which may differ from all others. It is therefore possible for share transfers to be settled right in between the cut-off date of the seller's custodian and the cut-off date of the buyer's custodian. If this is the case, both the seller and the buyer will be entitled to give voting instructions or to be appointed as proxies for the same shares. Where the duplication of voting rights does not lead to a situation where the number votes cast is greater than the amount of shares owned by the registered holder, the company will not be able to uncover this failure of the voting procedure.

### 3.5.2 *The functioning of bottom-up communication channels in direct holding systems*

In case of direct holding systems, it is the beneficial owner who is deemed as a shareholder. In consequence, the beneficial owner has the power to exercise all rights flowing from the shares he holds. When direct holding systems are concerned, the functioning of bottom-up communication procedures depends on the legal value of the information contained in the share register<sup>113</sup>. In some jurisdictions, such as Germany and France, the share register must be updated right after the settlement of any transfer of registered shares. Therefore, the right to vote shall be conferred to all investors who are registered in the share register as the record date expires. This means that, by the

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<sup>111</sup> The problem of premature cut-off dates in the UK has been analyzed in depth by MYNERS, P. (2007) p. 8.

<sup>112</sup> UNANYANTS-JACKSON, E. (2007), p. 80. The practice of cut-off dates is pretty common even with regard of voting instructions. There is indeed the need to make sure that voting instructions reach the registered holder in time for the general meeting.

<sup>113</sup> The function performed by the share register in the European jurisdictions have been discussed in paragraphs 2.3.1 and 2.3.2.

time of the record date, companies already know the identity of entitled shareholders, since such information had been previously forwarded by intermediaries in the holding chain. On the other hand, in countries such as Italy, the law does not require the share register to be updated accordingly to the share transfer that has just been settled<sup>114</sup>. The investor who is entitled to vote thus corresponds to the owner of the intermediated account in which the shares are registered. Such a system requires intermediaries to activate in order to communicate the identity of entitled shareholders to the issuer. This being said, it is useful to examine how the transmission procedure actually unwinds in the different Member States.

In Germany, the rules on shareholder identification oblige intermediaries to communicate the identity of new shareholders to the issuer on a daily basis<sup>115</sup>. Therefore, the right to exercise votes attaching to registered shares arises from the entry of the shareholder's data in the *Aktienregister*<sup>116</sup>. Despite the fact that the share register contains all information needed for determining who is entitled to vote, companies may have an interest in knowing which shareholders actually are actually going to attend the meeting and to exercise their voting rights. For this reason, the articles of the company may provide that attendance at the meeting and exercise of voting rights shall require shareholders to give notice of their attendance prior to the meeting<sup>117</sup>. In this case, the issuer deadline for the reception of notices of attendance ends up working as a fully-fledged record date. Shareholders intending to participate to the meeting must request his respondent bank to deliver a notice of attendance (*Anmeldung*), which shall reach the issuer at least six days prior to the meeting. The articles of the company may provide for a shorter deadline<sup>118</sup>.

The procedure for determining who is entitled to vote differs significantly when bearer shares are concerned. Indeed, bearer shareholders are not registered on the company's books<sup>119</sup>, so the company does not have the ability to determine who are the persons entitled to vote by simply consulting the share register. Instead, the bank with which

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<sup>114</sup> *Codice civile*, Article 2355, paragraph 5. See Paragraph 2.3.1.

<sup>115</sup> *Aktiengesetz*, § 67. See paragraph 2.3.2.

<sup>116</sup> *Aktiengesetz*, § 123 (5).

<sup>117</sup> *Aktiengesetz*, § 123 (1), sentence 1.

<sup>118</sup> *Aktiengesetz*, § 123 (2).

<sup>119</sup> Paragraph 2.4.2.

bearer shares have been deposited<sup>120</sup> shall issue a specific certificate in textual form (*Text-form Nachweis*). Such certificate proves the identity of the investor entitled to attend the meeting and to cast the votes flowing from bearer shares<sup>121</sup>. The certificate shall make reference to the twenty-first day prior to the meeting and must be delivered to the issuer not later than six days ahead of the same meeting<sup>122</sup>.

It is interesting that German banks have tried to get over the weaknesses of transmission systems that are solidly based on the chain approach, like the one that is usually enforced in the UK. In particular, banks are used to aggregate all communications (*Nachweisen* and *Anmeldungen*) providing proof that their clients are entitled to attend the company's meeting and to vote, whether such communications refer to registered or bearer shareholders<sup>123</sup>. The bank then proceeds to transmit all aggregated information to a depository institute (*Hinterlegungsstelle*). Once collected all communications, the *Hinterlegungsstelle* delivers to the issuer a list of meeting participants. Such list must also reveal the number of votes that each participant is going to be exercising in the upcoming meeting. The issuer then uses the list received from the *Hinterlegungsstelle* to verify the identity of meeting participants. It is therefore arguable that, when banks engage in practices such as the one described above, communications related to the entitlement of shareholders are free to reach the issuer without being passed from one link of the holding chain to the next. The direct transmission of bottom-up communications is enabled by the fact that, according to § 123 of the *Aktiengesetz*, certificates issued by the bank with which the shares have first been deposited (that is, the final-tier intermediary) shall constitute a sufficient proof of the identity of the entitled shareholder<sup>124</sup>. Indeed, such provision must be interpreted as meaning that no proof of the identity of shareholders is needed from the next links up the holding chain.

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<sup>120</sup> Bearer shares are usually held by depository banks in omnibus accounts (*Sammelverwahrung*). With this regard, see DE LUCA, N. (2002), p. 39.

<sup>121</sup> *Aktiengesetz*, § 123 (4), sentence 1. It is noteworthy that such certificate only serves as evidence of the shareholder's entitlement to vote. Indeed, bearer shareholders are entitled to exercise all rights attaching to their shares from the moment when such shares are delivered to them. In case of centrally held or dematerialized shares, the entitlement to exercise shareholders' rights follows to the settlement of the transaction.

<sup>122</sup> *Aktiengesetz*, § 123 (2), sentence 2.

<sup>123</sup> GARGANTINI, M. (2012), pp. 203-204.

<sup>124</sup> *Aktiengesetz*, § 123 (4), sentence 1.

Just like in Germany, French intermediaries are under obligation to send the issuers specific notices (*BRNs*) disclosing the identity of new shareholders at the end of every trading day<sup>125</sup>. The entitlement of register holders to exercise the rights attaching to their shares arises from their entry in the share register. Therefore, companies can determine the list of entitled shareholders as of the record date by simply consulting the share register. Registered shareholders willing to attend the meeting may request the issuance of an admission card (*carte d'admission*). Companies who have only issued registered shares may prefer to send admission cards to all of their shareholders on an individual basis ("push" communication system). Companies engaging in such practices are used to issue a document called Single Form (*formulaire unique*), which contains all information related to the meeting in a standardized format (meeting agenda, proxy vote and remote vote forms, admission card request forms, and others)<sup>126</sup>. The registered shareholder willing to attend the meeting shall request the issuance of his *carte d'admission* by filing the Single Form, which then must be sent to his intermediary. The intermediary then forwards the completed Single Form either to the issuer or to a person nominated by the issuer (*entité de centralisation*)<sup>127</sup>. Anyhow, the investor registered as a shareholder on the books of the company who proves his identity on the day of the general meeting shall be granted attendance<sup>128</sup>, even though he has not requested the issuance of an admission card.

On the other hand, the share register of French issuers does not record the identity of bearer shareholders. The same goes for non-resident shareholders holding their (bearer or registered) shares in an omnibus account (*compte intermédiaire*) opened with an intermediary (*intermédiaire inscrit*)<sup>129</sup>. In these cases, the share register only identifies

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<sup>125</sup> *Règlement général de l'Autorité des marchés financiers*, Article 322-55. See paragraph 2.3.2.

<sup>126</sup> The practice of issuing Single Forms has been proposed for the first time by a 2003 agreement between the representative associations of, respectively, issuers and intermediaries. The objective was the creation of a standardized medium for the circulation of meeting-related information, which is essential to bring the transmission procedure closer to the standards of straight-through processing. However, the issuance of Single Forms is not binding, given that the associations which concluded the agreement are not representative of all interested parties. See GARGANTINI, M. (2009), p. 105.

<sup>127</sup> GARGANTINI, M. (2012), pp. 206-207.

<sup>128</sup> ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVEES (2011), p. 29: «*si l'actionnaire est titulaire de titres de forme nominative, la justification de sa qualité est immédiate, puisqu'il est inscrit en compte d'actionnaires sur les fichiers de la société émettrice. Pour prendre part au vote, les titres de cet actionnaire doivent avoir été enregistrés comptablement le troisième jour ouvré précédant l'assemblée générale à zéro heure, heure de Paris (article R. 225-85 I du code de commerce)*».

<sup>129</sup> *Code de commerce*. Article L228-1. See paragraphs 2.3.2 and 2.4.2.

the *intermédiaire inscrit*, while the information about the identity of beneficial owners remains with the intermediary's books. Bearer shareholders willing to cast votes in the upcoming meeting shall therefore request their *intermédiaires inscrits* to issue a certificate which proves that they are the entitled shareholders<sup>130</sup>. It is noteworthy that the Single Form may also be used for the transmission of the requests for entitling certificates addressed to the *intermédiaire inscrit*. The transmission procedure is then equal to the one that has already been analyzed with regard to registered shareholders. The only difference will be that, in case of bearer shares (or in case of registered shares held by non-resident investors in a *compte intermédiaire*), the Single Form also serves as evidence of the identity of entitled shareholders.

In Italy, the procedure for enfranchising shareholders differs from Germany and France due to the different value given to the entries on the share register. According to a small part of Italian legal doctrine<sup>131</sup>, which this work nonetheless supports<sup>132</sup>, shares of Italian listed companies must be issued in registered form, except for the few cases where special laws provide otherwise<sup>133</sup>. However, the share register of Italian companies does not provide full and accurate information about the identity of shareholders. Indeed, shareholders are entitled to exercise the rights attaching to their shares regardless of the fact that their data have been entered in the share register<sup>134</sup>. A large part of Italian legal doctrine even claims that the entry of the shareholder in the share register is merely optional<sup>135</sup>. Therefore, shareholders willing to participate in the upcoming meeting must request their intermediary to send a communication to the issuer which serves as evidence of their entitlement to vote<sup>136</sup>. In other words, the process for enfranchising registered shareholders of Italian listed companies is similar to the processes for enfranchising bearer shareholders of French and German issuers. Despite the fact that securities are often held in omnibus accounts, all Italian intermediaries are under obligation to create for every single client a separate account

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<sup>130</sup> The procedures for enfranchising bearer shareholders of French and German companies are therefore pretty similar.

<sup>131</sup> GALGANO, F. (2013), p. 206; STAGNO D'ALCONTRES, A. and DE LUCA, N. (2017) pp. 450-451.

<sup>132</sup> Paragraph 2.4.2.

<sup>133</sup> An example is offered by *d. lgs. 24 febbraio 1998, n. 58*, Article 145, which provides for the so-called *azioni di risparmio*. See paragraphs 2.4.2 and 2.4.3.2.

<sup>134</sup> DE LUCA, N. (2015), p. 347; SPADA, P. (1999), p. 418; SALAFIA, V. (2009), p. 870.

<sup>135</sup> DE LUCA, N. (2007), p. 369; MINERVINI, G. (2005), p. 5. See Paragraph 2.3.1.

<sup>136</sup> *D.lgs. 24 febbraio 1998, n. 58*, Article 83-*sexies*. See GALGANO, F. 2013, p. 210; LENER, R. (2011), p. 331; FURGIUELE, L. (2015), p.133; CIAN, M. (2012), p. 114.

registering all movements in securities owned by such client<sup>137</sup>. Clients of the first-tier intermediary may then hold on behalf of their own clients, so they will have to open an account for every single one of them, and so on. Only the investor who holds shares in his own account opened with the final-tier intermediary is deemed as a shareholder and will be entitled to exercise all rights flowing from the shares registered in such account<sup>138</sup>. In order to attend the meeting, shareholders shall request their intermediaries to send to the issuer a communication which confirms that they are entitled to exercise the rights flowing from the shares they own as of the record date. The intermediary to which the request is addressed shall then communicate to the issuer that his client is entitled to attend the meeting and to cast votes. Such a communication shall specify the number of voting rights that the entitled shareholder can exercise, which is determined with reference to the entries in the shareholder's account opened with the final-tier intermediary as of the record date<sup>139</sup>.

But how are communications proving the identity of entitled shareholders transmitted from last-tier intermediaries to the issuer? After the legal reform of 2003, intermediaries spontaneously applied the chain approach to the bottom-up notification procedure. The last-tier intermediary would usually send the communication to the intermediary with which it has opened an omnibus account. Such intermediary would then forward the communication to his own intermediary, and so on until the communication reaches the first-tier intermediary<sup>140</sup>. After receiving the notification, the first-tier intermediary would then issue and send to the company the communication certifying that the shareholder identified by the last-tier intermediary is entitled to attend the meeting<sup>141</sup>.

From a practical point of view, the full application of the chain approach is of doubtful value. There is no reason for the notification proving the identity of entitled shareholders to reach every single intermediary in the holding chain. Indeed, only the final-tier intermediary has first-hand knowledge of the identity of the entitled shareholder, by virtue of having direct access to the separate account with which the

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<sup>137</sup> *D. lgs 24 febbraio 1998*, n. 58, Article 83-*quater*, paragraph 3.

<sup>138</sup> *D. lgs 24 febbraio 1998*, n. 58, Article 83-*quinqüies*, paragraph 1.

<sup>139</sup> *D. lgs 24 febbraio 1998*, n. 58, Article 83-*sexies*, paragraph 1.

<sup>140</sup> The first-layer intermediary is usually the intermediary participating to the central detention system and has an omnibus account opened with the CSD.

<sup>141</sup> Such a practice have been reported by ECKBO, B.E., PAONE, G. and URHEIM, R. (2011), p. 57.

shares of such shareholder have been deposited. Middle links of the holding chain have no means to verify whether the information in the notification issued by the last intermediary is correct<sup>142</sup>. In consequence, where the chain approach is in effect, middle links usually limit themselves to forward to the next level of the holding chain the very same notification that have been received from below. In light of the above, it is arguable that the notification for attendance should be sent from the last-tier intermediary directly to the issuer. Any communication addressing the upper links of the holding chain is futile, since the notification issued by the final-tier intermediary should serve as sufficient evidence that the identified shareholder is entitled to attend the meeting.

Despite the advantages that would stem from the direct transmission of notifications of attendance, the new joint Regulation issued by the Italian securities authority (*Commissione nazionale per le società e per la borsa – Consob*) and the Italian central bank (*Banca d'Italia*) on August 13<sup>th</sup>, 2018, has provided that the person in charge of sending all communications proving the identity of entitled shareholders to the issuer is actually the intermediary participating to the central detention system, i.e. the first intermediary of the holding chain<sup>143</sup>. In other words, the new Regulation of 2018 has reiterated Articles 22 and 27 of the former Regulation<sup>144</sup> of February 22<sup>nd</sup>, 2008, which has been repealed. The Italian regulator has thus forced intermediaries to use the chain approach for the transmission of notices of attendance, given that such notices shall reach the first-tier intermediary before reaching the issuer.

Needless to say, the general use of the chain approach increases the time necessary for the relevant communications to reach the issuer. This spurs intermediaries to set cut-off dates within which their clients shall request the issuance of their notices of attendance. The use of cut-off dates that expire before the record date gives birth to the same problems that have been analyzed when talking about indirect holding

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<sup>142</sup> The best thing that middle links of the holding chain can do is to verify that number of voting rights the notification refers to does not exceeds the amount of voting shares registered in the omnibus account of the previous intermediary.

<sup>143</sup> *Provvedimento Consob-Banca d'Italia del 13 agosto 2018 – Disciplina delle controparti centrali, dei depositari centrali e dell'attività di gestione accentrata ("provvedimento unico sul post-trading")*, Article 42; Article 49, paragraph 1.

<sup>144</sup> *Provvedimento Banca d'Italia/Consob del 22 febbraio 2008 – Regolamento recante la disciplina dei servizi di gestione accentrata, di liquidazione, dei sistemi di garanzia e delle relative società di gestione*.

systems<sup>145</sup>. However, in order to prevent both intermediaries from setting premature cut-off dates and issuers from setting premature deadlines, the legislator has introduced some provisions aimed at regulating the timing of the bottom-up transmission procedure. In particular, Article 83-*sexies* of *d. lgs. 24 febbraio 1998, n. 58* provides that all notices of attendance shall reach the issuer no later than the end of the third trading day prior to the date of the general meeting<sup>146</sup>. On the other hand, Article 42 of the aforementioned joint Regulation provides that the last intermediary shall take into account all requests for notices of attendance coming from their clients until the end of the second working day prior to the date within which such notices shall reach the issuer<sup>147</sup>. It is also useful to remember that, according to Article 83-*sexies* of *d. lgs. 24 febbraio 1998, n. 58*, the record date lies on the seventh trading day prior to the date of the general meeting<sup>148</sup>. The analysis of these provisions of law leads to the conclusion that shareholders as of the record date may request their intermediary to issue a notice of attendance until the end of the fifth trading day prior to the meeting. On the other hand, intermediaries are always granted a minimum of two working days<sup>149</sup> for complying with the duty of transmitting such notice to the issuer. Anyhow, a period of only two working days may not be sufficient for intermediaries to transmit all relevant information to the issuer, especially in case of a holding chain including one or several foreign intermediaries. This is the main reason why some foreign intermediaries are used to set their cut-off dates prior to the term under Article 42 of the joint Regulation<sup>150</sup>.

### 3.5.3 *Possible improvements of bottom-up communication channels in light of national market practices*

On the base of the analysis above, it is arguable that one of the major hurdles to the efficient flow of information from shareholders to issuers is the adoption of the chain approach. The necessary involvement of all links of the holding chain in the

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<sup>145</sup> Paragraph 3.5.1.

<sup>146</sup> *D. lgs. 24 febbraio 1998, n. 58*, Article 83-*sexies*, paragraph 4.

<sup>147</sup> *Provvedimento Consob-Banca d'Italia del 13 agosto 2018 – Disciplina delle controparti centrali, dei depositari centrali e dell'attività di gestione accentrata ("provvedimento unico sul post-trading")*, Article 42, paragraph 2.

<sup>148</sup> *D. lgs. 24 febbraio 1998, n. 58*, Article 83-*sexies*, paragraph 2.

<sup>149</sup> From the beginning of the fourth working day to the end of the third working day prior to the meeting.

<sup>150</sup> GARGANTINI, M. (2012), pp.253-254.

communication procedure makes the corporate dialogue slow and cumbersome, especially in the context of corporate actions where the time factor plays a key role. In the words of Strenger and Zetzsche, «*the chain approach sacrifices speed in favor of apparent accuracy*»<sup>151</sup>. Accuracy in determining a shareholding sounds like the most important aspect of voting, but it does not help at all if investors are prevented from voting due to the short period of time that remains between receiving the voting entitlement and the deadline for sending the notice of participation back to the issuer. Over the course of the years, both national jurisdictions and the private sector have come up with different techniques aimed at overcoming the obstacles arising from the chain approach. Moreover,

As has already been said<sup>152</sup>, the use of the chain approach in the UK is dictated by the peculiar traits of the Anglo-Saxon holding system. The lack of any legal relationship between the issuer and the beneficial holder, whose position against the issuer is explained by the existence of a chain of trusts, requires relevant information to be passed on from one level of the holding chain to the next. In such a system, the most significant attempts to free the corporate dialogue from the burdens of the chain approach have come from the private sector. In particular, CREST has developed an electronic proxy voting service which allows both issuers and beneficial owners to use electronic formatted messages for the transmission of all meeting related information, whether such information must be passed up or down the holding chain<sup>153</sup>. With specific regard to bottom-up communication channels, this system may be used for the transmission of both appointments of proxies and voting instructions. Even though it does not affect the functioning of the chain approach, the service provided by CREST significantly reduces the time of the transmission procedure, as it prevents intermediaries from manually revising the message received before forwarding it to the next link of the holding chain. The quicker the transmission procedure, the smaller the scope for the use of premature cut-off dates<sup>154</sup> by intermediaries. Furthermore, the use of electronic and standardized communications may even make the issuer deadline

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<sup>151</sup> STRENGER, C. and ZETZSCHE, D. (2012), p. 525.

<sup>152</sup> Paragraphs 2.4.2 and 3.5.1.

<sup>153</sup>EUROCLEAR UK (2011), pp. 1-4.

<sup>154</sup> Paragraph 3.5.1.

useless, thus allowing proxy instructions to be input at any time from the initial input of the meeting announcement up to the close of business on the day of the meeting<sup>155</sup>. On the other hand, the chain approach is less used in countries where direct holding systems are in place, given that notifications coming from the last-tier intermediary are usually considered as sufficient evidence of the fact that the shareholder the notification refers to is entitled to attend the meeting and to cast votes. Furthermore, market practices in direct holding systems aim at the further simplification of bottom-up transmission procedures. In Germany, the practice of aggregating *Anmeldungen* and *Nachweisen* related to all clients of the same final-layer intermediary reduces the number of bottom-up communications, while the appointment of a *Hinterlegungsstelle* allows the issuer to better verify the identity of entitled shareholders. In France, the use of Single Forms allows shareholders to aggregate all bottom-up communications in a single standardized message, the transmission of which is usually facilitated by the issuer appointing an *entité de centralisation*<sup>156</sup>.

On the contrary, the Italian regulator has made the chain approach compulsory in 2008<sup>157</sup>. The necessary use of the chain approach has been confirmed by the new joint Regulation of 2018<sup>158</sup>. Entitling communications shall therefore reach the intermediary participating to the central detention system before reaching the issuer, because the first-tier intermediary is responsible for verifying that the number of voting rights counted by the lower levels of the holding chain do not exceed the amount of holdings registered in his account opened with the CSD. Despite this, the Italian CSD *Monte Titoli s.p.a.* has developed a web-based platform (MT-X) which offers a communication service including the transmission of meeting-related information in a standardized format (*flussi informativi standardizzati*– FIS service). The peculiar functioning of such platform allows for the direct transmission of bottom-up communications in a highly standardized format<sup>159</sup>. However, empirical evidence

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<sup>155</sup> EUROCLEAR UK (2011), p. 3.

<sup>156</sup> Paragraph 3.5.2.

<sup>157</sup> *Provvedimento Banca d'Italia/Consob del 22 febbraio 2008 – Regolamento recante la disciplina dei servizi di gestione accentrata, di liquidazione, dei sistemi di garanzia e delle relative società di gestione*. See paragraph 3.5.2.

<sup>158</sup> *Provvedimento Consob-Banca d'Italia del 13 agosto 2018 – Disciplina delle controparti centrali, dei depositari centrali e dell'attività di gestione accentrata ("provvedimento unico sul post-trading")*, Articles 42 and 49.

<sup>159</sup> For more information about the functioning of the FIS service, see ABI, ASSONIME and ASSOSIM (2011). In particular, in order for intermediaries who do not have an account opened with the CSD to

shows that the vast majority of Italian intermediaries still have a preference for the chain approach. There are two main reasons for this. First, the costs for the participation to communication platforms are usually borne by intermediaries, since issuers have a free access to the service<sup>160</sup>. Second, first-tier intermediaries are usually against the adoption of direct transmission channels, since they are accountable for any errors in the calculation of voting rights owned by each shareholder.

#### 3.5.4 *Possible improvements of bottom-up communication channels in light of the amended Directive on shareholders' rights*

Overall, it is arguable that transmission procedures have reached a significant level of standardization in most national jurisdictions. However, the same thing cannot be said for cross-border communications. The cross-border transmission of information is indeed far from straight forward and is subject to costly, time-consuming and inefficient obstacles<sup>161</sup>. In its 2017 Report, ESMA has showed that national practices diverge significantly with regards to the procedures for transmitting entitling notifications and notices of attendance from the shareholders to the issuer<sup>162</sup>. Due to the meager level of standardization, the use of the chain approach in a cross-border context is usually unavoidable. The German system offers a significant example of this. As we have already seen, German bottom-up communication channels are usually based on a direct approach rather than a chain approach. This is because § 123 of the *Aktiengesetz* considers the communications coming from last-tier intermediaries to serve as sufficient evidence of the identity of entitled investors<sup>163</sup>. However, despite the general tendency to treat all communications coming from EU intermediaries on an equal footing, the provision in § 123 does not always apply to foreign intermediaries. Therefore, if it is based outside of Europe, the last-tier intermediary will not be able to send confirmations of entitlement directly to the issuer or to the appointed *Hinterlegungsstelle*. On the contrary, the communication will usually be

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use the FIS service, it is essential that the first-tier intermediary delegates to them the transmission of communications regarding the identity and the participation of entitled shareholders.

<sup>160</sup>GARGANTINI, M. (2012), p. 209.

<sup>161</sup> INTERNATIONAL CORPORATE GOVERNANCE NETWORK (2014).

<sup>162</sup> EUROPEAN MARKETS AND SECURITIES AUTHORITY (2017b), p. 36.

<sup>163</sup> *Aktiengesetz*, § 123 (4), sentence 1.

bounced up the holding chain from one intermediary to the other, until it finally reaches an intermediary that is either based in Germany or in another EU country.

Another major hurdle to the efficiency of cross-border communication channels is the poor development of electronic communication systems suitable for being operated in different countries. European communication systems were indeed developed in the days when everything was processed manually. Over the course of the years, parties in the chain of intermediaries have been increasingly using electronic means of communication for the transmission of meeting-related information. However, the operability of most electronic platforms used by intermediaries is usually limited to the national territory. This means that the manual processing of bottom-up communications is still very common practice, especially in cross-border settings<sup>164</sup>. Indeed, the existence of many different formats makes the process very manually intensive and prone to error, as there is a need for the involvement of people with appropriate training to fully understand the contents of the messages and feed them into the system. Therefore, unless a standard mechanism for transmitting information and a standard message format for every particular type of information are widely accepted, straight-through-processing and full automation of the process cannot be achieved.

Having acknowledged all the aforementioned issues, the amended Directive on shareholders' rights has laid down a series of provisions aimed at reaching a minimum level of standardization and automation for cross-border communication channels. First off, as has already been said<sup>165</sup>, the Directive lays down a general principle according to which relevant information shall not be bounced from one level of the holding chain to the next unless strictly necessary<sup>166</sup>. Such principle shall apply to all forms of communications between issuers and shareholders, regardless of the direction in which the single message is headed. In compliance with this provision, the direct approach for the transmission of entitling notifications shall be made mandatory, at least in countries where direct holding systems are in place, such as Italy. With this regard, it is arguable that the new Italian joint Regulation of 2018 missed the

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<sup>164</sup> UNANYANTS-JACKSON, E. (2007), p. 75.

<sup>165</sup> Paragraph 2.4.

<sup>166</sup> *Directive 2017/828/EU of 17 May 2017*, Article 3b, paragraph 5.

opportunity to amend the provisions laid down in Articles 22 and 27 of the previous joint Regulation of 2008.

However, this general principle will remain on paper if communication formats around Europe do not reach a sufficient level of standardization. Indeed, due to the lack of standardized formats widely recognized, intermediaries often proceed to the manual revision of communications received from cross-border entities, with a view to adapt such communications to national standards. In order to reduce the scope for the manual involvement of intermediaries in the transmission procedure, the EC implementing Regulation 2018/1212 has provided for the introduction of standardized formats for specific communications, such as confirmations of entitlement<sup>167</sup> and notices of attendance<sup>168</sup>. It is therefore arguable that a properly authenticated message complying with the standard formats provided for by the European Commission may be directly transmitted from the final-layer intermediary to the issuer, regardless of the Member State in which such intermediary is based. Furthermore, given the extraterritorial effects of the amended Directive on shareholders' rights<sup>169</sup>, there is no reason for issuers to reject direct communications coming from intermediaries based outside the European Economic Area, as long as the origin of such communications has been properly authenticated. It has to be pointed out that, consistent with the principle of proportionality<sup>170</sup>, the implementing Regulation only includes minimum standardization requirements. The further standardization of communication channels is entrusted to the private sector. In particular, market practices shall further regulate the communication formats according to the needs of different markets, with a view to make the cross-border transmission procedure as flowing and as versatile as possible.

As has already been said, the standardization of bottom-up communications is a prerequisite for the full automation of the transmission process. More precisely, standardization and automation are two sides of the same coin: the use of a standard message for every particular type of information removes any scope for manual processing, thus allowing the development of a communication channel which is

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<sup>167</sup> *Commission Implementing Regulation 2018/1212 of 3 September 2018*, Annex, Table 4.

<sup>168</sup> *Commission Implementing Regulation 2018/1212 of 3 September 2018*, Annex, Table 5.

<sup>169</sup> *Directive 2017/828/EU of 17 May 2017*, Article 3e. See paragraph 2.3.1.

<sup>170</sup> *Treaty on the European Union*, Article 5, Paragraph 4.

entirely based on IT systems. The development of an electronic-based communication platform would allow relevant information to be directly transmitted from final-layer intermediaries to issuers, at least when direct holding systems are in place. Moreover, when indirect holding systems are concerned, the use of IT-based systems would allow relevant information to efficiently flow through each level of the holding chain and to reach the issuer in due time.

With a view to achieve straight-through processing, the implementing Regulation has provided that transmissions between intermediaries shall be made in electronic and machine-readable formats which allow for greater interoperability<sup>171</sup>. With this regard, the best way to ensure the automated flow of information in a cross-border setting would be to coordinate the functioning of the different communication platforms already operating at a national level. Such an integrative approach would be more beneficial than the development of a uniform communication system based on a one-size-fits-all standardization. Indeed, enhanced coordination would result in greater interoperability between different communication platforms with no alteration of their basic functioning, especially when this has proved to achieve straight-through processing at a national level. It is arguable that the best way to achieve coordination and interoperability would be the implementation of ISO 20022, which is a universal message scheme for the transmission of financial information. The biggest advantage of ISO 20022 is that it is based on a data dictionary which covers the entire financial industry, enabling a common understanding and interpretation of information across such diverse areas as foreign exchange trading and corporate action processing. This facilitates mapping between standards. To put it simply, mapping allows to transform relevant information from one message standard to another. ISO 20022 therefore works as an interoperability hub, since it allows different standards to coexist and to work with each other<sup>172</sup>. Work is constantly underway to map the information in many standards into ISO 20022. A valid alternative to ISO 20022 would be ISO 15022, which is currently the predominant securities standard in cross-border settlement, reconciliation and corporate action processing. ISO 15022 messages for corporate actions and securities settlement and reconciliation are already well-structured and

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<sup>171</sup> *Commission Implementing Regulation 2018/1212 of 3 September 2018*, Article 2, paragraph 3.

<sup>172</sup> INTERNATIONAL ORGANIZATION FOR STANDARDISATION and THE SWIFT STANDARDS TEAM (2013), p. 30.

based on a data dictionary. It shall however be pointed out that additional functionalities have only been developed for ISO 20022, proxy voting being one of them.

### 3.5.5 *Is the record date really necessary?*

Just like meeting-related communications, the information related to the EU shareholder identification procedure is also suitable for being transmitted in machine-readable and automatically-processed formats. With this regard, the implementing Regulation of the European Commission has provided for minimum requirements that issuers' disclosure requests and intermediaries' replies shall comply with. Moreover, Article 9 of the implementing Regulation has strictly regulated the timing of the identification process, with a view to make sure that the whole procedure would get to conclusion as promptly as possible<sup>173</sup>.

It is therefore arguable that the progressive translation of corporate communication into standardized and machine-readable formats, along with the growing coordination and interoperability of corporate action processing practices, will eventually result in the possibility for issuers to verify the identity of entitled shareholders in real time. A record date would then be redundant<sup>174</sup>. Indeed, as has already been said<sup>175</sup>, the record date system is the expression of a 'second-best' scenario, as it waives the one share-one vote principle for the greater good, which is the efficiency of trading activities in financial markets and the proper unwinding of general meetings. However, assuming that the various book-entry systems of supporting the equity market can talk to each other electronically, a 'real time' identification procedure would no longer hinder the transferability of shares in the days prior to the meeting. In other words, due to the technological development, the reasons that once justified the implementation of a record date system would no longer prevail<sup>176</sup>.

With this regard, it is noteworthy that, at the time of the introduction of the record date system in Europe, the EU legislator was well aware that such a solution was more of a lesser evil than an absolute good. Even in the United States, where the record date

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<sup>173</sup> Paragraph 2.4.3.1.

<sup>174</sup> CLOTTENS, C. (2012), p. 31; NATHAN, C.M. (2006), p. 7.

<sup>175</sup> Paragraph 3.2.2.

<sup>176</sup> BALZOLA, S. (2013), p. 781; DE LUCA, N. (2010b), p. 340; SACCHI, R. (2012), pp. 44-45.

system has first been implemented, the legislator of Delaware has substantially allowed its suppression<sup>177</sup>. Article 7 of the first Directive on shareholders' rights provides that Member States do not have to apply the record date system to companies that are able to identify their shareholders from a current share register on the day of the general meeting.

It is questionable whether the current systems of shareholder identification already allow issuers to be exempted from the implementation of a record date system. Generally speaking, it is clear that some national jurisdictions, such as Germany and France, provide for the daily update share registers, so listed companies are enabled to identify their registered shareholders by merely consulting the share register on the day of the meeting. Usually, to be granted the right to attend the meeting and to cast votes, shareholders of German companies must have sent their notification of attendance to the issuer no later than the sixth day ahead of the meeting<sup>178</sup>. Nonetheless, issuers usually verify the entitlement of shareholders on the basis of registrations in the share register on the day of the meeting<sup>179</sup>. In order to ensure the effectiveness of such entitlement system, it is common practice that issuers block all entries in the share register for the time between the deadline for receiving notices of attendance and the day of the general meeting (*Eintragungsstopp*). Such a practice does not appear to be wholly consistent with the exemption under Article 7, paragraph 2 of the Directive on shareholders' rights, since the issuer deadline for the reception of notices of attendance ends up producing the same effects as the record date<sup>180</sup>. However, there is the possibility for issuers to prevent the effects of the record date by setting the issuer deadline on the very same day of the meeting. On the other hand, the use of the record date system surely cannot be avoided in France, where Article R225-85 of the *Code de commerce* sets a uniform record date for all listed issuers<sup>181</sup>, no exemptions allowed<sup>182</sup>. It is therefore arguable that the record date is still the predominant system for shareholder enfranchisement in European jurisdictions.

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<sup>177</sup> The practice of "bifurcated" record dates has already been analyzed in paragraph 3.4.1.

<sup>178</sup> The articles of most German listed companies provide that the reception of a notice of attendance is an essential condition for shareholder enfranchisement. See paragraph 3.5.2.

<sup>179</sup> DE LUCA, N. (2010b), p. 327.

<sup>180</sup> SECONDO, R. (2011a), p. 88.

<sup>181</sup> The record date in France corresponds with the second trading day ahead of the general meeting.

<sup>182</sup> Interestingly enough, the former text of Article R225-85 provided for an entitlement system which was designed to remove all forms of decoupling of voting rights and economic rights, at least from a

The implementation of the amended Directive on shareholders' rights may lead to the establishment of a uniform system for shareholder enfranchisement that allows 'real time' identification of entitled shareholders. Such a system would eliminate once and for all the time gap between the relevant date for shareholder enfranchisement and the date of the meeting. In particular, the use of the direct approach could be made mandatory for the transmission of shareholders' data to the issuer. The direct approach is requested by Article 3a of the amended Directive, which only applies when the disclosure request comes from the issuer<sup>183</sup>. However, the direct approach may very well be used also for the transmission of shareholders' data upon request of the shareholder who is willing to prove his entitlement to attend the meeting and to cast votes. Indeed, Article 3b of the Directive provides that «*the information received from the shareholders related to the exercise of the rights flowing from their shares [...] shall be transmitted between intermediaries without delay, unless the information can be directly transmitted by the intermediary [...] to the shareholder or to a third party nominated by the shareholder*»<sup>184</sup>.

The purpose of establishing a system for 'real time' shareholder enfranchisement cannot be achieved if practices for corporate action processing do not reach a sufficient

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formal point of view. In particular, the former text distinguished between the cases of *inscription* and the cases of *enregistrement comptable*. The former term refers to the final registration in the name of the shareholder (in case of registered shares owned by resident investors) or in the name of the *intermédiaire inscrit* (in case of either bearer shares or registered shares owned by non-resident investors). The *inscription* is made on the day of the transfer settlement and produces the same legal effects as the endorsement of paper-based certificates. On the other hand, the *enregistrement comptable* is a mere registration confirming the conclusion of a share transaction. The *enregistrement comptable* is usually made in the *comptes-simples* held by intermediaries for bookkeeping reasons. There is generally a three days gap between the date of the *enregistrement comptable* and the date of the *inscription*, since share transfers are usually settled on the third day after their conclusion (T+3 rule). At the moment of the *enregistrement comptable*, the buyer is not a shareholder yet, but he will become one after the *inscription* following the transfer settlement.

According to the former text of Article R225-85, entitled investors had to be determined not only on the basis of the *inscriptions* in the share register, but also on the basis of the *enregistrements comptables* in the *comptes-simples* of intermediaries on the third day prior to the meeting (record date). The French record date system was thus designed in a way that those who were registered as shareholders on the day of the meeting were always granted enfranchisement, since the time gap between the *enregistrement comptable* and the *inscription* was equal to the time gap between the record date and the meeting. In other words, the record date system was intended to identify all investors who would have been registered as shareholders on the day of the meeting, even though they were still not registered as such when the record date expired.

However, due to the amendments adopted by *décret n° 2014-1466 du 8 décembre 2014*, the current text Article R225-85 considers the *inscriptions* as of the record date to be the only relevant registrations for determining who is entitled to attend the upcoming meeting.

<sup>183</sup> Directive 2017/828/EU of 17 May 2017, Article 3a, paragraph 3. See Paragraph 2.3.4.2.

<sup>184</sup> Directive 2017/828/EU of 17 May 2017, Article 3b, paragraphs 4 and 5.

level of standardization and automation. For example, in cases where the chain approach cannot be waived, the ability of issuers to identify their shareholders on the day of the meeting will depend on whether the standardized formats and the electronic platforms used by the intermediaries in the chain are fast and efficient enough to allow the relevant information to reach the issuer in due time. As has already been said, the implementing Regulation strongly encourages the efforts of the private sector for achieving further standardization, automation and interoperability. With this regard, the implementation of ISO 20022 would represent a huge step forward in that direction.

The major problem of establishing a system for ‘real time’ shareholder enfranchisement would be to determine which are the parties that must bear the costs for its implementation. It seems, however, that the biggest part of such costs would probably be faced by intermediaries. Although technological changes may lead to higher levels of straight-through processing in the long term, they will require significant intermediary investment to support the adoption of either ISO 20022 or other standards which make for fast and efficient cross-border communication<sup>185</sup>. Inducing intermediaries to technological innovations could be really challenging. Indeed, intermediaries do not have an interest of their own in investing their financial resources in the improvement of corporate communication channels, as they benefit most from the existing multi-layer system of the holding chain and the underlying chain approach. Such system allows intermediaries to offer services to both investors and issuers, charging higher fees therefor<sup>186</sup>. Although investments in standardization and automation would benefit issuers and investors by allowing direct transmission of relevant information, most intermediaries would end up being excluded from the transmission procedure and would not be able to charge fees for the services they could have offered if the chain approach had been into effect.

To conclude, although the implementation of the amended Directive could potentially lead to the replacement of the record date system with a new method for shareholder enfranchisement that allows entitled shareholders to be identified on the very same day of the meeting, this does not seem to be an attainable objective in the short to medium

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<sup>185</sup> BROADBRIDGE FINANCIAL SOLUTIONS, INC. (2017), p. 8.

<sup>186</sup> STRENGER, C. and ZETZSCHE, D. (2012), p. 534.

term. Furthermore, the EU policymaker has explicitly recognized the legal value of the record date system. This is proven by Article 9 of the implementing Regulation, which provides that *«each intermediary shall transmit to the issuer any information regarding shareholder action without delay after it received the information, following a process allowing for compliance with the issuer deadline or record date»*<sup>187</sup>.

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<sup>187</sup> *Commission Implementing Regulation 2018/1212 of 3 September 2018*, Article 9, paragraph 4.



## CONCLUSIONS

The EU lawmaker has shaped shareholder identification as a mean to improve the dialogue between issuers and shareholders. The goal is to facilitate contacts between management and ownership outside corporate events and disclosure of periodic information. The enhancement of the issuer-shareholders dialogue is likely to increase the shareholders' loyalty to the company, spurring them to exercise their rights and their auditing powers to prevent abuses from managers and controlling blockholders. Shareholders who engage in an ongoing dialogue with the management are more likely to participate in corporate governance with a view to encourage the adoption of economically sustainable and long-term oriented managerial decisions. Furthermore, the increasement of investor relations might work as a means to attract long-term investors from the equity market. Indeed, investors who appear more inclined towards long-term revenues are more likely to invest in a company with a high level of shareholder engagement in corporate governance. In brief, the establishment of a close dialogue between a company and its shareholders encourages the actual shareholder base to actively engage in corporate governance and stimulates investors who have a propensity towards shareholder engagement to purchase a stake in the company. This may set off a virtuous circle in which the level of shareholder engagement in corporate governance keeps raising up, ultimately leading to the improvement of corporate governance as a whole. The amended Directive on shareholders' rights indeed considers long-term shareholder engagement to be a key feature of the modern corporate governance framework in listed companies, as it drives the company's business towards the objectives of environmental, social and governance sustainability and long-term value creation.

The analysis of Directive 2017/828/EU has shown that the new European shareholder identification regime could actually lead to an increase of shareholder engagement in the corporate governance of European listed companies. This is just what the EU legislator is hoping for. The amended Directive on shareholders' rights and the EC

implementing regulation provide for some major facilitations for issuers willing to communicate with their shareholders, the most relevant of which are:

- The empowerment of EU listed companies to request the identification of their shareholders at any moment. It is true that major national jurisdictions in Europe already implemented rules which allow issuers either to set off an identification procedure at their will (in the UK and Italy) or to be constantly updated about changes in the ownership structure (in Germany and France). However, the implementation of this provision could be a strong incentive for shareholder engagement in countries where shareholders can be identified only at or around the time of general meetings or other corporate actions. This is the case of Czech Republic, Portugal, Poland, Luxembourg and others. It is clear that the sporadic disclosure of shareholders' identifying data would not be appropriate for achieving the purpose laid down in the amended Directive, which is the enhancement of shareholder engagement through the establishment of an ongoing issuers-shareholders dialogue.
- The timing for the transmission of the disclosure request through the holding chain. Due to the fact that intermediated securities are usually held in omnibus accounts, the issuer is not able to detect the last intermediary in the holding chain, which usually holds all information regarding the identity of the end investors. The disclosure request must then be sent to the first-tier intermediary and then transmitted all the way down the holding chain. The transmission procedure may be slow and inefficient, since the layers of intermediaries separating issuers from their shareholders could be multiple. The EC implementing regulation 2018/1212 dealt with this problem by providing that any intermediary shall pass on the disclosure request to the next party down the holding chain within the end of the same business day as it received the request. In case the intermediary receives the request after 4 p.m. during its business day, the transmission shall occur no later than by 10 a.m. of the next business day. Intermediaries' compliance with these terms should allow the disclosure request to reach the final-layer intermediary within one or two business days at the latest.

- The direct transmission of shareholders' identifying data from the last-tier intermediary to the issuer. This provision is meant to prevent meaningless communications that could hamper the quickness and the effectiveness of the shareholder identification procedure. The use of the chain approach may be justified for the transmission of the disclosure request, as the issuer is not in the position to detect the final-layer custodians when omnibus accounts are in use. However, there is no good reason why the information about the identity of end investors should be passed on from one intermediary to the other before reaching the issuer. Indeed, the chain approach would not add any value to the information being transmitted to the issuer, as only the last-tier intermediary has direct knowledge of the end investor's identity. The direct transmission of shareholders' identifying data reduces the time necessary for the identification procedure to get to completion. Issuers are thus enabled to obtain all relevant information in just a few days (probably two or three business days) from issuance of the disclosure request, which is essential for them to engage with identified shareholders before that any substantial change in the ownership structure occurs. Moreover, the enforcement of a direct approach for the transmission of shareholders' identifying data prevents intermediaries in the holding chain from manually revising the communications received. This reduces the risk of the issuer getting unreliable information.
- The asserted ineffectiveness of all legal, regulatory, administrative and contractual restrictions to the transmission of shareholders' identifying data. The amended Directive provides that intermediaries complying with disclosure duties under the EU rules on shareholder identification are not to be considered in breach of any obligation of confidentiality, whatever the nature of such obligations may be. This provision is particularly important for ensuring the effectiveness of the shareholder identification procedure in a cross-border setting, where the differences in national regulations and market practices may impede the transmission of relevant communications, especially when confidential data is concerned. Furthermore, this provision should not be seen as too much interference of EU law in national confidentiality regimes, which would constitute an infringement of the principle of proportionality under

Article 5 of the EU Treaty. Indeed, the validity of any restriction on disclosure is not called in question. Rather, EU rules only provide that such restrictions are to be considered ineffective when their enforcement would hinder the shareholder identification procedure, thus hampering the establishment of an ongoing dialogue between issuers and shareholders.

- The extraterritorial effects of the EU rules on shareholder identification. When receiving a disclosure request, intermediaries based outside of the European Economic Area are nonetheless required to comply with disclosure duties under Article 3a of the amended Directive. This is an essential condition for issuers to reach shareholders who either reside in a foreign country or hold their shares in an account opened with a foreign intermediary.
- The introduction of a uniform shareholder identification regime for both registered and bearer shareholders. Article 3a of the amended Directive does not make any distinction between the forms of shares. It is therefore arguable that shareholders cannot object to the disclosure of their identifying data by virtue of their shares being issued in bearer form. Following the implementation of the amended Directive, only shareholders who hold less than 0.5% of the total share capital (or of the total amount of voting rights) will be empowered to object to the disclosure of their identities, provided that the Member State in which the company is based has decided to implement such threshold. On the other hand, with regard to fiduciary ownership, the amended Directive does not empower issuers to collect information about the identity of beneficiaries. Indeed, the EU shareholder identification regime focuses on the concept of “shareholdership” rather than on the concept of “economic ownership of the shares”. However, this problem is tackled by major national jurisdictions, where fiduciary ownership cannot be leveraged to conceal economic ownership, especially when the law grants primary protection to the issuer’s interest in disclosure (for example, in the context of general meetings).
- The improvement and the simplification of top-down and bottom-up communication channels. Aside from enhancing shareholder identification across the EU, both the amended Directive and the EC implementing Regulation have adopted a series of provisions for the fast and effective

transmission of corporate communications from issuers to shareholders and vice versa. This is an essential condition to ensure that issuers and shareholders can communicate swiftly with each other. Despite the fact that the approach to communication procedures varies depending on different factors (the nature of the holding system in place, the direction in which the communication is headed, the context in which the transmission procedure takes place, etc.), the amended Directive and the EC implementing Regulation have adopted some common principles to be applied to all forms of corporate communications. First, where there is an alternative between the two possible approaches to transmission procedures, the direct approach shall always prevail over the chain approach. Second, the EC implementing Regulation strongly encourages the implementation of standardized formats for any type of corporate communication and the development of IT-based systems for the transmission of such formats. Investments in standardization and automation would result in a greater interoperability between market practices which would drastically improve the quickness and the effectiveness of communication procedures. With specific regard to the transmission of communications of entitlement from the shareholders to the issuer, the implementation of standardized formats and the technological development may lead to a situation in which issuers are empowered to identify the shareholders entitled to vote on the very same day of the general meeting. The use of a record date-based mechanism for shareholder enfranchisement would then become obsolete. However, the suppression of the record date system does not seem to be a feasible objective, at least in the short to medium period.

Considering all these provisions combined, it is arguable that the European shareholder identification regime is suitable for pursuing the objective laid down in the amended Directive, which is the encouragement of long-term shareholder engagement in European listed companies. However, one of the major downsides of this legal regime is that it depicts the EU shareholder identification procedure as an issuers' prerogative. Only the issuers, hence their directors, have the power to set off the identification procedure and to access the data collected by intermediaries. No

protection is thus granted to the interest of other parties who may have a legitimate reason for acquiring shareholders' identifying data.

It is hard to believe that the amended Directive, whose primary objective is the enhancement of shareholder engagement, does not provide for the right of shareholders to instigate the identification procedure. If they had access to their respective identifying data, shareholders would be enabled to communicate with each other, with a view to coordinate their engagement policies. In particular, minority shareholders would enormously benefit from the identification procedure as general meetings approach. After receiving the meeting-related information from the issuer (in case of "push" mechanisms) or accessing the meeting-related information disseminated by the issuer (in case of "pull" mechanisms), minority shareholders could coordinate their voting strategies in the attempt to aggregate enough votes to actually influence the voting outcome of the general meeting. This would be a strong incentive for small shareholders to engage in the investee company and to exercise their supervisory powers collectively and, therefore, more efficiently. For these reasons, different national jurisdictions provide for the right of minority shareholders to set off an identification procedure. For example, according to Italian law, shareholders who collectively own a minority stake in the share capital can request the investee company to instigate an identification procedure under article 83-*duodecies* of *d.lgs.58/1998*, provided that the company has adopted enabling by-laws<sup>1</sup>. However, for some strange reasons, the EU lawmaker decided to privilege issuers-shareholders dialogue over intra-shareholders dialogue, although the improvement of the latter could drastically increase the level of shareholder engagement in listed companies, especially when closely-held.

Aside from minority shareholders, even proxy solicitors may be interested in accessing the information about the identity of shareholders. By setting off the identification procedure, proxy solicitors would be enabled to acquire information about the

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<sup>1</sup> *D.lgs. 24 febbraio 1998, n.58*, Article 83-*duodecies*, paragraph 3; *Regolamento Consob 14 maggio 1999, n.11971*, Article 144-*quater*, paragraph 1. The relevant stake for requesting the company to set off an identification procedure depends from the market capitalization of the investee company. If the market capitalization does not exceed one billion euros, the relevant stake amounts to 2.5% of the total share capital; if the market capitalization amounts to anything from one up to fifteen billion euros, the relevant stake amounts to 1% of the total share capital; lastly, if the market capitalization exceeds fifteen billion euros, the relevant stake amounts to 0.5% of the total share capital. The Articles of the company may provide for smaller thresholds.

ownership structure of the company and, therefore, to collect proxies more efficiently. Proxy solicitation may be highly beneficial for corporate governance, since it may lead to a better allocation of voting rights to be exercised in general meetings. Indeed, minority shareholders who would be interested in casting their votes often decide not to, because either they do not have enough information on how to properly vote their shares or because the benefits that may stem from the exercise of voting rights would not offset the costs for directly participating to the meeting. Proxy solicitation may facilitate the aggregation of votes in the hand of one or few persons (i.e. the solicitors) who are well informed about how to vote the shares and have the means necessary to face participatory costs. In other words, proxy solicitation works both as a means to reduce information asymmetries and as a means to cut down costs for engagement in corporate governance. However, the amended Directive does not provide by any means for the right of proxy solicitors to identify the company's shareholders.

Another risk of the EU shareholder identification regime is that directors will use the information about the identity of the company's shareholders to their own advantage, showing no interest in engaging in an ongoing dialogue with the ownership. In particular, directors may request the disclosure of shareholders' identifying data for anti-takeover purposes. Information on shareholding may give to incumbent directors and controlling blockholders an early warning that a hostile takeover bid is about to take place. For example, the shareholder identification procedure may reveal that an investor has recently purchased a significant stake in the company (toehold), which however remains below the thresholds for mandatory ownership disclosure. If the purchaser happens to be an investor who is particularly active on the market for corporate control (like a private equity investment fund), then there is a good chance that such investor is getting ready for launching a takeover bid on the shares of the company. Managers and incumbent blockholders can therefore prearrange defensive strategies which would significantly reduce the chance of success of an eventual future takeover.

It cannot be denied that shareholder identification rules have an anti-takeover effect, regardless of the functioning of the identification procedure. However, hostile takeovers may have both a beneficial and a negative effect on corporate governance. Indeed, while hostile takeovers are good for corporate governance as they allow for

the replacement of underperforming managers, they may also have a negative effect on the quality of management in that they discourage firm-specific human capital investment, which is key to a company's performance<sup>2</sup>. Whether the beneficial effects will prevail over the discouragement of specific investments mainly depends on the company's business as well as on the specific tasks performed by each member of the management. Based on these assumptions, some authors (Enriques, Gargantini and Novembre, 2010, pp. 731- 742) asserted that EU shareholder identification rules should adopt a takeover-neutral approach. In particular, any decision as to whether issuers can identify their shareholders should be left to by-laws. This way, every single company would be free to decide whether its managers should be empowered to detect shareholdings even below the thresholds for mandatory ownership disclosure. The decision of the company would obviously be influenced by the nature of the effects that hostile takeovers would produce on its corporate governance framework.

Despite the aforesaid, the EU lawmaker utterly discarded the option of a takeover-neutral approach: the decision as to whether issuers should identify their shareholders is not left to by-laws, but to companies' boards. EU law has therefore opted for a one-size-fits-all solution: rules in favor of shareholding disclosure (and therefore shareholder engagement) shall always prevail over rules in favor of changes in corporate control. This is the ending result of the legislative policy adopted by the European lawmaker. Legal doctrine can do nothing but acknowledging the primacy of shareholding disclosure, as policy choices made by the European legislator are not to be questioned. However, there is no doubt that the only purpose that shareholder identification should serve is the enhancement of shareholder engagement. Managers shall never instigate an identification procedure for the only purpose of engaging in anti-takeover behaviors. A solution to this problem may be adopted by Member States when implementing the amended Directive in their respective national jurisdictions. In particular, Member States may provide that managers who requested the identification of the company's shareholders shall publish a notice in which they thoroughly explain the reasons for such request. Furthermore, such notice should specify how managers actually intend to use the shareholders' identifying data with a view to improve the level of shareholder engagement in corporate governance. If

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<sup>2</sup> BECHT, M., BOLTON, P. and RÖELL, A. (2007) pp. 833, 851-852; ENRIQUES, L. (2010), p.4.

## CONCLUSIONS

managers use their disclosure properly, then the objective of the amended Directive is met and the anti-takeover effects eventually stemming from the identification procedure will have to be considered as a necessary evil along the way to a greater good.



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## ABSTRACT

In modern financial markets, the transfer of securities traded on the stock exchange takes place in the form of debits and credits recorded on accounts managed by intermediaries. Shares of listed companies are usually held through a chain of intermediaries operating as accounts providers. The intermediated shareholding system has a typical pyramidal shape. At its top there is a central securities depository holding one account for every intermediary participating to the central detention system, which -in turn- holds one account for each of its clients. The complexity of the holding system drastically reduces the issuers' insight into their shareholder bases, as multiple layers of intermediaries may separate the issuer from its shareholders (in case of direct holding systems) or from the beneficial owners of the shares (in case of indirect holding systems). Indeed, due to the widespread use of omnibus accounts, the information about the shareholder's identity usually remains with the last intermediary in the holding chain. Moreover, legal rules generally allow share transfers without the need to inform issuers.

This dissertation is mainly focused on the issue of "shareholder identification" that may be defined as a set of rules protecting the interest of issuers and of other parties in shareholding disclosure. Shareholder identification rules usually set the technical procedure through which shareholders' or beneficial owners' identifying data is transmitted from the final-layer intermediary to the issuer. The EU lawmaker has addressed shareholder identification for the first time just in 2017 with the approval of Directive 2017/828/EU of 17 May 2017 that has framed shareholder identification to a shareholder-empowering approach to corporate governance.

Having acknowledged that EU law designates a specific role for shareholder identification in corporate governance, the first chapter of this work focuses on how the European approach to corporate governance and to shareholders' rights has evolved over the years. Since its inception, the path towards the harmonization of corporate governance rules in the European Union has indeed pointed in the direction of shareholder empowerment. The Fifth Draft Company Law Directive, which can be regarded as the first attempt by the EU policymaker to set a common framework for corporate governance in Europe, laid down a series of provisions aiming at enhancing the role of shareholders in the governance of public limited companies. Following the abandonment of the project for a Fifth Draft Directive, a series of economic crises revealing massive corporate governance failures worked as a catalyst for regulatory initiative on shareholder empowerment. The financial scandals that occurred in the early 2000s (such as the breakdown of Enron and Worldcom in the United States, or the collapse of Balsam and Parmalat in Europe) showed that managers of multinational companies often engaged in fraudulent behaviors to the detriment of their shareholders.

The EU policymaker reacted to these scandals with the 2003 EC Action Plan and with the Directive 2007/36/EC, both being aimed at recovering the central position of the general meeting in corporate governance through the encouragement of shareholder activism. Second off, the 2008 global financial crisis shed light on the excessive focus of investor culture on short-termism, as on several occasions shareholders supported high risk-taking managerial activities for the sake of short-term profits. To develop shareholders' sensitivity towards the long-term interests of investee companies, the EC Green Paper on the EU corporate governance framework of 2011 distinguished between "inappropriate" short-term shareholder activism and "appropriate" long-term shareholder engagement. Such a distinction emphasizes the need to invest shareholders with more responsibility, persuading them to favor long-term investment strategies and encouraging them to actively exercise their voice and supervisory powers against both managers and controlling blockholders. The EU policymaker deemed long-term shareholder engagement as a key feature of the modern corporate governance framework in listed companies, since it drives the company's business towards the objectives of sustainable economic growth and long-term value creation. In line with this approach, the EC Action Plan of 2012 set the objective of establishing a level playing field for shareholder engagement in Europe.

Being a technical aspect of corporate governance, the EU lawmaker raised the issue of shareholder identification in this evolutionary process of EU corporate governance regulation. Directive 2017/828/EU (hereinafter the "Directive") has indeed implemented an EU-wide shareholder identification procedure, the purpose of which would be to enhance shareholder engagement by facilitating the contacts between issuers and shareholders. This may lead to an ongoing issuers-shareholders dialogue which spurs shareholders to actively engage in corporate governance, with a view to align managerial activities with the long-term objectives of the company.

The second chapter analyzes the new EU mechanism of shareholder identification and the techniques used by the EU lawmaker to improve the issuers-shareholder dialogue. When the Directive was adopted, most Member States had already implemented very articulated shareholder identification procedures. However, despite their effectiveness, national identification procedures cannot be fully implemented in a cross-border setting. The EU rules on shareholder identification thus provide for a fully-fledged identification procedure that every issuer having its registered office in a Member State can rely on. The new Directive lays down a series of disclosure obligations that all intermediaries holding shares of EU listed companies must comply with, regardless of the country in which the single intermediary is established. Furthermore, the Directive has some extra-territorial effects, as the rules on shareholder identification and on transmission of corporate information shall apply also to intermediaries which have neither their registered office nor their head office in the European Union.

From a comparative point of view, identification procedures adopted by Member States can be divided into three models. A first model entails that the issuer's request to have the identity of its shareholders disclosed shall be repeated at every level of the holding chain until it reaches the final-layer intermediary. This means that the issuer's initiative is essential for the disclosure request to be transmitted from every layer of the holding chain to the lower. This procedural model has been adopted by the UK (*Companies Act 2006*, Section 793). Following a second procedural, the issuer's request shall be only addressed to the first-layer intermediary or to the CSD. Once the request is received, intermediaries are under a legal obligation to transmit it down the holding chain until it reaches the final-layer intermediary. This is the model adopted by Italian law (*d. lgs. 24 febbraio 1998, n. 58*, Article 83-*duodecies*). Finally, in other countries the identification procedure does not require any action at all from the issuer. Indeed, the obligation of intermediaries to disclose the identity of shareholders to the issuer arises *ipso facto* from the very modification of the records on the accounts opened with the intermediaries. This is the case of Germany (*Aktiengesetz*, § 67) and France (*Code monétaire et financier*, Article L211-19; *Règlement général de l'Autorité des marchés financiers*, Article 322-55), where intermediaries must transmit the information about the identity of the owners of registered shares to the issuer on a daily basis.

The new EU shareholder identification procedure is clearly inspired by the second one of the aforementioned models. Article 3a of the Directive provides that any issuer willing to identify its shareholders shall set off the identification procedure by sending a disclosure request to first-tier intermediaries. The procedure then unfolds as intermediaries comply with their obligation to promptly transmit the issuer's request to the next level down the holding chain. The whole procedure may even be delegated by the issuer to the CSD. After receiving the issuer's request, last-tier intermediaries must send the information about the identity of shareholders directly to the issuer. The direct transmission of shareholders' identifying data is meant to limit the use of the chain approach, which occurs when the relevant information is bounced to every link of the holding chain before reaching its final addressee. Indeed, the chain approach would not add any value to the information being transmitted to the issuer, as only the last-tier intermediary has direct knowledge of the end investor's identity. Issuers are thus enabled to engage with identified shareholders before that any substantial change in the ownership structure occurs. Moreover, the enforcement of a direct approach for the transmission of shareholders' identifying data prevents intermediaries in the holding chain from manually revising the communications received. This reduces the risk of the issuer getting unreliable information.

Article 3a, paragraph 6 of the Directive provides that intermediaries complying with disclosure duties under the EU rules on shareholder identification are not to be considered in breach of any obligation

of confidentiality, whatever the nature of such obligations may be. This provision is particularly important for ensuring the effectiveness of the shareholder identification procedure in a cross-border setting, where national rules protecting confidential data may hinder the transmission of relevant information to the issuers. Intermediaries complying with the EU rules on shareholder identification shall thus be granted absolute protection from any national provision to the contrary, due to the primacy of EU law over national laws.

The Directive also takes into consideration the interest of investors in not having their identity disclosed. Indeed, Member States have the option to provide for companies having a registered office in their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights, which shall not exceed 0.5%. Although this provision seems to conflict with the purpose of enhancing shareholder engagement through shareholding disclosure, it is worth noting in mind that the Directive is the result of a difficult compromise between different legal traditions, as not all Member States were in favor of a full disclosure-friendly approach to the issue of shareholder identification.

It is interesting to notice that the new rules on shareholder identification do not make any distinction between bearer shareholders and registered shareholders. It is therefore arguable that shareholders cannot object to the disclosure of their identifying data by virtue of their shares being issued in bearer form. This means that, following the implementation of the Directive, the only legal limit to shareholder disclosure may consist in the 0.5% threshold described above, provided that Member States have decided to implement it. Moreover, evidence from Member States already points to a gradual decrease in issuance and detention of bearer shares. On the other hand, with regard to fiduciary ownership, the amended Directive does not empower issuers to collect information about the identity of beneficiaries. Indeed, unlike Section 793 of the British *Companies Act*, the EU shareholder identification regime focuses on the concept of “shareholdership” rather than on that of “economic ownership of the shares”.

The Directive also lays down a series of provisions with a view to improve the actual issuers-shareholders dialogue by making corporate communications as swift and efficient as possible. In particular, Article 3b of the Directive provides that, whenever possible, intermediaries shall transmit the information received directly to the final addressee, thus minimizing the steps necessary for the communication procedure to get to completion. In case direct communication channels cannot be enforced by law (such as in the UK, due to the lack of any legal relationships between issuers and beneficial owners), the EC implementing Regulation 2018/1212 provides for specific deadlines that intermediaries must comply with when transmitting relevant information to the next layer in the holding chain. Furthermore, the EC implementing Regulation strongly encourages the

implementation of standardized formats for any type of corporate communication and the development of IT-based systems for the transmission of such formats. Finally, the implementing Regulation itself provides for some standardized formats for the transmission of the most important corporate communications, including the issuer's disclosure request and the final-layer intermediaries' responses under Article 3a of the Directive.

The importance of shareholder identification in corporate governance grows exponentially as general meetings approach. The third chapter of this work thus focuses on the value of shareholder identification in the context of general meetings of shareholders. According to Article 7 of Directive 2007/36/EC, shareholders entitled to vote shall be determined with respect to the shares held on a certain date prior to the general meeting (i.e. the "record date"). The "record date" system has two main advantages: on the one hand, it allows the issuer to better manage the general meeting, as managers are enabled to determine a list of enfranchised shareholders before the corporate action takes place; on the other hand, it prevents both national laws and companies' by-laws from forbidding the transfer of shares in the period of time between the record date and the general meeting. However, the record date system creates scope for the decoupling of share ownership and voting rights: if shares are traded between the record date and the general meeting, the buyer will not be able to participate to the meeting and to cast votes, as such rights will be attributed to the seller (record date capture). This means that, whenever a record date is set, the issue of shareholder identification shall be understood in a diachronic and not merely synchronic sense: the record date system does not aim at mapping the company's shareholder base on the day of the meeting, but at identifying the investors who owned the company's shares as of the relevant date for shareholder enfranchisement, which precedes the meeting.

One major risk is that investors with a negative interest in the company may voluntarily leverage the effects of record date capture with a view to artificially increase their voting influence and to vote the shares against the interests of the company, without owning the corresponding cash-flow rights. This phenomenon is known as "negative empty voting" and is harshly detrimental to corporate governance efficiency and welfare creation. Moreover, the effects of record date capture may be leveraged by investors willing to conceal their economic stake in the company. This second phenomenon is known as "hidden ownership". The EU lawmaker has attempted to tackle these issues by extending the rules on mandatory ownership disclosure.

Few remarks should be made about the transmission of entitling communications from last-tier intermediaries to issuers. It is arguable that the efficiency of the record date system depends on whether the information about the identity of shareholders as of the record date reaches the issuer in due time before the meeting, so that managers are enabled to determine a list of enfranchised investors

before the general meeting actually takes place. However, the use of the chain approach makes the procedure for the transmission of entitling communications slow and cumbersome. This may result in the adoption of market practices that seriously hinder shareholder voting, such as the setting of cut-off dates. Over the course of the years, intermediaries' practices in Member States have progressively developed in the direction of direct transmission and straight-through processing. Major examples are the electronic proxy voting service offered by CREST in the UK, the use of the *formulaire unique* in France, the appointment by the issuer of a *Hinterlegungsstelle* managing the transmission procedure in Germany and the FIS service offered by *Monte Titoli s.p.a.* in Italy. However, such different market practices have a low level of interoperability, so they cannot be used to overcome the weaknesses of the chain approach in a cross-border setting. Under this profile, the implementation of the Directive and the EC implementing Regulation would represent a huge step forward in the direction of greater interoperability between communication mechanisms which allow for straight-through processing. In particular, investments in standardization and automation would drastically improve the quickness and the effectiveness of communication procedures.

Moreover, it is arguable that the implementation of standardized formats and the technological development may lead to a situation in which issuers are empowered to identify their shareholders entitled to vote on the very same day of the general meeting. The use of a record date-based mechanism for shareholder enfranchisement would then become obsolete. However, the suppression of the record date system does not seem to be a feasible objective, at least in the short to medium period. Indeed, it is hard to believe that intermediaries will voluntarily face the costs necessary for implementing straight-through communication procedures. Intermediaries do not have any interest in investing their financial resources to improve corporate communication channels, as they benefit most from the existing multi-layer system of the holding chain and the underlying chain approach.

To conclude, it is arguable that the European shareholder identification regime is suitable for pursuing the objective laid down in the amended Directive, which is the encouragement of long-term shareholder engagement in European listed companies. However, one of the major downsides of this legal regime is that it depicts the EU shareholder identification procedure as an issuers' prerogative. No protection at all is granted to the interest of other parties in collecting shareholders' identifying data, such as minority shareholders and proxy solicitors. In other words, the EU lawmaker decided to privilege issuers-shareholders dialogue over intra-shareholders dialogue, although the improvement of the latter could drastically increase the level of shareholder engagement in listed companies. Furthermore, the Directive disregards the anti-takeover effects that may stem from the disclosure of identifying data, as the EU lawmaker clearly favors shareholding disclosure over changes in corporate control.

## RIASSUNTO

Nei moderni sistemi economici, il trasferimento di azioni quotate nei mercati regolamentati avviene in via scritturale, per il tramite di annotazioni in addebito o in accredito su conti telematici aperti presso intermediari abilitati. Il sistema di detenzione azionaria si conforma secondo una struttura piramidale. Al suo vertice il depositario centrale accende, per ogni intermediario che gliene faccia richiesta, i conti destinati a registrare le disposizioni azionarie operate tramite lo stesso. Gli intermediari che accedono al sistema, a loro volta, provvedono ad accreditare i titoli a beneficio degli azionisti o degli intermediari che abbiano ricevuto da questi ultimi il relativo incarico. In conseguenza di tale sistema di allocazione le azioni di società quotate sono detenute attraverso complesse catene di intermediari che svolgono servizi di deposito e gestione di strumenti finanziari. La conformazione ricordata incide notevolmente sulla trasparenza dell'azionariato degli emittenti quotati. Da un lato, in conseguenza della prassi molto comune dei conti omnibus, i dati identificativi dell'azionista (o dell'investitore finale, nei sistemi di detenzione indiretta) sono generalmente conosciuti in via esclusiva dall'ultimo intermediario nella catena di detenzione. In secondo luogo, le norme sulla circolazione delle azioni generalmente permettono che il trasferimento dei titoli azionari avvenga all'insaputa dell'emittente.

La tematica dell'identificazione degli azionisti, che costituisce il tema centrale di questa tesi, individua un complesso di norme finalizzato a risolvere alcune delle problematiche relative all'opacità delle partecipazioni azionarie nei sistemi di gestione accentrata. Generalmente, le norme sull'identificazione degli azionisti predispongono la procedura tecnica tramite la quale i dati identificativi degli azionisti vengono trasmessi dall'ultimo intermediario all'emittente. La Direttiva 2017/828/UE ha recentemente introdotto una procedura identificativa uniforme a livello europeo. A questo proposito è opportuno precisare che le norme europee in materia di identificazione degli azionisti si inquadrano in un processo evolutivo della legislazione comunitaria in materia di corporate governance orientato verso un progressivo rafforzamento del ruolo degli azionisti nei meccanismi di governo societario. Il primo capitolo di questa tesi si concentra dunque sulla ricostruzione di tale processo evolutivo, al fine di comprendere al meglio la funzione dell'identificazione degli azionisti nel contesto europeo.

Sin dai suoi albori il processo europeo volto all'armonizzazione delle norme di corporate governance in ambito europeo ha avuto come obiettivo principale il recupero del ruolo centrale degli azionisti nel governo societario. Già la proposta di quinta direttiva in materia di diritto societario, la cui gestazione è poi risultata fallimentare, aveva puntato in questa direzione. Successivamente nel legislatore europeo emerse la consapevolezza di dover procedere a una riforma più organica dei meccanismi di

governance societaria, al fine di addivenire a un assetto più equilibrato dei poteri dei vari organi societari. Anzitutto, i fallimenti societari verificatisi all'inizio del nuovo millennio (come il fallimento di Enron e WorldCom negli Stati Uniti, o il collasso di Balsam e Parmalat in Europa) portarono alla luce una serie di condotte fraudolente perpetrate dagli amministratori di grandi società a danno degli azionisti. Le istituzioni europee reagirono a tali scandali con l'*Action Plan* del 2003 e con la Direttiva 2007/36/CE, le cui previsioni normative mirano ad incoraggiare l'attivismo degli azionisti attraverso la riduzione dei costi per la partecipazione in assemblea e l'esercizio del voto. La concezione predominante del ruolo degli azionisti nella governance societaria venne profondamente scossa in seguito alla crisi finanziaria del 2008. Venne infatti rilevato che, in molte occasioni, gli azionisti incoraggiarono gli amministratori a intraprendere una gestione societaria altamente rischiosa, al fine di incrementare il valore delle azioni nel breve periodo. Nel tentativo di direzionare la cultura degli investitori verso il perseguimento di obiettivi a lungo termine, il libro verde della Commissione Europea sulla *corporate governance*, pubblicato nel 2011, ha proposto una distinzione tra "*inappropriate short-term shareholder activism*" e "*appropriate long-term shareholder engagement*". Rispetto al termine attivismo, il concetto di *engagement* ne rappresenta, per così dire, una specificazione: con esso si intenderebbe delimitare le forme di attivismo suscettibili di configurare una stabile collaborazione tra azionisti e amministratori, al fine di una *governance* più efficiente, nonché di una crescita sostenibile del valore dell'impresa. La Commissione europea ha individuato nel *long-term shareholder engagement* uno dei fondamenti del governo societario delle società quotate, tanto che l'*Action Plan* del 2012 ha posto l'obiettivo programmatico di predisporre regole uniformi volte ad incoraggiare forme virtuose di attivismo azionario in tutta Europa.

Essendo un aspetto tecnico di *corporate governance*, il problema dell'identificazione degli azionisti si inquadra perfettamente nel processo evolutivo appena descritto. La Direttiva 2017/828/EU (in seguito, la "Direttiva") attribuisce alle norme europee in materia di identificazione degli azionisti una specifica funzione: la facilitazione del dialogo tra azionisti e amministratori ai fini del potenziamento dello *shareholder engagement*. Infatti, laddove l'emittente abbia la disponibilità dei dati identificativi degli azionisti, gli amministratori possono comunicare direttamente con questi ultimi, anche su base informale, attraverso un incremento del livello di *investor relation*. La facilitazione dei punti di contatto tra azionisti e amministratori può portare alla creazione di un flusso informativo continuo tra le parti, incoraggiando gli azionisti a esercitare attivamente i propri poteri di controllo nei confronti dei gestori e a partecipare attivamente alla *governance* societaria per il raggiungimento di obiettivi di lungo periodo.

Una volta individuata la *ratio* della normativa europea, il secondo capitolo della tesi si concentra sul funzionamento della nuova procedura di identificazione degli azionisti, analizzando in particolare le

tecniche legislative con le quali si intende migliorare concretamente il dialogo tra emittente e azionisti. Già da diverso tempo gli ordinamenti giuridici più evoluti si sono dotati di norme, talvolta molto elaborate, volte a consentire all'emittente di identificare il proprio azionariato. Tuttavia, le procedure identificative nazionali non sono idonee ad assicurare la trasparenza dell'azionariato in un contesto transfrontaliero. In considerazione di ciò, la Direttiva si pone l'obiettivo di superare le difficoltà dovute all'efficacia territorialmente circoscritta delle normative nazionali, prevedendo una serie di obblighi che tutti gli intermediari nei cui conti siano registrate azioni emesse da emittenti europei debbono osservare. Tali obblighi si applicano anche agli intermediari che hanno la sede legale o la sede amministrativa principale al di fuori del territorio dell'Unione. La Direttiva ha dunque un'efficacia extraterritoriale.

Da un punto di vista comparatistico, le procedure identificative degli azionisti adottate dagli ordinamenti giuridici nazionali possono ricondursi a tre modelli generali. Un primo modello normativo, cui si è ispirato il legislatore britannico (*Companies Act 2006*, sez. 793), individua nell'iniziativa dell'emittente il motore della procedura identificativa. La richiesta di identificazione deve infatti essere ripetuta dall'emittente ad ogni livello della catena di intermediazione, sino a giungere all'ultimo depositario. Un secondo modello, invece, attribuisce rilevanza all'iniziativa dell'emittente al solo fine dell'avvio della procedura. L'emittente è infatti tenuto a rivolgere la richiesta di identificazione solo al depositario centrale o agli intermediari partecipanti al sistema di gestione accentrata. Gli intermediari hanno dunque l'obbligo legale di procedere autonomamente all'inoltro della richiesta ai livelli successivi della catena di detenzione, fino a che l'ultimo intermediario non viene raggiunto. A questo modello è ispirata la normativa italiana (d.lgs. 24 febbraio 1998, n. 58, art. 83-*duodecies*). In alcuni ordinamenti, infine, non è necessaria nessuna richiesta da parte dell'intermediario, in quanto gli obblighi di comunicazione dei dati identificativi degli azionisti sorgono *ipso facto* in seguito alla variazione delle disponibilità nei conti di registrazione degli strumenti finanziari aperti presso gli intermediari. È questo il caso della Germania (*Aktiengesetz*, § 67) e della Francia (*Code monétaire et financier*, art. L211-19; *Règlement général de l'Autorité des marchés financiers*, art. 322-55).

La procedura europea di identificazione degli azionisti appare chiaramente ispirata al secondo dei suddetti modelli. L'art. 3 *bis* della Direttiva statuisce infatti che ciascun emittente quotato ha il diritto di inviare una richiesta identificativa ai primi intermediari nella catena di detenzione. L'intermediario ricevente ha dunque l'obbligo legale di trasmettere la richiesta ai propri clienti nei cui conti siano registrate delle azioni emesse dal richiedente. Questi ultimi, a loro volta, dovranno inoltrare la richiesta al livello successivo della catena, laddove le azioni non siano state acquistate in conto proprio. Man mano che gli intermediari ottemperano agli obblighi di trasmissione, la richiesta si

muove lungo la catena di detenzione sino a raggiungere gli intermediari finali, i quali trasmetteranno le informazioni relative all'identità degli azionisti direttamente all'emittente. La previsione di un sistema di trasmissione diretta dei dati identificativi risponde alla necessità di scongiurare inutili allungamenti della procedura. Non vi è infatti alcuna ragione valida per cui la comunicazione dei dati degli azionisti debba essere reiterata lungo l'intera catena di detenzione (*chain approach*), considerato che solo l'ultimo intermediario è solitamente in possesso di tali dati. Il sistema di trasmissione diretta garantisce la tempestività della procedura, cosicché gli emittenti possano comunicare con gli investitori identificati prima che la compagine azionaria subisca sostanziali modificazioni.

La Direttiva prevede che gli intermediari che adempiono agli obblighi di trasmissione previsti dalla normativa europea in materia di identificazione degli azionisti non debbano essere considerati in violazione di eventuali restrizioni alla comunicazione di informazioni imposte da clausole contrattuali o da disposizioni legislative, regolamentari o amministrative. Tale deroga generalizzata agli obblighi di riservatezza posti a carico degli intermediari è particolarmente significativa, in quanto garantisce l'efficienza della procedura identificativa in ambito transfrontaliero. Questo vale soprattutto per i casi in cui un intermediario coinvolto nella procedura risieda in uno Stato le cui norme accordano all'interesse degli investitori alla riservatezza dei propri dati sensibili una protezione maggiore rispetto all'interesse dell'emittente alla trasparenza dell'azionariato.

La Direttiva attribuisce una qualche rilevanza anche all'interesse degli investitori all'anonimato. È difatti concessa agli Stati Membri la facoltà di impedire la trasmissione dei dati identificativi degli azionisti che detengano una partecipazione al capitale sociale o una percentuale di diritti di voto inferiore a una certa soglia, che non può però essere stabilita in misura superiore allo 0.5%. Questa disposizione sembra essere in contrasto con l'impianto generale della Direttiva, che sembra invece improntato a favorire la massima trasparenza dell'azionariato nei confronti dell'emittente. È però opportuno considerare che il testo finale della Direttiva rappresenta una soluzione di compromesso raggiunta all'esito di una travagliata procedura legislativa. Non tutti gli Stati membri erano infatti favorevoli a un regime legale squisitamente ispirato al principio di *full disclosure*.

Uno dei tratti più interessanti della Direttiva è l'assoluta equiparazione delle posizioni degli azionisti al portatore e dei titolari di azioni nominative, quantomeno nel contesto della procedura di identificazione. La Direttiva non contiene infatti alcun riferimento alle differenti tipologie di azioni. Si deve dunque ritenere che gli azionisti al portatore non potranno opporsi alla trasmissione dei propri dati identificativi all'emittente, laddove quest'ultimo abbia avviato una procedura di identificazione in conformità dell'art. 3 *bis* della Direttiva. In questo modo, gli emittenti sono messi in grado di comunicare con tutti i loro azionisti, a prescindere dalla tipologia delle azioni che questi ultimi

detengono. Sembra che, in seguito all'implementazione della Direttiva, l'unica limitazione alla trasmissione delle informazioni in merito all'identità degli azionisti consisterà nella soglia (massima) dello 0.5% di cui sopra, sempre che lo Stato membro in cui l'emittente è incorporato abbia deciso di adottarla. Inoltre, le recenti innovazioni legislative a livello nazionale evidenziano il carattere fortemente recessivo delle azioni al portatore (si pensi, a questo proposito, all'abrogazione del § 24 dell'*Aktiengesetz*). Al contrario, in caso di partecipazioni fiduciarie, la Direttiva non attribuisce agli emittenti il diritto di conoscere l'identità dei beneficiari ultimi delle azioni. Infatti la normativa europea in materia di identificazione degli azionisti contempla una disciplina incentrata essenzialmente sulla titolarità (formale) delle azioni, a differenza della normativa britannica, la quale ruota attorno al concetto di "interesse (sostanziale) nelle azioni".

La Direttiva introduce anche una serie di previsioni volte al miglioramento del dialogo tra azionisti ed emittenti. Tali norme sono volte a garantire la celerità e l'efficienza della trasmissione delle comunicazioni rilevanti attraverso la catena di intermediazione. A questo proposito, l'art. 3 *ter* della Direttiva statuisce che, ogni qualvolta sia possibile, le informazioni rilevanti debbano essere trasmesse dall'intermediario che ne è in possesso direttamente al destinatario ultimo (l'emittente o l'azionista), scongiurando così i rallentamenti conseguenti all'utilizzo del *chain approach*. Inoltre, il regolamento esecutivo 2018/1212 della Commissione Europea incoraggia fortemente l'adozione di formati standardizzati per ogni tipologia di comunicazione rilevante, la cui trasmissione dovrebbe avvenire per il tramite di canali telematici al fine di garantire una completa automatizzazione della procedura di comunicazione (*straight-through processing*). Lo stesso regolamento esecutivo fornisce un concreto stimolo per l'evoluzione dei canali comunicativi, in quanto predispone una serie di formati standardizzati per alcune comunicazioni particolarmente rilevanti nel contesto della *governance* societaria, ivi incluse la richiesta di identificazione e le risposte degli intermediari ai sensi dell'art. 3 *bis* della Direttiva.

L'informazione sull'identità degli azionisti acquisisce per gli emittenti un valore particolarmente significativo in prossimità dell'assemblea degli azionisti. Il terzo capitolo di questo lavoro si concentra quindi sul ruolo della procedura identificativa nel contesto dell'evento assembleare. L'art. 7 della Direttiva 2007/36/CE ha introdotto un meccanismo che attribuisce la legittimazione all'intervento e al voto agli investitori cui la legge riconosce la qualifica di "socio" a una certa data, detta data di registrazione, antecedente la celebrazione dell'assemblea. Il meccanismo europeo di legittimazione degli azionisti presenta principalmente due vantaggi: in primo luogo, esso facilita la gestione dell'evento assembleare da parte dell'emittente, permettendo agli amministratori di determinare la lista di soggetti legittimati con un certo anticipo rispetto all'assemblea; in secondo luogo, esso assicura la libera trasferibilità delle azioni durante il periodo intercorrente tra la data

rilevante per la legittimazione e la data dell'assemblea. Tuttavia, il sistema della data di registrazione permette una dissociazione tra titolarità delle azioni e legittimazione al voto: colui che diviene azionista durante il periodo intercorrente tra la data di registrazione e l'assemblea non potrà infatti partecipare al prossimo evento assembleare, dato che la legittimazione all'intervento e al voto rimarrà in capo all'alienante (*record date capture*). La data di registrazione può considerarsi un peculiare meccanismo di identificazione degli azionisti. La sua peculiarità sta nella finalità che la procedura identificativa persegue: mentre le norme in tema di identificazione degli azionisti sono intese a tracciare un preciso quadro dell'attuale compagine azionaria, il sistema della data di registrazione è volto a stabilire chi, tra i vari investitori che si siano succeduti nella titolarità delle azioni, abbia il diritto di partecipare all'assemblea e di votare. Le norme sull'identificazione degli azionisti hanno riguardo ai profili sincronici dell'individuazione dell'investitore, mentre il meccanismo della data di registrazione ne prende in considerazione quelli diacronici.

A causa della sua peculiare conformazione, il sistema della data di registrazione si presta a una serie di abusi e manipolazioni. In particolare, i portatori di un interesse contrario a quello dell'emittente potrebbero abusare degli effetti della *record date capture* (tramite operazioni di *stock lending*, *hedging* etc.) al fine di accrescere artificialmente la quota di voti a loro disposizione, per poi esercitare il voto in maniera contraria all'interesse sociale. Questo fenomeno è conosciuto come "*negative empty voting*". Peraltro, gli effetti della *record date capture* possono essere manipolati anche al fine di celare la proprietà economica delle azioni. Questo secondo fenomeno è noto con il nome di "*hidden ownership*" e diviene particolarmente significativo laddove l'azionista che rimane celato intenda lanciare un'offerta pubblica di acquisto sulle azioni dell'emittente. Il legislatore europeo ha tentato di contrastare queste pratiche abusive attraverso l'estensione dei contenuti dell'obbligo di notifica delle partecipazioni rilevanti (Direttiva 2004/109/CE nella versione emendata dalla Direttiva 2013/50/EU, artt. 9 ss.).

È opportuno fare alcune riflessioni in merito alle procedure di trasmissione delle comunicazioni legittimanti dall'ultimo intermediario all'emittente. Considerata la funzione (anche) organizzativa della data di registrazione, si può asserire che l'efficienza di tale meccanismo dipende dalla circostanza che le comunicazioni relative all'identità dei soggetti legittimati raggiungano l'emittente con un certo anticipo rispetto all'assemblea. Tuttavia, gli intermediari ai livelli inferiori della catena sono soliti inoltrare le comunicazioni legittimanti all'intermediario presso il quale essi hanno aperto un conto a loro nome, con la conseguenza che l'informazione rilevante raggiunge l'emittente solo dopo che tutti gli intermediari della catena sono stati coinvolti nella procedura di trasmissione (*chain approach*). I rallentamenti dovuti all'utilizzo di un tale approccio hanno portato all'adozione di pratiche che rendono particolarmente difficoltoso l'esercizio del diritto di voto da parte degli

azionisti. A tal proposito, basti pensare alla pratica delle *cut-off date*. In progresso di tempo, le pratiche commerciali e le innovazioni del settore privato si sono evolute nella direzione di una maggiore celerità della procedura comunicativa: si pensi al servizio di *electronic proxy voting* gestito da CREST in Gran Bretagna, all'utilizzo del *formulaire unique* in Francia, alla nomina da parte delle società tedesche di un "ente di deposito" (*Hinterlegungsstelle*) che procede alla raccolta e all'inoltro delle comunicazioni legittimanti, nonché al servizio FIS gestito da Monte Titoli s.p.a. in Italia. Tuttavia, tali pratiche commerciali sono caratterizzate da un basso grado di interoperabilità, con la conseguenza che il *chain approach* continua a essere il meccanismo di trasmissione delle comunicazioni rilevanti maggiormente utilizzato, specialmente in contesti transfrontalieri. Sotto questo profilo, l'implementazione della Direttiva e del regolamento esecutivo della Commissione potrebbe senz'altro favorire l'interoperabilità dei canali di comunicazioni nazionali. In particolare, l'adozione di formati standardizzati e lo sviluppo tecnologico dei canali di trasmissione, fortemente incoraggiati dal regolamento esecutivo, potrebbero condurre alla definitiva automatizzazione della procedura comunicativa (*straight-through processing*).

Inoltre, una volta raggiunto un significativo livello di standardizzazione e di sviluppo tecnologico, non può escludersi che, in futuro, le comunicazioni legittimanti possano raggiungere l'emittente il giorno stesso dell'assemblea. In un tale contesto, il sistema della data di registrazione diverrebbe obsoleto. Tuttavia, non sembra che il superamento del meccanismo della data di registrazione sia un obiettivo conseguibile nel medio-breve periodo. È infatti improbabile che gli intermediari sostengano volontariamente i costi necessari per l'automatizzazione dei canali di comunicazione, considerato che essi traggono maggior beneficio dall'utilizzo del *chain approach*. In altre parole, i benefici degli investimenti che gli intermediari dovrebbero sopportare per garantire la trasmissione standardizzata e automatizzata delle comunicazioni legittimanti si riverserebbero esclusivamente su emittenti e investitori. Dall'altro lato, invece, molti intermediari finirebbero per rimanere esclusi dalla procedura comunicativa e si ritroverebbero nell'impossibilità di applicare le tariffe per i servizi comunicativi offerti.

In conclusione, sembra potersi affermare che la procedura europea di identificazione degli azionisti sia conforme all'obiettivo di politica legislativa fissato dal legislatore europeo, ossia l'incoraggiamento dello *shareholder engagement* attraverso il potenziamento e la facilitazione del dialogo tra emittenti e azionisti. Nonostante ciò, la Direttiva configura la procedura identificativa come una prerogativa esclusiva dell'emittente e, quindi, degli amministratori. Solo l'emittente può avviare la procedura di cui all'art. 3 *bis* della Direttiva. Nessuna tutela è invece riconosciuta all'interesse che altri soggetti potrebbero avere nella trasparenza dell'azionariato, inclusi e soprattutto gli azionisti di minoranza. Per qualche sconosciuto motivo, la Direttiva ha voluto privilegiare il

dialogo tra emittenti e azionisti, senza tuttavia considerare che anche il potenziamento del dialogo tra azionisti avrebbe potuto essere molto vantaggioso ai fini di un maggiore coinvolgimento degli azionisti nella *governance* societaria. In secondo luogo, la Direttiva non tenta in alcun modo di limitare gli effetti anti-scalata che il meccanismo di identificazione degli azionisti potrebbe produrre. Il legislatore europeo ha infatti inteso favorire l'obiettivo di assicurare la trasparenza dell'azionariato nei confronti dell'emittente rispetto a quello di assicurare una maggiore contendibilità del controllo societario.