

WHO IS THE SHAREHOLDER?
THE (IR)RELEVANCE OF INTRODUCING AN
EU-HARMONISED DEFINITION OF
'SHAREHOLDER' IN THE CONTEXT OF THE
SRD II REVIEW PROCESS
WP 2023-07

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Who is the shareholder?

The (ir)relevance of introducing an EU-harmonised definition of 'shareholder' in the context of the SRD II review process

Abstract

This working paper reflects a presentation I delivered to the members of the Belgian Company Law Centre, during its PhD Seminar in April 2023. It addresses a subtopic of my ongoing PhD research, which focuses on chains of intermediaries. This working paper is a normative and critical analysis of an ongoing discussion and should be interpreted as such.

I am grateful to my respondent, Simon Landuyt, my supervisor prof. Hans De Wulf, fellow members of the Financial Law Institute (including prof. Christophe Van Der Elst and em. prof. Eddy Wymeersch) for their inspiring feedback, which I tried to incorporate appropriately in this text. Many thanks to my close colleague, Floris Mertens, for thoughtful remarks on the draft of this text.

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Context: SRD II review and persistent voting issues

1. The normative question of whether a definition of ‘shareholder’ should be introduced at the European level within the legislative framework of the First- and Second Shareholder Rights Directives¹ (hereafter: “SRD I” and “SRD II”) is a hot topic because of the SRD II-review that is currently ongoing (see below, n°7). The introduction of an EU-harmonised definition of the ‘shareholder’ should be viewed in the wider context of persistent voting issues that occur at (annual) general meetings (hereafter: “GM’s”) of EU listed companies.

To recall, the scope of the SRD I-II framework is limited to GM’s of companies having their registered office in an EU Member State (European issuers) and whose shares are admitted to trading on a regulated market situated or operating within a Member State.²

2. Despite SRD II’s commitment to the voting process and the industry-led development and implementation of Market Standards³, the European Commission pointed out in its 2020 Capital Markets Union (“CMU”) Action Plan that the many different implementations of SRD II across the European Member States cause cross-border voting issues, rendering the GM process complex, difficult and costly.⁴ With the aim of integrating national capital markets into a genuine single market, as part of its Action 12, the Commission committed itself to assessing whether the introduction of an EU definition of ‘shareholder’ could alleviate some of these concerns.⁵

3. Over the period from 2020 to 2023, many industry voting reports unfortunately confirmed the Commission’s findings with respect to the voting process at European GM’s. The most important of these are briefly outlined here.

4. After the transposition of SRD II by Member States into national law, the Association of Global Custodians (“AGC”) identified a series of major voting-related problems in its 2020 report. The AGC went so far as to state that “rather than

¹ 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.* 14 July 2007, ep. 184, 17-24 (hereafter: “SRD I”); Directive (EU) 2017/828 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.* 20 May 2017, ep. 132, 1-25 (hereafter: “SRD II”).

² Art. 1, par. 1 SRD II.

³ The ‘Market Standards for General Meetings’ (the latest version dating back to 2020) are self-regulatory measures, developed by different actors in the intermediary chain in 2010 to dismantle Giovanni Barrier 3 on corporate actions. They are a set of best practices that apply to shares within the scope of SRD I and II. Many rules of SRD II are a literal transplant of the Market Standards for General Meetings. See JOINT WORKING GROUP ON GENERAL MEETINGS, “Private Sector Response to the Giovannini Reports Barrier 3 - Corporate Actions Market Standards for General Meetings” (Final version subject to implementation 2020), July 2020, https://www.ebf.eu/wp-content/uploads/2020/07/2_GM-Market-Standards-2020.pdf , 10. Other Market Standards are those for Corporate Actions Processing (updated 2015) and for Shareholder Identification (updated in 2020).

⁴ EUROPEAN COMMISSION, “A Capital Markets Union for people and businesses-new action plan”, 24 September 2020, https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF , 13.

⁵ *Ibid.*



facilitating access to European capital markets for end investors, SRD II may well instead act as a barrier to access”⁶. The AGC focuses particularly on the divergent existing national requirements that are enforced upon shareholders and intermediaries as a result of the transposition of SRD II (matters that have not been handled by SRD II’s Implementing Regulation⁷, hereafter “IR 2018/1212”). As a result, the AGC highlighted three present-day challenges: (i) lack of a common definition of shareholder; (ii) lack of common requirements for the attribution of entitlements; and (iii) specific and different national requirements for the exercise of rights (such as requirements for powers of attorney in some but not all Member States).⁸ The question of ‘who’ is recognised as a shareholder, and who enjoys the associated entitlements, as well as the various national procedures that exist to exercise shareholder rights, are denounced as problematic.

5. In parallel, in its 2022 response to the Commission’s CMU Action plan, the Association for Financial Markets in Europe (“AFME”) concluded that no further action has been taken to alleviate the concerns highlighted in the Action plan. According to the AFME, EU shareholders still face difficulties in exercising shareholder rights and, according to them, these difficulties mainly concern the process by which shareholders send issuers (or their agents) a message specifying *how* they wish to exercise their voting rights. The unsolved problems are threefold, they claim: the content of a message may be problematic (due to insufficient information reaching the bottom of the chain), difficulties can arise as to its form, or uncertainty can arise regarding the principal entitlement to exercise voting rights.⁹ In line with the AGC report, the AFME considers this last hurdle as the most fundamental one, and therefore strongly challenges the continued lack of a European definition of “shareholder”, which results in end-investors still not being recognised as legal shareholders in some cross-border holding chains.¹⁰

6. Although a comprehensive empirical picture of the soundness and gravity of these allegations in the EU is lacking, the 2022 and 2023 BETTERFINANCE reports

⁶ ASSOCIATION OF GLOBAL CUSTODIANS, “Shareholder Rights Directive II Position Paper”, 4 August 2020, <http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf> , 3.

⁷ Commission Implementing Regulation (EU) 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.* 4 September 2018, ep. 223, 1-18.

⁸ *Ibid*, 3.

⁹ ASSOCIATION FOR FINANCIAL MARKETS IN EUROPE, “AFME’s views on Capital Markets Union – Action 10 (Withholding Tax) and Action 12 (Shareholder Rights)”, 13 May 2022 <https://www.afme.eu/Portals/0/DispatchFeaturedImages/AFME%20on%20CMU%20Actions%2010%20&%2012%20-%20Published%20Paper.pdf> , 7-13.

¹⁰ *Ibid*, 8.



provide valuable insights with respect to voting processes in practice.^{11 12} Strikingly, BETTERFINANCE concludes that the current legal European framework leads to “disastrous results” during the 2021 and 2022 AGM seasons. The 2023 BETTERFINANCE report points to the continued existence of considerable obstacles to the right to participate in the AGM and/or the right to vote, especially in cross-border holding chains in the EU. Arguably, these ‘practical’ difficulties that arise with respect to the exercise of shareholders’ voting rights are not all causally related to the national law interpretation of the ‘shareholder’ and the discussion analysed in this paper, but they are briefly discussed here to outline the wider context.

Overall, with respect to the 2022 AGM season, BETTERFINANCE finds that:

- The voting process is perceived highly complex by shareholders (63% in 2022, compared to 79% in 2021 perceived it as complex¹³);
- The voting process is often ineffective (merely 48% of the respondents were ultimately able to vote at 2022 AGM’s¹⁴). The main reasons for investors not obtaining a GM admission card were no or late transmission of information¹⁵, high costs, and the intermediary not offering an admission card but only a proxy-voting option¹⁶;
- and, when the voting process is effective, it remains very costly.¹⁷

This last finding is perhaps most striking, given that art. 3d SRD II instructs Member States to make charges proportional to the intermediary service provided, and not discriminatory between domestic and cross-border holding chains (except for real differences, for which charges may be levied). In reality, BETTERFINANCE found that compared to the 2021 AGM season, in 2022 the number of respondents facing charges for cross-border AGM services *increased* from 50% (2021) to 64% (2022). The charges

¹¹ For the 2022 and 2023 reports about the 2021 and 2022 AGM seasons, respectively, see BETTERFINANCE, “Barriers to Shareholder Engagement 2.0 - SRD II Implementation Study”, 6 January 2022, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-2-0-srd-ii-implementation-study/>, 28p.; BETTERFINANCE, “Barriers to Shareholder Engagement - SRDI II Revisited”, 24 January 2023, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srd-ii-revisited/>, 50p.

¹² With only 43 respondents, the BETTERFINANCE report makes a valuable, though small-scale first attempt to give practical insight in voting issues at the GM’s of European investee companies. However, since it includes both institutional and individual investors, and at times leans more heavily towards the latter in its conclusions, the relevance of these results for institutional investors remains hard to grasp.

¹³ BETTERFINANCE, “Barriers to Shareholder Engagement - SRDI II Revisited”, January 2023, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srd-ii-revisited/>, 26.

¹⁴ “In 2022, 45% of all participating shareholders could not obtain a voting card for a GM outside their home country and were therefore unable to cast their vote. Conversely, we found that this AGM season only guaranteed the execution of voting rights for up to 48% of shareholders (36% through direct voting and 12% through proxy voting), whereas 7% abandoned the request, citing cumbersome/lengthy or inefficient procedures (communication issues with bank/broker, etc.)”, *Ibid*, 18.

¹⁵ For example, notification of a GM in another Member State reached the investor too late or not at all, and when an admission card was being asked, some intermediaries refused delivery or asked for cumbersome additional information to be provided, *Ibid*, 16.

¹⁶ *Ibid*, 14-17.

¹⁷ *Ibid*, 3.



levied by intermediaries for each AGM in 2022 ranged from €32 to more than €250, and more than 30% of respondents claimed these charges exceeded €250 per AGM.¹⁸ Even more strikingly, BETTERFINANCE now points to the introduction of so-called “AGM service packages”¹⁹ offered by intermediaries (which, for example, include reporting AGM notifications and providing AGM admission cards). Additional fees are then charged, on top of the package, for ancillary services such as proxy voting. Not subscribing to the AGM service package makes services such as proxy voting even more expensive.²⁰ Crucially, while SRD I and (especially) SRD II have increased awareness of shareholder rights and encourage investors to become more engaged with holding companies, they seem to have also opened the door for intermediaries to monetize the exercise of these rights. By bundling rights into packages for which charges are levied, shareholder rights appear less like actual ‘rights’ and more like a paying service. BETTERFINANCE nevertheless rightfully nuances that individual investors with relatively small(er) holdings are generally more affected by these charges than larger institutional investors with larg(er) holdings, who often also have considerably more bargaining power with respect to their intermediaries.²¹

With respect to BETTERFINANCE’s first two points (i.e., complexity and ineffectiveness of the voting process), the continued existence of different national requirements for participation to European AGM’s (in terms of notice periods, record dates²², deadlines for notification of participation, powers of attorney ...²³) indeed forms a major burden to the cross-border exercise of voting rights.²⁴ When institutional investors hold highly diversified equity portfolios that include shares of issuers from different European Member States, these different procedural requirements result in higher monitoring costs and therefore act as an impediment to the exercise of shareholder rights. This point was also addressed by the AGC and AFME reports.²⁵

¹⁸ *Ibid*, 21-22.

¹⁹ *Ibid*, 21-22.

²⁰ BETTERFINANCE reports fees of €450 for proxy voting per GM and €750 for assistance of physical attendance in a GM.

²¹ *Ibid*, 23.

²² In my opinion, in addition to harmonizing the record date, there is also need for a sufficiently long minimum period between the convocation/notice of the GM and the record date (for example, 10 days) to facilitate informed voting entitlement positions.

²³ The widely differing participation procedures of the Member States were also extensively discussed by LAFARRE in A. LAFARRE, *The AGM in Europe: Closing the Gap between Theory and Practice*, Bingley, Emerald Publishing Limited, 2017, 35-38.

²⁴ BETTERFINANCE, “Barriers to Shareholder Engagement – SRDI II Revisited”, January 2023, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srd-ii-revisited/>, 40-43 (see recommendations f - l). The enduring differences between national company laws with respect to (the exercise of) voting rights was also part of the argument made by the European Commission in Action 12 of its Capital Market Union Action Plan, see EC, “A Capital Markets Union for people and businesses-new action plan”, 24 September 2020, https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF, 13.

²⁵ See ASSOCIATION OF GLOBAL CUSTODIANS, “Shareholder Rights Directive II Position Paper”, 4 August 2020, <http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf>, 9 (“SRD II



The 2023 BETTERFINANCE report also reiterated the need for the harmonisation of the ‘shareholder’ concept at EU level.²⁶ The link between the identified practical obstacles and the harmonisation of the shareholder definition is not explicitly clarified, but by implication the following can be concluded. In essence, the reasoning seems to be to create a level playing field: striving for more uniformity in cross-border chains about the person in the chain who, for example, must be identified as a shareholder in response to an identification request from the issuer, who must be able to obtain an admission card, etc., without the cross-border aspect creating differences in this respect (differences that currently result in more legal uncertainty, and thus higher costs and delays).

7. In the context of the review of Chapter Ia of SRD II (as well as art. 3j. on proxy advisors), the European Commission is required to submit to the European Parliament and to the Council a report assessing the implementation of SRD II across the EU. In that mission, the committee is supported by the European Securities and Markets Authority (hereafter: “ESMA”), who launched a ‘Call for Evidence on the Implementation of SRD2 provisions on proxy advisors and the investment chain’ in October 2022, seeking comments by the industry by 28 November 2022.²⁷ ESMA aims to inform the committee of its findings by July 2023. One of the issues addressed in ESMA’s call for evidence is the introduction of an EU- harmonised definition of ‘shareholder’.

Status quo: nationally defined “shareholder”

8. At present, both SRD I and II refer to the “shareholder” as the natural or legal person recognised as such under the applicable national law.²⁸ Hence, there is no autonomous definition at supranational level, contrary to what is often the case in a B2C context (cf. definition of “enterprise” and “consumer” as interpreted by the European Court of Justice). By consequence, there are now various definitions of “shareholder” across the European Member States, grouped around two dominant

does not set out requirements with respect to the timing of key dates for a general meeting”, referring to the different record dates between Member States, and also confirming the requirement of paper-form powers of attorney in at least five Member States); see also ASSOCIATION FOR FINANCIAL MARKETS IN EUROPE, “AFME’s views on Capital Markets Union – Action 10 (Withholding Tax) and Action 12 (Shareholder Rights)”, 13 May 2022 <https://www.afme.eu/Portals/0/DispatchFeaturedImages/AFME%20on%20CMU%20Actions%2010%20&%2012%20-%20Published%20Paper.pdf> , 8 (also including references to the record date and paper-based proxy documentation).

²⁶ BETTERFINANCE, “Barriers to Shareholder Engagement – SRDI II Revisited”, January 2023, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srd-ii-revisited/> , 40.

²⁷ ESMA, “Call for Evidence: Implementation of SRD2 provisions on proxy advisors and the investment Chain”, 11 October 2022, https://www.esma.europa.eu/sites/default/files/library/esma32-380-211_call_for_evidence_on_the_implementation_of_srd2.pdf , 36p.

²⁸ Art. 2 (b) SRD I. Art. 1, par. 2 SRD II makes clear that references to the “applicable law” are references to the law of the Member State in which the company has its registered office.



tendencies.²⁹ Despite the amount of company law regulation targeting shareholders at the European level in recent years, the absence of a harmonised definition can readily be explained by the fact that whoever qualifies as a shareholder is a deeply entrenched and historically grown national choice of the Member States, and the EU maintains a restrained legislative position in this respect.³⁰ As is the case at the international level (cf. the attempted harmonisation in the form of the Geneva Securities Convention³¹), in essence the EU must cope with the difficult balancing exercise between civil law Member States and common law Member States. Essentially, the difference between the two stems from property law concepts, including those relating to share ownership. The absolute majority of European Member States adheres a civil law perspective to the shareholder position: the end-investor is considered to be the 'owner' of shares and enjoys shareholder status with direct entitlements against the issuer, while intermediaries are mere agents and have no proprietary rights to the shares they hold for their clients. In common law Member States (once the UK, and *post*-Brexit still Ireland, Malta and Cyprus), the distinction between legal and beneficial ownership under trust law causes a higher-tier intermediary to be recognised as the legal shareholder vis-à-vis the issuer. End-investors, as beneficiaries of a (sub)trust, have mere derived entitlements and enjoy no direct shareholder rights in relation to issuers.³²

²⁹ A useful attempt to map all of these definitions was made by ASSOCIATION OF GLOBAL CUSTODIANS, "Shareholder Rights Directive II Position Paper", 4 August 2020, <http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf>, 19-28 (subject to changes in accordance with Member States' national companies laws).

³⁰ Art. 4-5 Consolidated Version of the Treaty on the European Union, *Oj.L.* 26 October 2012, ep. 326, 13-45 and art. 50 j. 114 Consolidated version of the Treaty on the Functioning of the European Union, *Oj.L.* 26 October 2012, ep. 326, 47-390.

³¹ UNIDROIT Convention on Substantive Rules For Intermediated Securities ("Geneva Securities Convention"), 9 October 2009, available at <https://www.unidroit.org/wp-content/uploads/2021/06/convention.pdf>. Even though the Geneva Securities Convention was an attempt to harmonize substantive securities laws at the international level, it remained neutral as to whether the rights attached to securities are to be exercised by the ultimate account holder, its intermediary or any other upper-tier intermediary. In respect to shares, from the issuer's point of view, the Convention does not determine whom the issuer is required to recognise as the 'shareholder'. This is left to the nationally applicable company law. The Convention has currently only been ratified by Bangladesh, so it has not yet entered into force (the EU is reluctant to ratify it). For an interesting critical assessment of the Convention's 'neutral' approach, see T. CREMERS, "Reflexions on 'Intermediated Securities' in the Geneva Securities Convention", *European Banking and Financial Law Journal* 2010, Vol.1, 93-106.

³² For high-level background reading on this division, see E. MICHELER, *Property in Securities: a Comparative Study*, Cambridge, Cambridge University Press, 2007, 253p.; L. GULLIFER, "Intermediated Securities and the Right to Vote in the UK" in L. GULLIFER and J. PAYNE (eds.), *Intermediated Securities: Legal Problems and Practical Solutions*, Oxford, Hart Publishing, 2010, 187-218; C. CHUN, *Cross-Border Transactions of Intermediated Securities: A Comparative Analysis in Substantive Law and Private International Law*, Berlin, Springer-Verlag, 2012, 504p.; M. YATES and G. MONTAGU, *The Law of Global Custody*, London, Bloomsbury, 2013, 377p.; V. DIXON, "The Legal Nature of Intermediated Securities: An Insurmountable Obstacle to Legal Certainty?" in L. GULLIFER and J. PAYNE (eds.), *Intermediation and Beyond*, Oxford, Hart Publishing, 2018, 49-84; J. PAYNE and L. GULLIFER, "Intermediated Securities: The European Perspective" in J.H. BINDER and P. SAGUATO (eds.), *Financial market infrastructures: law and regulation*, Oxford, Oxford University Press, 2021, 396-417; E. FERRAN, "Shareholder Engagement and Custody Chains", *European Business Organization Law Review* 2022, Vol. 23, 518-519.

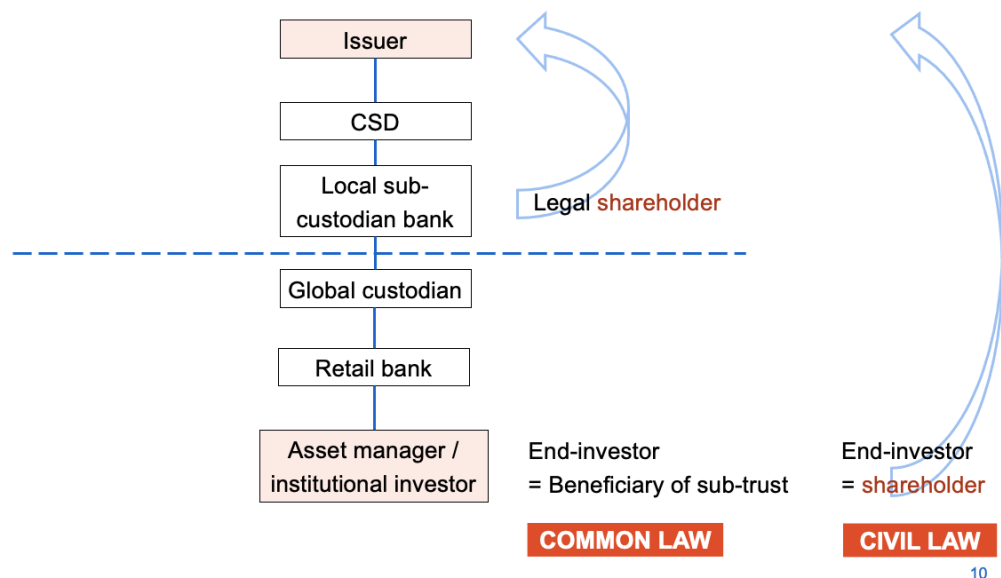


With respect to the applicable national law, the interpretation of the concept of shareholder is governed by the issuer's *lex societatis*. In Europe, the *lex societatis* is determined by two divergent private international law theories: the registered office doctrine, and the 'real' office doctrine. There is a trend towards the registered seat doctrine in Europe, influenced by *inter alia* case law of the European Court of Justice on freedom of establishment.

The figures below graphically illustrate the situation in the EU.

Common law MS	Civil law MS
UK, Ireland, Malta, Cyprus	Absolute Majority of MS
Intermediary = nominee = legal shareholder, end-investor is mere beneficiary of a (sub)trust	End-investor is considered 'owner' of shares and enjoys shareholder status
	e.g. Belgium: art. 7:35 j. 7:38, 7:41 BCC (exercise of membership rights with the issuer by <u>owner</u> of dematerialised securities, regardless of their registration in the name of <u>owner</u> or holder)

INTERMEDIATED HOLDING CHAIN



9. When an entity higher up the custody chain is identified as the shareholder in accordance with the applicable national law, this has two important consequences.

First, the intermediaries in the chain below the formal shareholder level are not captured by the scope of the directive, or in other words, the SRD I-II framework does not apply to them. For example, they will not have obligations to pass on information in due time, they will not be bound by non-discriminatory rules on the charges they



ask for their services and they do not have to respond to identification requests from issuers³³. Second, end-investors will not be able to enjoy the rights the SRD I-II framework guarantees: for example, end-investors may not become aware of a notice of a GM and may have difficulty obtaining a GM admission card. Being able to exercise shareholder rights will depend much more on the specific contractual arrangements that were made in the custody relationship. The client's bargaining power plays a major role in this respect.³⁴

Proposed definitions

10. ESMA's call for evidence requested feedback on two proposed definitions of the "shareholder"³⁵:

- The natural or legal person on whose account or on whose behalf the shares are held, even if the shares are held in the name of another natural or legal person who acts on behalf of this person (beneficiary shareholder);
- The natural or legal person holding the shares in its own name, even if this person (nominee shareholder) acts on behalf of another natural or legal person.

In more simple terms, the first definition equates the shareholder with the end-investor; namely, the natural or legal person that is *not* an intermediary and that holds the shares for *its own* account. The second definition implies recognition of a nominee-system, whereby an intermediary holding shares on behalf of someone else would be recognized as "shareholder" in relation to the issuer. To some extent, it is puzzling how these two definitions were presented side by side at all, when the former is clearly more suited to civil law systems and the latter more to common law systems, and in that view the two definitions are each other's direct opposites.

³³ What is more, should they do so (and disclose the identity of certain clients), they can be in breach of contractual provisions since they do not enjoy the protection of SRD II in this respect (see art. 3a (6) SRD II).

³⁴ Ireland is a special case: the Irish implementing legislation considers end-investors 'shareholders' for the purpose of identification requests from issuers but does not consider them 'shareholders' when it comes to the exercise of shareholder rights. According to the Association of Global Custodians, "Irish law still considers the ability of end investors to exercise their rights is dependent on intermediaries carrying out their instructions since a share in a company is considered held by a member entered on the register of members: companies are not bound to recognise beneficial ownership or other interests on its register of members. As a result, end investors are reliant on Irish courts to protect them on the basis of a "purposive interpretation" of the term "shareholder" so as not to deprive them in the Irish transposing measures of the intention expressed in SRD II.", see ASSOCIATION OF GLOBAL CUSTODIANS, "Shareholder Rights Directive II Position Paper", 4 August 2020, <http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf>, 8; E. FERRAN, "Shareholder Engagement and Custody Chains", *European Business Organization Law Review* 2022, Vol. 23, 523; European Union (Shareholder Rights) Regulations 2020, SI 2020/81 (Ireland).

³⁵ ESMA, "Call for Evidence: Implementation of SRD2 provisions on proxy advisors and the investment Chain", 11 October 2022, https://www.esma.europa.eu/sites/default/files/library/esma32-380-211_call_for_evidence_on_the_implementation_of_srd2.pdf, 10-11.



11. A third approach has now been suggested by EuropeanIssuers, who claim that harmonisation is not necessary with regards to the definition of shareholder and instead proposed to harmonise the notion of the “end-investor” (which also has not been harmonised), more specifically as “the person having invested its own money into shares and holding them for its own account”³⁶.

These definitions are critically assessed hereafter.

12. It should be noted that the consideration to introduce any definition in line with the concept of shareholder or end-investor is not entirely new. From 2002, at the European level the idea had been raised to explicitly designate the person in the chain enjoying the ‘entitlement to control the voting right’. This prerogative would belong to the “ultimate accountholder”. This proposition (the entitlement to control the voting right) was put forward by the Expert Group on Cross-Border Voting in Europe in its 2002 report on the cross-border exercise of voting rights.³⁷ It designated “the last accountholder in the European securities holding systems, not being a securities intermediary within these systems” as the “ultimate accountholder”.³⁸ Arguably, the main characteristic and at the same time limitation of such a rule was that the ultimate account holder could actually be an intermediary who was not an intermediary within the European securities holding systems, meaning an intermediary located in a third country. As a result, the ultimate accountholder could still be holding the shares on behalf of someone else, which would, to some extent, defy the purpose of the rule. The introduction of this “ultimate accountholder” concept was considered by the Commission in 2005, during the legislative preparatory work for its proposal of SRD I³⁹, but was ultimately not included in that proposal and, since then, seems to have taken a back seat. By contrast, and more desirably, SRD II’s scope is considerably wider since its rules also apply to third-country intermediaries that provide services to shareholders of so-called ‘European shares’⁴⁰.

³⁶ EUROPEANISSUERS, “EuropeanIssuers answers to ESMA’s Call for Evidence on the implementation of SRD2 provisions on proxy advisors and the investment chain”, 5 December 2022, <https://www.europeanissuers.eu/publications-viewer?id=3729>.

³⁷ J. WINTER, “Cross-Border Voting in Europe: The Expert Group on Cross-Border Voting in Europe, Final Report”, WODC onderzoeksnotities 2002/6, <https://repository.wodc.nl/handle/20.500.12832/1326>, 77p.

³⁸ *Ibid*, 20-23 (the Primary Rule).

³⁹ EUROPEAN COMMISSION, “Impact Assessment of Shareholders Rights Annex 4: Synthesis of the Comments on the Consultation Document of the Services of the Internal Market Directorate-General. Fostering an Appropriate Regime for Shareholders’ Rights”, April 2005, https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2006/sec_2006_0181_en.pdf, 124-125.

⁴⁰ In the words of the Directive, it applies to third-country intermediaries “which have neither their registered office nor their head office in the EU when they provide services to shareholders or other intermediaries with respect to shares of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State”, see art. 3(e) j. art. 1(5) SRD II.



Normative assessment of the proposed definitions

13. In my opinion, ESMA's second 'nominee' definition should be avoided at all costs. It leans more towards the Anglo-Saxon holding model of intermediated securities and seems opposite to the idea of investor protection already strongly embedded in the SRD I-II framework. It would significantly change the *status quo* in the majority of European Member States, which apply a civil law-based notion of shareholding and grant direct entitlements to end-investors, as shareholders, against issuers. Most importantly, for many end-investors it would be a step backwards rather than forwards, because by now it has become clear that end-investors in common law jurisdictions are facing problems to exercise certain shareholder rights.⁴¹

ESMA's first definition, which equates the shareholder with the end-investor, secures investor protection to a large(r) extent, but may be politically infeasible at the European level. Naturally, opposition can be expected from Member States adhering to nominee-systems.

14. Harmonising the concept of an 'end-investor', as proposed by EuropeanIssuers, therefore makes for an interesting reflection. The development of this argument rightfully relies on the implicit presence of the end-investor in IR 2018/1212.⁴² This is because many rules of the IR actually target the person at the bottom of the holding chain. For instance, the IR defines the "first" and "last intermediary", the latter being "the intermediary who provides the securities accounts in the chain of intermediaries for the shareholder"⁴³. By doing so, the European Commission seems to have made a distinction between the last link in the chain (i.e., the last intermediary, that holds securities on behalf of a shareholder) and the shareholder (who is, by definition, no longer an intermediary). This can be interpreted as meaning that (for example applied to the transmission of information process) as long as the information sits at the level of an intermediary, that does not hold securities for its own account but holds them on behalf of someone else, the Commission considers that the bottom of the chain has not yet been reached and the information flow must continue downwards. By analogy, decisions on voting rights cannot rest with that last intermediary. However, this definition, as it currently stands, has two ambiguities: first, it does not clarify the situation where a 'last intermediary' holds shares on its own behalf (as a beneficiary,

⁴¹ See for background reading E. MICHELER, "Intermediated Securities from the Perspective of Investors: Problems, Quick Fixes and Long-term Solutions" in L. GULLIFER and J. PAYNE (eds.), *Intermediation and Beyond*, Oxford, Hart Publishing, 2018, 237-258; P. DAVIES, "Investment Chains and Corporate Governance" in L. GULLIFER and J. PAYNE (eds.), *Intermediation and Beyond*, Oxford, Hart Publishing, 2018, 187-214 and the caselaw discussed there.

⁴² EUROPEANISSUERS, "EuropeanIssuers answers to ESMA's Call for Evidence on the implementation of SRD2 provisions on proxy advisors and the investment chain", 5 December 2022, <https://www.europeanissuers.eu/publications-viewer#?id=3729>.

⁴³ Art. 1 (6) IR 2018/1212.



in a ‘house account’) and is therefore a ‘shareholder’⁴⁴, and second, the fact that the interpretation of the ‘shareholder’ is still determined at the national level may conflict with this definition of the last intermediary⁴⁵. Perhaps, it would therefore be useful to amend this definition by clarifying that the “last intermediary” is “the intermediary who provides the securities accounts in the chain of intermediaries for the [end-investor]”.

15. The idea of applying the SRD I-II framework to end-investors as opposed to shareholders is that any national implementation of its rules should have effect at the bottom of the holding chain, and national legislation should provide for legal rights to ‘flow’ to the bottom of the chain, even when the formal legal shareholder is an entity higher in the chain.⁴⁶ This could be done, for example, by national provisions that require the formal shareholder to pass on rights to the end investor.

Arguably, it would not be the first time that EU legislation actually targets the end-investor/beneficiary level, as opposed to that of the mere formal shareholder. For instance, such a ‘functional approach’ also underpins the European Transparency Directive⁴⁷. According to art. 10 of the Transparency Directive, the transparency notification duty also applies to the person who can exercise voting rights that are being held by a third party in its own name, but on that person’s behalf (i.e., the case of a nominee). As such, a plea to not adopt an all too formalistic approach to the SRD I-II framework makes sense.

Still, for shareholder matters not within the scope of SRD I-II, the introduction of a harmonised end-investor concept would also create an additional layer of complexity in national legal systems that use a different shareholder concept, and that will undoubtedly retain that concept for those matters. In those jurisdictions, there would then exist a *dual* shareholder concept depending on the subject matter, which may not be a sustainable position.

⁴⁴ According to the current definition, it would seem that those two capacities cannot be united in the same person, which was surely never its intention.

⁴⁵ For example, when the shareholder in a common law system is a higher-tier (therefore not ‘last’) intermediary.

⁴⁶ In this respect, BETTERFINANCE notes that “the Implementing Regulation needs to be strengthened in its language to ensure that the information flow does not end at nominee level”, BETTERFINANCE, “Barriers to Shareholder Engagement – SRDI II Revisited”, January 2023, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srdi-ii-revisited/>, 40.

⁴⁷ 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, 31 December 2004, p. 38–57.



Critical thoughts

16. Evidentially, any definition will not be a cure-all. What is also necessary to ensure a smoother (A)GM process with more certainty over the exercise of voting rights in European Member States is, first, that intermediaries be required to adopt compulsory systems for electronic, *automated* transmission of information. Apparently now, not all of them do, which still causes delays in information transmission. Many of the problems discussed above could arguably be solved by enhanced investments in communication technology, as the IR 2018/1212 envisions. Next, further harmonisation of procedural requirements for participation to GM's (eg. harmonising record dates and other deadlines for submitting documents to issuers) seems inevitable, and imposing more strict sanctions on intermediaries who fail to adhere to the timeline and strict deadlines of the IR.

17. The review could also be an opportunity to increase clarity and legal certainty for investors in financial instruments *representing*, but not constituting shares, for example depositary receipt holders. Depositary receipts are negotiable certificates that represent shares in a foreign company, issued by a local bank, and traded on a local stock exchange. They are separate securities, linked to or based on the underlying foreign shares. While the underlying shares could fall within the scope of SRD II, the position of depositary receipt holders should not.⁴⁸ It nevertheless seems that in some cases, depositary receipt holders can be contractually entitled to exercise voting rights⁴⁹, which may create confusion about their position.

18. The question may be raised whether any designation of the person who may exercise shareholder rights should not 'simply' refer to the person ultimately receiving the cash proceeds of the shares (e.g. dividends), as passed on by the last bank in the chain. When considering this angle, it should be noted that the process for payouts of investment proceeds such as dividends differs considerably from the (proxy) voting process. First, it concerns a one-way cascade system whereby intermediaries are only required to transfer funds to their client's account until the 'ultimate' client has been reached. Consequently, in practice no real problems have been reported in this area.⁵⁰ The voting system, on the other hand, is in many respects a two-way street and

⁴⁸ ASSOCIATION OF GLOBAL CUSTODIANS, "Shareholder Rights Directive II Position Paper", 4 August 2020, <http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf>, 7-8.

⁴⁹ Securities and Markets Stakeholder Group, "ADVICE TO ESMA: SMSG own position paper: Depositary Receipts and Geopolitical Risks", 2 December 2022, https://www.esma.europa.eu/sites/default/files/library/esma22-106-4322_smsg_advice_on_depository_receipts.pdf, 1.

⁵⁰ ASSOCIATION OF GLOBAL CUSTODIANS, "Shareholder Rights Directive II Position Paper", 4 August 2020, <http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf>, 17; ASSOCIATION FOR FINANCIAL MARKETS IN EUROPE, "AFME's views on Capital Markets Union – Action 10 (Withholding Tax) and Action 12 (Shareholder Rights)", 13 May 2022 <https://www.afme.eu/Portals/0/DispatchFeaturedImages/AFME%20on%20CMU%20Actions%2010%20&%2012%20-%20Published%20Paper.pdf>, 7; BETTERFINANCE, "Barriers to Shareholder Engagement – SRDI II Revisited", January 2023, <https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srdi-ii-revisited/>, 39.



presupposes the active involvement of intermediaries to a much greater extent (e.g., to transmit information downwards to the investor, or upwards to the issuer). Second, receipt of funds does not presuppose recognition in a particular capacity vis-à-vis the issuer, where an entitlement to be involved in the voting process clearly does. A designation of the end-investor – leaving aside whether or not this is also the shareholder – *could* make a reference to the receiver of dividends⁵¹, but should not be limited to such a reference. Contractual arrangements may allow the receipt of dividends to accrue to a third party on the basis of a separate agreement and, as was just explained, the contrast in complexity with the voting process warrants a different approach.

19. Another clarification should be made regarding the person of the end-investor. It is crucial to notice this end-investor may not be an owner in an economic sense. If this is a *legal* person that holds shares for its own account, it may just as well be an institutional investor that invests the funds of several ultimate beneficiaries on a pooled basis (i.e., a collective fiduciary position, such as a collective investment fund (UCIT) or a pension fund). The institutional investor's investments in shares are, as it were, the reflection of the savings of a series of underlying 'private' individual investors. These private individuals, who are clients of the institutional investor, can be referred to as 'end savers' and are to be distinguished from 'end-investors', for instance by realising that "the end saver in a fund or other collective product is not setting out to invest directly in equities and has no reasonable expectation of getting direct control of the bundle of rights generally associated with being a shareholder"⁵².

As a sidenote, a new trend has emerged in shareholder voting in recent years: direct voting mechanisms (for example, BlackRock's 'Voting Choice' program). I have commented on these mechanisms elsewhere.⁵³ Here, I merely want to clarify the position of those who benefit from direct voting mechanisms. Through Voting Choice, BlackRock, for example, has allowed some institutional clients of its index funds to exercise the index fund's voting rights in portfolio companies in proportion to the percentage of the fund they beneficially own. In such a case, the index fund, as managed by BlackRock, should be considered as the 'end-investor'. Its clients are merely 'end savers', who can now enjoy a greater say in the way the index fund exercises its voting rights. Regardless of these terminological explanations, it can be argued that direct voting mechanisms reflect a growing aspiration by the market to grant more control over the exercise of voting rights towards the *bottom* of the holding chain.

⁵¹ Cf. BETTERFINANCE's definition, *Ibid*, 40.

⁵² E. FERRAN, "Shareholder Engagement and Custody Chains", *European Business Organization Law Review* 2022, Vol. 23, 520.

⁵³ L. VAN MARCKE, "'Direct' Voting by Institutional Investors: A Trojan Horse?", *Oxford Business Law Blog*, 13 March 2023, <https://blogs.law.ox.ac.uk/blog-post/2023/03/direct-voting-institutional-investors-trojan-horse> .



20. Finally, this whole discussion should be viewed against the wider background of long, cross-border, complex chains of intermediaries that interpose themselves between the issuing company at the top of the chain, and the end-investor at the bottom of the chain. As this working paper hopefully made clear, whoever in the chain is recognised as the formal legal shareholder in relationship to the issuer, may differ from one jurisdiction to another. This causes many issues in company law and corporate governance, which I am exploring in my ongoing doctoral research and for which I aim to formulate some ways to alleviate the ongoing concerns. Some of these issues are: private international law issues related to intermediated securities, the (in)ability to exercise voting rights attached to shares due to securities financing transactions⁵⁴, the lack of transparency within the chain (what I call: “the hassle of identification of end-investors”), the disenfranchisement of the end-investor in common law regimes (i.e., the loss of access to legal remedies and the exercise of other governance rights before courts), intermediary risk (i.e. client asset protection in a case of intermediary insolvency), the transmission of information through the chain, and, of course, shareholder voting issues, as addressed to some extent in this working paper.

As is often the case, it became clear during this discussion on ‘who is the shareholder’ that perhaps it is not so much the law (and the lack of any definition of ‘shareholder’) that is the problem, but that the problem is mostly the chain itself.⁵⁵ I agree with this statement to a large extent. Nevertheless, I would argue that the presence of legacy chains is a given nowadays, which will not disappear overnight (the lobbying and financial interests are simply too big), so that any legislative level (International, European or national) it is therefore best to find ways in which the law can respond to this reality – for example, by not maintaining an overly formal concept of ‘shareholder’ but looking at ways to let rights ‘flow’ to the bottom of the chain. On the other hand, there is now more momentum than ever to apply technological solutions, perhaps even in the form of distributed ledger technologies (the technology underpinning Blockchain), to post-trade processes such as custody services. The road lies open for exploration.

⁵⁴ As discussed in a separate paper, L. VAN MARCKE, “Securities lending as a barrier to (or an instrument for) shareholder activism and the role of intermediaries as lending agents” in A. VAN HOE and T. VOS (eds.), *Shareholder Activism in Belgium: Boon or curse for sustainable value creation?* forthcoming, Brussel, Larcier Intersentia, 2023. Now available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232198.

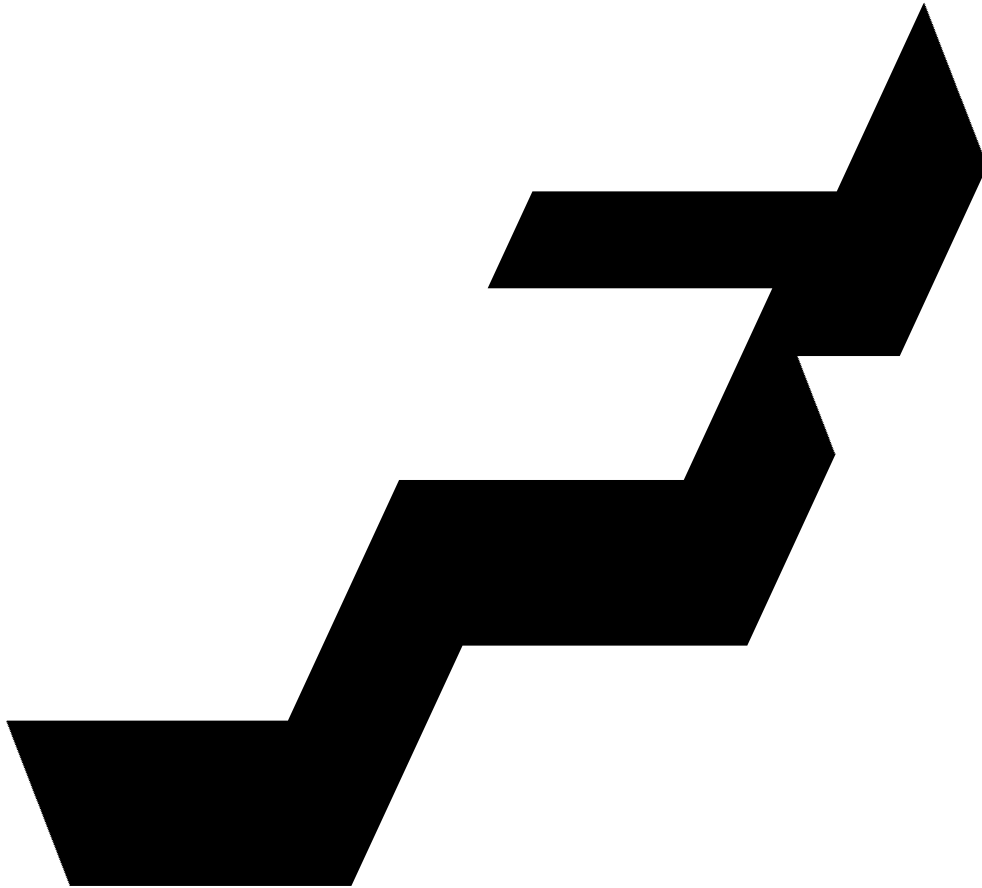
⁵⁵ A fitting quote from Simon Landuyt, my respondent at the PhD Seminar of the Belgian Company Law Centre.



Conclusion

In the context of the SRD II review that is currently ongoing, the European Commission has committed itself to assessing whether the introduction of an EU-harmonised definition of the 'shareholder' could prove beneficial within the SRD I-II framework. The wider background of this assessment is the reality that SRD II's various implementations across the Member States at present cause cross-border voting issues, rendering the GM process of European listed companies complex, difficult and costly for shareholders. Perhaps one of the greatest differences in implementations is the 'shareholder' concept and the opposing view therein between common law and civil law jurisdictions. The creation of a level playing field, with legal certainty in cross-border holding chains about the person entitled to exercise shareholder rights, and with fewer practical obstacles to the exercise of those rights, remains a utopia in the EU.

In this working paper, the various definitions (of 'shareholder', 'end-investor' and 'ultimate accountholder') that have already been proposed were subjected to critical reflections. It should be clear by now that no definition will ever be a cure-all, and harmonisation of many other procedural GM-related requirements is needed. It remains to be seen which way ESMA and the Commission will eventually propose to go over the course of this year, since this is anything but an easy subject-matter to find its way around.



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