

## ABSTRACT

This thesis deals with the phenomenon of the intermediated holding of securities which has recently changed the perception of the legal nature of securities as well as the rights connected with them.

The intermediated holding of securities is a relatively new notion in the area of capital markets and securities law. In the same way globalisation has transformed the approach to the commerce of tangible goods it has also changed the market environment for the abstract creations represented by securities and rights connected with them. The impact of this metamorphosis has meant that securities are no longer traded as goods requiring physical transfer and delivery but are instead increasingly traded as intangibles circulating only through changes made to electronic records in securities accounts.

When financial markets were dominated by certificated securities their holders had a direct relationship, both to the security and to its issuer. Due to the operation of a double legal fiction which, on the one hand, incorporated the rights flowing from the securities in the certificate serving as a corporeal means of transport for the record of these rights, and, on the other, granted to this certificate the status of a movable asset, the holders of securities could trade the security in the same way as with any other physical goods. This revolutionary idea - the legal fiction incorporating rights flowing from the security into a certificate and considering this certificate as a tangible movable asset – became, at the end of 19<sup>th</sup> and in the first half of 20<sup>th</sup> centuries, one of the main drivers of the boom in securities trading since it radically reduced related transaction costs.

Unfortunately, the subsequent development of securities trading reached such intensity that this legal fiction later became the key impediment to the expansion of capital markets. In consequence, the trading as well as holding patterns of securities had to undergo a substantial transformation. As a result, the overwhelming majority of securities exist today only in the form of an electronic record in the securities account maintained by the intermediary. The relation of the holder to these securities is only indirect since it can be exercised only through the intermediary who performs the transactions with the securities on the basis of the account holder's instruction by way of a change in the

records on the account which it maintains for the account holder; to a limited extent the same holds true also for the assertion of rights flowing from the securities to the issuer.

While Czech legislation – thanks to the adoption of legal rules regarding the maintenance of electronic securities accounts and the establishment of a central depository – has made an important, although not entirely sufficient, step towards the integration of modern systems of indirect securities holding, the same cannot be said with respect to legal doctrine in the area of securities and capital market law. With the exception of a limited number of publications on individual issues, Czech doctrine has so far avoided a more complex examination of the phenomenon of intermediated securities holding, which in fact makes traditional legal concepts applied to directly held certificated securities unusable in the context of indirectly held intangible securities.

The primary objective of this thesis is thus to fill this vacuum on the basis of an analysis of the notion of intermediated holding and the intermediated security in certain foreign laws and by applying the conclusions of this analysis to similar notions currently existing under Czech law.

The secondary goal is to stress the impossibility of maintaining the concept of a security based on a certificate and to formulate new fundamentals of the concept of a security using the new paradigm of an intangible security recorded electronically on the securities account. However courageous this approach may appear, it must not be forgotten that the outlined change in the doctrinal approach to the securities has already taken place in a number of economically developed civil law and common law countries and that, in some of them, this was followed by an in-depth reform of private law rules on securities and rights connected with them.

The adoption of the UNIDROIT Convention on Substantive Rules regarding Intermediated Securities at the end of 2009 demonstrates that the efforts to create a functional global legal framework for intermediated holdings of securities were not vain. The drafting of uniform rules for the intermediated holdings of securities has, however, revealed traps in the dogmatic conceptual divergencies among individual national laws.

This new approach to the intermediated holdings of securities should be followed up by the Czech legislator by creation of a new special legal framework for intermediated

securities and their intermediated holdings. He should base himself on the the functional approach while using as far as possible neutral terminology not stained with the old notions stemming from certificated securities. The definition of intermediated securities, as new objects of private law, should not concentrate on the medium for the security, but should be based on subjective rights transferable by a record in a securities account which represents the real nature of intermediated holdings.