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Proposals on Shareholder Identification and Information Flows under the Shareholder Rights Directive need further Clarification

German issuers welcome proposal but wish to see remaining uncertainties addressed

Position Paper on Level II Regulation laying down minimum requirements implementing the provisions of Directive 2007/36 of EP and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of Shareholders' rights (version as of 9 May 2018)

General Remarks

We welcome the possibility to comment on the draft regulation on Level II for implementing amendments of the Shareholders' Rights Directive Level II. We believe that this regulation and the underlying directive will further improve and harmonise information flows between companies, intermediaries and shareholders and, in turn, will ease to practice shareholders' rights cross border within the EU.

However, the draft of the level II act contains a number of technical terms and considerations that are difficult to understand without further explanations. In addition, the consultation period overlaps with the general meeting season, at least in Germany. Our comments thus should be understood as preliminary.

We welcome that the draft regulation puts forward electronic communication especially for processes to transfer information from issuer to the shareholder along the chain of intermediaries. Nevertheless, the suggested formats of data fields appear to closely follow the current SWIFT standard which is not used for the communication between issuers and shareholders or issuers and intermediaries, but only for the transmission of information between intermediaries. Therefore, it could be made clearer, that issuers are not forced to implement expensive interbank-communication tools for complying with the level II act, but that the level II act is primarily designed for the inter-intermediary communication.

In the same vain, it is our understanding that the SRD II does not oblige issuers and investors to communicate along the chain of intermediaries as there may exist or may be developed channels of direct communication that also serve the objectives of the SRD II. For example, in the case of German registered shares the legal model provides for direct communication based on the share register of the company. Indirect communication is only used if intermediaries are registered that do not hold shares on their own account but on the account of end investors. Thus, issuers should not be obliged by the level II act to use the chain of intermediaries so that the level II is neutral in that respect.

From our perspective it is the objective of the SRD II that general meeting information will be passed on to the end investors in order to allow them to decide on voting and other excises of rights. However, depending on the national law the end investor and depending on the holding model of securities is not necessarily the shareholder in the legal sense. Thus, we believe that it could be made clearer that intermediaries not holding shares on their own account have to forward information to their clients ultimately holding the shares.

From an issuer's perspective the process of vote confirmation is new. The final level II act thus should provide for both some kind of flexibility as well as efficiency on the side of the issuers. Against this background, we suggest the following clarifications when it comes to vote confirmation.

- We suggest that where a vote has been casted electronically, including an electronic platform, an immediate reply by the electronics system that the vote has been received should regarded as an electronic vote (receipt) confirmation in the sense of Art. 3 c paragraph 2 subparagraph 1 of the Shareholders' Rights Directive (SRD II).

- We understand that also the provision on recording and counting of votes (Art. 3c paragraph 2 subparagraph 2) have electronic voting in mind. Thus, it could be made clearer that issuers' duties are limited to votes casted electronically.

- In line with Art. 3 c, par, 2, subparagraph 2 of the SRD II we also suggest making it clearer both in the recitals and in the text that where information is already available to shareholders there is no need to provide additional confirmation.

- Furthermore, it must be clear that the issuer can only confirm the voting of the shareholders he knows. This means in particular, that he cannot confirm end investors' individual votes when they are casted anonymously by intermediaries in a huge block of votes. In this case, the issuer can at best confirm that the proxy voted for certain amount of voting rights, but not for whom the proxy voted. In a similar way, issuers of registered shares can only confirm votes for shareholders that registered on their own account in the share register. This should be clarified.

1 Text Draft Regulation

Article 1 Definitions

In Art. 1 (3) a **"corporate event**" is defined. The definition is unclear in two respects. First, it is unclear what is meant by a corporate event "initiated by a third party". This should be clarified, because in our understanding the issuer is the ultimate source of any corporate event. Second, it should be clarified that takeover bids are out of scope.

In Art. 1 (7) **"record date"** is defined. The term shall also be used for the date when the shareholder identity shall be determined. For issuers this is confusing as the record date is typically used for dates, on which rights flowing from the shares (in particular the right to participate and vote in a general meeting) are determined.

We therefore recommend to have an own term for the disclosure request in Art. 1 (7) as well as in table 1 A.4. and table 2 A.4. We suggest to use the term "disclosure date".

Art. 1 (15) should from our perspective to be redrafted in "**'ex date'** means the date as from which the shares are traded without the rights flowing from the shares ~~including the right to participate and vote in a general meeting".~~ The current wording is confusing as the ex date is only used for the standard forms for other corporate events (see table 8 of the Annex) and in relation to general meeting only the record date is rightly used.

Article 2 Standardised formats, interoperability and language

It is our understanding that Art. 2 together with the Annex defines the format and the minimum content of electronic information that ultimately should enable "straight through"-processing along the chain of intermediaries.

However, the wording it appears to be somewhat confusing with regard to how far standardization shall go and whether there is a need for unstandardised information to be passed on. Terms that may need further explanation are:

- What does "taking into account the targeted recipient of the information" (Art. 2 (2)) mean?
- What does "allowing access to shareholders, who are not intermediaries, access to all information, as well as any modalities for shareholder actions only through generally available tools and facilities" mean?

Article 5 Confirmation of entitlement to exercise shareholders rights in a general meeting

Art. 5 paragraph 1 sentence 3 reads: "The last intermediary shall confirm to the shareholder or third party nominated by the shareholder the entitled position, *unless it is known to the issuer and the first intermediary, or is transmitted to the issuer and first intermediary through the chain of intermediaries."*

Art. 5 appears to define different processes / options to confirm the entitled position to both the shareholder (end investor) and the issuers (or its service provider). However, from reading this Article it is unclear which situations the EU Commission has in mind so that it remains unclear whether existing processes of entitlement are covered (e.g. the entitlement through the share register for registered shares) and/or whether changes are envisaged.

In the recitals it should thus be clarified that in the case of registered shares the share register of the issuer reflects the entitled position. Also, it should be made clear, that in any case issuers are not obliged to proof the entitlement to the shareholders. Otherwise the last part of Art. 5 para 1 ("or is transmitted to the issuer and first intermediary through the chain of intermediaries") could be read as if in this case such an obligation for the issuer could result.

Article 6 Notice of Participation by shareholder in a general meeting

Art. 6 paragraph 2 states: "Where the notice of participation includes a reference to the entitled position of the shareholder or client, the last intermediary shall ensure that the information is consistent with the entitled position."

We wonder in which constellation there is a notice of participation which does not refer to an entitled position of the shareholder. Also here, the meaning should be made clearer to avoid discussion.

Article 9 Deadlines to the be complied with by issuers and intermediaries in corporate events and in shareholder identification processes

The deadlines in Art. 9 should ensure more flexibility. Art. 9 paragraph 1 states that the issuer who initiates the corporate event shall provide information to the first intermediary on the same day on which it announces the corporate event. This is rather short: If the corporate event is announced by the issuer late on the business day or even after regular close of business/closing time of settlement systems, the issuer cannot ensure that information is passed on the same day; information should be provided at the beginning of the next business day.

Furthermore, for corporate events other than general meetings (i.e. corporate actions) there are already standard procedures in the market how these are

processed and communicated to the investors (see also recital (11). We, therefore, read the standard that no additional issuers' duties will result beyond the status quo. However, this could and should be clarified and is particularly true for dividend payments, that are announced together with the general meeting and are initiated after the voting has taken place.

Art. 9 paragraph 5 defines rules on the vote confirmation: "The voting receipt shall be provided to the shareholder immediately after the cast of the votes. The confirmation *of recording and calculation* of votes in the general meeting shall be provided by the issuer in a timely manner and no later than *15 days after the general meeting*. *When* the intermediary …"

Apart from our suggestion in the general remarks, we have three remarks on the wording of Art. 9 para. 5:

- We think that the term "calculation" is misleading. Art. 3 c paragraph 2 subparagraph 2 asks for a confirmation that the votes have been validly recorded and counted by the company, unless that information is already available to shareholders. Thus, the term calculation appears to imply something different than a mere counting of votes and thus may create a certain legal uncertainty. Furthermore, the draft does not reflect the possibility that the information could be already available for the shareholders (e.g. via a voting plattform) so that there is no obligation for the issuer to confirm the votes. This should be clarified in the text as well as in the recitals.

- We also consider the deadline of 15 days after the general meeting too short and not convincing. Member States even may decide that vote confirmation only becomes necessary upon request and may establish a deadline for requesting such confirmation; such a deadline for requesting shall not be longer than three months from the date of the vote (Art. 3 c paragraph 2 subparagraph 2). If the shareholder asks for a confirmation three weeks after the general meeting a deadline of 15 days after the general meeting will not be practicable. Therefore, the EU COM should clarify what happens if a member state uses the option to oblige issuers to confirm votes only upon request.

- The term "when the intermediary" may imply that intermediaries have to receive the confirmation in any case. As this may not necessarily be the case (e.g. when the issuer confirms the voting directly), we suggest making this clear by using the term "In case" or "where" (see SRD II).

2 Comments on the Draft ANNEX

General Remarks on the Tables

We welcome that in future common message contents and formats will be used to transfer all the relevant information regarding the general meeting, voting rights and other corporate actions in a straight-through process from the issuer to the shareholder and vice versa. Nevertheless, we have some suggestions regarding the different data fields in the tables

Furthermore, it should be compulsory to provide the Legal Entity Identifier Code (LEI) of the legal where it is asked for in a table and a LEI is existing, e.g. in Table 2 B.1, or C. 1 (a) and Table 5 B. 3 (a). The LEI is a valid identification number in Europe which uniquely identifies the legal persons. Only where no LEI is available other unique identification numbers shall be provided. In this case, it has, however to be specified which identifier code is used. As we are not aware, whether there may be shareholders where no unique identifier is available at all, this case should be considered and clarified.

Regarding time specification the following format that has to be used (YYYYMMDD) we suggest that it is possible to fill in the exact time, e.g. 0.00 p.m., because there may be circumstances where the exact time is useful or necessary. For example, issuers may allow for changes in voting instructions until 12am on the day of the general meeting.

Table 1 – Request to disclose information regarding shareholder identity

- General remark: We recommend, that tables 1 and 2 contain a data field for the name of the issuer. Although ISIN and LEI are given it should be helpful to have the name of the issuer as this is the most commonly known data of a company.

- General remark: In case the requesting person and/or recipient is a service provider for the issuer table 1 could be read as if it identifies the (legal) person who request the disclosure (the service provider) but not the issuer, i.e. the ultimate addressee of the information, even if the issuer meant to be the data source according to the standards. Also relevant for table 2.

- A.4.: We recommend “disclosure date” instead of “record date” (see above).

- A.6.: It isn't clear whether a threshold in percentages shall refer to capital or shares that are allowed to vote). Therefore, this should be further differentiated to "pcs (percentage shares)" or "pcc (percentage of capital)".

- A.6.: Furthermore, we recommend to also foresee the possibility to limit the request on legal persons. This would also exclude problems regarding conflicting data protection law.

- B.2: The limitation to 35 characters may prove to be to short in case the legal name of the recipient is very long.

Table 2 – Response to a request to disclose information regarding shareholder identity

- General remark: We recommend, that tables 1 and 2 contain a data field for the name of the issuer. Although ISIN and LEI are given it should be helpful to have the name of the issuer as this is the most commonly known data of a company.

- General remark: In case the requesting person and/or recipient is a service provider to the issuer table 1 could be read as if identifies the (legal) person who request the disclosure (the service provider) but not the issuer, i.e. the ultimate addressee of the information. Also relevant for table 1.

- A.5.: We recommend to use "disclosure date" instead of "record date" (see above).

- B.1: See general remarks on LEI above

- C.1 (a): See general remarks on LEI above

- C.2 (b): In case of natural person first and surname may not allow identification. The date of birth should therefore be considered as an additional date field.

- C.9: Not only the E-Mail address should be asked for but it should be possible to give a differend electronic adress to keep in mind other and new forms of electronic communication. Here it could be said: „Electronic address".

Table 3 – Meeting Notice

- General remark: The name of the issuer should be mentioned (see above).

- A.1./A.2.: The unique identifier code shouldn't be a code made up by the issuer alone, because then any issuer could define its own system which will result in complexity and overlaps. It should be clear, that unique codes have to be both unique and defined in a harmonised way in order to correctly identify a meeting.

- C.3.: The remark on A.1/A.2.

- C.6.: We agree with this obligation, but it should be sufficient that issuers provide a single URL for a meeting. Thus, field E.3. could be deleted or made strictly voluntary.

- D.1. It should be clarifie what ist meant by "voting by correspondance" (postal vote? Or further means of participation)

- E.3: See commetn on C.6. Besides, 4 alphanumeric characters are not enough (declaration of an URL is necessary).

- E.3: It should be possible to specify also the way of participation as in E.1 (VI, PH, PX, EV; so an repeating data field).

Table 4 – Confirmation of Entitlement

- General remark: For the case of German registered shares the share register of the issuer determines who is entiteled to participate in and to vote at a general meeting. As already laid down in our remarks on Article 5, we suggeset to clarify that no further issuer obligations result in the entitlement process.

- A.2.: See remarks on table 3.A.1.

Table 5 – Notice of Participation

- In case of registered shares the notification of partipation is checked against the share registers and regularly a service provider of the issuer is involved in this process. To the extent the form is thought to be used also for this case, the number of the shareholder as well as the name of the service provider should be foreseen as data fields.

- A.3.: See remarks on tabel 3.A.1.

Table 6 & 7 – Voting receipt and Confirmation of the recording and counting of votes

- See general remarks on tables 4 & 5. In case of registered shares the number of the shareholder which is the constituting element of the share

register should be part of the notifications of the issuer and as an option should be created to include a service provider who takes care of the notification process for the issuer.

- See also our general remarks at the beginning of the position paper.

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