Deutsches Aktieninstitut

Removing Obstacles for Shareholder Identification

Trialogues on the Shareholder Rights Directive
Should Recognize the Needs of Listed Companies

Positon Paper for the Trialogues on the Shareholder Identification Mechanism under the Shareholder Rights Directive, 12 November 2015

General Remarks

As frequently pointed out, Deutsches Aktieninstitut welcomes that the Shareholder Rights Directive (SRD) will introduce a general right for listed companies to identify their shareholders. Shareholder identification is a prerequisite for efficient communication between companies and their investors as well as for shareholder engagement. A number of Member States of the EU have already implemented systems of shareholder identification based on national corporate laws and embedded in the national legal traditions. All of these systems work efficiently in the national context but are de facto less or little effective in cross-border situations.

This is also the experience of the German issuers of registered shares which regularly are not able to identify foreign shareholders due to the specifics of the international custody business (e.g. long holding chains with a number of intermediaries between the company and the end investors). At the same time, the shareholder base of listed companies has become increasingly international. 50 percent of the shares of DAX companies are held by non-German investors. Listed companies therefore are highly interested in that these shareholders can be addressed for investor relations purposes, receive relevant information about general meetings and will be enabled to cast their votes in an efficient manner.

The proposals on shareholder identification therefore rightly recognizes the existing deficits and tries to establish an EU-wide minimum standard for the identification of shareholders and the flow of information between listed companies and their investors. Deutsches Aktieninstitut thus supports that listed companies should get the right to identify their shareholders (Article 3a), that intermediaries will be obliged to transmit information from listed companies to end investors and vice versa (Article 3b) and that intermediaries should be obliged to facilitate the exercise of shareholder rights (Article 3c). However, the details of these duties will generally be defined in Implementing Acts which bears the risk of legal uncertainties, over-bureaucratic regulation and the contraction or disregard of national legal traditions in the field of corporate law.

Therefore, to be successful these three guiding principles of Chapter IA should be drafted carefully both in the SRD and maybe even more in the Implementing Acts.

Against this background this position paper compares the proposal of the EU Commission (COM-proposal), the General Approach of the Council of the EU (Council-Approach) and the Report of the European Parliament (EP-Report) in order to summarize the German listed companies' point of view on the relevant issues.[1]

[1] This position paper presents the view of the biggest listed Germany companies with registered and bearer shares organized in the issuers' working committee (Arbeitskreis Emittenten) and the working committees on registered shares (Arbeitskreis Namensaktien) of Deutsches Aktieninstitut. Both working committees are the central forums of opinion building among the listed companies in the German market.

1 Art. 3a: Identification of Shareholders

It should be laid down clearly that the identification of shareholders is a right for listed companies (at least for those with registered shares) and not a service of intermediaries. This is ensured by the Council and the EP whereas the first sentence of the COM-Proposal ("shall ensure that intermediaries offer … the possibility to have their shareholders identified") could cause misunderstandings. We therefore support the wording of the Council and the EP.

We, however, oppose the Council-Approach's option to introduce a minimum threshold for identification of shareholders of 0.5 percent of shares or voting rights. Such a threshold would de facto make impossible the identification of shareholders in the majority of cases as only a few investors will cross that threshold. For example, one of the large German blue-chip companies in the DAX30 currently has approximately 175 000 shareholders. Of those, fewer than 100 shareholders hold positions of 0.1% or more (figures derived from share register and shareholder ID). In addition to that, a threshold will cause massive problems in practice as shareholders may have more than one account with different banks (that cannot be aggregated without knowing the shareholder/end investors and/or disaggregating omnibus accounts).

We are also supportive to Art. 3a para. 4 as it makes clear that a request to identify shareholders cannot be denied on the grounds of national legal provisions. From our point of view it is important that the national identification mechanisms (that may vary due to different legal traditions) can be enforced cross-border. Therefore, we also support that intermediaries from Non-EU-countries are also included in the regulation.

For the mechanism to work smoothly it has also to be ensured that all relevant data is provided to listed companies that is necessary to enter into an efficient dialogue with investors. Therefore:

- Deutsches Aktieninstitut would prefer that data collected from the idenfication can be used by issues without a limit in time for investor relation purposes. If this option is not considered in the trialogues we will, however, support that both the Council-Approach and the EP-Report clarify that the data collected from identification can be used until 24 months after the respective shareholder has ceased to be a shareholder. In contrast, according the COM-proposal shareholder data has to be deleted by the issuer after 24months even if the identified person is still holding shares.

- Deutsches Aktieninstitut supports the Council's and the EP's clarification (Art. 2 (l), Rec. 4d) that in addition to the identity of the shareholder also information on the number of shares and where available votes has to be delivered. A shareholder identification would make little sense if this key information could not be gathered by the issuer.

- Deutsches Aktieninstitut welcomes that the Council and even more the EP clarify that shareholder identification serves the general and broader purpose of communication between companies and investors. The original COM-proposal, in contrast, has been too strict in limiting the identification mechanism to the only purpose of facilitation of the exercise of rights, which may cause legal uncertainty if a certain identification request serves this aim.

As to the Implementing Standards according to Art. 3a para 5 it should be ensured that only a minimum standard is defined, so that Member States are able to reflect their national legal traditions or corporate laws. However, as a minimum the following data should be transmitted: name of the shareholder/end investor, address and contact details including email, number of shares, number of voting rights.

2 Art. 3b: Transmission of Information

Deutsches Aktieninstitut is also supportive to Art. 3b which codifies that intermediaries transmit information from listed companies to investors and vice versa in order to improve the process of shareholder communication and engagement. Without the support of intermediaries it is de facto close to impossible that all shareholders/end investors get information in a timely manner. For bearer shares this is self-evident. But also in the case of issuers of registered shares intermediaries are necessary for the transmission of information – at least for the end investors that are not known to the respective companies because the share register contains nominee shareholders.

From our point of view the final text should either take over the wording of the COM-proposal or the EP-Report as to when intermediaries will be involved ("if the company *chooses not* to directly communicate" or "if the company *does not* directly communicate"). The Council's Approach, in contrast, creates room for interpretation whether a listed company "*is* not able to communicate directly with its shareholders". One could for example argue that according to the mechanism of shareholder identification of Art. 3a every listed company should in principle be able to identify its shareholders or should at least undertake efforts to identify them.

Deutsches Aktieninstitut also basically supports that companies have to deliver the relevant information in a standardised and timely manner to the intermediary. In order to make the communication process more efficient some kind of standardisation appears to be necessary so that intermediaries will be able to transmit the information electronically (if possible) and investors can trust in getting similar information from all European companies. However, in defining the relevant standards, the following should be ensured:

- Neither the format nor the content of the information should interfere with existing national corporate law. Insofar the standards should be flexible enough to recognize national specifics of the company laws or specific sector regulations.

- All relevant parties (i.e. issuers, banks and other service providers) should be intensively consulted when defining the standards in order to avoid bureaucratic burden and in order to ensure efficient implementation. Intensive consultation should also ensure that all relevant information is identified and all national specifics are recognised in the implementation process.

- It has to be avoided that the standardisation unintentionally creates monopolies for the collection the relevant information. Otherwise there would be the risk that prices for transmitting data could be set at inappropriate levels.

- As to the Implementing Standards according to Art. 3b para. 5 it should generally be ensured that only a minimum standard is defined, so that Member States are able to reflect their national legal traditions in corporate laws or other relevant regulation.

3 Art. 3c: Facilitation of the Exercise of Shareholder Rights

As long as the end investors do not receive information directly from the listed companies investors are not able to exercise their rights (e.g. voting rights, taking part in corporate actions) without interacting with intermediaries. Deutsches Aktieninstitut therefore is of the opinion that shareholders should be enabled to cast their votes. We also agree that it should be the obligation of intermediaries to facilitate the relevant processes as it is proposed in Art. 3c para. 1.

However, the three proposals are not entirely clear in two respects:

- First, it is not clear whether "making arrangements that shareholders can exercise their rights" (Art. 3c para. 1 lit. 1) and "the exercise of rights by the intermediary" (Art. 3c para. 1 lit 2) are alternative options for the member states and what would be the consequences if a Member State decided to implement only one of the options. If Member States implemented "the exercise of rights by the intermediary" (lit 2.) as the only way to facilitate the exercise of shareholder rights, the investor need to stick to this particular service even if they would prefer to engage directly with the respective issuers.

- Second, also here it is left to Implementing Acts (Art. 3c para. 3) what exactly will be the duties of intermediaries in this respect so that it is impossible to evaluate the impact of the new regulation to this point of time. This clearly creates legal uncertainties for a very important issue.

As regards Art. 3c para. 2 it is important to know, that (electronic) vote confirmation is currently not a common practice in the EU. Thus, mandatory vote confirmation will likely result in additional bureaucratic burden and/or massive legal uncertainties for listed companies. We therefore generally oppose a mandatory vote confirmation process by the issuers as it does not add value for (end) investors.

In addition to that, it has to be noted that some Member States have already implemented processes that serve the objective of the proposed regulation. In Germany intermediaries are obliged to inform the end investors if the casting of votes failed or a specific vote instruction has not been followed. From our point of view this obligation is sufficient in order to ensure that investors can trust in that votes are passed on to issuers and that the voting has actually taken place.

If the EU sticks to the idea of vote confirmation, we would strongly recommend any amendment to the EU-COM proposal that results in less compliance risks and costs for listed companies.

In particular:

- First of all, listed companies can only confirm votes if the end investors/shareholders, the number of shares voted and the votes themselves are known to the company. As long as votes are casted by intermediaries without uncovering the end investor there is no technical basis to confirm the votes to end investors. This practical limitation has not yet been reflected in the proposals.

- We support that the EP (and also the Council?) proposes to limit the confirmation process to votes casted electronically. But we would like to see the term “electronically” specified in the sense that votes sent via email and FAX messages are not covered by this obligation, so that a confirmation would only be mandatory of the vote itself is casted over an electronic system.

- We also support that Council opens the option to Member States that votes need only to be confirmed upon request.

- Ideally, both conditions should be combined in the final text in order to limit the bureaucratic burden for listed companies.

- We do not support the EP’s proposal to publicly disclose, via the website, the minutes of the general meeting. At least in Germany, the minutes are already available in the register of companies (Handelsregister) which is sufficient for information purposes. As to the publication of voting results we also doubt that this is necessary. Though many issuers do already present the voting results on their websites we doubt that this should be a legal obligation.

- It has also to be acknowledged appropriately that national legal systems may rest on a very different legal traditions. Therefore, Deutsches Aktieninstitut is concerned that the Implementing Acts according to Art. 3c para. 3 could not take fully into account these differences or even worse could contradict existing national solutions with a proven track record. We would therefore prefer that the level-1-text leaves flexibility to the Member States.

4 Art. 3d: Transparency of Costs

According to Art. 3d intermediaries may be allowed to charge prices for services to be provided under Chapter 1A of the SRD. Though there is a role model for at least a parts of the new obligations of the SRD in the German market, Art. 3d potentially creates conflicts between intermediaries, issuers and investors.

From an issuer's (as well as a shareholder's) perspective it should be ensured that the prices charged are reasonable, proportional and nondiscriminatory as it is proposed. Only under these conditions it can be avoided that the legal duties of Art. 3a, 3b and 3c are undermined through the back door of unreasonable price policy. Among the three proposals the Council's Approach and the EP-Report, however, are preferable. The Council and the EP make clearer that not all of the services of Chapter 1A have to be charged which appears to be reasonable having in mind different national traditions or depending on the nature of the "service" (e.g. for companies of registered shares it should be a legal obligation that end investors are identified as this is the legal "model" of a registered shares. Uncovering end investors' holdings behind nominee accounts should therefore be basically free of charge.).

We also welcome that differences in charges for cross-border situations have to be justified (EU-COM, EP) or are even prohibited (Council). Indeed, Chapter 1A has been proposed by the EU-COM because the processes of information and exercise of rights is less efficient and priced unreasonably in the cross-border context. With respect to justification it should however be clarified as the when/where this justification has to take place (in advance when costs are made transparent, only in case of legal proceedings).

5 Art. 3e: Third Country Intermediaries

Deutsches Aktieninstitut basically supports that intermediaries from third countries will be in the scope of the SRD. Indeed, listed companies all over Europe are interested in that not only their European shareholders receive information and are assisted in the exercise of their shareholder rights but also their Non-EU-shareholders. To reach this objective, some kind of extraterritoriality that covers the whole chain of intermediaries appears to be necessary.

The original EU-COM proposal as well as the EP-Report, however, limit the extraterritorial scope to intermediaries that have established a branch in the EU. The Council's Approach is broader because it obliges any intermediary that offers services relating to a listed company established in the EU and being listed on an EU Regulated Market. Alternatively one could also consider to oblige intermediaries that offer financial services in the EU requiring a licence under banking laws.

Contact

Dr. Gerrit Fey
Deutsches Aktieninstitut e.V.
Niedenau 13-19
60325 Frankfurt am Main
Phone + 49 69 92915 - 41
Fax + 49 69 92915 - 12
fey@dai.de

Holger Lehnen
Deutsches Aktieninstitut e.V.
Niedenau 13-19
60325 Frankfurt am Main
Phone + 49 69 92915 - 27
Fax + 49 69 92915 - 12
lehnen@dai.de