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CCBE Response to the European Commission Consultation on Fostering an Appropriate Regime for Shareholders' Rights

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The CCBE (Council of Bars and Law Societies of Europe), through its Company Law Committee, would like to comment on the above mentioned consultation document as follows:

In summary, as a matter of principle, the CCBE, which represents over 700,000 European lawyers through their national bars and law societies in the EU and the EEA, supports the aim of the Consultation Document to foster an appropriate regime for shareholders' rights but has some concerns as to the ways in which it is proposed to achieve this as set out in this response.

The following comments are made with regard to certain specific paras of the Consultation Document.

2. The Consultation is an implementation of the EU Company Law Action Plan of 2003. Such Action Plan, and in particular the aim to enhance the exercise of their rights by shareholders of listed companies, has been favourably commented upon by the CCBE.

3. The CCBE fully supports the reasons why an appropriate regime to enhance to facilitate the exercise of shareholders' rights is needed.

4. The forthcoming proposal on shareholders' rights should be applicable to listed companies. It may be premature to invite Member States to extend the forthcoming proposal to non-listed companies, however it would be appropriate, in the opinion of the CCBE, to invite Member States to consider whether the forthcoming proposal should be extended to non-listed companies. Such consideration could also pertain to non-listed open ended investment funds.

5.1 We have concerns how the proposal for a Directive could set up a framework to identify the person entitled to control the voting rights as the last natural or legal person holding a securities account in the chain of intermediaries, such last person not being a securities intermediary within the European securities holding systems nor a custodian nor a depositary or any other entity holding securities in an account for the beneficial ownership of a third party. There are many ways in which an investor may hold shares and there may be many intermediaries in a chain of intermediaries. We do not think the proposed test would always identify the appropriate person entitled to vote.

As regards intermediaries in the chain, we do not think that there should be a different treatment of different kinds of intermediaries.

As regards identification, due recognition should be given to the fact that ultimate investors for valid reasons recognised in law sometimes intentionally use a trusteeship for their holdings. Where this is done it is up to the ultimate investor himself to ensure that his shares are voted according to his instructions.

We do not think an intermediary should be compelled to identify someone for whom he holds shares to the company without the consent of that investor.

5.1.2 We agree that the four options should be available to Member States to allow the ultimate investor to exercise the entitlement to control the voting rights.

The ultimate investor should in all cases be offered the possibility, either to provide the financial intermediary with voting instructions or to vote the shares himself on the basis of a power of attorney issued by the financial intermediary.

5.1.3 Securities intermediaries should be required to certify to the issuing company who the ultimate investor entitled to control the voting rights is and for how many shares.

The issuing company should only have to look to the securities intermediary closest to the issuer (for companies with registered shares, they would only look at the registered shareholder). Such intermediary would certify to the issuer the holding of the ultimate investor on the basis of a chain of certificates from all other intermediaries. Whenever problems arise in that process they must be solved between the relevant parties in the chain. Due recognition is to be given to trusteeships. Apart there from, it is up to the ultimate investor to decide whether his name is to be disclosed through the certification chain. After all, voting is a right and not an obligation. We think any system under which the company was required to rely on a certification of someone not on its register on members would in practice be unworkable.

The issue of which parties would have to bear the costs in the certification process should be resolved between the relevant parties in the chain, and the proposed Directive could state so. It should not impose such cost upon the issuer.

5.2 Entities engaged in stock lending should themselves deal with the issue of voting rights in the stock lending agreements, or should recall the shares prior to the shareholders meeting if they are interested in voting. We do not think stock lending causes problems in practice and think it would create significant problems if there were to be any requirement not to lend stock at particular times.

5.3 The problems associated with the holding of depositary rights should be addressed in the forthcoming proposal for a Directive.

Holders of depositary receipts should be recognised as holding the rights attached to the underlying shares and specific exclusions from voting rights should be removed. Any proposal to deal with this issue should make sure that the registered shareholder is required to provide the necessary information as to the holders of the receipts to the company.

6.1 The forthcoming directive proposal should contain provisions regarding the disclosure of GM notice and materials and some standards for the dissemination of such information. Website and any other form of electronic dissemination should be enabled in addition to traditional paper form dissemination.

Issuers should maintain a specific section on their website where they would have to publish all GM related information. A recommendation should be given to have a description of shareholders' and investors' rights in relation to voting (voting by proxy or in absentia) and with regard to the GM (right to ask question or table resolutions).

If it is decided that the forthcoming proposal for a directive should deal with the "pushing" of information from the issuer through the chain of intermediaries to the ultimate investor, we believe the issuer should only be required to disseminate the information to the registered shareholder or intermediary closest to him, and the subsequent dissemination through the chain to the ultimate investor should then to be dealt with by the chain (and the issuer should not be expected to meet this cost). Direct dissemination to the ultimate investor could be an alternative provided that the registered shareholder or intermediary closest to the issuer (after internal clearance in the chain) has instructed the issuer to do so.

6.2 Share blocking requirements indeed can have a tendency to represent a barrier to the exercise of voting rights, especially for cross-border investors.

Therefore, we agree that the forthcoming proposal should require the abolition of shareblocking requirements and propose the introduction of alternative systems to determine which shareholders are entitled to participate and vote at the GM.

7.1 Member States should be prevented from imposing requirements on companies regarding the venue of the GM that would act as a barrier to the development of electronic means of participation.

To that end it would be helpful if minimum criteria be defined at EU level to enable shareholders' participation to the GM by electronic means.

7.2 The forthcoming Directive proposal should define minimum standards on the way shareholders' questions may be filed and dealt with at the GM.

The filing of questions should be possible both in traditional paper and electronic form.

It should be noted that the issue of authentication of the ultimate investor arises also in this context.

Also, it is important that any proposed system should be workable, not too bureaucratic and should allow the chairman of the meeting some discretion as to how to deal with questions (for example where there are a number of questions relating to the same area).

7.3 The forthcoming Directive proposal should define certain criteria concerning the minimum (not maximum) shareholding threshold for the tabling of resolutions and placing items on the GM agenda and the timing to file these ahead of the GM.

These minimum criteria could be taken from the majority/minority percentages required for a squeeze-out: A minority that cannot be squeezed-out must have the right to table resolutions and placing items on the GM agenda.

As regards timing, differentiation is recommendable for tabling resolutions relating to a matter which is already on the agenda (shorter period) and placing (new) items on the GM agenda (longer period). It should be made clear who must meet the costs of circulating details of these matters. Any proposed timing should take account of the national laws for sending materials to shareholders.

7.4.1 The forthcoming Directive proposal should oblige Member States to introduce in their national company law the possibility for all companies to offer shareholders the option of voting in absentia (by post, electronic or other means).

7.4.2 The forthcoming Directive proposal should contain provisions to further facilitate the use of proxy voting across Member States and to lift obstructive local requirements.

Electronic voting should be permitted.

8.1 Companies should be obliged to disseminate the results of votes to all shareholders either through a regulatory news service or by posting them on their website within a certain period following the GM.

As regards the minutes of the GM, the provisions applicable to minutes seem to differ considerably from Member State to Member State. Member States should be invited to examine whether the minutes of the GM should be likewise disseminated, it being understood that minutes in this context does not mean a full verbatim transcript.

8.2 It is not only the non-confirmation of vote execution that hinders significantly the exercise of their voting rights by the ultimate investors. It is the entire chain of intermediaries situation that often has the effect of hindering the exercise of voting rights by the ultimate investor. Of course, there are contractual obligations within the chain that, if properly fulfilled, could ensure that no such hindering effect takes place. If obligations are to be imposed by the Directive proposal on the intermediaries in the chain, such obligations should not be limited to the confirmation aspect only.

9. The following points seem of particular importance to us:

a. The issuer can only be required to have regard to the registered shareholder or the intermediary closest to the issuer. Otherwise there would be a real risk that a vote taken at the GM is invalid or can be invalidated by shareholder action in cases where mistakes occur in the authentication process in the chain of intermediaries.

b. Voting is a right, not an obligation. This is the basis on which the proposed Directive should operate when dealing in particular with the problem of a chain of intermediaries.

c. Ultimate investors may have valid reasons to use a trusteeship for their holding, or they may wish to remain anonymous for other reasons. This should also be recognised by the proposed Directive.

d. Costs following from the fact that some ultimate investors use a chain of intermediaries should not be borne by the issuer. Such cost should rather be borne by the respective ultimate investor who has set the cause for such cost.