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

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

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

The CCBE which represents over 700,000 European lawyers through their national bars and law societies in the EU and the EEA, has studied with great interest the Synthesis of the comments on the First Consultation document, and welcomes the fact that the Commission has decided to launch a Second Consultation which is more specific than the First Consultation.

The CCBE comments on the Second Consultation document as follows.

II.1 Scope

As regards the scope of applicability for shareholders' rights, the CCBE mostly agrees with the proposal of the Commission. Any potential measure at EU level establishing minimum standards for shareholders' rights should apply solely to companies formed under the laws of a Member State and whose shares or depositary receipts relating to shares (however not other securities such as bonds) are admitted to trading on a regulated market in one or more Member States within the meaning of Council Directive 2004/39/EC. UCITS (of the corporate type) falling within the scope of 8.1 (2) of the Directive 85/611/EEC, and equivalent funds, should be excluded from the scope of any such measures.

II.2 The "Ultimate Investor" or "Ultimate Accountholder"

We agree with the proposal by the Commission that work on the definition of the "ultimate investor" should be pursued in a longer term perspective, in close connection with the concurrent work in the field of clearing and settlement. We do not think that the definition of the "ultimate investor" is a pre-requisite to facilitating cross-border voting. In this context we wish to repeat our comments in the first consultation process, in particular our observation that due recognition should be given to the fact that "ultimate investors" for valid reasons recognized in law sometimes intentionally use a trusteeship for their holdings. In those and in comparable cases it should be left to the parties to decide who should be entitled to vote. The confidentiality of a trustee agreement should not be pierced by the definition of the "ultimate investor" nor by the general aim of fostering cross-border voting.

II.3 Stock Lending and Depositary Receipts

Stock Lending

As regards the Commission's proposal that agreements providing for the temporary transfer or consideration of shares shall contain provisions informing the relevant parties to the agreement of the effect with regard to the voting rights attaching to the transferred shares, we wonder whether such tutelage is really needed. After all, the parties to such agreements are in most, if not all, cases experienced in such kind of transactions and conversant with the consequences thereof, and it would be unusual and inappropriate to require such parties to include a particular provision in their agreement.

If, contrary thereto, the Commission thinks that such provisions are in fact needed, then the minimum standard should not be introduced by means of a Directive but rather by means of a Recommendation to Member States which invites the Member States to encourage the adoption of a code of best practice rule to the effect of such provisions.

As regards the due information to be given to the principal before an intermediary enters into an agreement for the temporary transfer or consideration of shares which he holds on behalf of the

principal, such information could indeed be useful because the principal, for lack of experience, may not be aware of the effect of the agreement with regard to the voting rights. However, it should in our opinion not be required that this due information must be given prior to each transfer agreement. It should rather be sufficient if the information is given on a general basis which covers all future transfer transactions. Important is that the information covers not only the intended or possible conclusion of the transfer agreement but also the effect thereof on the voting rights attaching to the transferred shares. Lastly we think that it may not be necessary to impose the costly information process on intermediaries where the principal is a sophisticated investor. At the least there should be a right of such sophisticated principal to waive the information obligation of the intermediary.

Depositary Receipts

As a matter of principle, the CCBE has some sympathy for the proposal that holders of the depositary receipts shall alone have the right to determine how the voting rights attached to underlying shares represented by depositary receipts are exercised. However, we think that a minimum standard to that effect should be decided upon only after the various questions arising in this context have been considered. Probably the most important question concerns the legal consequences if in a given case the aforesaid principle is not complied with. Will there be internal consequences between the parties only, or will the validity of the vote be affected? Our view is that there should be only internal consequences between the parties and that the validity of the vote should not be affected. Should the Commission decide that a minimum standard be aimed at, the CCBE thinks that it would be more appropriate to have a Recommendation to Member States inviting code of best practice provisions.

II.4 Pre General Meeting Communications

Notice periods for convening a General Meeting

The CCBE agrees that a minimum standard would indeed be important. However, we strongly feel that the notice period should be counted in calendar days and not in business days. The reference to business days would in a uniform way exclude Saturdays and Sundays, however, would leave the possibility that among the days from Monday through Friday certain days do not count because they are legal holidays, and legal holidays in fact differ significantly from Member State to Member State. The effects thereof can only be eliminated if the notice period is calculated by reference to calendar days.

As regards the number of days, we think that the notice period should be not less than 21 calendar days in case of the Annual General Meeting and not less than 14 calendar days in the case of other Shareholders' Meetings.

Content of the notice

We agree with the proposed minimum content of any notice convening a general meeting, provided that, as regards the indication of the agenda, a general description of the agenda items is sufficient.

Information relevant to the General Meeting

Here, too, the CCBE agrees with the Commissions' Proposal, however, again on the basis that the periods in question should be measured in calendar days.

Dissemination, and language, of the meeting notice and materials

The CCBE has considerable concerns with regard to the proposed minimum standard that any notice convening a General Meeting and any document intended to be submitted to the General Meeting should be made available "in a language customary in the sphere of international finance" unless the General Meeting decides to the contrary. This proposal for all practical purposes will mean that all companies resident outside the UK will have to prepare all notices and documents not only in their own language, but also in English. This would impose a very heavy cost burden on such companies for which there is no sufficient justification if the company has no (or only few) foreign shareholders.

English language notices and English language documents should rather be obligatory only upon a vote by the shareholders to that effect, or upon request of shareholders representing a certain minimum percentage of capital. In other words, the CCBE favors an opt-in approach, and not the opt-out approach suggested by the Commission.

The aforementioned cost burden and the time needed to translate the documents can be quite extreme when one considers the various possible items of an agenda. For instance, if the Shareholders' Meeting is to vote on a proposed merger all documents relating to the merger, in particular the merger agreement and its annexes, would have to be translated. Such agreements with annexes not infrequently have several hundred or even thousands of pages.

Specific section of the issuers' website dedicated to the General Meeting

The CCBE agrees with the proposed minimum standard that the Member States shall ensure that issuers post on their websites the information relevant to General Meetings at the same time as such notices are published and/or sent to the issuers' shareholders. However, this obligation should apply only where such websites in fact exist.

As regards the proposed minimum standard on what the information to be placed on the website shall include, the CCBE again is in agreement, except that in our opinion it would go too far to request that all "other documents relevant to the General Meeting" should be put on the website (if any). First, the term "documents relevant to the General Meeting" is too broad and uncertain. Needed are only those documents that directly relate to an item on the agenda of the Meeting. Even with that limitation, remembering that merger agreements and annexes can easily have several hundred or even thousands of pages, issuers should be permitted to indicate where such documents can be obtained or inspected (e.g. on the premises of the company), instead of posting all such documents on the website.

II.5 Admission to the General Meeting - Share Blocking

The CCBE agrees with a minimum standard to the effect that the immobilization of shares for any period prior the Meeting, as a condition for voting at the Meeting, shall be abolished and shall be replaced by a system of a date of record prior the relevant General Meeting.

II.6 Shareholders' Rights in relation to the GM

6.1 Electronic participation in General Meetings

In our opinion the minimum standard should have a slightly different wording. Member States shall not restrict the participation of shareholders to the General Meeting via electronic means, however, Member States shall have the right to introduce measures to protect the integrity of electronic voting.

6.2 Right to ask questions

The CCBE agrees with the proposed minimum standard that shareholders shall have the right to ask questions at least in writing ahead of a General Meeting and obtain responses to their questions. In our opinion such responses should be given the latest at the General Meeting. If the response has been made earlier, a copy of the response should be available to all shareholders at the General Meeting.

As regards the proposed principle that responses to shareholders' questions in General Meetings shall be made available to all shareholders, we think that it would first be advisable to consider the question of how and when this is to be carried out. The cost aspect is to be considered as well. After all, the question and answer phase in General Meetings increasingly lasts several hours.

As regards the cost aspect, the CCBE wishes to raise the question whether it is justified that the company should bear the cost of disseminating responses given at the General Meeting. We think there is some merit in the principle that whenever a shareholder does not attend a General Meeting it

is for the shareholder to bear the consequences thereof. Dissemination of responses by the company would mean that indirectly all shareholders have to bear the cost, including those present at the Shareholders' Meeting. In addition it should be realized that cost free distribution to absent shareholders could make attendance in person less attractive.

It should in any case be permitted to give answers to questions of shareholders in the form of group answers and topical answers so that identical or related questions can be answered together.

The CCBE shares the view of the Commission that the good order of General Meetings needs to be ensured.

The right to obtain an answer to a question asked should exist, it seems to us, only if the question is relevant for an agenda item. Questions without agenda relevance – they occur not infrequently – need not be responded to.

As regards the protection of confidentiality and strategic interests of issuers, we wonder whether the sole criterion should be confidentiality of which the strategic interests of the issuer would be a sub-category. Also we wish to point out that there exist many problems of detail in connection with the protection of confidentiality. One such problem is whether it is sufficient for the management to invoke confidentiality, e.g. on the ground of a confidentiality clause agreed with a contracting party, or whether the confidentiality protection must be justified objectively in view of all circumstances.

6.3 Right to add proposals to the agenda and to table resolutions

We agree with the proposed minimum standard that shareholders shall have the right to add items to the agenda of, and table resolutions, at General Meetings provided that the relevant shareholder/shareholders hold a minimum stake not to exceed 5 percent of the share capital of the issuer or a value of € 10 million which ever is the lower.

We have sympathy for the proposal that such rights must be exercised "sufficiently in advance of the date of the General Meeting, to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of a General Meeting". However, we wonder how the "sufficiently in advance" period should be determined, given the fact that the answer to this question can differ from issuer to issuer, depending on the number and location of shareholders. We suggest the Commission should consider how a company should deal with a proposal which is defamatory or might otherwise involve a breach of law.

6.4 Voting

Voting by correspondence

We agree with the proposed minimum standard that member states shall ensure that shareholders of listed companies have the possibility to vote by correspondence.

As regards the hindering or prohibiting of voting by electronic means at General Meetings, we would prefer the language suggested above in connection with item II.6.1/ Electronic participation in General Meetings.

Proxy voting

Some members of the CCBE Company Law Committee have no objections to eliminate all existing restrictions on qualification for proxy voting. However some other members are concerned with the proposal, in particular if the proxy is appointed without detailed and binding instructions, since some Member States, for good reasons, require that the proxy person must meet certain qualifications, e.g. must be another shareholder or the spouse of a shareholder. This raises the question whether the fundamental freedom of capital would justify to request the abolition of said restrictions which serve i.a. the purpose of preventing outsiders with own interests from influencing the affairs of the issuer without capital investment of their own. If proxy voting by foreign shareholders is to be facilitated, the

opening up in the direction of custodian bank etc. would be sufficient and would be acceptable to such members of our Committee.

Here again, it may be advisable to give the General Meeting the possibility for opting-in or opting-out.

We would agree that there should be a need for custodian banks etc. to qualify as proxy holder.

We share the view of the Commission that shareholders shall not be prevented from appointing their representatives by electronic means.

The same applies to the Commissions' proposal that persons appointed as proxy shall enjoy the same rights to speak and ask questions in General Meetings as those to which the shareholders they represent are entitled.

As regards the collection of proxies in advance to General Meetings, we share the view of the Commission that independence must be ensured. However, the independence requirement should be applicable not only to the collection of proxies but also to the exercise of the voting right, be it on the basis of instructions, be it in those cases where no instructions have been given. A person can be independent even though it is paid for by the company, as the example of company's registrars and auditors shows.

As regards proxy collection we do not consider it necessary to require that the collecting person/entity must be a third party. We think it would be sufficient if the collection is made by a designated person employed by the issuer who is given the requisite independence.

We agree that all votes on each resolution by a General Meeting shall be taken into account, irrespective of the means by which the votes are cast.

The setting up of a (non-exclusive) EU proxy form that all issuers would have to accept, would indeed by helpful. In this context, the Commission will need to check whether there are certain requirements (such as pieces of information) which must be included under the laws of a Member State for the proxy to be valid, and to deal with the question whether these requirements are superseded by the EU proxy form or must be complied with in addition.

II.7 Position of Intermediaries in the Cross-Border Voting Process

Definition of intermediary

The definition in the opinion of the CCBE should tie into the definition of who is regulated in the various Financial Services Directives.

Registration as Nominees

We do not think that whenever an intermediary is registered as a shareholder in respect of shares held for the account of another person, a mention to that effect should be added in the relevant companies' shareholders registers. First, ultimate investors for valid reasons recognized in law sometimes intentionally use a trusteeship for their holdings, and the confidentiality of such trusteeship should be safeguarded. Second, we wonder about the purpose of the transparency pursued by the Commission. Transparency is not a value in its self, and in addition, there is a legal right to privacy. Third, the Commissions' proposal does not specifically say that the name of the concrete person for which the intermediary is holding the shares, need not be mentioned. This could imply that the mention indeed would have to be individual specific.

Being granted a power of attorney

We have sympathy with the concept that the person behind the intermediary shareholder shall have the right to be given a power of attorney by the intermediary to attend, and to act at, the General Meeting as if such person were a shareholder. However, experience shows that there are quite often

chains of intermediaries in which the front end intermediary holds the shares for another intermediary, and that other intermediary holds the shares for again another intermediary, and so on to the ultimate investor. Apart therefrom the nature of the relationship between the various persons/entities involved can differ significantly so that a general rule as suggested by the Commission would probably be generalistic. It seems to the CCBE that more differentiation is needed.

Voting upon instructions

The CCBE agrees with all minimum standard proposals made by the Commission.

II.8 Communications following the General Meeting

Dissemination of the voting results

Here, too, the CCBE agrees with the minimum standards proposed by the Commission, with the proviso that posting on the issuers' website shall be required only if such website exists.

II.9 Other Suggestions

As mentioned at the beginning, the CCBE shares the view of the Commission that cross-border voting should be facilitated. However, we wish to point out that due consideration must be given, too, to the justified interests of the issuer and the domestic shareholders, in particular as regards the language and cost aspects. Cross-border investments by their very nature can entail language and cost consequences. What is needed is a balanced answer to the question which of these consequences must be born by the foreign investor and which consequences can he "socialize", i.e. which consequences are to be born by the issuer company.