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CCBE Response on the Proposal for a Directive on the Exercise of Voting Rights by Shareholders of Companies having their registered Office in a Member State and whose Shares are admitted to Trading on a Regulated Market

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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 proposal 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 proposed Directive. It views the proposal as a measure that processes further one particular area of shareholders' rights on which the Commission has carried out two consultation processes to which the response by the CCBE was in principle quite favourable.

As regards details, we have only the following remarks:

1. The general meeting notice of not less than 30 calendar days provided for in Article 5 para 1 should only apply to the Annual General Meeting (AGM). We think there is a need for the management to be given the right to shorten the notice period in the case of extraordinary meetings. Such meetings are most likely to occur in situations where time is of the essence, e.g. in a take-over or merger or insolvency situation. The minimum notice period for extraordinary meetings should be say 14 or 15 calendar days.
   We realise, of course, that such a reduced notice period would reduce for shareholders the time span available for reflection and decision making. However, modern communication facilities – their use should be encouraged – are considerably faster than the old ordinary mail communications which in several Member States were the basis for fixing the notice period at 30 days or one month. We think that the increase in speed of modern communication facilities should be taken into account when legislating on the notice period for extraordinary meetings. It must be realised, too, that a reduction in notice period gives the company the possibility for speedier reaction to the circumstances that underlie the call of the extraordinary meeting, and this possibility of speedier reaction lies in the interest of all shareholders.

2. Article 6 para 1 should distinguish between the ordinary AGM and extraordinary GM. Shareholders should be given the right to add items on the agenda of the meeting only with respect to the ordinary AGM. The right to table draft resolutions that stay within any given item on the agenda, should exist for both the ordinary AGM and an extraordinary GM.

3. Article 6 para 3 says that the aforesaid rights shall 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 the general meeting. We think it would be preferable to replace the term "sufficiently in advance" with a clear cut period so that the management and other shareholders cannot argue that the shareholders that have exercised their right to add items to the agenda or to table draft resolutions, have done so late and therefore their requests cannot be complied with.
   In our view the Directive should also deal with the communication by management to the other shareholders whenever a shareholder has – in due time – added an item to the agenda and/or has tabled a draft Resolution. Management should be under an obligation to communicate within a specified period of time (counting from the receipt of the notice from the shareholder exercising its right or counting backwards from the date of the general meeting).

4. As regards Article 8, we think that Member States should not only be forbidden to prohibit the participation of shareholders in the general meeting by electronic means but should in addition be invited to facilitate such participation.

5. Article 10 para 3 says that a proxy holder shall enjoy the same rights to speak and ask questions in general meetings as those to which the shareholder it represents would be entitled. The Directive makes an exception herefrom by adding the words “unless instructed otherwise by the shareholder”. We wonder how such a restrictive instruction by the shareholder would work in practice. The internal relationship between a shareholder and his proxy holder is, as a rule, unknown to the issuer/company and the issuer/company should not be required to concern itself with this relationship. We think it would be dangerous to make it possible to argue that a proxy holder should be denied the right to speak and to ask questions on the basis that the proxy holder has been instructed otherwise by the shareholder. Who would be able to raise such an argument and how would the company deal with such a point if it were raised? The internal relationship between a proxy holder and the shareholder appointing him should not be a matter for the other shareholders or the management in the general meeting. To deal with this issue as proposed by the Directive would create significant risks that the validity of resolutions adopted at the meeting could be challenged.

6. Article 13 para 3 in our view needs to be broadened. An instruction for voting may be given not only by the other person or entity for the account of which the shares are held, but alternatively by someone acting on behalf of such other person or entity, e.g. a third party that has been duly authorised by the ultimate beneficial owner (who may be different from the person for whose account the shares are held) vis-à-vis the person holding the shares. The proposed change should make it possible for instructions to given by someone other than the person for whose account the shares are held provided he has been given the necessary authority. We are, however, concerned that the company will not know whether the persons referred to in paragraph 1 have been properly instructed to vote or not. This raises the same issues as are referred to above about the undesirability of the company having to concern itself with such matters. The question of whether a shareholder is voting in accordance with the proper instructions from someone duly authorised should be an internal matter between the shareholder and that person.

7. Article 14 is very difficult to understand when saying that for the purpose of counting votes, all votes cast shall be taken into account. In some Member States a shareholder can appoint a proxy (e.g. the chairman of the meeting) and direct that proxy how to vote. Is the intention that such a direction to a proxy is treated as a vote for this purpose? Under the law of some member States, such a direction would not be regarded as being a vote - although the proxy would be expected to vote in accordance with that direction when the vote is taken. Is it intended to say that any abstention declared by (or on behalf of) the shareholder shall not be taken into account? If that is the intention then the Directive should say so by adding a half sentence to the present language. Otherwise there would be very considerable uncertainty about the meaning of Article 14, remembering that Member States company laws do not give a uniform answer to the question of how an abstention vote is to be treated, or how minimum requirements as to the number of votes needed to pass a resolution are to be calculated in the case of abstentions. The wording may also be taken to mean that all votes must be taken on a poll – i.e. where each shareholder has a number of votes reflecting the number of shares he holds (and therefore that a vote on a show of hands where each shareholder has one vote regardless of the number of shares he holds would not be possible). Is that the intention?