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CCBE comments on the proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers. The CCBE wishes to make the following comments on and suggested amendments to the proposed Directive.

Article 1 (2)(g) The definition of "asset manager" includes an AIFM as defined in Directive 2011/61/EU. Some members think this Directive should not apply to such managers. The clients of such managers are normally sophisticated users who are able to negotiate with such managers for any information they need. They do not need the same protections as retail clients. If the definition remains as currently drafted, clients of AIFM managers should be allowed to agree that the requirements should not apply to their AIFM asset manager.

Article 1 (2)(i) We are concerned that the definition of proxy adviser will catch persons who give professional advice and, as an incidental activity, give advice on the exercise of voting rights. We do not think this is the intention. We suggest the definition is changed – see below. We think some further wording should be included so that the obligation only applies to proxy advisers who provide services in relation to companies listed in the EU. As each Member State will implement the requirement differently, we think it needs to be clear which Member State requirements a proxy adviser is subject to when making recommendations in relation to a company. We suggest that a proxy adviser should be subject to the requirements of the Member State either where a company is incorporated or where its shares are listed or primarily listed (but that this should be set out in the directive and be consistent throughout the EU).

Commission proposal	**CCBE proposed amendment**
"proxy adviser" means a legal person that provides, on a professional basis, recommendations to shareholders on the exercise of their voting rights;	"proxy adviser" means a legal person whose only activity or principal activity is to provide, on a professional basis, advice on how to exercise the voting rights attached to securities (advisory activity) and/or assistance in the exercise of voting rights attached to securities (agency activity) for institutional shareholders.
	Justification
	This definition avoids catching persons who give professional advice and, incidentally, give advice on the exercise of voting rights. It is based on the definition suggested in the ESMA

	Report on Proxy Advisers.

Article 3a We question the Commission's rationale for including this right for listed companies to identify their shareholders. Listed companies already have quite extensive information about their shareholders from the disclosures made pursuant to the Transparency Directive. We doubt that, in practice, listed companies will wish to engage with shareholders who have less than a 5% interest. If the Directive remains as drafted, we think a provision should be included to allow those shareholders with a holding of less than 5% (or, if lower, the percentage set by their Member State as the percentage above which disclosures of interests must be made) to opt out of the obligation to provide their details to the company. We think there is a risk that it will be confusing for there to be provisions on the identification of shareholders in both the Shareholder Rights Directive and the Transparency Directive. If the objective is to decrease the level of ownership at which a shareholder must make itself known to an issuer, it would seem appropriate to amend the Transparency Directive accordingly.

In **Article 3a.3** the company and intermediary only have to ensure that natural persons can rectify or erase any incomplete or inaccurate data. We think this right should extend to **all** persons. We note that companies and intermediaries may not keep information relating to a shareholder for more than 24 months after receiving it. We do not see the point of this restriction. Many shareholders will remain shareholders for a longer period. In practice companies will just issue a new request to re-obtain the information when the 24 months has expired – and so will have to incur a cost which is not justifiable. If the obligation was a requirement not to keep the information once the person ceased to be a shareholder, that would make more sense. If the provision remains as drafted, at least we think that each individual shareholder should be able to agree otherwise or that the company should be able to keep information for a longer period if this is permitted by their constitutional document.

Commission proposal	**CCBE proposed amendment**
The company and the intermediary shall ensure that natural persons are able to rectify or erase any incomplete or inaccurate data and shall not conserve the information relating to the shareholder for longer than 24 months after receiving it.	The company and the intermediary shall ensure that all persons are able to rectify or erase any incomplete or inaccurate data relating to them and shall not conserve the information relating to the shareholder for longer than 24 months after the person ceases to be a shareholder.
	Justification
	This allows any person (natural or legal) to rectify or erase incomplete or inaccurate data. It allows a company to keep information while the person remains a shareholder and for 24 months after they cease to be a shareholder.

Article 3c In 2, it is not clear to whom the company has to give a confirmation that a vote has been cast. We think that the company should only give information about whether a vote has been cast by a particular shareholder to that shareholder if the shareholder has voted or to the shareholder's intermediary if the intermediary has voted for the shareholder and the drafting should make this clear. Information about how a particular shareholder has voted should not be made public without that shareholder's approval. Is the intention that, if the intermediary casts the vote and so has to provide the confirmation to the shareholder of this, that there would be no obligation on the company? In some member states, a shareholder can authorise someone other than an intermediary to vote on their behalf. In this case, would the company be required to give the confirmation to the shareholder (rather than the person authorised to vote)? We also think that this requirement should only apply if the shareholder or intermediary so requests (so as to reduce costs and avoid providing unwanted information).

Commission proposal	CCBE proposed amendment
2. Member States shall ensure that companies confirm the votes cast in general meetings by or on behalf of shareholders. In case the intermediary casts the vote, it shall transmit the voting confirmation to the shareholder. In case the intermediary casts the vote, it shall transmit the voting confirmation to the shareholder.	2. Member States shall ensure that, if requested, companies confirm to a shareholder (if the shareholder has cast a vote in a general meeting) or to an intermediary (if the intermediary has cast a vote on behalf of a shareholder in a general meeting) the number of votes cast by that shareholder or intermediary in that general meeting, as the case may be. If an intermediary has cast a vote on behalf of a shareholder, it shall transmit a voting confirmation to the shareholder if so requested.
	Justification
	The wording makes clear to whom the confirmation must be given. It makes it clear a voting confirmation need only be given if requested.

Article 3d We note that intermediaries will be allowed to charge for providing information about shareholders to companies and for transmitting information and facilitating the exercise of votes. Whilst shareholders will be able to choose which intermediary to use (and so can choose the cheapest if they want), companies will not be able to control the charges they will have to pay to receive this information or transmit information. Paragraph 3d.1 should specify where the intermediaries should publicly disclose prices, fees and any other charges – e.g. on their website.

Commission proposal	CCBE proposed amendment
Intermediaries shall publicly disclose prices, fees and any other charges separately for each service referred to in this chapter.	Intermediaries shall publicly disclose on their website prices, fees and any other charges separately for each service referred to in this chapter.
	Justification
	This sets out where intermediaries must publicly disclose their fees etc.

Article 3 e Many intermediaries can provide services to shareholders in the Union without establishing a branch in the EU. We think this paragraph should apply to intermediaries who provide services to shareholders in the EU in relation to companies listed in the EU, whether or not they have established a branch in the EU.

Commission proposal	CCBE proposed amendment
A third country intermediary who has established a branch in the Union shall be subject to this chapter.	A third country intermediary who has established a branch in the Union or who provides services to shareholders in the Union in relation to a company (whether or not they have established a branch in the Union) shall be

	subject to this chapter.
	Justification
	An intermediary that provides services to shareholders in the EU in relation to EU companies listed in the EU should be subject to the requirements, whether or not they have established a branch in the Union.

Article 3f We understand that the intention is that institutional investors and asset managers should have a comply or explain obligation in relation to an engagement policy. However, we do not think this is clear from the drafting. We suggest that paragraph 1 is redrafted so that it only applies where it is decided to develop a policy and that paragraph 3 applies where it is decided to have a policy.

Commission proposal	**CCBE proposed amendment**
Member States shall ensure that institutional investors and asset managers develop a policy on shareholder engagement ("engagement policy"). This engagement policy…	Member States shall ensure that institutional investors and asset managers decide whether or not to develop a policy on shareholder engagement ("engagement policy"). Any engagement policy…
	Justification
	This makes clear that institutional investors and asset managers have a choice whether or not to develop a policy.

Commission proposal	**CCBE proposed amendment**
Member States shall ensure that institutional investors and asset managers publicly disclose on an annual basis their engagement policy…	Member States shall ensure that institutional investors and asset managers publicly disclose on an annual basis any engagement policy…
	Justification
	This makes clear the obligation only applies if there is an engagement policy.

In paragraph 4 it should be stated where the disclosure must be made – either on a website or in an annual report – and that the disclosure must be made on an annual basis.

Article 9a (1) In general we think it is unclear who is intended to be covered by the provisions relating to "directors". We find the wording of the second paragraph very difficult to understand. We assume that this is intended to deal with a case where a company recruits a new director after a policy has been approved. If a policy that has been approved includes provisions to allow a company to pay a new director within certain parameters set out in the policy, we do not think this would be payment "outside" the policy. In practice, we doubt directors would be willing to join a new company on the basis that remuneration is awarded to them provisionally pending shareholder approval.

In paragraph 3 most members do not believe that explaining the ratio between the average remuneration of the directors and the remuneration of full time employees other than directors will provide information of any value to shareholders and so think this should be deleted. We think it

should be made clear that the various proposals do not require the company to provide information about the remuneration of individual directors (as opposed to information about directors collectively). We think that references to the contracts of directors should be references to the contracts or mandates of directors. In some Member States directors are nominated or mandated and do not enter into contracts.

Article 9b Our comment about the meaning of directors is relevant here too. The word "individual" in line 3 of paragraph 1 should be deleted. We assume that information about remuneration and benefits granted to all directors should be sufficient, without specifying to which director they relate. We understand that the vote referred to in paragraph 3 is intended to be only advisory – we think this should be made clear.

Article 9c The definition of related party is very wide. Even taking account of the exemptions provided in the paragraph we think that, as drafted, the provision will catch too many transactions, particularly intra group transactions and transactions with joint venture parties. Our preference would be to use a new definition of related party transaction so that it only catches a transaction that is with a substantial shareholder of the company (e.g. holding 10% or more) or a director or one of their respective associates. We also think that transactions in the ordinary course of business should be excluded. In addition, we think the Commission should consider further exemptions – and that the exemption for transactions between wholly owned subsidiaries should be automatic, rather than being left to Member States as an option. In addition it should be made clear that the reference to wholly owned subsidiaries catches companies that are indirectly wholly owned by the company as well as directly wholly owned. In paragraphs 1 and 2, the references to certain percentages of the companies' assets should set out more clearly how these are to be calculated. For example, does "assets" mean both current assets and non-current assets, and are these to be determined by reference to the most recent audited accounts?