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Shareholder Rights Directive: what's new for companies, investors & intermediaries

In December 2016, the European Institutions finally agreed on the amended Shareholder Rights Directive. The new rules were proposed to address investors' short-termism and shortcomings in corporate governance of listed companies which were exposed by the financial crisis and created strong social and political criticism. Florence Bindelle and Aleksandra Palinska, representatives of EuropeanIssuers, a Brussels-based trade association representing the interests of publicly quoted companies across Europe, give the organisation's point of view.

In December 2016, after nearly two years of negotiations, the European Institutions finally agreed on the amended Shareholder Rights Directive (so called SRD II). In May 2017[1], the final text was published in the Official Journal of European Union and most of the provisions will apply as of 10 June 2019 following their transposition in each country.

The new rules were proposed to address investors' short-termism and shortcomings in corporate governance of listed companies which were exposed by the financial crisis and created strong social and political criticism. Among the hot topics were serious impediments to the exercise of shareholders´ rights, excessive short-term risk taking by investors and fund managers, and directors' pay which was perceived in case of some companies as excessive and not sufficiently justified by performance. The SRD II tries to address these and other issues, luckily without going as far as some voices had asked for, and trying to strike the right balance. The overall goal of the revised Shareholder Rights Directive is to contribute to the long-term sustainability of the European companies, enhance the efficiency of the chain of intermediaries and to encourage long-term shareholder engagement.

WHAT ARE THE MAIN NEW REQUIREMENTS?

To achieve the above-mentioned objectives, the Directive introduces new requirements regarding:

- identification of shareholders;
- transmission of information between companies and investors and facilitation of exercise of shareholders rights;
- remuneration of directors;
- transparency for institutional investors, asset managers and proxy advisors;
- related party transactions.

IDENTIFICATION OF SHAREHOLDERS

The SRD II provides for a right for companies to identify their shareholders. That means that companies also have the right to obtain information on shareholders' identity from intermediaries (e.g. banks, investment firms, central securities depositories that provide services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons). This provision aims at enhancing the dialogue between companies and their shareholders.

Since the Directive aims at enhancing shareholder engagement, thus transferring more power to shareholders, an effective cross-border shareholder identification system is an indispensable prerequisite for companies to meet this objective.

We are grateful to the Commission and the Parliament for ensuring that companies are given the

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right to identify their shareholders. We are somewhat disappointed though that due to objections of certain Member States companies in certain countries will end up with a threshold below which it will not be possible to identify their shareholders. We understand that the concept of registered shares, which holders of should all be known by the company, will not be touched by this. The maximum threshold that can be set by Member States was set at 0.5% of shares or voting rights. Given dispersed ownership of many companies, we hear that if a threshold is set at 0.5%, very few shareholders would be identified. For example, one of the large German blue-chip companies in the DAX30 currently has more than 200 000 shareholders. If you set a threshold at 0,1%, only between 30-50 shareholders would be identified, if at 0,5%, not even 10 shareholders would be identified.

We are now looking forward to the implementing acts by the Commission and the transposition of the Directive by the Member States and we hope that companies will end up with effective shareholder identification solutions based on state of the art technology that would allow to lower their costs. Especially in some countries they are very high countries due to intermediaries' fees. For instance, we hear that in Italy some companies pay €2,5 million to identify its 1 million shareholders (€2.5 per shareholder) or even €1 million in case of 230 000 shareholders (€4.34 per shareholder). While we hear that in Germany the cost reimbursed for transfer of shareholder data by issuer to the bank / intermediary is up to €0.10 meaning significantly less. It is important that there is a healthy competition amongst the providers of such services and that companies have the choice whose services to use.

For provisions dealing with shareholder identification, transmission of information and facilitation of the exercise of shareholder rights (Articles 3(a), 3(b) and 3(c)), the Commission is to develop the implementing measures by 10 September 2018. Those provisions will enter into application 24 months after adoption of the implementing acts.

The overall goal of the revised Shareholder Rights Directive is to contribute to the long-term sustainability of the European companies, enhance the efficiency of the chain of intermediaries and to encourage long-term shareholder engagement.

TRANSMISSION OF INFORMATION BETWEEN COMPANIES AND INVESTORS AND FACILITATION OF EXERCISE OF SHAREHOLDERS RIGHTS

New rules aim to facilitate the exercise of shareholders' rights and to increase shareholder participation and voting at general meetings. Intermediaries are also obliged to provide all information from the company to shareholders that will ensure the appropriate exercise of their rights. These provisions are very important both for investors and companies as there have been many so called "plumbing" issues within the intermediary chain especially in cross-border situations. As a result, investors are discouraged from active engagement as they often face high costs and administrative burdens. It may even happen that a shareholder is denied from attending the Annual General Meeting due to not respected timelines, wrong or not properly filled in documentation, etc. EuropeanIssuers has been engaged for years in work aiming to enhance communication between companies and shareholders and to facilitate the exercise of shareholder rights. We have been chairing the industry group that developed and approved Market Standards for General Meetings which attempted at improving the situation. Unfortunately, due to their non-binding nature, certain market participants did not see the incentive in complying. Now we hope that these standards will be taken into account while developing the implementing measures for the SRD II.

DIRECTORS' REMUNERATION

The Directive grants shareholders the right to vote on the remuneration policy (ex ante) and on remuneration report (ex post) of the company's directors. The former is in principle a binding vote, while the latter is advisory. The remuneration policy must be submitted to a vote whenever there is a material change and at least every 4 years. The policy also shall be publicly disclosed after the vote by the shareholders at the general meeting. The Directive provides that Directors' remuneration should contribute to the company's business strategy, long-term interests and sustainability. The directors' performance should be assessed taking into account both financial and non-

DIRECTIVE DES DROITS DES ACTIONNAIRES

La nouvelle directive européenne sur les droits des actionnaires propose des règles qui ont pour but de d'encourager l'engagement à long terme des actionnaires et d'accroître la transparence entre les sociétés et les investisseurs. Elle donne des droits ainsi qu'impose des exigences sur les sociétés, les investisseurs institutionnels, les gestionnaires d'actifs et les conseillers en vote. D'un côté, les entreprises ont gagné le droit d'identifier leurs actionnaires mais, de l'autre, doivent assurer plus de transparence sur les rémunérations des dirigeants et les transactions avec des parties liées. Les investisseurs ont gagné plus de contrôle sur les rémunérations des dirigeants et les transactions avec des parties liées aux entreprises, mais les investisseurs institutionnels sont aussi soumis à des règles de transparence plus rigoureuses.

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ABOUT EUROPEANISSUERS

EuropeanIssuers aims to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer-term. EuropeanIssuers' members include both national associations and companies from all sectors in 14 European countries, covering markets worth ?7.6 trillion market capitalisation with approximately 8000 companies.

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financial performance criteria.

While companies are not fond of the high level of detail of information to be disclosed both for the remuneration policy and report, they appreciate certain degree of flexibility allowed, also at the Member States' level. Amongst others, Member States may exempt smaller listed companies from having a vote on the remuneration report and replace it with a discussion at the general assembly of shareholders.

RELATED PARTY TRANSACTIONS

The Directive requires companies to publicly disclose material transactions with parties related to the company at the latest at the time of the conclusion of the transaction. They must be accompanied by all necessary information to assess the fairness of the transaction. Also, material related party transactions shall be approved by the shareholders or the administrative or supervisory body to provide adequate protection for the interests of the company and all its shareholders.

We welcome flexibility granted by the co-legislators compared to the original Commission proposal, which acknowledged the fundamental differences between company law systems in Europe. For instance, Member States are to define material transactions and whether the approval should be granted by the general meeting or by the administrative or supervisory body. It is also up to the Member States to set the quantitative ratios to help assess the materiality of transactions. It is possible to have different ratios for a vote and disclosure. Companies also welcomed the exemption for transactions entered in the ordinary course of business and concluded on normal market terms.

TRANSPARENCY FOR INSTITUTIONAL INVESTORS, ASSET MANAGERS AND PROXY ADVISORS

The Directive requires investors to develop and publicly disclose a policy on shareholder engagement, or to provide a proper explanation as to why they have chosen not to do so following the well-known 'comply or explain' approach. The engagement policy shall include the information on the exercise of voting rights, monitoring of the company invested in, dialogue with the company, and the management of conflicts of interest. Similar requirements apply to proxy advisors whose important role, providing research, advice or voting recommendations to shareholders, has been recognised. Proxy advisors also need to adopt a code of conduct to ensure the reliability and quality of their recommendations on how to vote in general meetings of listed companies. ■

(1) Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.