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Mr. Didier Reynders
Commissioner for Justice
European Commission
Rue de la Loi 200
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Brussels, 14 September 2020

Subject: Letter on the harmonisation of the definition of 'shareholder' under Shareholder Rights Directive II

Dear Mr Commissioner,

The CMU HLF has invited the Commission to amend the Shareholders Rights Directive (SRD 2) and its Implementing Regulation to provide a harmonised definition of 'shareholder'.

Shares of listed companies are often held through complex chains of intermediaries which render the exercise of shareholder rights more difficult and may act as an obstacle to shareholder engagement. Some harmonization of the shareholder notion would help smooth the differences between national shareholder identification processes, which are a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights and encouraging shareholders to commit to long-term engagement.

Currently, the concept of the 'shareholder' is defined by the applicable corporate law, meaning that determination of the person entitled to receive and exercise shareholder rights depends on the Member state of issuance.

Most Member States follow a substantive or functional approach of the shareholder concept, in essence the person who has validly acquired a share in a company and is the end-investor. Three common-law Member states (Ireland, Cyprus and Malta) take a formal approach and regard the shareholder as the person being registered on a company's register of shareholders, even when this person is a nominee and not the end investor.

The US follows an approach by which the *in rem* right in the share is taken away from the end investor (called "disenfranchisement") and replaced by an instrument a "securities entitlement", which only gives a contractual right against a bank or other nominee and makes the nominee the shareholder. Large US custodians employ that approach even for shares in European companies and argue that European legal systems should adopt the US approach.

This lack of harmonization, it is claimed, makes it difficult for some intermediaries, including US custodians, to determine the person entitled to receive and exercise shareholder rights, the "end investor". This should not be the case.

Under European law, especially the Central Securities Depository regulation (CSDR) and the Transparency directive, all intermediaries have to separate shares they hold on their own account (for which they are shareholders) from shares they hold for someone else (including "securities" which they book into accounts of their clients, even when they are considered "shareholders" under US or UK law). So under these legal rules – and, indeed under UK regulation - these intermediaries must know perfectly well whether or not they are the "end investor".

Furthermore, a proper use of modern IT systems and technology will avoid any uncertainty when determining who is the end investor. It is in fact the lack of investment in IT technologies that has prevented some intermediaries from complying with their obligations under SRD (to pass on information to end-investors and help them exercise their shareholder rights).

Issuers, on the other hand, are able to rely on the definition of 'shareholder' being that which applies in the law under which they are domiciled. The definition of 'shareholder' may differ among Member states but, in the vast majority of them, it refers to the end-investor having invested his own money directly into a share which is determined by the laws of the domicile of the issuer.

By design, SRD2 is based on the end-investor concept: this is the person at the end of the custody chain, not acting as an intermediary, that holds securities on a securities account provided by the "last intermediary" which is the intermediary providing the securities account to the person holding shares on their own account

The issue here is the difference between two ownership regimes: the nominee on the own hand (who sometimes holds the legal title to the shares albeit not having invested its own money, and who is usually an intermediary) may feel that it is under no obligation to pass the voting rights to the investor (who holds the economic rights), and the end-investor on the other hand (who holds both categories of rights).

Mandating the nominee concept EU-wide, when it is currently the law in only three Member states, would put at risk the very principle on which SRD 2 was based, namely the obligation for intermediaries to pass on information to end-investors and help them exercise their voting rights.

However, to meet the intermediaries request halfway, we agree with harmonization of the shareholder concept, on the condition that it is on a functional basis of the "person having invested his (own) money directly into a share" or the person who is entitled to receive and exercise the rights enshrined in a security under the applicable company law of the country where the issuer is incorporated.

Meanwhile, pending the SRD 2 review in 2022-2023, we would like to express our concern that the nominee concept and an alleged lack of harmonisation are increasingly being used by said intermediaries as a pretext for not complying with SRD 2, for example in cases where the shareholder

is claimed to object to his name being disclosed, perhaps on grounds of secrecy or confidentiality. Now SRD 2 has set the right to identify the shareholder across Europe in all member states. This is based on the model of the UK, France and Ireland where this right of issuers was already acknowledged.

I trust that our comments are well-received and I remain at your disposal for any further discussion on the topic.

Your sincerely,

Luc Vansteenkiste

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We aim 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. We seek capital markets that serve the interests of their end users, including issuers.

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