

**EUROPEAN COMMISSION CONSULTATION ON MINIMUM REQUIREMENTS
IN THE TRANSMISSION OF INFORMATION FOR THE EXERCISE OF
SHAREHOLDER RIGHTS (Reference Ares(2018)1944240)**

**SUBMISSION OF A JOINT WORKING GROUP OF THE COMPANY LAW
COMMITTEE OF THE CITY OF LONDON LAW SOCIETY AND THE LAW
SOCIETY COMPANY LAW COMMITTEE**

The views set out in this submission have been prepared by a joint working group of the Company Law Committee of the City of London Law Society (CLLS) and the Law Society Company Law Committee.

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The Law Society (the **Society**) is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

We have the following points on the draft Implementing Regulation:

1. Article 3c.(3) of Directive (EU) 2017/828 (the **Amending Directive**) states that "3. The Commission shall be empowered to adopt implementing acts to specify the minimum requirements to facilitate the exercise of shareholder rights laid down in paragraphs 1 and 2 of this Article as regards the types of the facilitation, the format of the electronic confirmation of receipt of the votes, the format for the transmission of the confirmation that the votes have been validly recorded and counted through the chain of intermediaries, including their security and interoperability, and the deadlines to be complied with. Those implementing acts shall be adopted by 10 September 2018 in accordance with the examination procedure referred to in Article 14a(2).".

The Directive, as amended, recognises that the company law requirements in different Member States differ and that matters that are required by law in one Member State are not necessarily required in another. The implementing Regulation should recognise this more expressly. Where the Directive as amended allows flexibility it should be clear that the implementing Regulation does not impose a requirement where none existed previously. This should be expressly recognised in both the Recitals and in the operative provisions. In the Annex, more use of the words "if applicable" would be helpful.

2. In Recital (7), to reflect the comment in 1 above, this should be amended to reflect Recital (13) of the Amending Directive, which says "This Directive is without prejudice to national law regulating the holding and ownership of securities and arrangements maintaining the integrity of securities and does not affect the beneficial owners or other persons who are not shareholders under the applicable national law."

3. In Recital (8), remove the comma after the word "confirm" in line 2.
4. Definition of "issuer" and definition of "first intermediary". We think there is some confusion with these definitions. The definition of "issuer" includes a third party nominated by a company registered in a Member State with shares traded on a regulated market to perform the tasks referred to in the Regulation. The definition of "first intermediary" includes an intermediary nominated by the issuer who maintains all the share records of the issuer by book entry with respect to the shares traded on a regulated market. It therefore seems that the same entity could come within the definition of issuer and the definition of first intermediary. Is this intended? Also, it would be helpful to make it clear that a third party nominated by an issuer may be nominated for some or all of the tasks referred to in the Regulation.
5. Definition of "first intermediary". We think it is possible that the person who maintains the share records of an issuer by book entry may not do so for all the shares or that they may not hold all the shares on behalf of the shareholders of the issuer (they may hold some shares for another intermediary). We think it might be possible for an intermediary to do both these activities for the same issuer.
6. Definition of "corporate event". We think this should say which "involves" (not affects) the exercise of the rights flowing from the shares. Normally a corporate event does not affect the rights – but the shareholder does have to exercise their rights to participate.
7. Definition of "last intermediary". This requires the intermediary to provide a securities account for the "shareholder" who holds the shares on its own behalf. We are not sure that the last intermediary in a chain of intermediaries will hold shares for a shareholder who holds those shares on its own behalf. We think it would be possible for the last intermediary to hold shares for a shareholder (i.e. the person recognised as shareholder under the law of the relevant Member State, but for that shareholder to hold the shares on behalf of someone else. An example would be a trustee of a trust holding shares on behalf of the trust's beneficiaries. Such a person would not be an intermediary.
8. Definition of "entitled" position. It will not always be the case that the rights flowing from the shares will include the right to participate and vote in a general meeting. Investment funds, in particular, may have listed non-voting shares.
9. Definition of "issuer deadline". The reference to "determined so" in the last line is not clear. We think it is intended to mean determined by the third party to notify the third party or someone nominated by the third party of the shareholder actions regarding the corporate event it initiated. This should be clarified.
10. Article 2(3). There are no definitions of interoperability and straight-through processing. It would be helpful to give some guidance, perhaps in a recital.
11. Article 2(4). We do not think the reference to generally available tools and facilities is clear. An issuer may need to put restrictions on shareholders from outside the EU using particular tools and facilities eg for security law reasons. It should be clear that tools and facilities would be treated as being generally available in such cases.
12. Article 5(1) imposes an obligation on the first intermediary to confirm the entitled positions of shareholders in its books. It does not say that the obligation is to confirm

it to the next intermediary in the chain where there is one, or that that intermediary has a similar obligation to pass the information to the next intermediary. This should be made clear. If the first intermediary is also the last intermediary it should be made clear that there is no obligation to confirm the entitled position. The Article does not set out any timing for how quickly these confirmations must be given. Article 3b(5) (as inserted by the Amending Directive), requires information to be transmitted without delay. It also provides an exemption where the information can be directly transmitted by the intermediary to the company or to the shareholder or to a third party nominated by the shareholder. That exemption should be reflected in this provision.

13. Article 6 seems to assume a notice of participation is always needed – but in some Member States it is not necessary for a shareholder to transmit a notice of participation. The obligation should apply where the shareholder requests the last intermediary to do this.
14. Article 8. The words "all key information... necessary for the intermediary to complete its obligations to the shareholder" are not clear. How will the issuer know what these obligations are, as they will be a matter of contract between the intermediary and shareholder? The words "necessary... for the shareholder to exercise shareholder rights" are preferable.
15. Article 8(2)(b). We do not think the power to make an implementing Regulation allows the imposition of a requirement as to when the payment date must be set (as opposed to deadlines for transmission of information or for exercise of rights).
16. Article 8 (2)(c) and (e). Delete the comma after corporate event in each place.
17. Article 8(2) (d). The wording is very hard to understand and should be clarified.
18. Article 9(4). There is no possibility here (unlike elsewhere) to deal with a case where information is received so late that it cannot be sent that day and instead may be sent as soon as possible the next day. This possibility should be allowed. This also puts an obligation on the last intermediary not to set a deadline too early, but does not seem to have an equivalent obligation for other intermediaries in the chain.
19. Article 9(5). We assume that the first sentence is dealing with a voting receipt to be provided in accordance with Article 3c(2) (as inserted by the Amending Directive). Where votes are sent electronically, is the Regulation treating the vote as cast when the electronic vote instruction is received by the company or when the vote is taken at the relevant meeting? (Where a proxy appointment is lodged with the company with instructions on how to vote, is that treated as a vote being cast?) The sentence does not make it clear who is to provide the receipt or to whom. Are the sentences that follow the first sentence intended to set out the details? This is not clear. In the last sentence, it is not clear who is responsible for deciding if the confirmation can be transmitted to the shareholder or third party they have nominated. How do the intermediaries know that they do not have to transmit on a confirmation or that it has been sent direct?
20. Article 9(6). This assumes there will always be a "record date" for a shareholder identification request – but in some member states this will not always be the case e.g. where a request is made other than in connection with a general meeting. In the third paragraph, it would be helpful to add the words "Where there is a record date, " at

the beginning of the sentence that starts " It shall also not apply to responses to requests...".

21. Article 10. The obligation on the issuer and intermediaries to "ensure" security, integrity and authentication of information requires too high a standard. An obligation to take reasonable steps to ensure would be more appropriate – otherwise it suggests strict liability. Also, this Article does not deal with information sent to third parties who initiate a corporate event or someone acting on their behalf (e.g. where there is a corporate event, such as a takeover offer).
22. Does the Annex deal with a situation where a meeting is adjourned? Does the Annex allow a shareholder to register an abstention, as well as a for vote or an against vote? In Table 8, B7 seems to assume that the payment date will always be fixed. We think the payment date may be an expected date, rather than a certain date, for example where there are conditions that may or may not be satisfied and could affect the date. This should be reflected.
23. There are various typographical errors, as follows:
 - 23.1 Recital (12) should have a full stop at the end.
 - 23.2 Article 1 definition of "issuer", in line 4, there should be a space before "with respect to".
 - 23.3 Article 1 definition of "first Intermediary", the word "intermediary" should start with a lower case "I". We suggest the last sentence be in brackets.
 - 23.4 Article 1 definition of "Issuer deadline" the word "Issuer" should have a lower case "I".
 - 23.5 Article 1 definition of "ISIN", insert "and" at the end of the definition.
 - 23.6 Article 1 definition of "LEI": there should be a full stop at the end (not a semi colon).
 - 23.7 Article 9(1). There should be a full stop at the end.
 - 23.8 Article 9(2) line 3, Article 9(3) line 6 and Article 9(4) line 8 should read "in time" (not on time).

9 May 2018