CROSS-BORDER EXERCISE OF SHAREHOLDERS RIGHTS

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.
Abstract

This dissertation was written as part of the LLM in Transnational Commercial Law, Arbitration, Mediation and Energy Law at the International Hellenic University. This essay focuses on the two key EU Directives that affected most the exercise of shareholders’ rights across-borders. At first, all European directives related to the examined issue since 1968 are mentioned. Following, Directives 2007/36/EC and (EU) 2017/828 are analysed and discussed declaring some of the deficiencies of their establishment. Afterwards, there is a critical evaluation of the Directives and some proposals for reforms are submitted. The essay ends with conclusions.

Keywords: shareholders; voting rights; cross-border; transparency; intermediaries.

Mari Atzemian
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Preface

I would like to thank express my sincere thanks to my advisor Dr Thomas Papadopoulos, who supported me and guided during the preparation of my dissertation. Besides my advisor, I would like to thank the staff of the university, all the professors which I had the chance to attend their classes and all my classmates for their encouragement and cooperation. Moreover, I would like to thank my family and my friends who stood by me and supported me for delivering this dissertation.
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1. Introduction

It was at the beginning of the 21st century when European Union law started worrying about the rights and obligations of shareholders. The protection of the interests of the stakeholders and third parties was the main issue, whereas corporations and shareholders were faced only as participants in a significant market according to financial and economic terms. Securities were dealt as products rather than tools and their holders as consumers. As a result, the partners exercised their rights by participating in the General Meeting (GM) of shareholders.

The participation of shareholders in corporate governance matters and the exercise of their rights are the cornerstone of the operation of companies and, by extension, the movement of the economy. However, the investment approach of the shareholders not involving themselves in the social policy of the companies led the EU to establish a series of corporate governance principles and rules, which since then began addressing this topic from the stock markets’ point of view, prioritising the shareholders of listed companies on regulated markets.

The European Shareholders Rights Directive sought to ensure the prompt cross-border exercise of shareholders' rights, nonetheless the financial crisis of 2008 revealed its deficiencies and the need for the establishment of a revised edition. Although not all Member States have adopted yet measures necessary to comply with the new Directive, however, it is foreseen that the revised edition will not supersede more obstacles than the previous one.

More specifically, Directive 2007/36/EC established rules to support the exercise of shareholders’ rights in General Meetings of companies, having their registered office in a Member State of the European Union and listed on an official stock exchange. It also aimed to take into account the opportunities presented by modern technology. The aforementioned Directive was reviewed by the Directive (EU) 2017/828 concerning matters relating to the encouragement of long-term shareholder engagement and

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transparency in listed companies. This Directive aims at abolishing the weaknesses of shareholders’ control of specific decision-making procedures, developing the supervision of the management body and encouraging the long-term engagement of shareholders.

The purpose of this paper is, firstly, to comprehend the framework of European corporate governance and the exercise of shareholders' rights, and then to examine the complications and difficulties of this framework that emerged due to the financial crisis. It is crucial for one to understand the mental approach of shareholders and thus their level of participation in a company’s run, the reasons that lead them to participate or not to in corporate governance, how the Directives have contributed into shareholders’ engagement and whether there can be amendments in the future.

This essay will be structured as follows. In the second chapter, Directives since 1968 will be outlined and discussed regarding their affect they had upon shareholders’ rights. Following, in the third chapter Directive 2007/36/EC will be discussed, while in the fourth chapter Directive (EU) 2017/828 will be analysed. Finally, before the conclusion, there will be a chapter referring to a critical evaluation upon the last Directive and some proposals for amendments will be deposited.
2. Directives which Have Affected Shareholders’ Rights since 1968

Before analysing the two key Directives, critical aspects of the Directives, which have so far affected the rights of shareholders, are highlighted in this chapter, which is structured as follows. Initially, the Directives that have affected shareholders’ rights since 1968 will be outlined and afterwards, a brief commentary is made on the course followed by the European Parliament and the Council regarding these Directives.


Since 1968 fourteen Directives have been introduced establishing rights and obligations of shareholders until the introduction of Directive 2007/36/EU (of the European Parliament and the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies), known as the Shareholders’ Rights Directive I. This Directive was later amended with the publication of 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), known as the Shareholders’ Rights Directive II. For better comprehension of the issues elaborating in this essay, a review of some crucial points of the previous fourteen Directives will take place.

1. Directive 68/151/EEC²

This Directive established the obligatory publication of data³, the publication of all information related to the company in the national paper of each Member State (MS), the reveal of the publication date of the above information and rules regarding the responsibility of the founders of the company.

2. Directive 77/91/EEC⁴

² First Council Directive 68/151/EEC on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968]. This Directive is no longer in force.

³ Such as the amendments made to the company structure.

⁴ Second Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1976]. This Directive is no longer in force.
The Directive establishes a frame of protection of the interest of partners and third parties related to the companies, in respect of the maintenance, increase or reduction of the capital and the formation of the companies. Due to this, the Directive establishes specific requirements related to issues of disclosure of information. The articles of association must include information, such as type and name of the company; the amount of capital and its reduction or increase amendments; duration of the company; rules related to the persons responsible for the management of the company; its registered office; distribution of dividends; and other related data. Moreover, there are provisions included which ensure the equal treatment of the shareholders and the protection of creditors.


All companies included in the first Directive hold the majority of the voting rights directly or indirectly, or they can exercise a dominant influence. This case exists when a third country’s law governs the company, provided that the legal form is comparable.


This Directive establishes the promotion of the legibility of financial and non-financial data designated to shareholders and the public.


Electronic means are established, and the obligation to publish information in the paper is abolished. Moreover, reporting obligation of shareholders is introduced via this mean.


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4 Second Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1976]. This Directive is no longer in force.


The Market Abuse Directive determines and forbids *market manipulation and insider dealing*, and also determines the conditions for *buyback programs*.


The Prospectus Directive engages with *stock exchange harmonisation*, focuses more on *financial and transferable securities*, defines *categories of investors*\(^10\) and mentions the problems related to *best practices followed by companies* regarding transparency and systemic risk.


This Company takeover bids Directive introduces methods of the *national supervisory authorities’ growth in stock market areas* and clarifies *relations between shareholders and the main bodies of the companies*. More specifically, clarifies issues such as securities and attached voting rights, operation related information, protection of minority shareholders and transparency issues, monitoring and establishment of codes.

9. Directive 2004/109/EC\(^12\)

The Issuers of securities - transparent information Directive aims to *improve information supplied to investors* about issuers of securities admitted to trading on a regulated market, located or operating in an EU country. MSs have to *publish periodic financial information* on their income throughout the fiscal year, in addition to continuous *information concerning the possession of significant percentages of voting rights*.\(^13\)


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\(^10\) Categories of qualified and unqualified investors.


The Cross-border mergers of limited liability companies Directive focuses on the protection of shareholders through the publication of the draft terms, the approval of the GM, determines various effects on shareholders and the protection of employees.

11. Directive 2006/43/EC\(^{15}\)
The statutory audit — ensuring accurate company financial statements Directive concentrates on the harmonisation of auditing and more specifically on the moral dimension of auditing, to ensure reliable information to shareholders.

12. Directive 2006/46/EC\(^{16}\)
The specific Directive refers to the principle of ‘comply or explain’, making companies publish the annual corporate governance statement. Shareholders thus are being informed concerning the responsibility of the management, supervisory and administrative bodies.

13. Directive 2006/48/EC\(^{17}\)
The taking-up and pursuit of the business of credit institutions Directive identifies the risks run by credit institutions as a result of their activities. It lays down the requirements for taking up and pursuing the business of credit institutions and contains provisions on freedom of establishment and freedom to provide services, relations with third countries and the principles of and technical instruments for prudential supervision.\(^{18}\)

14. Directive 2006/68/EC\(^{19}\)
The Directive focuses on public limited liability companies and any alteration concerning their capital and the prevention of market abuse. Any capital related alteration concerns


\(^{17}\) Directive 2006/48/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions (recast) [2006]. This Directive is no longer in force.


not only the bodies of the company but the shareholders’ meetings, too. Moreover, attention is given to the protection of minority shareholders, the publication of operations, decisions, and others.

15. The Directive 2007/36/EC along with Directive EU 2017/828 are going to be discussed further in this essay.

2.2. Commentary

The companies and the shareholders have been beneficial to the movement of the economy since decades. Thus, from a very early stage, it is observed that it was considered necessary to disclose the financial data of the companies and, on a second level, those of the shareholders. The European Parliament afterwards established the publication of these data be by electronic means so that access would be more accessible. Consequently, this transparency should attract more investors to the companies.

However, the most important objective of all was to achieve shareholders’ participation in corporate issues to develop and establish a practice based on long-term rather than short-term goals. As a result, the Directives 2007/36/EC and 2017/828 (EU) were voted, and they established provisions and rules regarding shareholders’ rights at GMs and their engagement in the corporate structure and decision-making procedures. The Directive 2007/36/EC will be discussed in the next chapter, while the Directive 2017/828 (EU) will be analysed in the third chapter of this essay.

In this chapter, the Directive of Shareholders’ Rights is being discussed. At first, crucial points of this Directive are mentioned. Then, the reasons that led to the proposal of its establishment are outlined. Following, the main aims of the Directive are underlined, while in the fourth section the key provisions are analysed. Finally, some of the deficiencies of the Directives are being featured.

3.1. Introduction

In 2007 the Directive 2007/36/EC on the exercise of shareholders’ rights (the “SRD I” or the “Directive” hereof) was formally adopted, and it comprised a part of EU law. The main purpose of this directive is to establish minimum rights for shareholders in listed companies throughout the European Union. The proposed Directive seeks “to ensure that shareholders, no matter where in the EU they reside, have timely access to complete information and simple means to exercise certain rights – notably voting rights – at a distance”\(^\text{20}\). Now, the Prospectus Directive\(^\text{21}\) concentrates on data that issuers are obliged to disclose on admission to the market, while the Transparency Directive\(^\text{22}\) engages with data which corporations need to make available regarding company meetings. However, none of the two Directives deals with issues relating shareholders’ voting rights. Consequently, it was crucial that a new Directive was proposed having a primary objective of the protection of investors and the promotion of an active exercise of rights of shareholders attaching to voting shares.

3.2. Proposal for the establishment of SRD I

The Commission’s proposal for a directive was adopted on July 11, 2007, and published on July 14, 2007. On August 3, 2007, the SRD I entered into force and the implementation of the Directive should take place by the MSs within two years in their national laws.

\(^\text{20}\) European Commission, Press Release, “Corporate governance: Commission proposals to make it easier for shareholders to exercise their rights within the EU”, IP/06/10, 10 January 2006, Brussels.

\(^\text{21}\) See ref. 6, Directive 2003/71/EC.

\(^\text{22}\) See ref. 12, Directive 2004/109/EC.
The problems that led the Commission to the decision of submitting this Directive were mainly mere that needed reconstruction. Shareholders did not get knowledge of the information on GMs in time, and they could not trade their shares before the GM so they could vote. Moreover, they were usually obliged to go in person to the GMs, even though these meetings were held in another MS due to the lack of existence of effective rules on representation and distant voting\textsuperscript{23}. Therefore, the 2003 Commission’s Communication suggested proposals to improve the shareholders’ rights, whose shares are involved in listed companies, so the problem of long-distance voting is settled.

In 2003, the Commission in its communication to the Council and the European Parliament determined that shareholders of listed companies should be able to have access to some specific information prior to the GM via electronic means. Furthermore, it noticed, that “\textit{there is a need for enhancing the exercise of a series of shareholders’ rights in listed companies (right to ask questions, to table resolutions, to vote in absentia, to participate in general meetings via electronic means). These facilities should be offered to shareholders across the EU, and specific problems relating to cross-border voting should be solved urgently. The Commission considers that the necessary framework should be developed in a Directive, since an effective exercise of these rights requires a number of legal difficulties to be solved. In view of the important benefits expected from such a framework, the Commission regards the relevant proposal as a priority for the short term}”\textsuperscript{24}.

In 2004, the European Parliament in its Resolution supported Commission’s intentions as it (European Parliament) “\textit{considers that it is necessary in all cases to distinguish between large and small shareholders, mainly as regards the use of modern technology in the exercise of shareholders’ voting rights, given that small shareholders are usually more at risk}; and “\textit{supports the Commission in its intention to strengthen shareholders’ rights in particular through extension of the rules on transparency, proxy voting rights,}”


\textsuperscript{24} Communication from the Commission to the Council and the European Parliament – “\textit{Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward}” /\textsuperscript{*} COM/2003/0284 final */
the possibility of participating in general meetings via electronic means and ensuring that cross-border voting rights are able to be exercised”25.

3.3. Main aims of the establishment of the SRD I

The SRD I secures minimum rights to shareholders of corporates whose shares are traded on a regulated market, such as having timely access to the relevant information before the GM and offering specific means for distance voting26. It repeals share blocking and institutes minimum standards for the rights to pose questions, state issues on the GM agenda and propose resolutions. Member States, on the other hand, are allowed to pursue any other measures to ease the exercise of the rights mentioned in the Directive.

Overall, the Directive introduces the following main aims:

- the obligation of companies to inform shareholders with specific information related to the GMs. A minimum notice period of 21 days to shareholders for most GMs, a period which can be reduced to 14 days. Also, information such as the location, agenda, date, voting description and participation procedures need to be published on the company’s website;

- the obligation of companies to provide other data and information to shareholders, namely the total number of shares and voting rights, draft resolution for the GM, documents and forms need to be used by proxy27;

- shareholders may vote electronically. Any obstacles regarding the electronic participation in the GM are being removed, including electronic voting, subject only to restrictions that are compulsory for the verification of identity of voters;

- repeal of share blocking and the establishment of a record date28 in all MSs 30 days before the GM;


27 It is referred when one shareholder authorises other one to represent him/her at the General Meeting.

28 It is referred to a certain date indicated by the company where a shareholder is obliged to have officially owned shares, so he is able to participate and vote in General Meetings.
• the possibility of shareholders to set questions related to the agenda and have them answered, to put items on the agenda\textsuperscript{29} and table draft resolutions;
• the establishment of good corporate governance. Meaning the removal of any restrictions referring to the eligibility of people to act as a proxy holder and removal of immoderate formal requirements for the appointment of the latter; and
• transparency of voting results through disclosure on the company’s Internet site.

3.4. Key provisions of the Directive

As the European Commission stated “The Shareholders’ rights Directive introduces minimum standards to ensure that shareholders of companies whose shares are traded on a regulated market have a timely access to the relevant information ahead of the GM and simple means to vote at a distance. It also abolishes share blocking and introduces minimum standards for the rights to ask questions, put items on the GM agenda and table resolutions. The Directive allows Member States to take additional measures to facilitate further the exercise of the rights referred to in the Directive”\textsuperscript{30}.

The primary purpose of the establishment of this Directive is first to provide shareholders and other parties, who are interested in companies, protection. Also, to encourage the corporation to be set up anywhere in the European Union and enable these corporations in cooperating with each other, even though they have bases in different European countries. Lastly, through these actions corporations may be more competitive and efficient.\textsuperscript{31}

The main provisions of the SRD are the following.

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\textsuperscript{29} This right is related to shareholders who have a 5\% holding in the company’s capital.
3.4.1. Article 4

“The company shall ensure equal treatment for all shareholders who are in the same position with regard to participation and the exercise of voting rights in the general meeting”32.

Concerning rights that are related to financial participation in the corporation’s profits33, take-overs34 and information that is related to a decision referring to investments35, EU law has obliged corporations to treat all shareholders with the same respect and treat them equally. Through this Directive, this equality-principle is extended to the voting procedures in the GMs.

3.4.2. Article 5

The issue of the access of shareholders to procedural information related to the meetings was introduced in the Transparency Directive. According to the latter, issuers have to make available data of the time, place and agenda of the meeting, the rights of holders to participate in meetings, the number of shares and voting rights36. Article 5 of the Directive expands these prerequisites. Because “shareholders should be able to cast informed votes at, or in advance of, the general meeting, no matter where they reside”37, the Directive demands for a timely notice and complete information referring to the agenda issues to be submitted. Moreover, the corporations may provide and make accessible any information regarding the GM to shareholders using modern technology. The Directive establishes a minimum notice period to shareholders for the company to issue convocation of the GM of twenty-one days before the GM38. This period, however, may be reduced to fourteen days under two conditions: shareholders can vote by electronic means, and the GM is not considered as the annual GM. This reduction shall

32 Article 4 of Directive 2007/36/EC
33 Article 42 of the Second Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (hereinafter Capital Directive) [1976].
35 Article 17 (1) of the Transparency Directive
36 Article 17 (2) (a) of Transparency Directive
37 Recital 6 of Directive 2007/36/EC
38 Article 5 (1) (a) of Directive 2007/36/EC
be decided by a majority of not less than two-thirds of the votes attaching to the shares, or the subscribed capital and this decision may not last more than the date of the next annual GM\(^39\). For the second or the subsequent meeting, in case the first convocation did not occur due to lack of quorum, MSs do not need to apply the minimum notice periods referred previously\(^40\). This occurs provided that new items are not put on the agenda for the GM, and there is a gap of ten days between the final GM and the first date of GM.

Companies, twenty-one days before the GM, have to upload on their website the information\(^41\) which follows:

1. Convocation, indicating specific information, such as the place and the time of the meeting, and the agenda\(^42\). The convocation\(^43\) must include a clear and precise description of the relevant procedures that shareholders shall follow to exercise their rights\(^44\);
2. Number of shares and voting rights (including separate shares for each class)\(^45\);
3. Documents to be submitted to the GM\(^46\);
4. Draft resolutions and comments by the bodies of the company or shareholders\(^47\); and

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\(^39\) Article 5 (1) (b) of Directive 2007/36/EC
\(^40\) Article 5 (1) (c) of Directive 2007/36/EC
\(^41\) A company provides data to shareholders via the pull and the push method. According to the pull method, the company makes information available to shareholders who can access it at the “pre-determined” place.
\(^42\) Article 5 (3) (a) of Directive 2007/36/EC
\(^43\) The convocation shall: according to Article 5 (3) (b) (i) of Directive 2007/36/EC contain deadlines, by which shareholders have the right to put items on the agenda and to table draft resolutions, in case these rights are exercised after the convocation, and to ask questions during or before the meeting; according to Article 5 (3) (b) (ii) of Directive 2007/36/EC contain the procedures regarding proxy voting, and more specifically, the forms and the means by which the companies are to accept the electronic appointment of proxy holders; according to Article 5 (3) (b) (iii) of Directive 2007/36/EC contain the procedures regarding casting voting by correspondence or by electronic means, where applicable; according to Article 5 (3) (c) of Directive 2007/36/EC determine and include further information regarding the record date according to Article 7 par. 2 of the Directive; according to Article 5 (3) (d) of Directive 2007/36/EC indicate the source of the documents to be submitted to the GM and any draft resolutions; and according to Article 5 (3) (e) of Directive 2007/36/EC the Internet address where all documents and information related to the GM will be uploaded.
\(^44\) Article 5 (3) (b) of Directive 2007/36/EC
\(^45\) Article 4 (b) of Directive 2007/36/EC
\(^46\) Article 4 (c) of Directive 2007/36/EC
\(^47\) Article 4 (d) of Directive 2007/36/EC
5. Forms relevant to proxy voting or voting by correspondence, unless these are sent directly to the shareholders.\textsuperscript{48}

The above information has to be available on the company’s website during all necessary period, initiating on the first date on which the notice is sent and terminating with the closure of the meeting. The company has to provide the information to shareholders “in a manner ensuring fast access to it on a non-discriminatory basis.”\textsuperscript{49 50}

\textbf{3.4.3. Article 6}

The Directive offers to shareholders the possibility to (a) put items on the agenda (accompanied each item by justification or a resolution), (b) to table draft resolutions, and (c) to ask questions, a right that will be discussed further on article 9. Regarding the first and second rights, these can be “exercised in writing.”\textsuperscript{51}

“The exercise of those rights should be made subject to two basic rules, namely that

- any threshold required for the exercise of those rights should not exceed 5% of the company’s share capital and that
- all shareholders should in every case receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda.”\textsuperscript{52}

Member States have to set a specified number of days deadlines before the GM or the convocation.\textsuperscript{53} On the other hand, if the exercise of these rights requires amendments of the agenda, then the company needs to make available the revised edition by uploading it on the company’s website, before the record date.\textsuperscript{54}

\textsuperscript{48} Article 4 (e) of Directive 2007/36/EC
\textsuperscript{49} Article 5 (2) (a) of Directive 2007/36/EC
\textsuperscript{50} According to the “push” method, the company has to supply or send information to the shareholder.
\textsuperscript{51} Article 6 (1) (a) of Directive 2007/36/EC
\textsuperscript{52} Article 6 (1) (b) of Directive 2007/36/EC
\textsuperscript{53} Article 9 of Directive 2007/36/EC
\textsuperscript{54} Either by postal services or electronic means, see Article 6 (1) (3) of Directive 2007/36/EC
\textsuperscript{55} Recital 7 of Directive 2007/36/EC
\textsuperscript{56} Article 6 (3) of Directive 2007/36/EC
\textsuperscript{57} Article 6 (4) of Directive 2007/36/EC
3.4.4. Article 7

The Directive pays attention to some procedural details, requiring proportionality between the purpose and the procedure needed by a Member State and/or a company. More specifically, those details are (a) shareholder identity\(^{58}\), (b) exercise of proxy voting\(^{59}\), (c) obstacles on electronic participation\(^{60}\) and (d) voting by email. These issues will be discussed in this article and the next ones.

“Obstacles which deter shareholders from voting, such as making the exercise of voting rights subject to the blocking of shares during a certain period before the general meeting, should be removed”\(^{61}\). The Directive establishes the record date system, based on which shareholders can have the right to vote at the GM, while their share can be traded afterwards\(^{62}\). In this way, share blocking is abolished, and shareholders are not abandoned from selling their shares after the GM. The record date system is required for companies that cannot identify their shareholders from a current register of shareholders on the day of the GM\(^{63}\) and it may last up to 30 days before the GM is concerned.

Moreover, any other proposal, which prevents shareholders from selling or transferring shares since the record date until the GM, is prohibited\(^{64}\). Otherwise, investors have to deposit their shares prior the GM for a specific time of period until the end of it. This technique was frequently used under the law of particular MSs, which used this method as an alternative to the record date system regarding the corporate or intermediary level. Many institutional investors were observed that they were prevented from exercising their voting rights due to the requirement of these investors to be able to respond to market reactions\(^{65}\). Consequently, the voting right is sterilised because of

\(^{58}\) Article 7 (1) of Directive 2007/36/EC  
\(^{59}\) Article 11 (2) of Directive 2007/36/EC  
\(^{60}\) Article 8 (2) of Directive 2007/36/EC  
\(^{61}\) Recital 3 of Directive 2007/36/EC  
\(^{62}\) Article 7 (2), (3) of Directive 2007/36/EC  
\(^{63}\) Article 7 (2) (b) of Directive 2007/36/EC  
\(^{64}\) Article 7 (1) of Directive 2007/36/EC  
the dysfunctional proceedings of distribution of pre-meeting data and to the tight record dates.

To sum up, the record date system tries to some level not to split the entitlement to vote and the ownership of shares. In cases where others than the beneficial owners were entitled to vote, such as nominees, votes were usually cast irrespectively of the beneficial owners’ interest. This would result in “hidden ownership” practices. Through the Directive provisions, however, nonetheless, this practice is being prevented partially, the issuer of the shares is still able to raise objections to the shareholder’s registration that it was a result of hiding ownership and illegal tactics rather than of reasonable economic interest.

### 3.4.5. Article 8

Companies should not deal with barriers but provide shareholders with the possibility to participate in GMs by any means. The MSs shall allow shareholders to participate in the GMs by electronic means, notably any or providing the following:

- real-time transmission of the GM;
- real-time two-way communication, permitting shareholders to participate in the GM from a remote location; and
- a mechanism for casting votes, prior or during the GM, without the need of the presence of a proxy holder.

Member States are encouraged to adopt rules with the purpose of ensuring that all voting results reflect the objective of the shareholders in all circumstances.

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68 Recital 9 of Directive 2007/36/EC

69 Article 8 (1) of Directive 2007/36/EC

70 Recital 9 of Directive 2007/36/EC
3.4.6. Article 9

Every shareholder may ask questions “related to items on the agenda” of the GM and have them answered, while MSs shall set the rules “on how and when questions are to be asked and answered”\textsuperscript{71}. The Member States, however, may consider that several answers have been given when relevant information is uploaded on the company’s website\textsuperscript{72}. It is considered that the specific provision may broaden the opportunity of shareholders to set questions which their answers may jeopardise any economic or business interests of the company. The company, as a result, desiring not to disclose more information but to withhold it, it may cause the challenge of GM decisions by its shareholders\textsuperscript{73}. It is, therefore, each MS’s responsibility to take the several measures regarding the frame based on which the shareholders may set their questions.

3.4.7. Article 10

“\textit{Good corporate governance requires a smooth and effective process of proxy holders}”\textsuperscript{74}. The Directive provides the possibility to every shareholder to appoint an individual or legal person as a proxy holder. Existing boundaries regarding proxy voting should, therefore, be abolished, and the proxy holder may have the same rights of the shareholder for the voting procedure\textsuperscript{75}. Furthermore, a person who is a proxy holder may represent more than one shareholders holding proxies from different ones\textsuperscript{76}. However, to exist good corporate governance, there have to be sufficient safeguards against a probable abuse of proxy voting. Proxy holder shall participate in the voting procedure according to the shareholder’s instructions\textsuperscript{77}, while member States have the

\textsuperscript{71} Recital 8 of Directive 2007/36/EC \\
\textsuperscript{72} Article 9 (2) (b) of Directive 2007/36/EC \\
\textsuperscript{74} Recital 10 of Directive 2007/36/EC \\
\textsuperscript{75} Article 10 (1) of Directive 2007/36/EC \\
\textsuperscript{76} Article 10 (5) of Directive 2007/36/EC \\
\textsuperscript{77} Article 10 (4) (a) of Directive 2007/36/EC
right to apply some restrictions for no other purpose other than to deal with potential conflict of interest. Such measures would constitute:

- limitation on the appointment of a proxy holder to a unique meeting;
- limitation on the number of proxy holders referring to one shareholder, concerning Article 13 (5) of the Directive;
- disclosure of specific facts by the proxy holder to prove the lack of conflict of interest against the shareholder appointed;
- restriction or exclusion of the proxy holder who does not have specific instructions on how and what to vote;
- restriction or exclusion of transfer of the proxy to another person; and
- the requirement of keeping a record of the instructions given regarding the voting procedure by the proxy holder.

### 3.4.8. Article 12

The companies offer the possibility to shareholders to participate in the voting procedures by correspondence before the GM.

### 3.4.9. Article 13

The specific article deals with the problem of shareholdings being held through a chain of intermediaries. Until the establishment of SRD I, shares are held through securities accounts with brokers and/or banks as intermediaries, who provide custodial services. These chains are often long, significantly complicated involving different jurisdictions while the intermediaries do not keep separate accounts. For instance, an investor in Member State A holds shares in an account with an intermediary in Member State A. This intermediary holds an account with a depository bank in Member State B. This bank

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78 Article 10 (3) (a) of Directive 2007/36/EC
79 Article 10 (2) (a) of Directive 2007/36/EC
80 Article 10 (2) (b) of Directive 2007/36/EC
81 Article 10 (3) (a) of Directive 2007/36/EC
82 Article 10 (3) (b) of Directive 2007/36/EC
83 The Directive, however, according to Recital 10 of the Directive, does not oblige companies to confirm that proxy holders vote according to the instructions possibly given by the appointing shareholders.
84 Article 10 (4) (b) of Directive 2007/36/EC
holds an account with a local custodian in Member State C. Finally, this custodian is registered in the share register of the company.\(^{85}\)

*Diagram A: Shareholding chain of securities accounts*

Consequently, not only it is difficult to record an individual chain of securities account, but also it is therefore legally uncertain who is entitled to cast votes on behalf of whom in the end. The same complexity applies when proxy holders are involved in this chain, too.

Therefore, according to the Directive, omnibus accounts are allowed to be held by professional intermediaries on behalf of shareholders.\(^{86}\) The Member States, in the case that they have to settle some requirements, they may require a list to disclose to the company the identity of the holder, and the number of the shares voted.\(^{87}\) Moreover, procedural requirements may require verification of voting instructions by the intermediary.\(^{88}\) The holder of omnibus account may have the right to vote differently for each client and to provide a proxy to each client for the voting procedure.\(^{90}\)

The Directive does not solve central issues in the voting procedure, and these provisions are not sufficient to permit investor, who holds shares, to acknowledge how votes are eventually cast. However, it requires the Commission a further consideration “*with a*

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\(^{85}\) Jaap Winter, “*The shareholders’ rights directive and cross-border voting*”, (June 2006)

\(^{86}\) Article 13 (1) of Directive 2007/36/EC

\(^{87}\) Article 13 (2) of Directive 2007/36/EC

\(^{88}\) Article 13 (3) of Directive 2007/36/EC

\(^{89}\) Article 13 (4) of Directive 2007/36/EC

\(^{90}\) Article 13 (5) of Directive 2007/36/EC
view to ensuring that investors have access to effective voting services and that voting rights are exercised in accordance with the instructions given by those investors” 91.

3.4.10. Article 14

Companies shall determine for each resolution at least the number of shares for which votes have been given, the represented proportion of the share capital, the total number of votes, the number of votes in favour and against, and where applicable the number of absent voters. The results of the voting procedure shall be available on the company’s website within a period not exceeding fifteen days after the GM 92.

3.5. Conclusion

The Directive, although it establishes solutions to some of the existing obstacles in corporate governance, however many of them remain troublesome. Firstly, it does not prescribe that Depositories and custodians shall cooperate, and because intermediaries do not have an economic interest in the voting procedures of the shareholders at the GMs 93, they usually stay voluntarily uninvolved. Moreover, the Directive promoted and established the use of electronic means in all procedures, however, it does not determine the specific means, allowing, therefore, the companies to insert any technology 94. This may prevent some individual shareholders from participating in the voting procedures due to high costs. Furthermore, under this Directive is not ensured that institutional investors have the chance to exercise their voting rights at the end, due to complex intermediary chains, while Depositories may freely impose high charging fees without being restricted upon a ceiling. Due to the above, many shareholders may remain passive. Consequently, it is observed that there are many gaps that this Directive has to fulfil, so the shareholder engagement may develop and be secured.

91 Recital 11 of Directive 2007/36/EC
92 Article 14 (2) of Directive 2007/36/EC

In this chapter, the first section will introduce the new SRD (II). Following the second section, many of the deficiencies of the Directive 2007/36/EC will be quoted, while in the third section, the aims of the European Commission, concerning the Directive’s amendment will be referred. In the fourth section, the principal amendments to the SRD I will be discussed, and subsequently the key provisions of the SRD II will be analysed. Lastly, there will be a comparison to the US approach noted.

4.1. Introduction

On 20 May 2017, the 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 was published. The Shareholders’ Rights Directive was firstly published “with a view to enhancing shareholders’ rights in listed companies”. However, “the financial crisis revealed that shareholders in many cases supported managers’ excessive short-term risk-taking95. This could lead to corporate governance and performance profoundly below the standard, and some action had to be taken. In December of 2012, therefore, the Commission in its communication announced its intention to modernise the corporate law and governance structure96. This new Directive shall aim to minimise the deficiencies in shareholders’ manner of control of specific decision-making procedures, to encourage their engagement in the long-term run and to enhance supervision of main bodies of the company. “Greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies”97. Many measures in the new Directive have been inserted, and many have been amended. However, those with the more significant interest will be discussed further in Section 5 of this chapter.

97 Recital 14 of Directive 2017/828
4.2. Addressing the problem

The main issue concerning the liability of issuers towards shareholders is the voting right. In recent years, across borders ownership has been spread and demands for facilitation of voting procedures are increased. The financial crisis revealed a lack of shareholder engagement and many deficiencies in corporate governance. Despite the establishment of the 2007 Directive, investors had to overcome many barriers and obstacles in cross-border voting procedures, such as logistics, costs, regulations and legal requirements (including national), which made challenging to institutional and individual investors to exercise their rights and participate to proceedings of the company. Hereunder are going to be discussed in brief some of the leading problems in voting procedures and corporate governance, which led the Commission to revise the Directive of 2007.

4.2.1. Obstacles to cross-border voting

It was observed that the receipt of relevant documents and data sufficiently on time before GMs was a process troublesome. Despite the fact that electronic means were introduced to companies’ software and voting procedures, it remained difficult.

4.2.2. Complex chain of intermediaries

As this issue was discussed before, any information regarding shares which is transmitted from and to the issuer across borders is handled through a chain of intermediaries. Local custodians are not obliged to register shareholders in the share register of non-resident issuers if there is not a prior request from the shareholders. Individual shareholders being unaware of these procedures they do not request from the bank or a custodian to proceed so, and their shares are being treated as bearer shares. From this situation, the ones that gain advantages and may participate in the voting procedures through a proxy are the institutional investors.

4.2.3. Lack of “push” method service

Many shareholders whose shares are held from custodians have to seek information to be able to participate effectively in the voting procedures in the GMs across borders,
without result the most of the times. Institutional investors may have access to voting platforms and proxy advisory services, however individual investors, due to the high cost of these services, they usually not have access to the information needed. In many MSs, it is observed that companies although they make available the relevant information for the GMs according to the Directive, they do not ensure the fast access to the data on a “non-discriminatory basis” as they should.

4.2.4. Fees

Custodians are known to charge extraordinary fees for their services, and as a result, individual investors cannot receive not even an admission ticket for a GM\textsuperscript{98}. These fees are correspondent to the shareholder irrespective of how many shares does he/she own.

4.2.5. Documentation requirements

Shareholders who are attending a GM abroad have to provide more data for their identity\textsuperscript{99} rather than when they are attending a local GM. Moreover, information provided by shareholders is not always processed accurately, but incorrectly, misspelt or with others errors. For instance, the name on the admission ticket may have been misspelt, or the request for a ticket was somewhere lost in the intermediary chain or was never known to the relevant issuer.

In general, this is happening due to many reasons. One of them is considered the lack of responsibility. For example, when a shareholder has a contract with a bank, which may be the first custodian in the chain, a shareholder does not know the other intermediaries involved and so may not request explanations from them. In this case, no one has an obligation to refer or has an economic risk other than the first custodian. Another reason is the lack of automation of the proceedings regarding proxy voting for individual investors. All information is being transmitted manually and vocally and as a result occur miscommunications and errors.

\textsuperscript{98} Indicatively, the cost of these fees may vary from 0 to 100 EUR, depending the Member State.

\textsuperscript{99} Such as their place of birth.
4.2.6. Share blocking

Despite the provisions of the Directive, which required the MSs to terminate share blocking and to establish the record date system, share blocking is being continued regarding cross-border voting procedures. “For instance in Denmark listed shares are held under nominee in an omnibus account. To vote these shares, shareholders have to open a so-called segregated account in his or her name which may take – on a cross-border basis – up to ten weeks. As long as the shares are held in this segregated account normally until the day after the general meeting, they are practically blocked from voting because a request to sell these shares would also have to be processed through the whole custodian chain which again would take a certain time”\textsuperscript{100}.

4.2.7. Interim registration requirements

In some Member States, such as Finland and Sweden, it is required that shares are re-registered in the name of the owner before the GM\textsuperscript{101}. For the shareholder be able to vote and participate in the GM, he/she has to disclose his identity and ensure from the custodian that the re-registration has taken place. Otherwise, he/she will not be able to vote because the share is registered in the name of the custodian.

4.2.8. Lack of time and cut-off dates

Individual shareholders confront another problem, as well, because of the intermediaries’ chain. A shareholder who requests an admission ticket from the issuer, the request has to reach him before the deadline proposed in the invitation. The last custodian in the chain, who will transfer the request to the issuer, may not do it in time, and the issuer will not provide the ticket to the shareholder at the end. However, some custodians have their deadline dates (cut-off dates), so they can proceed all requests efficiently to the issuer. These cut-off dates vary according to the law of each MS, to the


custodian’s preferences, etc. The last custodians in the chain usually set their cut-off dates a few days before the record date creating barriers to shareholders.  

4.2.9. General Meeting relates issues

Some Member States allow shareholder’s admittance after the start of the GM only for a specified time. As a result, a shareholder who may arrive late at the place of the GM due to force majeure, he will not be able to participate and vote. Other shareholders may find themselves in a situation where they have to leave the GM prior its start, and they need to transfer their voting rights to a proxy. However, in some Member States it is not possible, and thus shareholders lose their voting rights. Moreover, not in all GMs the discussions and procedures are being translated into English. This makes difficult the participation and voting by shareholders who reside across borders. Finally, although the Directive has established the right to shareholders to ask questions, this is not feasible in all MSs in the same manner. For instance, in Germany shareholders may ask as many questions as they want, but in France, shareholders are known to ask up two or three questions each.

4.3. Principal aims of the European Commission

The Commission in 2012 in its Communication referred to three particular main aims, namely enhancing transparency, engaging shareholders and supporting companies’ growth and their competitiveness. Shareholder engagement, more specifically, is considered to be an exchange of minds with companies regarding issues such as risk, performance, strategy, corporate governance including remuneration, capital structure, etc. and not only a voting procedure in GMs. This dialogue between shareholders and companies is very crucial that is established, so long-term success is

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102 For instance, some custodians require from shareholders a short notice, and this does not provide the latter adequate time to reconsider their intention to participate.  
103 The Commission focuses on the transparency in relationships between companies and investors, providing better information regarding corporate governance and revealing voting policies respectively.  
104 The Commission proposes that shareholders have better access in remuneration policies and related party transactions of the company; moreover, that asset managers, institutional investors and proxy advisors have some obligation to promote the efficiency in engagement.
promoted. Not only companies and shareholders but the whole economy benefits from active engagement\textsuperscript{105}.

Internal Market and Services Commissioner Michel Barnier referred to the necessity of a “reliable and sustainable” corporate governance. Furthermore, he highlighted that short-term thinking has resulted in disastrous effects and that the solution is found to company boards of directors (BoD) that are more effective and shareholders that assume their responsibilities\textsuperscript{106}.

Green Paper in this manner mentioned that shareholders’ involvement needs to be enhanced and they have to be more encouraged in taking long-term decisions, caring about the long-term performance. On the other hand, evidence showed that most of the shareholders’ funds are being managed by asset managers, who follow short-term investment strategies focusing on “turning over the portfolio” and this has led to weak shareholder engagement, once the interests of the formers and the latter are contrasting.

In its Communication, the Commission also clarified the need for institutional investors to provide data regarding their engagement and voting strategies engaging them to take more seriously their part in the company. Moreover, it proposed to focus more on the remuneration policies and that payment should be connected to efficiency; that shareholder's control over related party transactions should be improved. At last, the approach of 'comply or explain' was introduced and mentioned to be discussed further.

All the above were confirmed through a Press Release from the European Commission the same day\textsuperscript{107}.

In 2014, the Commission proposed the revision of the Shareholder Rights Directive. In its proposal, it mentioned more solid transparency requirements for asset managers and institutional investors and referred to engagement policies concerning corporations in which they invest. It referred to the issue of the identification of shareholders especially


in cross-border situations, and it introduced the ‘say on pay’ condition. Finally, according to the principle of ‘comply or explain’, a corporation when it prefers to withdraw from the applicable corporate governance code shall give a reason for the withdrawal. The Commission’s Recommendation aims to guide listed companies, investors and other interested parties to improve the overall quality of corporate governance statements published by companies.108

Following the previously mentioned procedures, in December of 2016, the EU Parliament and Commission agreed on the final version of the new Directive. Companies would be allowed to identify their shareholders and have access to their identity information from any intermediary in the chain, with respect however to shareholders who hold more than 0,5%. Therefore, only a small population of shareholders of listed companies will have their identity details revealed. Better Finance, the European Federation of Investors and Financial Services Users, concerned about the disclosure of shareholders’ identity, asked the European Parliament whether the MSs may “set a threshold that is as low as possible, and the shareholders of the listed companies have access to the same information as easily as those companies do”109. Needless to say, that charging policies of custodians to shareholders remain high, preventing non-resident shareholders from participating in voting procedures in GMs via a representative or a proxy holder.

On the 14th of March, 2017 the European Parliament finally voted its report on the revised SRD, entering into force two years after the publication in the official journal. The resolution was passed by 646 votes to 39, with 13 abstentions.110 Its amendments are going to be discussed further in the next section.

4.4. Main amendments to SRD I

The main of all reasons for this amendment was the short-term strategies of the shareholders. It is the case that institutional investors, such as funds, banks and insurance companies hold the significant part of the shares listed in EU companies, while asset managers handle assets of most of these institutional investors. Both represent the significant part of EU economy and fail to follow long-term strategies. European Commission noticed that short-term strategies are observed to be encouraged due to situations, such as:

- Fund managers, on average, every 1.7 years, they turn their portfolio in;
- The evaluation of the performance of asset managers is usually accomplished every three months or even earlier, and as a result, they do not take into account the long-term performance, but they are put in pressure to perform well in short terms;
- The extremely high remuneration of CEOs comparing to their weak performance and the troubles confronted by the company, let many shareholders dissatisfied; and
- The average period of share-holding is considered to be eight months.

This new Directive aims to encourage in general the long-term shareholder engagement.

4.4.1. Shareholder’s identification

For the direct and effective communication between the company and its shareholders to proceed, listed companies may identify their shareholders. Intermediaries are obliged to transmit information to and from the company, so the shareholders are facilitated to exercise their rights.

Furthermore, intermediaries are obliged to offer the final shareholder’s information to the company, upon its request. The Directive, however, establishes an exception; the MSs may require that shareholders with no excess of 0.5% of shares be excluded from the identification obligation.
4.4.2. Facilitation of voting rights of shareholders

It is known that shareholders are the key factors in a company and that they have to participate in the voting procedures so that development and productivity are improved. Complex chains of intermediaries usually hold communication between the company and its shareholders back, a procedure which is necessary for shareholders to facilitate their rights. The new Directive obliges intermediaries to pass on essential information from the shareholder, including retail shareholders, to the company and vice versa, so that shareholders may exercise their rights appropriately.

Moreover, MSs shall ensure that shareholders can be informed, upon their request, whether their vote was taken into account and whether the company validly registered and accounted for the vote\textsuperscript{111}. This obligation has also reference to third-country intermediaries who represent shareholders with shares in listed companies in the EU. In this manner, non-resident shareholders may be able to participate in the GMs of the company and vote effectively.

4.4.3. Institutional investors and asset managers

The new Directive requires institutional investors and asset managers to reveal their investment methods and those regarding their engagement with the companies in which they invest. Through this manner, they are more encouraged to follow long-term strategies rather than short-term, disclosing their policy on an annual basis and examine environmental and social issues. “The new rules will require institutional investors to disclose how they take the long-term interests of their beneficiaries into account in their investment strategies and how they incentivise their asset managers to take these long-term interests into account. Asset managers will be required to report to the institutional investors for whom they manage funds how they have performed in relation to their mandate”\textsuperscript{112}.


\textsuperscript{112} European Commission, Fact Sheet – “Shareholders' rights directive Q&A", (Brussels, 14 March 2017) MEMO/17/592.
Moreover, investors have to get along with the ‘comply or explain’ approach. More specifically, in case the investor does not comply with the provisions, he has to explain himself reasonably. This approach is applied to corporate governance and stewardship codes, as well. Although there is no obligation to reveal information, however, one has to explain why he did not proceed so. This policy will reveal how investors and managers accommodate with shareholder engagement in their strategies and the engagement activities they pursue.

4.4.4. Proxy advisors

Proxy advisors are companies which provide advice, research and recommend shareholders on how to vote in GMs. These companies specialise in analysing disclosures of corporations, recommend on voting procedures, especially in cases across borders and they get to influence shareholders decisions importantly.

Due to the above, they are required according to the provisions of the new Directive to disclose information about their advisory and recommendation methods towards investors and to publish the applying code of conduct. This is to maintain reliable and high-quality recommendations.

4.4.5. ‘Say on pay’

The new Directive gives voice to shareholders and “transparency and accountability about directors’ pay” is encouraged. The new provisions allow shareholders to have an opinion regarding directors’ remuneration policies, having the right to know and consequently influence the amount of the latters’ payment. The Directive’s aim, therefore, is the interaction between performance and pay.

According to the SRD II, shareholders have the right to vote in the GM on the remuneration policy followed by a company for its directors. More specifically, shareholders can vote twice. Firstly, they vote ex-ante regarding their concerns about the remuneration awards to the directors in the future. This vote is considered binding, permitting companies to award remuneration only on the base of the policy approved. Member States, though, will have the right to choose the advisory approach, according to which, companies may not proceed based on shareholders’ vote, but they are
required to refer to a revised policy. The company has to publicly disclose without delay
the remuneration policy voted by the shareholders at the GM. Secondly, they vote ex-
post regarding their concerns about the remuneration report already describing the
remuneration awarded during the previous financial year. The particular vote is
considered advisory, and the companies may have the possibility to replace the voting
procedure by an argument during the GM.
Directors’ remuneration is the key factor in adjusting the shareholders’ and directors’
interest assuring that director will behave according to the company’s best interest. The
remuneration policy influences Directors’ performance and this means that if the
directors are getting awarded according to short-term incentives, it stands to reason
that they will make short-term decisions. It is essential that the directors’ decisions align
with the long-term aims and sustainability of a company and not with short-term
objectives.

4.4.6. Related party transactions

“Transactions with related parties may cause prejudice to companies and their
shareholders, as they may give the related party the opportunity to appropriate value
belonging to the company”\textsuperscript{113}. Consequently, the new Directive requires companies to
disclose data of related party transactions, which nonetheless might create risks for
minority shareholders. The companies are obliged to submit for disclosure these
transactions, so they are approved by the shareholders in the GM or by the BoD, and
the interests of the company are adequately protected.

4.5. Key provisions of SRD II

The rationale of this Directive is to reinforce the long-term focus on corporate
governance and to restrict shortcomings. Critical issues of the provisions of the SRD II
are commented hereunder.

\textsuperscript{113} European Council, Press Release (2017), Enterprise and industry, Single Market, “Shareholders' rights
4.5.1. Article 3a

It is crucial for some companies to know the identity of its shareholders. Having this kind of information, they will be able, for instance, to understand better their interest, or forecast the result after the voting procedure in the GMs.

Listed companies have the right to identify their shareholders\textsuperscript{114} so they can come into contact with them directly\textsuperscript{115}. Each MS may allow a request for shareholder identification\textsuperscript{116}, but only for those shareholders who hold no more than 0,5\% of shares or voting rights\textsuperscript{117}. However, it is indicated that while issuers of some MSs are entitled to initiate a process to access information on the identity of their shareholders at their request, issuers of other MSs receive information at the GMs or after participation in GMs\textsuperscript{118}. Moreover, intermediaries\textsuperscript{119} may be required, upon the company’s request\textsuperscript{120}, to provide the company with information regarding the shareholder’s identity. If the chain of intermediaries consists of more than one of them, the request of the company has to be transmitted on time between the intermediaries and the relevant information about the shareholder’s identity has to be transmitted on time as well to the company by the intermediary\textsuperscript{121}.

“Companies and intermediaries, however, are often not aware that a person has ceased to be a shareholder unless they have been informed by the person or have obtained that information through a new shareholder identification exercise, which often takes place only once a year in relation to the annual general meeting or other important events such as takeover bids or mergers”\textsuperscript{122}. Therefore, they cannot store the data more than

\begin{itemize}
\item \textsuperscript{114} Article 3a (1) of Directive 2017/828
\item \textsuperscript{115} Recital 4 of Directive 2017/828
\item \textsuperscript{116} Details of the shareholders, that have to be sent to the company, include data such as the name, contact details, its registration number if it is a legal person, or, if there is not any, a unique identifier (such as Legal Entity Identifier), the number of shares held by the shareholder and the date of acquisition.
\item \textsuperscript{117} Article 3a (1) of Directive 2017/828
\item \textsuperscript{118} European Securities and Markets Authority (2017), “Report on shareholder identification and communication systems”, ESMA31-54-435, p.19 Table 1.
\item \textsuperscript{119} Article 2 (b) (d) of Directive 2017/828. “Intermediary means a person, …, a credit institution … and a central securities depository …, which provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons;”
\item \textsuperscript{120} Article 3a (2) of Directive 2017/828
\item \textsuperscript{121} Article 3a (3) (a) of Directive 2017/828
\item \textsuperscript{122} Recital 7 of Directive 2017/828
\end{itemize}
twelve months after the day they were aware of the fact that the specific shareholder ceased having this identity, concerning some exceptions.

The personal data of shareholders should enable the company to communicate with shareholders directly, so the exercise of their rights and the engagement with the company can be facilitated.

4.5.2. Article 3b

In general, “in the chain of intermediaries, especially when the chain involves many intermediaries, information is not always passed from the company to its shareholders, and shareholders’ votes are not always correctly transmitted to the company”. Due to this, and according to the new SRD, the intermediaries have to send from the company to the shareholders (or the third party nominated by the shareholder) specific information so that shareholders may facilitate the exercise of their rights. If the information is already available on the company’s website, a notice indicating where the information can be found on the website will suffice. It is recorded that most of the listed in the EU companies make their information available through the websites, newspapers and generally to the public, while only a few of them communicate to the individual shareholders through the chain of intermediaries.

Furthermore, according to the SRD II, companies shall be required to transmit the relevant information to shareholders and intermediaries promptly, and the intermediaries to the shareholders without delay. However, it is recorded that most of the EU jurisdictions have not established deadlines for the efficient transmission of the information. Intermediaries, moreover, have to transmit the information relevant to

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123 Article 3a (4) (b) of Directive 2017/828
124 Article 3a (4) (c) and Recital 7 of Directive 2017/828
125 Article 3a (4) (a) of Directive 2017/828
126 Recital 8 of Directive 2017/828
127 Article 3b (1) of Directive 2017/828
the exercise of the shareholders’ rights to the company immediately, according to the shareholder’s instructions.\textsuperscript{131}

The purpose of this new provision is to assure that the sending of the information will be treated similarly across the European Market.

4.5.3. Article 3c

Shareholders of listed in the EU companies shall be committed and engage in the corporate decisions to promote development and productivity.\textsuperscript{132} Intermediaries have to facilitate the exercise of the rights of shareholders including the right to participate and vote in GMs. Shareholders may exercise these rights either by themselves or by nominating a third person to do so. In this case, intermediaries shall make all the necessary arrangements for the shareholders or the nominated third parties, unless the intermediaries are nominated to do so, then “they exercise rights upon the explicit authorisation and instruction of the shareholders and for their benefit.”\textsuperscript{134}

Shareholders or the nominated third party, after the GM, can confirm that their votes have been validly taken into account by the company, upon a request.\textsuperscript{135} When the voting procedure is by electronic means, an electronic confirmation has to be received by the shareholder.\textsuperscript{136}

4.5.4. Article 3d

The Directive establishes a high level of transparency regarding the charges, such as fees and prices, for the services that intermediaries provide to shareholders so that equity investment can be promoted across the Union, and the exercise of the shareholders’ rights be facilitated.\textsuperscript{137} Intermediaries shall publicly disclose any charges regarding the new provisions relating to the shareholder identification and the facilitation of the

\begin{itemize}
  \item \textsuperscript{131} Article 3b (4) of Directive 2017/828
  \item \textsuperscript{133} Article 3c (1) (a) of Directive 2017/828
  \item \textsuperscript{134} Recital 9 of Directive 2017/828
  \item \textsuperscript{135} Article 3c (2) (b) of Directive 2017/828
  \item \textsuperscript{136} Article 3c (2) (a) of Directive 2017/828
  \item \textsuperscript{137} Recital 11 of Directive 2017/828
\end{itemize}
exercise of shareholders’ rights. Discrimination between the charges and any differences imposed between cross-border and domestic charges may be applied only “where duly justified and where they reflect the variation in actual costs incurred for delivering the services” by intermediaries.

4.5.5. Article 3e

All the above provisions shall apply to intermediaries who do not have their registered office either their head office in the EU, as well. This is applied because “if third-country intermediaries were not subject to this Directive and did not have the same obligations relating to the transmission of information as Union intermediaries, the flow of information would risk being interrupted.” Therefore, intermediaries who represent shareholders holding shares of companies having their registered offices in the EU and shares which are admitted to trading on markets situated in the EU are subject to these provisions.

4.5.6. Article 3g

Shareholder engagement is crucial for the development of the company, and the higher the involvement of them in the company is, more considerable is the improvement of the financial and non-financial performance of companies, including the social, environmental and governance factors. Institutional investors and asset managers although they constitute essential shareholders of listed companies, they frequently not engage with companies in which they hold shares, and so capital markets put more pressure on short-term performance strategies, jeopardising all long-term goals. For the reasons above, more transparency is needed from the institutional

138 Article 3d (1) of Directive 2017/828
139 Article 3d (2) of Directive 2017/828
140 Recital 12 of Directive 2017/828
141 Recital 14 of Directive 2017/828
142 According to Article 2 (e) of Directive 2017/828, institutional investor is “(i) an undertaking carrying out activities of life assurance ... and of reinsurance ...; (ii) an institution for occupational retirement...”.
143 According to Article 2 (f) of Directive 2017/828, asset manager is “an investment firm ... that provides portfolio management services to investors, an AIFM (alternative investment fund manager) ... or a management company ..., or an investment company that is authorized in accordance with Directive 2009/65/EC provided that it has not designated a management company authorized under that Directive for its management;”
144 Recital 15 of Directive 2017/828
investors and asset managers regarding their engagement policy, investment strategies and their implementation\textsuperscript{145}. Therefore, MSs shall require that institutional investors and asset managers satisfy two requirements. Otherwise, they shall publicly disclose the reason why they did not satisfy them\textsuperscript{146}. These two requirements are:

a) Institutional investors and asset managers shall describe their shareholder engagement policy in their investment strategy, the activities they carry out to succeed in the engagement policy and how they manage them. Moreover, they need to describe how they are willing to manage actual or potential conflicts of interests, for instance when institutional investors or asset managers have business relationships with the investee companies\textsuperscript{147}.

b) Institutional investors and asset managers shall publicly disclose, on an annual basis, information about the implementation of their engagement policy, and more specifically how the voting procedure proceeded, which were the significant issues during the procedure and describe the usage of the proxy advisors’ services\textsuperscript{148}.

The abovementioned information shall be available on the institutional investors’ or asset managers’ website, free of charge\textsuperscript{149}.

4.5.7. Article 3h

It is crucial that there is a medium to long-term approach, so the stewardship of assets is accomplished responsibly. For this reason, institutional investors are required to disclose publicly, on an annual basis, how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities and how these elements advance to the medium to the long-term performance of their assets\textsuperscript{150}.

When institutional investors choose asset managers\textsuperscript{151} to invest for themselves, then they have to disclose publicly specific information related to its arrangement with the

\textsuperscript{145} Recital 16 of Directive 2017/828
\textsuperscript{146} Article 3g (1) of Directive 2017/828
\textsuperscript{147} Article 3g (1) (a) of Directive 2017/828
\textsuperscript{148} Article 3g (1) (b) of Directive 2017/828
\textsuperscript{149} Article 3g (2) of Directive 2017/828
\textsuperscript{150} Article 3h (1) of Directive 2017/828
\textsuperscript{151} On a discretionary client-to-client basis or through a collective investment undertaking.
asset manager\textsuperscript{152}. The herementioned information shall be available on the institutional investors’ website, free of charge, and shall be updated on an annual basis unless there are no changes\textsuperscript{153}.

4.5.8. Article 3i

Asset managers are required to disclose, on an annual basis, to the institutional investor some information regarding their arrangement referred to the previous article discussed. This will allow the institutional investor to examine whether and how much he adheres to an effective policy for shareholder engagement\textsuperscript{154}. It is crucial for the smaller and less cultured institutional investors to be able to evaluate the asset manager’s behaviour and policy. Consequently, asset managers have to disclose to institutional investors how their strategy and management of the equity will lead to the medium to the long-term performance of the assets. Such information shall contain:

- reports on the critical material medium to long-term risks associated with the portfolio investments, on the policies used by the proxy advisors for engagement activities\textsuperscript{155}; and

- the composition, turnover and turnover costs of their portfolio, and their policy on securities lending.

This information indicates whether the asset manager proceeds aligned with a long-term strategy in favour of the investor’s interests. Also, on the one hand, “\textit{high portfolio turnover may indicate lack of conviction in investment decisions and momentum-following behaviour}” and on the other hand, “\textit{unexpectedly low turnover may signal inattention to risk management or a drift towards a more passive investment approach}”\textsuperscript{156}.

\begin{itemize}
  \item \textsuperscript{152} According to Article 3h (2) of Directive 2017/828, the information the institutional investor has to disclose is: (i) how it incentivises the asset manager to align its investment strategy and decisions with the profile and duration of the liabilities of the institutional investor, in long-term liabilities; (ii) how it evaluates the performance of the asset manager and its remuneration policy; (iii) how the institutional investor does monitor portfolio turnover costs incurred by the asset manager; and (iv) the duration of the arrangement.
  \item \textsuperscript{153} Article 3h (3) of Directive 2017/828
  \item \textsuperscript{154} Recital 20 of Directive 2017/828
  \item \textsuperscript{155} Article 3i (1) of Directive 2017/828
  \item \textsuperscript{156} Recital 21 of Directive 2017/828
\end{itemize}
Asset managers should also inform institutional investors about their decision making policy by an evaluation of the medium to the long-term performance of the investee company\textsuperscript{157} and also about any existence of conflicts of interests which may have arisen in connection with engagement activities, and if so, its management\textsuperscript{158}. The Member States, at last, may require asset managers to provide the relevant information to other investors of the same fund, upon a request, if he does not manage the assets on a discretionary client-to-client basis\textsuperscript{159}. This is, so all the other investors of the same fund can be informed.

4.5.9. Article 3j

Proxy advisors\textsuperscript{160} provide advice, research and recommendations on how should institutional investors and asset managers vote in GMs of listed companies. They may influence the vote of the investors or the managers, and they contribute to the reduction of costs of the analysis referring to the company\textsuperscript{161}. Because of their essential role, they are required to be subject to transparency requirements\textsuperscript{162}. More specifically, they are required to be subject to a code of conduct, to publicly refer to it and to report on the application of it\textsuperscript{163}. Proxy advisors who do not apply the conduct of code, they are obliged to give a clear and reasoned explanation. On the other hand, if they apply the code, but they depart from a recommendation, they are required to indicate from which part they depart, providing alternative measures\textsuperscript{164}. Moreover, they are required to publicly disclose, on an annual basis, information about the preparation of their research, recommendations and advice\textsuperscript{165}, as well as to disclose to their client's potential conflicts of interests or business relationships influential to the

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{157}] Recital 22 of Directive 2017/828
\item[\textsuperscript{158}] Recital 23 of Directive 2017/828
\item[\textsuperscript{159}] Article 3i (3) of Directive 2017/828
\item[\textsuperscript{160}] According to Article 2 (b) (g) of Directive 2017/828, proxy advisor is “a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors’ voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights”.
\item[\textsuperscript{161}] Recital 25 of Directive 2017/828
\item[\textsuperscript{162}] Recital 26 of Directive 2017/828
\item[\textsuperscript{163}] Article 3j (1) of Directive 2017/828
\item[\textsuperscript{164}] Article 3j (1) (b) of Directive 2017/828
\item[\textsuperscript{165}] Article 3j (2) of Directive 2017/828
\end{itemize}
\end{footnotesize}
preparation of their research and recommendations related to the voting procedures. Some of the information that proxy advisors are required to disclose are:

- characteristics of the methodologies and voting policies they apply on market-basis;
- the procedures they apply, ensuring quality of the research and recommendations on the voting procedure;
- how they take into account, if they do so, legal, national market, company-specific and regulatory conditions;
- the policy referring to prevention of potential conflicts of interest; and
- whether they have communication with the companies and its stakeholders.

Finally, third-country proxy advisors, who do not reside in the Union neither they have their offices throughout the Union, may provide services through an establishment situated in the Union.

4.5.10. Article 9a

The long-term success of a company is also due to the directors’ help. Directors’ remuneration policies are matters that are up to the competence of the company, its shareholders and BoD and, if any, employee representatives. Remuneration is the crucial factor for corporations to align their interests with those of the directors and is fundamental that shareholders be able to express their opinion and vote on relevant matters.

For the above reason, Member States require that shareholders have the right to vote regarding the remuneration policy at the GM and the remuneration report. The specific vote on the remuneration policy shall be binding and companies may pay the

166 Article 3j (3) of Directive 2017/828
167 Article 3j (2) of Directive 2017/828
168 Article 3j (4) of Directive 2017/828
169 According to Article 2 (b) (i) of Directive 2017/828, director is “(i) any member of the administrative, management or supervisory bodies of a company; (ii) where they are not members of the administrative, management or supervisory bodies of a company, the chief executive officer and, if such function exists in a company, the deputy chief executive officer; (iii) where so determined by a Member State, other persons who perform functions similar to those performed under point (i) or (ii)”.
170 Recital 28 of Directive 2017/828
171 Article 9a (1) OF Directive 2017/828
directors only according to the remuneration policy approved by the shareholders in the
GM\textsuperscript{172}. “\textit{In exceptional circumstances, though, companies may be allowed to temporarily
derogate from the remuneration policy, provided that the policy includes the procedural
conditions under which the derogation can be applied and specifies the elements of the
policy from which a derogation is possible}”\textsuperscript{173}. Exceptional circumstances should only
refer to situations where the remuneration policy is essential to serve the long-term
interests and sustainability of the company as a whole or to assure its viability\textsuperscript{174}.
Furthermore, where remuneration policy has not been approved, and the GM has not
approved either the proposed policy, the company may pay the directors according to
its existing practices submitting newly revised policy for approval\textsuperscript{175}. In case the vote is
not binding, but advisory, companies are allowed to pay its directors according to the
remuneration policy which has already been submitted for a vote, even if this policy is
not approved, after all, submitting a revised policy for a vote at the next GM\textsuperscript{176}.

The remuneration policy has to advance long-term interests, business strategy and
sustainability of the company and not linked to short-term goals\textsuperscript{177}. It has to explain how
the employment conditions of the employees and their payment were considered when
the remuneration policy was undervote\textsuperscript{178}. When the remuneration is variable, the
company shall set clear, through its remuneration policy, comprehensive and varied
criteria for the award, such as financial and non-financial performance criteria and
explain how they contribute in the long-term shareholder engagement\textsuperscript{179}. However,
when the remuneration is share-based, the company shall specify, through its
remuneration policy, vesting periods and explain how it contributes to the long-term
shareholder engagement\textsuperscript{180}. The remuneration policy, finally, shall describe the
decision-making process, as well as the duration of the contracts and agreements.

\textsuperscript{172} Article 9a (2) (a) of Directive 2017/828
\textsuperscript{173} Article 9a (4) of Directive 2017/828
\textsuperscript{174} Recital 30 of Directive 2017/828, Article 9a (4) (b) of Directive 2017/828
\textsuperscript{175} Article 9a (2) (b) of Directive 2017/828
\textsuperscript{176} Article 9a (3) of Directive 2017/828
\textsuperscript{177} Recital 29 of Directive 2017/828
\textsuperscript{178} Article 9a (6) (b) of Directive 2017/828
\textsuperscript{179} Article 9a (6) (c) of Directive 2017/828
\textsuperscript{180} Article 9a (6) (d) of Directive 2017/828
The shareholders will have the right to vote every time there is a material change or in any case at least every four years\textsuperscript{181}.

4.5.11. Article 9b

For the remuneration policy to be ensured, shareholders shall have the right to vote on the company’s remuneration report\textsuperscript{182}. The report should be clear and understandable and should provide a comprehensive overview of the remuneration awarded to individual directors during the last financial year\textsuperscript{183}. “\textit{In particular, the compulsory character of the ex-post vote has been strongly criticised because of the uncertainty created for top executives since the payment of their variable and exceptional remuneration is made conditional upon ratification by shareholders, even if it is perfectly in line with the remuneration policy voted the year before}”\textsuperscript{184}. On the other hand, the vote of the shareholders may be only advisory. However, the company has to explain in the next remuneration report how the shareholders’ vote was taken into account\textsuperscript{185}. When it comes to small and middle-sized companies, MSs may provide that instead of the voting procedure, the remuneration report may be submitted for discussion in the GM, and the company has to explain in the next remuneration report how the discussion was taken into account\textsuperscript{186}.

\textsuperscript{181} Article 9a (5) of Directive 2017/828
\textsuperscript{182} The remuneration report shall include the following: (i) the total remuneration split out by component, explanation regarding how the remuneration aligns with the remuneration policy followed, how it commits to the long-term company’s performance, how the criteria regarding the performance were applied; (ii) the annual alterations relating to the remunerations of the company’s performance and the average remuneration of full-time employees, except the directors, for at least the last five financial years; (iii) the remuneration awarded to individual directors not only of the company but from any other undertaking belonging to the same group. If the remuneration of the latter were excluded from the report, then there would be a risk that companies would try to circumvent the requirements of the Directive, providing hidden remuneration through a controlled undertaking (according to Recital 35 of Directive 2017/828); (iv) the number of shares and options offered or granted; primary conditions for the exercise of the rights including the exercise price and date; (v) information about possibilities of reclaiming variable remuneration, alterations accomplished by the company regarding remuneration policy and an explanation of the alterations and the exceptional circumstances; and (vi) information about possibilities of reclaiming variable remuneration, alterations accomplished by the company regarding remuneration policy and an explanation of the alterations and the exceptional circumstances.
\textsuperscript{183} Article 9b (1) of Directive 2017/828
\textsuperscript{185} Article 9b (4) (a) of Directive 2017/828
\textsuperscript{186} Article 9b (4) (b) of Directive 2017/828
The remuneration report has to be publicly available on the company’s website for a ten-year period\textsuperscript{187}, so shareholders have easy access and potential investors and stakeholders can be informed respectively\textsuperscript{188}. Member States may require companies to publish the report by other means, as well. Such disclosure is imposed on an individual basis, to promote corporate transparency and directors’ accountability. This disclosure will enable shareholders to facilitate their voting rights and have a ‘say on pay’ based on each director’s performance\textsuperscript{189} taking into account the performance of the company overall. Publication of remuneration report will enable not only shareholders but potential investors and stakeholders, too.

It is essential that director’s data that is included in the remuneration report not offend against provisions of the General Data Protection Regulation\textsuperscript{190} or not refer to the family situation of individual directors\textsuperscript{191}. More specifically, remuneration components such as child or family allowances may be referred, where applicable, however, not the ground on which they were granted\textsuperscript{192}. Personal data is disclosed to promote corporate transparency, directors’ accountability and shareholders’ right to have a ‘say on pay’\textsuperscript{193}, concerning MS’s law regarding disclosure of directors’ data for other purposes\textsuperscript{194}.

4.5.12. Article 9c

The company and its shareholders may be affected by transactions with persons related to the company or directors may be placed in a conflict position. This is because transactions with related parties may create harm to companies and their shareholders, due to the desire of the related party to appropriate value of the company\textsuperscript{195}. It is vital that there are safeguards, so companies’ and shareholders’ interests are protected. This

\textsuperscript{187} According to Recital 41 of Directive 2017/828, “At the end of 10-year period, the company should remove any personal data from the remuneration report or cease to disclose the remuneration report publicly as a whole. Following that period access to such personal data could be necessary for other purposes, such as in order to exercise legal actions”.

\textsuperscript{188} Article 9b (5) (a) of Directive 2017/828

\textsuperscript{189} Article 9b (1) of Directive 2017/828

\textsuperscript{190} Regulation (EU) 2016/679 of the European Parliament and of the Council of 24 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

\textsuperscript{191} Article 9b (2) of Directive 2017/828

\textsuperscript{192} Recital 36 of Directive 2017/828

\textsuperscript{193} Article 9b (3) (a) of Directive 2017/828

\textsuperscript{194} Article 9b (3) (c) of Directive 2017/828

\textsuperscript{195} Recital 42 of Directive 2017/828
is the reason why material related party transaction should be submitted for approval from the shareholders or the administrative or supervisory body of the company\textsuperscript{196}. According to the Directive, MSs should define what does material transaction mean, taking into consideration (i) the influence that the transaction may have on the decision taken by the shareholders and (ii) the risk that it may create for the company and the shareholders who are not a related party, including the minority\textsuperscript{197}. When a director or a shareholder is a related party, then the shareholder or the director shall not participate in the voting procedure or the approval\textsuperscript{198}. However, shareholders who are a related party may be allowed to participate in the voting procedure provided that national law assures safeguards which will be applied prior or during the voting procedure, so interests of shareholders, who are not a related party, and the company may be protected\textsuperscript{199}. Companies have to publicly disclose material transactions with related parties the latest on the conclusion of the transaction\textsuperscript{200}. A public announcement is crucial so shareholders, employees, creditors and other interested parties may “\textit{be informed of potential impacts that such transactions may have on the value of the company}”\textsuperscript{201}. Member States may require that this disclosure is accompanied by a report from the company’s and shareholders’ aspect, who are not related parties. This will define whether or not the transaction is fair and reasonable, and will explain on which assumptions it is based on together with the methods. The report, more specifically, shall be produced by (i) the supervisory or administrative body of the company, (ii) an independent third party or (iii) the audit committee or any committee which is participated by independent directors\textsuperscript{202}.

\textsuperscript{196} Article 9c (4) (a) of Directive 2017/828 \\
\textsuperscript{197} Article 9c (1) of Directive 2017/828 \\
\textsuperscript{198} Article 9c (4) (c) of Directive 2017/828 \\
\textsuperscript{199} Article 9c (4) (d) of Directive 2017/828 \\
\textsuperscript{200} According to Article 9c (2) of Directive 2017/828, such disclosure shall include at least the name of the related party, the date and the value of the transaction and any other information essential to assess the fairness of the transaction \\
\textsuperscript{201} Recital 44 of Directive 2017/828 \\
\textsuperscript{202} Article 9c (3) of Directive 2017/828
4.6. A comparative approach to the US system

In the United States, court decisions and legislative enactments from the State the corporation is situated compose together their company law. Unlike EU legislation, the US compose their securities law in the same manner, while there is the Securities and Exchange Commission (SEC), which serves the federal securities law. The US company law, thus, presents some similarities and comparisons to the European law system.

Because in US companies there is no active shareholder presence, which may control their governance, proxies are regularly needed to ensure shareholders for the quorum at the GM, to proceed to any necessary actions. The SEC, particularly, has powers on regulating proxies, which they concentrate on disclosure requirements when publicly traded corporations require proxies. Moreover, it is crucial that is mentioned the issue of proxy fights. Through a proxy fight a decision in favour of the proxies may be succeeded on issues of policy changes, managers are eventually managed either by influencing their behaviour or resulting into their replacement or other effects may take place.

Regarding the EU provisions about equal treatment, the US system does not prescribe specific rules. However, the federal proxy rules ensure disclosure requirements and overall shareholder protection. Provisions regarding the abolition of share blocking, the prior notice for participation at the GM and the facilitation of the exercise of proxy voting rights are similar to the Europeans. Furthermore, electronic means are also encouraged in US system in all procedures, allowing shareholders to appoint proxies through the internet.

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205 Securities Exchange Act of 1934 § 12(b)
206 17 C.F.R. § 240.14a-3 (regulating solicitation of proxies).
207 Proxy fights occur when a group of shareholders attempt to join each other or other groups of shareholders to discuss a unanimous vote on issues pending to be discussed in a meeting, while they desire to oppose against or have an effect on the company’s management.
On the other hand, the right to ask questions established in the SRD does not reflect the American approach, since if a shareholder is prevented from setting a question does not constitute a breach of the law\textsuperscript{210}. For an issue to be set on an agenda for further discussion and vote in a meeting, it shall constitute a proper subject under state law\textsuperscript{211}. Shareholders adjust mainly to voting issues regarding the election of the board members whereas directors usually set the agenda. In case shareholders desire to elect directors of their choice, they will have to afford the costs, such as soliciting proxies\textsuperscript{212}. Upon soliciting proxies, through proxy fights, shareholders can exercise the right of expression and thus propose non-binding resolutions so they can influence the board\textsuperscript{213}.

\textsuperscript{210} David A. Drexler, Lewis S. Black Jr. & A. Gilchrist Sparks III, \textit{Delaware Corporate Law and Practice} § 24.05[1] (2007) ("\textit{Statutory requirements for meetings are sketchy. While there are fairly extensive provisions dealing with such matters as record dates, notice, and quorum requirements, few directions are provided for what may or must occur at the meeting itself.}").

\textsuperscript{211} Del. Code Ann. tit. 8, § 211 (b), (2007).

\textsuperscript{212} Lisa M. Fairfax, "\textit{Making the Corporation Safe for Shareholder Democracy}", 69 \textit{OHIO ST. L.J.} 53, 72 (2008) (discussing the legal and policy issues);

\textsuperscript{213} Arthur R. Pinto & Douglas M. Branson, "\textit{Understanding Corporate Law}", § 5.05[F] (2d ed. 2004).
5. Critical Assessment and Proposals

The two Directives regarding shareholders’ rights attempted to accommodate the exercise of their rights and promote shareholders’ engagement with the company. Both, although they introduced and established provisions, assisting the existent issues, however, they resulted in some deficiencies. In this chapter, some of them may be discussed, and some proposals shall be deposited.

5.1. Critical Assessment

There is observed a significant effort to promote shareholders’ engagement through the SRD’s and now the SRD’s II provisions, but with no success. According to SRD I, shareholders have the opportunity to put items on the agenda and set questions using electronic means across borders. Nevertheless, this provision or the importance generally of any issue tabled for resolution at a GM, does not affect the attendance of the shareholders214. On the other hand, according to SRD II, shareholders can always be informed adequately and timely by the intermediaries so that they can exercise their rights more effectively. However, the provisions of the new Directive do not seem that they solve the problem of the complexity of intermediaries’ chain neither however they prevent the existence of this kind of chains.

To ensure the improvement of the cross-border voting procedures and its effectiveness upon EU legislation, there needs to exist harmonisation across the MSs’ law systems. Although many MSs have already established the possibility to vote via a proxy holder, however, the procedures are now more complicated than before. As a result, many shareholders, especially individuals, due to high costs and complexity in these procedures choose not to participate and exercise their rights.

Moreover, the revised Directive emphasises on new transparency requirements concerning asset managers and institutional investors. Asset managers are required to disclose their level of portfolio turnover while institutional investors to disclose their

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engagements with asset managers. However, suggesting the implementation of a
certain strategy by the abovementioned, considering that diversity is prevalent in the
management of investment funds by asset managers rather discourages long-term
performance and shareholder engagement goals.\textsuperscript{215}

Concerning ‘say on pay’, it is considered that the size of an institution’s position, for
instance, affects the institutional vote. More specifically, positions held based on small
amounts of shareholdings or little investment amounts, provide little management
support, since they have small incentives and limited opportunities to take part in
governance structures of the company. The support gets smaller when there is a
substantial blockholder independent from any Institutional Shareholder Services’
recommendations. On the other hand, it is noticed that ‘say on pay’ vote is frequently
used to confront management when the corporate structure is dispersed. To sum up,
following the abovementioned thoughts and observations, minor institutional investors,
who consist of a significant amount of the shareholdings and the ownership of the
company, influence vitally the corporate governance.\textsuperscript{216}

Lastly, the over-disclosure of the shareholders’ identity-related information or the
directives’ identity-related information it may come across to the data protection
perspective in the future. Although the SRD II mentions the consideration of the GDPR\textsuperscript{217}
when applying the SRD II provisions, however, this does not fortify an application of the
regulation, and this may lead to a moderately opposite result than a more profound
engagement.


\textsuperscript{217} Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
5.2. Proposals

For individual shareholders to be activated and participate in all kinds of procedures, it is essential not to result in high costs. A widely accessible European platform disclosing adequate information to shareholders regarding corporate structure and GM conventions and a prompt and affordable procedure for admissions to the GM may urge more shareholders to be active.

Moreover, a fixed rate of intermediary or proxy charging fees would render convenience to shareholders to attend at GMs or exercise their votes. The choice of a free of charge service by the intermediaries would be the most ideal for the shareholders, however, in the today’s real economy, this would seem imaginary scenario.

Additionally, the company's inability to compensate directors adequately after the rapid economic crisis may constitute the reason for a review of the practices followed by a company. Companies should ensure that shareholders receive sufficient information so they can make sophisticated ‘say on pay’ decisions, while they should give the freedom to the BoD to forward the company's interests. High remuneration policies may constitute the vital issue of discussion of the GMs and distract shareholders from desiring to discuss much more severe subjects concerning the company.

Last but not least, European institutions should consider developing the Directive and its fundamental provisions into a Regulation. Time has shown that regarding essential issues ‘harmonisation’ is not adequate to solve problems and thus there is a need for a stricter frame and a European law parallel to all Member States.
6. Conclusions

Shareholders own the company, but the board manages the company. Through the first Directive and then through the second one, an attempt was made that shareholders engage more with the corporate governance, having no success.

In this dissertation, I put an effort describing the features of each key Directive related to the exercise of shareholders’ rights. It is concluded that the first Directive established some provisions for the shareholders’ interest and, in order to participate more actively whether they reside in a Member State or not. Through the Directive, shareholders are entitled to ask questions, put items on the agenda and be informed prior the general meetings. However, although there was an attempt to establish a record date, so shareblocking is abolished, it is concluded that this issue did not vanish. Following the first Directive, in 2017, Directive 2017/828 was adopted, and new provisions were introduced. Shareholders are able to vote on directors’ remuneration policies, and relationships between asset managers, proxy holders and institutional investors are characterised by transparency. None of these provisions nonetheless managed to promote shareholders’ engagement and many of the Directives’ deficiencies are mentioned and analysed through the dissertation, and mainly in chapter 5.

It is highly recommended and virtually certain that European Institutions come across with a proposal of new Directive to approach critical concerns of shareholders and promote their engagement and participation in the future. High charging fees and complex intermediaries’ chains remain the focus of all problematics.
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