Berlin, 11. Juli 2005

Fostering an Appropriate Regime for Shareholders' Rights
Second consultation document
of the Services of the Internal Market Directorate General

Sir,

the German Notaries' Association, having already commented on the first consultation document issued last autumn by letter of November 10th 2004, is grateful for the opportunity to present our view again.

We appreciate the progress which has been made since last year. The problems to be solved seem to have been identified much more precisely. The focus seems to have shifted from mere IT-issues to issues of substantive law. Nevertheless we would like to state our opinion again on the questions raised in the second consultation document.

Question 1:

Do you agree with the proposed scope for any future measure at EU level, if any, establishing minimum standards for shareholders' rights?

Yes, basically we do. We favour a procedural approach, consisting of

(1) harmonization of rules on terms for convening a GM, publishing the agenda, proposed resolutions;

(2) speeding up the cross-border communication between banks and other depositaries of securities so that holders of securities will be informed reasonably in advance on date, place and agenda of a GM;

(3) banning any kind of rules or procedures discriminatory to non-domestic shareholders, especially with regard to proxy-voting;

(4) setting minimum standards for the shareholders' right to ask questions and to table resolutions;

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(5) guaranteeing legal certainty by reliable minutes of the GM, the resolutions passed at the availability of these minutes.

Question 2:

Do you consider, contrary to the views expressed above, that granting ultimate investors' at EU level a legal enforceable right to direct how votes attached to shares credited to their accounts are cast, is a pre-requisite to facilitating cross-border voting?

If so, do you agree with the following proposal, based on the works of UNIDROIT: "the legal or natural person that holds a securities account for its own account shall have the right to determine how votes attached to shares credited to its securities account are to be cast?

No, we do not think that the solution of the problem of the voting right of the ultimate investor is the *condicio sine qua non* of cross-border voting. There are more important obstacles to cross-border voting which should be addressed at first (see *supra* Question 1 (1) and (2)). Basically the legal relationship between shareholder and trustor should be left to agency law. However, there might be situations in which rules of a Member State governing this legal relationship are of discriminatory effect vis-à-vis non-domestic investors. These obstacles to a common market of corporate control should be removed.

Question 3:

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons.

1. *Agreements providing for the temporary transfer for consideration of shares shall contain provisions informing the relevant parties to the agreement of the effect of the agreement with regard to the voting rights attaching to the transferred shares.*

2. *Where an intermediary enters into such an agreement in relation to shares which the intermediary holds on behalf of another person, or which are held in a securities account in the name of another person, the intermediary shall, prior to entering into the agreement, duly inform that person or its representatives of its intention to enter into such an agreement ant the effects of the agreement with regard to the voting rights attaching to the relevant shares.*

No, we do not agree. Whether the depositary is entitled to lend someone else's stock or not is a matter of agency law, i.e. the legal relationship between the shareholder (deponent) and the depositary. Under agency law, the agent is not allowed to alienate the assets entrusted to him unless otherwise agreed. Hence a minimum standard should only be created with respect to the Common Frame of Reference in European Contract Law, a project executed

by Directorate General SANCO. As yet, no research on the Common Frame of Reference with respect to agency in general or banking law in particular has been done. It is neither advisable nor necessary to create a *fait accompli* prior to the completion of the Common Frame of Reference. Moreover, in most cases the deponent as well as the depositary (= stock lendor) in case of stock lending are professionals who do not need to be informed on the legal effects of stock lending.

Question 4:

Do you agree with the following minimum standard? If not, please give your reasons.

Holders of depositary receipts shall alone have the right to determine how the voting rights attached to underlying shares represented by depositary receipts are exercised.

We only partially agree. If the investor may choose between an investment in shares or an investment in depositary receipts there is no need for such regulation, at least if the economical differences of the two alternatives remain relatively small. However we see such a need if depositary receipts are the only option for an investor. The standard may be clearly defined if one share is represented by one depositary receipt. But if one share is represented by several depositary receipts, other problems will arise. How do several deponents exercise their instruction rights? Do they have to hold a General Meeting of the deponents? This seems to be slightly exaggerated.

Question 5:

Do you agree with the following minimum standard? If not, please give your reasons.

1. *Annual General Meetings of listed companies shall be convened on a first call with no less than 21 business days notice.*

2. *Other Shareholders' Meetings shall be convened on a first call with no less than 10 business days notice.*

We only partially agree. The distinction between ordinary GM and extraordinary GM may be deeply rooted in some jurisdictions, especially in the French *Code de commerce*. However, the distinction seems to be out-of-date. The distinction has the effect that the agenda of an annual GM deals only with subjects of minor importance and that all the delicate issues are shifted to the extraordinary GM. Hence basically this distinction should be abandoned. There is only a need for an extraordinary GM in case of a tender offer (takeover bid) giving the opportunity to the shareholders (offerees) to decide on defence strategies.

Moreover, the minimum term of 21/10 business days will cause problems because not every day is a business day in every jurisdiction, the term is difficult to calculate and too short for cross-border information of investors.

Therefore we propose a minimum term of one month for every GM except a GM deciding only on the acceptance or refusal of a takeover bid or on defence strategies against such a bid. The latter GM should be convened with a minimum term of two weeks.

Question 6:

Do you agree with the following minimum standard? If not, please give your reasons.

Any notice convening a General Meeting shall at least:

- *indicate precisely the place, time and agenda of the meeting and give a clear and precise description of participation and voting procedures and requirements for voting at the General Meeting. Alternatively, it may indicate where such information may be obtained.*

- *indicate where the full, unabridged text of the resolutions and the documents intended to be submitted to the General Meeting may be obtained.*

Yes, we fully agree.

Question 7:

Do you agree with the following minimum standard with regard to the time at which GM-related documents should be made available? If not, please give your reasons.

The full text of the resolutions and documents related to the agenda items and intended to be submitted to the General Meeting shall be made available at the latest 15 business days before any Annual General Meeting and at latest 10 business days before any other General Meeting.

We only partially agree.

As to the distinction between annual GM and extraordinary GM and to the ambiguous term “business days” we refer to the answer given to Question 5 above.

Moreover these terms are rather short especially if difficult questions of Corporate Finance are involved. It should be expected of a qualified board of directors to submit the proposals and the relevant documents with regard to an agenda within the terms of convention of the

GM (see Question 5 above). Anyway a multitude of different terms only increases the probability of mistakes.

Question 8:

Do you agree with the following minimum standard? If not, please give your reasons.

Any notice convening a General Meeting and any document intended to be submitted to the General Meeting shall be made available in a language customary in the sphere of international finance, unless the General Meeting decides to the contrary.

No, we do not agree. First, the term "customary in the sphere of international finance is unclear. Presently only English is such a language. In a few decades, it might be Chinese or Hindi, too. These languages would not be of any use for fostering European shareholders' rights. Second it should be expected of an international investor to learn foreign languages. European legislation should encourage to learn many languages spoken in Europe. Third the minimum standard imposes a lot of costs on smaller listed companies. Fourth this issue should be left to capital markets. If a company wishes to raise funds abroad, it must meet the needs of foreign investors.

Question 9:

Do you agree with the following minimum standard? If not, please give your reasons.

1. *Member States shall ensure that issuers post on their website the information relevant to General Meetings at the same time as such notices are published and/or sent to the issuers' shareholders.*

2. *Such information shall include at least: the notice of the meeting, the full text of the resolutions intended to be submitted to the General Meeting and other documents relevant to the General Meeting, a precise description of the means given to shareholders to participate in the General Meeting and cast their votes and the forms to be used to vote by correspondence and/or by proxy.*

No, we do not agree. If official media for publication of a convention and the related documents are fixed by a minimum standards, there is no need for additional publication. An official electronic publication media may offer search engines revealing much more information to investors than the isolated website of the company. The information policy the company applies to its own website may be left to the market as well as to the regulations of the stock exchange where the company is listed.

As to the forms of proxies, we suggest a uniform proxy form for EU companies drafted in several languages but the same fields to be filled by the principal so that e.g. an Irish investors can fill an Estonian proxy form without any knowledge of this language.

Question 10:

Do you agree with the following minimum standard? If not, please give your reasons.

1. *Provisions making the right to vote in a General Meeting conditional, or allowing the right to vote to be made conditional, on the immobilisation of the corresponding shares for any period prior to the Meeting shall be abolished.*

2. *The right to vote at the General Meeting of a listed company shall be made conditional upon qualifying as a shareholder of that listed company on a given date prior to the relevant General Meeting.*

We agree. The record date should be as close as possible to the relevant GM. This implies a considerable acceleration of communication speed between depositary banks and shareholders/the company. Referring to the proposal made in answering Question 9, a European standard form for a record date certificate (same form, several languages) would be helpful.

Question 11:

Do you agree with the following minimum standard? If not, please give your reasons.

Member States shall remove existing requirements, and shall not impose new requirements, that act or would act as a barrier to the development of the participation of shareholders to the GM via electronic means.

We agree in principal. However this seems feasible only as a long-term measure. In short term it is more efficient to increase communication speed between banks and to establish a reliable system of proxy voting than to force companies into costly IT-experiments. The difficulty of technical questions should not be underestimated.

Question 12:

Do you agree with the following minimum standard? If not, please give your reasons.

Shareholders shall have the right to ask questions at least in writing ahead of the General Meeting and obtain responses to their questions. Responses to shareholders questions in General Meetings shall be made available to all shareholders.

The above principles are without prejudice to the measures which Member States may take, or allow issuers to take, to ensure the good order of General Meetings and the protection of confidentiality and strategic interests of issuers.

No, we only partially agree. The right to ask questions has to be weighted against the interest of the Company to maintain efficient procedures. Therefore the right to ask questions should be given only in the General Meeting, neither before nor afterwards. Any obligation leading to a documentation of dozens of slightly similar questions and answers will be a too costly and time consuming burden to the company.

We agree with the limits set for questions in para. 2 of Question 12.

Question 13:

Do you agree with the following minimum standard? If not, please give your reasons.

1. *Shareholders, acting individually or collectively, shall have the right to add items on the agenda of a General Meeting and table resolutions at General Meetings. Such rights may be subject to the condition precedent that the relevant shareholder or shareholders hold a minimum stake in the share capital of the shareholder.*

2. *Such minimum stake shall not exceed 5 % of the share capital of the issuer or a value of € 10 million, whichever is the lower.*

3. *Such rights must be exercised sufficiently in advance of the date of the General Meeting, to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of the General Meeting.*

We basically agree. However, a minimum stake only seems necessary if the resolution tabled by a shareholder is not covered by the agenda but opens a new topic. If the resolution tabled by the shareholder is a mere countermotion giving an alternative to a proposal of the board, a minimum stake does not seem necessary. The criteria *"value"* seems too vague: does it depend on the stock exchange quotation of the shares or on the nominal value of the shares (i.e. the value of the shares in comparison to the total share capital)? A more precise definition is required.

Question 14:

Do you agree with the following minimum standard? If not, please give your reasons.

1. *Member States shall ensure that shareholders of listed companies have the possibility to vote by correspondence.*

2. *Member States shall remove existing requirements, and shall not impose new requirements, on companies which hinder or prohibit voting by electronic means at General Meetings.*

We agree. Voting by correspondence may be a solution to increase the attendance to GMs which often is rather poor. We appreciate that the Commission does not require companies to invest in IT for electronic voting is an inadequate solution. As to the reasons, we refer to Question 11 above. Voting by electronic means should be left to the market. Especially companies with a high free float will be extremely interested in preventing majorities by accident in the GM and will therefore invest in this technology. At presents there seems to be no need for mandatory law.

Question 15:

Do you agree with the following minimum standard? If not, please give your reasons in each case. In particular, where you believe that certain constraints should be maintained, please justify your opinion.

1. *Every shareholder shall have the right to appoint any other natural or legal person as a proxy to attend any General Meeting.*

2. *No constraint or limitations shall be imposed other than provisions relating to the legal capacity of the person. In particular, there shall be no limitations on the persons who can be appointed as proxies and on the number of proxies any such person may hold.*

3. *Shareholders shall not be prevented from appointing their representatives by electronic means.*

4. *Persons appointed as proxies shall enjoy the same rights to speak and ask questions in General Meetings as those to which the shareholders they represent are entitled.*

5. *Issuers shall not themselves collect proxies in advance of General Meetings but shall entrust independent third parties with such collection.*

6. *All votes cast on each resolution submitted to a General Meeting shall be taken into account, irrespective of the means by which the votes are cast.*

Do interested parties consider that it would be appropriate to set up an EU proxy form that would have to be accepted by all issuers in all Member States while excluding the use of other formats allowed for under Member States' laws?

We fully agree with topics 1-2, 4 and 6 above. However, topic 3 creates legal uncertainty for electronic means do not render conclusive evidence that indeed the principal has been given the proxy. An email may have been sent by anyone. Even an electronic signature may have been given by abusing the principal's signature card. The proposal sub 3 shifts the risk of a void vote to the company in case of avoidance of a resolution.

As to topic 5, the experiences in Germany with employees of the issuer as proxies for a GM are encouraging. Those proxies, usually members of the legal department of the company, show long lists to the notary recording the minutes of the GM stating how they are going to vote on the different topics. We did not see any cases of forgery or abuse. Hence the cheap and practical solution of appointing an employee of the company as proxy should not be banned.

In our comments on the first consultation, we proposed a EU standard proxy form. We appreciate that the Commission has adopted this proposal. However, this form will find its way in the market anyway. There is not need to exclude forms under the jurisdiction of the Member States. An opt-in model is sufficient, for – just for economical reasons – the market will only use the standard form.

Question 16:

Do you agree with the following definition? Please give your reasons.

A legal or natural person who, as part of a regular activity, maintains securities accounts for the account of other legal or natural persons shall be considered as an intermediary. An intermediary may also securities accounts for its own account.

We agree that financial intermediaries should not be used to exclude shareholders from exercising their voting rights. However, a nominee agreement should not be included. An investor may have a rightful interest not to show up in person. In this case voting rights should be vested in the nominee.

Question 17:

Do you agree with the following minimum standard? If not, please give your reasons.

Whenever an intermediary is registered as a shareholder in respect of shares which he/she actually holds for the account of another legal or natural person, a mention should be added in the relevant companies' shareholders registers that such intermediary holds the shares for the account of another person.

No, we do not agree. Everybody is free to enter into nominee agreements if he/she wishes to not be known as shareholder. There is no reason why company law should impose any restrictions on freedom of contract. Restrictions in this area are only a matter of capital market law (e.g. rules on disclosure of shareholding exceeding defined thresholds set by the Transparency Directive) or of laws against money laundering.

Question 18:

Do you agree with the following minimum standard? If not, please give your reasons.

Where an intermediary is a shareholder in relation to shares which the intermediary holds for the account of another legal or natural person, that other legal or natural person shall have the right to be given a power of attorney by the intermediary to attend the General Meeting and act at the General Meeting as if he/she were a shareholder.

This proposal clearly demonstrates the difficulties of the definition of intermediary (Question 16). However, even in case of a nomineeship the principal is entitled to a power of attorney for the principal may terminate the nominee agreement and disclose its shareholding. So it is probable that this minimum standard does not cause major detrimental side-effects in other areas.

Question 19:

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons.

1. *Member States shall allow intermediaries to hold shares on behalf of their clients in collective or individual accounts.*

2. *Intermediaries shall have the right to cast votes upon their clients express instructions.*

3. *Where intermediaries hold on behalf of their clients shares in collective accounts, they shall be able to cast split votes.*

We agree.

Question 20:

Do you agree with the following minimum standard? If not, please give your reasons.

1. *Within a reasonable period of time which shall not exceed one month following the General Meeting, the issuer shall make available to all shareholders information on the results of the votes on each resolution tabled at the General Meeting.*

2. *Such information, which shall include for each resolution, the number of voters, the number of voted shares, the percentages and numbers of votes in favour and against of each resolution and the percentages and numbers of abstentions, shall be posted on the issuer's website.*

No, this standard is insufficient: It is interesting to see the apparent problems in other jurisdictions in which the minutes of a GM are not recorded by a notary who submits them to the Commercial Register. In legal systems with notarial recording of GM, the issued raised by this proposal are unknown. If a jurisdiction does not rely on notarial minutes of a GM, the need for these minimum standards is understandable, although a solution to these problems could be achieved much more easily by imposing the form of an authentic instrument at least for the minutes of listed companies.

Anyway, the proposed minimum standard does not achieve conclusive evidence by the minutes of what really happened in the GM. This evidenciary purpose could be achieved by Notarial minutes of the GM, minutes done by an umpire professional who is entitled to advise the shareholders and the company as well. This is the additional advantage of an authentic instrument, a great step forward in enhancing shareholders' rights as well as improving legal certainty.