Berlin, 28/03/2006

Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies

COM (2005) 0685 final

Sir,

the German Notaries' Association is grateful for the opportunity to comment on the said proposal.

Before going into details, we would like to highlight our appreciation (i) for the project itself as well as (ii) for the process of lawmaking marked by two consultations offering the opportunity to comment extensively already in a preparatory stage as well as to give input from legal practitioners. Especially the two elaborate synthesis of the consultations available on the Commission's website were very helpful instruments to check whether our own opinion was within the mainstream of the practitioners' community or not. This structure deserves being mentioned as an example for "better legislation".

We would like to comment on the articles of the proposal as follows:

Art. 2:

We suggest to delete the words *", including a state,"* in Art. 2 (a), for a state, at least an EU Member State, is currently not listed at a stock exchange.

Furthermore we suggest to word Art. 2 (c) as follows:

" 'shareholder' means for the purposes of this directive any natural person or legal entity governed by private or public law that holds: …"

For purposes of capital market law, also beneficial owners of shares are deemed to be shareholders. The definition should point out that its scope is limited to the purposes of this directive being part of company law, not of capital market law.

Art. 4:

The wording *"who are in the same position"* is consistent with Art. 17(1) of the Directive 2001/109/EC, at least with regard to the English version (obviously not with regard to the German one). However, the scope of the proposed Shareholders' Rights Directive (regulation corporate law) differing slightly from the scope of the Transparency Directive (regulating capital market law), such wording is not fully consistent with Art. 60 of the Regulation 2157/2001 and Art. 31 of the Directive 77/91/EEC, both focussing the *"class of shares"* as a sub-category of *"position"*. The purposes of the proposed Shareholders' Rights Directive being more related to the latter legal sources, we suggest to word Art. 4 as follows:

"The issuer shall ensure equal treatment for all shareholders who are in the same position with regard to participation and voting in its general meetings, in particular who hold shares of the same class."

Art. 5:

Commenting on Art. 5, we would like to address the following topics:

- the minimum term for convention (sub a);
- the problem of calculating a period retroactively (sub b);
- the method of convening a general meeting (sub c).

a) Art. 5(1) *"30 calendar days"*:

Setting a period for convening a general meeting, the legislator at first has to decide between a period expressed in days, in weeks or in months.

A period expressed in months offers the advantage of calculating it just by adding one month to the month current at the convention. A period expressed in weeks may be misunderstood for many jurisdictions count 15 days instead of a fortnight (see table 1 below). However, expressing the period in days does not shorten the period between the convention and the meeting if the meeting is held in March. A second advantage is that periods expressed in days may be calculated more easily in a spreadsheet (e.g. using MS Excel®).

However, one should be aware of the extensive use of periods expressed in months in the European legislation, e.g. Art. 8(4) and (6), Art. 32(3), Art. 37(5), Art. 66(4) Council Regulation No. 2157/2001, Art. 4, Art. 6 lit a) and b), Art. 9 Council Directive 82/891/EEC, Art. 6, Art. 8 lit a) and lit b), Art. 11 Council Directive 78/855/EEC.

In course of the further implementation of the Commissions Plan to Move Forward in corporate law, harmonization of the existent *acquis* is a desire of practitioners: Especially in case of mergers or divisions, the application of different terms in EU legislation complicates the

preparation of general meetings and makes it fault-prone. It would be much easier to draft time tables for general meetings with identical applicable periods for all requirements.

b) Art. 5(1) *"before"*:

The problem how to compute terms retroactively should be addressed. This issue is not regulated by Council Regulation No. 1182/71/EEC, cf. Art. 3(4) sentence 2 of this Regulation. Retroactive computation of terms is not addressed by Art. 1:304 PECL ("Principles of European Contract Law" or in short: the "Lando-Principles") either. In the national jurisdictions, the issue often is controversial.

In German interpretation *"before"* means: a meeting scheduled for 10th July 2006 requires notification on 9th June 2006 at the latest. A meeting scheduled for 17th March 2006 requires notification on 14th February 2006 at the latest.

Wording in the laws on stock corporations differ in the Member States, as it is shown by

Table 1

Periods for Convening a General Meeting

Member State	**Sources of Law**	**Content**
Austria	§ 107 (1) Ö-AktG	at least fourteen days between the day of last publication and the day of the general meeting
France	Art. 126 Décret du Conseil d'Etat No. 67-236 du 23 mars 1967	fifteen days between the day of the last publication and the day of the assembly (respectively six days in case of a following convention)
Germany	§ 123 (1) AktG	at least thirty days before the day of the general meeting
Italy	Art. 2366 al. 2 Codice Civile	at least fifteen days before the day of the general meeting
Poland	Art. 402 Polski Kodeks spółek hanlowych	at least three weeks before the date of the general meeting
Spain	Art. 97(1) Ley de Sociedades Anónimas	at least fifteen days before the day of the general meeting
UK	Sec. 369 (1) (a) Companies Act 1985	21 days' notice
EU	Art. 9(4) Directive No. 2004/25/EC	*"provided that the meeting does not take place within two weeks within two weeks of notification's being given"*

Hence in Austria, Germany, Italy, Poland and Spain the day of the publication is, but the day of the meeting is not included in the period for its convention. This applies to the Directive 2004/25/EC as well. In France, both days aren't included. In the UK the term seems to be computed according to Art. 3(2) lit. (b) of the Council Regulation 1182/71/EEC.

Hence we suggest a wording of Art. 5(1) so that Art. 3(2) lit. b) Council Regulation No. 1182/71/EEC becomes applicable (see below).

c) Art. 5(1) *"sent out"*:

With regard to the law in the Member States, the wording of the proposal seems to be consistent only with UK law.

Throughout the continent, a general meeting of a listed stock corporation is convened by publication in a media determined by law, by the company's articles of association or by regulation of the respective stock exchange (e.g. in Germany the electronic Federal Gazette as prescribed by the German Stock Corporation Act and the so-called *"Börsenpflichtblatt"* prescribed by the stock exchange on which the stock if the company in question is listed). Continental law at least provides for a minimum "default" media.

The different methods for convening a general meeting are shown in

Table 2

Methods of Convention of a General Meeting

Member State	Sources of law	Method of Convention
Austria	§ 105(2) Ö-AktG	Publication in the official gazette(s) of the company
France	Art. 124 Décret du Conseil d'Etat No. 67-236 du 23 mars 1967	In case of listed companies: publication in the *Bulletin des annonces légales obligatoires*
Germany	§§ 25, 121(3) AktG	Publication in the official gazette(s) of the company, at least in the electronic Federal Gazette
Italy	Art. 2366 al 2 Codice Civile	Publication in the *Gazetta Ufficiale* or in a newspaper (if indicated in the articles)
Poland	Art. 402, 304 § 1 No. 10 Polski Kodeks spółek hanlowych	Publication at least in the *Monitor Sądowy I Gospodarczy*
Spain	Art. 97(1) Ley de So-	Publication in the *Boletín*

Member State	Sources of law	Method of Convention
	ciedades Anónimas	*Oficial del Registro Mercantil* and one of the newspapers with greater circulation in the respective province
UK	Secs. 369, 370(2) Companies Act; Secs. 38, 39 Table A.	Other notification than by letter only upon agreement of the shareholder

Hence convention by letter is common mainly in the UK (cf. Sec .369 (1) and (4B) Companies Act), however not common in the continental Member States.

In the vast majority of Member States, convention by letter is considered as too burdensome and too costly. An exception is made for companies the shareholders of which are known. This judgment is supported by empirical evidence.

Example:
A company has 10,000 shareholders. On average, each of them moves to another home every eight years. This results in 1,250 yearly changes of addresses which have to be monitored, reported by the shareholders' brokers or banks and registered by the company. If everyone of these shareholders holds shares in ten corporations, 12,500 data records undergo a yearly change.

Empirical evidence shows that sending out letters after having published the convention (cf. § 125 German AktG) largely contributes to the total cost of a general meeting. Even in case of small listed companies, figures may attain 20,000 letters, in case of big companies up to 100,000 letters or more are usual. Overall direct cost for such mass-mailing ranges between 50,000 and 300,000 euros or more. In case of a small listed company, these amounts attain about one third of the total cost of the general meeting.

The Explanatory Memorandum states with regard to Art. 5 that the addressee of the letter convening a general meeting is the CSD which disseminates the information further to the individual shareholders. However, this interpretation is not supported by the wording of the proposal. Addressee in this wording is not the CSD but the individual shareholder (even in the case of bearer shares). Beside that, the CSD charges the cost for the required further forwarding of information to individual shareholders to the company.

Hence whether convening by letter or not should be left to legislation of the Member States.

d) Proposed wording of Art. 5(1):

Taking into account the comments set forth above, we propose to word Art. 5(1) of the Shareholders' Rights Directive as follows:

"Notwithstanding Article 9(4) of Directive 2004/25/EC of the European Parliament and of the Council, any general meeting shall be convened with a term of at least 30 days

by notification in the media determined by the Member States. The Member States shall at least determine one official organ used for publication of the convention with legally binding effect. The Member States shall inform the Commission on the name of and of the access to the latter organ."

By this wording the problems arising from calculating a period retroactively will be avoided as well.

E. g.: if a meeting is scheduled for 10th July 2006, its convention must be published on 10th June 2006 at the latest. If a meeting is scheduled for 17th March 2006, its convention must be published on 15th February 2006 at the latest.

The said term and its calculation should be made consistent throughout the correspondent EU legislation, especially with regard to the legal instruments quoted sub a).

In case of adopting our proposal, Art. 5(2) lit. d) may be worded as follows:

"the full, unabridged text of the resolutions and an indication where the documents intended to be submitted to the general meeting for approval may be obtained"

In case of publication of a convention in an official gazette, there is not need for a separation between *"draft agenda"* and proposed resolutions. Both may be published in the same announcement to ease the access of the shareholders to the relevant information.

Art. 7

Art. 7(3) sentence 2 poses an identical problem arising from retroactive calculation of a period as Art. 5(1). Moreover, a date of up to 30 days before the day of a general meeting is not acceptable as a record date. Regarding the view of practitioners expressed in the two consultations preceding the proposal, the Commission's position is not easy to comprehend.

The synthesis of the first consultation states sub 5.2:

"Suggestions with regard to timing ranged from 15 days to 24 hours before a general meeting, with a majority of responses pleading in favour of a record date 3 or 2 days before the general meeting."

The synthesis of the comments on the second consultation (sub 5.) supports and confirms this view. Only a group of 20 % of the respondents favoured a record date set between 10 business days and 30 calendar days before the general meeting.

Art. 7(3) provokes the question of *cui bono*. Setting the same day as record date for a general meeting (as well as the date for application for attendance to a general meeting) as well as date for sending out (not publishing) the convention of this meeting obviously excludes persons planning to object to a resolution. It would be of no use to buy shares after the meet-

ing has been convened and to apply for attendance. In this aspect the proposal rather seems to be an “Anti-shareholders’ Rights Directive”. Ironically speaking, this should be welcomed by an association of notaries for it guarantees short meetings with less questions, less criticism and hence less work for the notary keeping the minutes.

Of course, the abuse of shareholders’ rights should not be facilitated by EU legislation. But these phenomena should be addressed by more appropriate means (e.g. restrictions on the right to avoid resolutions of the GM; entitling companies to sue “rapacious” shareholders for damages, making actions of avoidance contingent on providing security for company’s lawyers fees etc.). The approach of Art. 7(3) might be disproportionate. We are deeply concerned that it may well have detrimental impact on the European market of corporate control. Anyway, shareholders monitoring the behaviour of companies already hold one share in each of such companies so that their attendance to general meetings cannot be prevented by Art. 7(3) either.

Therefore Art. 7(3) sentence 2 should be worded as follows:

“However, this date shall be one week before the end of day for which the general meeting has been convened.”

For a shareholder wishing to attend to a general meeting, knowledge of the record date is so important that different dates in each Member State would be harmful to legal certainty. Therefore we suggest full harmonization of such date. Moreover a harmonized record date would simplify considerably the monitoring of such dates by financial institutions. We suggest one week with regard to our proposal as to questions before a general meeting (see Art. 9 below). In case of full harmonization sentence 3 may be deleted as redundant.

Art. 8:

In the first place, an interesting aspect of Art. 8 should be highlighted:

Art. 11(2) expressly bans the electronic signature as a disproportionate requirement for shareholders.

However, this barrier is not expressly referred to in Art. 8(2). Thus the argument of Art. 11(2) as to the identification of the shareholder or proxy-holder participating electronically in a general meeting may be inverted, so that an identification by electronic signature may be required under Art. 8 and so that Art. 11(2) is only limited to granting proxies. This issue should be clarified in the text. The same applies to Art. 12(2).

Art. 8 provokes – in the second place – a more general observation. As we already pointed out in our comments to the consultation documents, the use of electronic means in a general meeting (e.g. in case of electronic proxies, electronic attendance or electronic voting instructions) is costly and the underlying technology is not fully developed.

Especially there is no feasible way to identify the person interfering electronically in a general meeting. Even in case of electronic signature, identification is only the result of the legal fiction that an electronic signature shall be imputed to the owner, not to the bearer of the signature card. Hence, identification by electronic means is not more than a "deemed identification". The problem what to do when this presumption is rebutted remains; the consequences are up to the companies.

The Commission imposes this legal uncertainty on every listed company without providing for a solution. Thus European listed companies are totally left alone with the consequences of this technology, e.g. if objections to a resolution are raised in a general meeting by electronic means and the chairman (upon advice of the notary keeping minutes) has to decide in seconds what to do.

Considering the alternatives available for listed companies there is no need to use them as guinea pigs in a EU-wide laboratory. This only serves the interests of influential pressure groups lobbying their economic interests through European legislation. Companies may already retain a proxy-holder to whom voting instructions may be given by shareholders unable to attend to the meeting physically. The experiences with this option at least in Germany are excellent (see below our suggestions for Art. 12).

Hence further use of electronic means should be completely in the discretion of the each company. If a company thinks that there are technically feasible solutions and if the use of electronic means is of advantage, it should be possible to opt in.

Hence, it seems sufficient to word Art. 8 as follows:

"Article 8
Use of electronic means

Member States shall not prohibit the use of electronic means with regard to general meetings, in particular for voting in advance or in absentia, for granting proxies, for giving instructions to proxy-holders or for shareholders taking part in the meeting themselves. However, the decision whether to make use of these possibilities or not, what requirements to be imposed to ensure the identification of shareholders and the security of the electronic communication or to which degree the liability of the companies may be excluded shall be in the reasonably exercised discretion of every company making use of such means."

Art. 4 is a sufficient means to prevent discriminatory exercise of such discretion.

In this case Art. 11(2) and Art 12 (2) may be deleted, there is no need to mention *"electronic form"* in Art. 9(1).

Art. 9:

All the Member States of the European Union know two ways to keep shareholders informed: general regulated information and individual information.

Capital market law provides for a general standard by regulated information such as prospectuses, reports on the financial position of the company, information on major shareholdings, insider dealing etc (cf. Directive 2004/109/EC). Regulated information is enforced by the competent authorities. The advantages of this approach lie in the scalability of regulated information, the disadvantages in the transaction cost of regulated information for the companies and for the Member States (e.g. costs for drafting reports or the maintenance of regulating bodies)[1].

Company law also provides for a standard by regulations on the minimum content of conventions of general meetings, in requiring that certain documents shall be available to shareholders' inspection in the premises of the company, on the company's website or at the Commercial Register. In every Member State, this kind of regulated information is supported by rights of individual shareholders to ask questions outside or inside of general meetings, see

Table 3

Shareholders' Information Rights

Member State	Questions before GM	Questions at GM
Austria	None.	Questions with relevance to the agenda. Right to withhold information in case it may do material harm to the company or to affiliated companies or to the national security of Austria. The individual shareholder's right of information is only enforceable if the supervisory board concurs (§ 112 Ö-AktG).
France	Right to be informed on specified topics, mostly relating to the annual financial statements, L 225-115 - L 225-118 Code de Commerce.	Questions in writing before the general meeting to be answered during the general meeting, L 225-108 Code de Commerce. Verbal questions during the meet-

[1] See the US experiences with the Sarbanes-Oxley Act.

Member State	Questions before GM	Questions at GM
		ing permitted.
Germany	none.	Questions with relevance to the agenda. Right to withhold information in case it may do material harm to the company or to affiliated companies or information on other assessment of the assets of the company than in the annual financial statement (§ 131 AktG).
Italy	Information rights are vested in the *collegio sindicale* or the *consiglio di sorveglianza* or the *comitato per il controllo sulla gestione*. The individual shareholder may address complaints to these organs, Art. 2403-2403bis, 2408-2409, 2409 terdecies, 2409 octiesdecies Codice Civile.	Right of one third of the capital represented in the general meeting to have the meeting adjourned due to lack of information, Art. 2374 Codice Civile.
Poland	none.	Questions with relevance to the agenda. Right to withhold information in case it may do material harm to the company or to affiliated companies or information on other assessment of the assets of the company than in the annual financial statement. Answers in writing possible (Art. 428-429 Polski Kodeks spółek hanlowych).
Spain	Right to file questions until the seventh day before the meeting with regard to the agenda. Right to withhold information the disclosure of which would to harm to the company (Art. 112 Ley de Sociedades Anónimas)	Right to ask questions with regard to the agenda and which have to be answered within seven days after the meeting (Art. 112 Ley de Sociedades Anónimas).

Member State	Questions before GM	Questions at GM
UK[2]	Individual shareholder's right of information is subject to agency law (right of inspection of the books and records for a proper purpose and in good faith).	Individual shareholder's right of information is subject to agency law (right of inspection for a proper purpose and in good faith).

Additional individual shareholders' rights are of advantage to the capital market for they may lead to disclosure of information too specific to be covered by regulated information with its more general approach.

However, individual information rights may lead to abuse by shareholders who raise masses of questions shortly before or in a general meeting thus forcing companies to retain disproportionate manpower to meet the need of answering as shortly as possible ("back-office").

Individual shareholders' rights exercisable in general meetings may, as at least German and French practise shows, also be understood as an invitation to psychopaths to act out their inclinations.

As German practise further shows, individual shareholders' rights may also be abused to blackmail companies if the mere assertion that a question has been answered insufficiently provides a *prima facie* legal basis of an action for avoidance of a shareholders' resolution which may impede its registration in the Commercial Register required for its effectiveness.

As these arguments as well as the approaches of the Member States in Table 3 above show, individual shareholders' rights of information should be restricted in such a way that if questions are permitted upon convention of and in a general meeting,

(i) such questions should be related to the draft agenda of such meeting,

(ii) if answers are given outside such meeting such disclosure should be made available to every shareholder,

(iii) the company should be entitled to refuse any disclosure harmful to its interests and

(iv) the remedy of a denial of or of an insufficient answer should be an action for information but (usually) not an action to set aside a resolution due to withholding relevant information.

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[2] See also *Sebastian Lommer*, Das Auskunftsrecht des Aktionärs in Deutschland und die Informationsrechte der Gesellschafter der US-amerikanischen Public Business Corporation, 2005, p. 123 sqq.

Hence we suggest a wording of Art. 9 based on the Spanish *Ley de Sociedades Anónimas* as follows:

"Article 9
Right to ask questions

Shareholders or shareholders' representatives may have the right to ask questions in writing until the sixth day before the day of the general meeting, which shall be answered verbally in the meeting. They may further ask questions in the general meeting, which shall be answered in writing or on the company's website within one week after the general meeting. Such questions, however, must be of relevance as to the agenda of the meeting. The company may refuse to answer questions as far as its interest not to disclose information outweighs the shareholders' interest of information. Art. 8 applies as well."

Art. 10:

a) Art. 10(1) sentence 2 *"legal capacity":*

Art. 10(1) sentence 2 requires the *"legal capacity"* of the proxy-holder. We are afraid to remark that the German translation of the proposed directive in this aspect (*"rechtsfähig"* = having legal personality) is – with all respect – wrong. Legal capacity is more than just being a legal entity. There is no use granting proxies to babies or toddlers. Legal capacity implies the ability to enter into binding agreements. However, limited legal capacity (under German law: *"beschränkte Geschäftsfähigkeit"*) should be sufficient as well if a Member State knows such rule. Hence the directive should take into account the specific regulation of legal capacity in the civil codes of the Member States. Only regulations with discriminatory effect on foreign shareholders should be prevented.

b) Art. 10(1) sentence 4 *"one person"*:

Art. 10(1) sentence 4 limits the number of proxies to *"one person"*. This restriction seems at least unnecessary, if not arbitrary. It bans granting sub-power of attorney if the proxy-holder is prevented from attending to the general meeting, e.g. in case the proxy-holder is excluded from voting in a given topic due to a conflict of interest. Why should it be forbidden to grant proxies to several lawyers of a law-firm who should remain flexible in the decision who of them to attend the meeting?

Art. 10(1) sentence 4 should therefore be deleted.

One may conclude from Art. 10 that the Commission fears that restrictions on proxies may be abused to deter foreign investors to attend to general meetings. We are afraid not to understand this completely. Article 4 of the proposal already forbids in general any regulation with discriminatory effect. It should therefore be sufficient that the laws on proxies for general meetings do not differ from the general rules of the civil law of the respective Member State

on powers except that the Member State may prescribe that proxies for general meetings shall be in writing.

Art. 11:

On the one hand, Art. 11(2) (*"other than that of an electronic signature"*) offers the interesting perspective that the Commission now considers the new electronic forms as too burdensome for the purposes of a general meeting.

With regard to the Commission's former position this shift of view is remarkable. Up to now electronic signature has always been marketed as a inexpensive, quick and easy solution for business on a massive scale. After years of ferociously EU-wide lobbying of this gadget, such a statement must be interpreted as the declaration of technological bankruptcy of the whole concept[3] itself. What else if not a general meeting of a big listed company is business on a massive scale?

On the other hand, the Commissions does not address the question which method of identification of a shareholder is available beside electronic signature. The reasons for such wrapping in silence are obvious, for there is not such method.

Thus the problem is left again to the companies having to deal with proxy-holders who assert to be entitled to vote without having any possibility to exclude them from a general meeting. Without reliable electronic forms, secure identification of a shareholder is not possible within the few hours of a general meeting.

Thus, as already pointed out in the comments to Art. 8 above, an "opt-in" approach seems definitely more appropriate.

Art. 12 and Art. 13:

As to Art 12(2), we refer to our comments to Art. 8 and 11 (again, as to electronic signature, the argument of Art. 11(2) may be inverted).

As to Art. 12(1), one should be aware that huge amounts of ballots create an additional burden for each listed company. Hence there should be a minimum period between the receipt of the ballot and the commencement of the general meeting so that the company may already prepare the ballots for counting in the general meeting together with the votes cast there. Otherwise, it might not be possible to establish in a general meeting whether a motion has been carried or not.

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[3] Cf. the enthusiasm of the Directive 2003/58/EC with regard to this technology.

The headline of Art. 13 is misleading. The provision deals with the rights of beneficial owners of shares to instruct their trustees to vote on their account, not with instructions of a shareholder given to a proxy-holder before or in a general meeting how to exercise the shareholder's voting right (as one might expect after the regulation of voting in absentia in Art. 12). The second case would be of practical relevance for the purposes of the directive, whereas the first case is outside the scope of a "shareholders' rights directive" for it deals with questions of agency law (in particular banking law).

The second case is partly covered by our suggested wording for Art. 8. It seems only necessary to provide for a proxy-holder designated by the company giving all shareholders who cannot attend to the general meeting personally the opportunity to exercise their voting rights.

Hence we suggest the following wording of Article 12:

"Article 12
Designated proxy-holder, voting in absentia

1. ***A listed company shall designate a proxy-holder offering the opportunity to all shareholders to exercise their voting rights in a general meeting. Such proxy-holder shall accept shareholders' instructions how to exercise the voting right if there are given at least in writing 48 hours before the time of the general meeting.***

2. ***Any shareholder of a listed company shall have the possibility to vote in writing in advance of the general meeting, if the ballot reaches the company at least 48 hours before the time of the general meeting.***

3. ***Member States may impose requirements with regard to paragraphs 1 and 2 as may be necessary to ensure the identification of the shareholders and as they are proportionate to this objective."***

The terms of 48 hours in paragraphs 1 and 2 are maximum terms. No Member State is prevented to impose shorter terms in national law, no company should be prevented to provide for shorter terms in its articles of association.

Art. 13 may be deleted for such issues should be left to the European Common Frame of Reference.