Consultation response DACSI **18-1102**

Commission Implementing Regulation re minimum requirements under Shareholders Rights Directive II

The NL market's reaction to the Commission's proposal of 11 April 2018 (Ares(2018)1944240)

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DACSI (the Dutch Advisory Committee Securities Industry) is the principal trade association in The Netherlands for firms active in the securities industry. The association represents the interests of its members as users/clients of infrastructure providers in the field of securities, e.g. exchanges, central counterparties, central securities depositories. With 12 members, DACSI represents the vast majority of the banks active in The Netherlands, and positions the Dutch view to the market infrastructure service providers and the regulatory authorities in The Netherlands and the European Union.

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The Dutch Market, represented by DACSI, is glad to provide its view on the proposed text for the Commission Implementing Regulation in the context of the Shareholders Rights Directive II [1](ShRD II), published for consultation on 11 April 2018[2].
We highly value this detailed proposal ("Draft IR"), prepared jointly by the Commission Services and market experts. We note that it already reflects a delicate balance between the interests of the numerous stakeholders involved. In this response we:

(i) briefly highlight the elements we support,
(ii) ask your attention for some issues we envisage within the draft IR – and provide suggestions to resolve them -,
(iii) identify two issues that have their origin elsewhere but cause problems when implementing the ShRD II and the IR.

These issues originating elsewhere are the timing of the *record date* for the general meeting and the *initial holding date* as optional element of the shareholder identification.

General remarks

i Support

We strongly support the most important elements in the proposal:

- the chosen legal form in connection with a strong drive for harmonisation of processes and information flows;
- digital info flows, including use of e-mail (or other digital ….) between last intermediary and end investor;
- the emphasis on straight-through processing along the entire chain: from issuer to end investor and vice versa;
- "adoption" of MSCAP (the Market Standards for Corporate Actions Processing) and its definitions.

ii Issues with Draft IR

We envisage a few issues of general nature:

Minimum requirements

For (almost) all of the messages dealt with the articles in the Draft IR specifies "minimum requirements". This leaves room for – or even invites - member states to "gold plate" the harmonised message content by adding country specific attributes. With cross-border shareholdings such country specific additions will have their complicating effect in the entire Union. Evidently, parties involved in the process would be obliged to support the (perhaps even incompatible) sum of local requirements with their systems/programs to. Needless to say this would not contribute to harmonisation and efficiency.
We recommend that maximum harmonisation is asked for wherever possible.

Opting-out for investors

We think an article allowing for an opt-out of information transmission for investors who do not want to receive certain information or have specific agreements with their intermediaries precluding them from sending that information is desirable. This is in particular relevant for those shareholders who do not want to receive this info through this channel and/or do not want to pay for it.

Exceptions when investor has no e-mail

In exceptional cases the last intermediary will not be able to transmit information to the end investor by e-mail (or another digital instrument for communication). When the investor persists in traditional non-digital communication, the last intermediary:

[1] 2007/36/EC in connection with 2017/828
[2] Ref. Ares(2018)1944240

- should be enabled to charge this investor for the additional costs, and to offer the opt-out possibility (it would be counterproductive to let the issuer pay for less efficient communication channels down the chain);
- should be exempt from the deadlines in the IR that are based on digital info flows.

Date of Entry into force
Whereas the IR – rather than the ShRD II itself – determines how issuers, intermediaries and service providers have to build their processes and info flows, these parties should be given adequate preparation time. Hence, the date of entry into force should not be related to the ShRD II, but to the IR; whilst many provisions introduce new flows, messages or structures, a lead time of at least eighteen months is deemed necessary.

Definition of corporate event
The proposed definition of "corporate event" in Article 1 (3) lacks clarity because:

1. It refers to "corporate action". Corporate Action is not defined elsewhere in European legislation, but it is in the Market Standards.
2. t is meant to be wider than Corporate Action: it should include the exercise of voting rights, the right to attend the General Meeting and some connected rights.

Hence, the definition of the wider "corporate event" cannot be construed by referring to the narrower "corporate action". In addition, the use of "which" implies a clarification, not a restrictions.

We propose:
'corporate event' means any action or event, initiated by the issuer or by a third party, affecting the exercise of the rights flowing from the shares; the corporate event may or may not affect the underlying share, such as the distribution of profits or a general meeting

We provide some remarks per individual process/message below.

iii Issues originating elsewhere
Analysing the details provided in this Draft IR learns that some issues need attention or action elsewhere, maybe the Level 1 text of the ShRD II, perhaps somewhere else. Regardless of the timing with which the issue could be solved, we recommend to look for a solution for:

- *Record date*
  The record date for the General Meeting should be made mandatory and harmonised in all EU countries: fourteen days before GM (elaborated in the context of the Confirmation of entitlement (4)).

- *Initial holding date*
  The option to request the initial holding date should be eliminated (elaborated in the context of the Identity Disclosure (1 and 2)).

Remarks per individual process/message

1. Request to disclose information regarding shareholder identity

Table 1
A6 Threshold quantity
We underline that the – by far - optimal manner of expressing a threshold is in terms of "an absolute number of shares". The table rightfully states that the use of a percentage is detrimental to the process. The latter would imply that addressees of the request have to determine what the number of outstanding shares is or will be per record date.

Not only is this a time consuming element in the process, it may – based on different information – result in errors and/or different outcomes per addressee.
Comma as decimal separator in "pc + 5 numeric characters"?

A7 Date from which the shares have been held

ShRD II Art 2(j)iii allows the Issuer to request for the initial holding date. We strongly underline that asking for the "Date from which the shares have been held" is very likely to:

- delay the processing of the request materially;
- result in ambiguous and/or inconsistent answers [3].

Hence, we applaud the remark in the draft IR that requesting such a date "may affect the straight through processing", which is certainly an understatement. This ambiguity/inconsistency issue cannot be resolved by the draft IR. The most effective way to solve is, is to remove this option as element in the identification request in the Level 1 ShRD II text.

2. Response to a request to disclose information regarding shareholder identity

Table 2

C2b Name of shareholder in case of a natural person

The table requires full first name(s). In the NL – and possibly elsewhere as well – banks do not record full first names, but rather initials of natural persons (e.g. "J.M."). When such persons are uniquely identified by a national identifier (as assumed in C1b) registering full first names for the sole purpose of shareholders identification is unnecessary, in addition to being costly. We therefore suggest that reporting the full initials is deemed sufficient.

It is not clear when "more than one surname" is in place. In the Netherlands, a substantial number of natural persons' surnames is composed of two surnames, separated by a hyphen (e.g. "Jansen – de Boer"); other individuals use a surname consisting of two parts separated by a space ("Castilho dos Santos"). We think that the specs should clarify that these instances reflect one surname and do not require a separating comma.

We encourage the Commission to clarify the use of first names and surnames.

C12 Initial date of shareholding

As indicated above (par 1 under A7), asking a specification in different parts of a shareholding according to an initial holding date is conceptually problematic, as it would require allocations of transactions to dates that are easily arbitrary. A way out as regard the logic of the question would be allowing negative numbers in C11, in order to reflect a sale or other disposal as part of a resulting position.
From an added-value point of view however, we doubt whether the resulting data would be meaningful. An intermediary can only respond based on his own data. When holdings are transferred from another account (with another intermediary), the result becomes not particularly worthful.

3. Meeting Notice

No comments.

[3] A typical holding position per record date is the result of purchases and sales, exercised options, transfers (between different custodians), inheritance, ….. Determining the "initial holding date" would require an allocation routine and the availability of many data. In case of transfers the intermediary will not have access to the necessary data, and when positions are held longer than the legally required period for conserving data, the data will not be available either. Ambiguity, inconsistency or incorrectness will be unavoidable. Bearing this all in mind, an obligation to provide this initial holding date would be disproportional to its value and to the disturbance of the STP process.

4. Confirmation of entitlement

"Entitled position" and Record Date

z. E.g. in France and in the UK there are only two days in between. This makes it extremely difficult, and in practice impossible to report the "entitled position" as of the record date before the general meeting.

This problem has nothing to do with the definition(s) or with the provisions in the draft IR, but is caused by the short interval between record date and GM. Solutions used in practice do not solve the problem, but would allow for useless information.
Solving the issue lies in requiring that the record date lies a longer period before the GM; preferably a uniform period (in contrast to a minimum period), preferably fourteen calendar days. This will (also) enable issuers to specify the record date before the Market Deadline.

We acknowledge this is a Directive issue rather than of the IR, but it is essential for a well-functioning process around the general meeting.

Table 4
D3/4 Name and identifier of proxy or other third party nominated by shareholder
Whilst the Confirmation of Entitlement (Article 5) is (finally) addressed to the shareholder, we do not understand why the name and identity of a proxy are to be included. Intermediate intermediaries do not know whether a proxy is appointed; only the last intermediary can possibly have this information, but it is within the realm of the shareholder himself to change a proxy.
We think these data elements do not belong in this subprocess conceptually.

5. Notice of Participation

Table 5
B3a Unique identifier of shareholder in case of a legal person
We think the option (2) to identify a shareholding bank by means of a BIC (Bank Identifier Code) is unnecessary and undesirable. Any legal person is supposed to always have an LEI (in particular by the time the IR is implemented). A legal person without an LEI, a client code or a unique national registration number (option 1) is merely unthinkable.

6. Voting Receipt

No comments.

7. Confirmation of the recording and counting of votes

Member states may provide in their local implementation that the issuer is only obliged to confirm upon request.
If so, this implies confirmation to requestor only.
Table 6 does not make clear, that two situations can exist:

- Confirmations to be sent to all shareholders who have voted (electronically or by proxy)
- To be sent only to specific shareholders who have requested

We suggest that the Table 6 is amended as to the situation whereas this confirmation is sent only to shareholders who did not opt-out for this information.

8. Notification of corporate events other than general meetings

The concept of "last participation date" appears to be the same as the "Guaranteed Participation Date" (GPD) that the Corporate Actions Joint Working Group (CAJWG) standards (Market Standards CA Processing) define as "last date to buy the Underlying Security with the right attached to participate in an Elective Corporate Action".

Taken into account that this GPD definition is now widely shared by the European Securities Industry and under an implementation process if not already implemented in IT systems definition, the change of naming could introduce confusion between stakeholders and is therefore advised against.