Eurosharehoders response to the European Consultation on Legal Certainty of Securities Holdings and Disposition

Eurosharehoders is the organisation of European shareholders associations. It was founded in 1992. At present Eurosharehoders gathers 33 national shareholders associations all over Europe.
The main objectives of Eurosharehoders are:
- to promote scientific research in capital markets and shareholder value;
- to support the principles of corporate governance;
- to represent and protect private investors' interests, particularly investors in equities and other listed securities;
- to support the EU-wide harmonisation of issues such as minority shareholders protection, capital markets transparency and cross-border proxy voting.

Eurosharehoders hereunder responds the DG Markt G2 MET/OT consultation document on the legal certainty of securities holdings and dispositions

- Name and address of the respondent :
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- Field of activity of the respondent :
  See box above

- Does the respondent (or in the case of an association, its members) conduct domestic or cross-border securities operations in the EU/EEA area?
  Not directly. But several of our member national organizations do collect croos-border proxies, and Eurosharehoders is trying to facilitate it through its web-based "EuroVote" project.

SUMMARY

Eurosharehoders believes that:
1/ The legal information flows regarding securities holdings and disposition should be thoroughly simplified, be made fully available to real (economic) holders and issuers via internet, and at no extra cost for retail investors, especially for cross-border holdings and for the exercise of cross-border voting rights, either directly or via proxies.

2/ the necessary holding and disposition information services from the real (economic) holder of the securities to the issuer should be unbundled from the custody services currently performed by financial intermediaries.

ANSWERS TO THE QUESTIONNAIRE

Q1: Objectives : Euroshareholders (ESH) supports that "EU law should regulate the legal framework governing the holding and disposition of securities held through securities accounts and the processing of rights flowing from securities held through securities accounts." , that "*all* account providers must be regulated at EU-level and should be subject to a detailed authorization and supervision framework notably the one provided by MIFID" and that " the full exercise of investor rights must be guaranteed. "

Q2 Shared Functions: when in some jurisdictions account providers actually share the task of maintaining a securities account with one or even more, other service providers which are not considered as account providers, these *persons* should be "responsible" , legally responsible vis-à-vis the account holder for receiving and executing registration and voting instructions and be the operational addressee for the exercise of corporate rights.

Q3: no comment

Q4: no comment

Q5: Account held securities : ESH supports that " securities standing to the credit of a securities account confer upon the account holder at least the following rights:
(a) the right to exercise and receive the rights attached to the securities if the account holder is the ultimate account holder or if, in any other case, the applicable law confers the right to that account holder;
(b) the right to effect a disposition
(c) the right to instruct the account provider to arrange for holding the securities with another account provider or otherwise than with an account provider".
We support the functional approach under which "the common legal framework would not harmonise the property laws of Member States but limit itself to setting out what the attributes of that law would be "in such way that "EU law addressing the exercise of rights would be in a position to guarantee that the ultimate account holder at least controls the exercise of the rights".

Q6: We support that the envisaged principles on the exercise of corporate rights guarantee that the ultimate account holder either exercises itself or is at least in control of the exercise by the legal holder.

Q7: We consider as positive but not crucial to achieve global compatibility regarding the substantive law of securities dispositions and not only EU-wide compatibility.

Q8: Methods for Acquisition and Disposition: while not being able to appreciate the suggested methods we consider as highly important to "avoid that more securities are credited to account holders than had been originally issued by the issuer."

Q9: We support that "an harmonised EU-framework better guarantee that account providers do not create excess securities by over-crediting client accounts (keeping in mind that all account providers are either banks or MiFID regulated entities)".

Q10: The issue of costs is very important as the big international banks have levied important charges to investors willing to carry cross-border but also domestic votes in the last ten years, thereby strongly discouraging the voting of shares and affecting negatively corporate governance worldwide.

We consider that the exercise of the rights attached to the securities is fundamental and that any professional pretending to offer securities services should be held responsible for protecting theses rights and should never penalize their exercising. The current practice encourages free riding among investors. We consider that it is not appropriate to charge individual fees for the execution of ordinary basic securities holding services such as confirming the holding in number of shares to another account provider, transmitting information to the account holder and transmitting to another account provider or to the issuer the instructions of one account holder .

We consider that the above services are part of the a basic custody or account providing service and therefore should be included in the annual fee charged to all clients account holders of similar classes of securities (bonds, shares, or else) and should no longer be charged only to the only voting securities account holders.

Therefore, we consider that not even "in limited circumstances involving cross border holdings with third countries" it might be worth considering the sharing of costs between the account holder and the account provider.
However we certainly consider that the sharing of costs between the account provider and its account holders is certainly acceptable, except for individual holders, as (given the average size of their portfolios) no specific fee should be charged for cross-border voting (either direct or by proxy). Retail holders already usually pay considerable custody fees as a percentage of their portfolio assets. These fees should be investigated by the European Commission, and should cover any services related to securities ownership.

Q11: legal effectiveness of acquisitions and dispositions : no comment

Q13: Effectiveness in insolvency : no comment

Q16: Protection of acquirers against reversal : no comment

Q17 : Priority : no comment

Q20: Protection of account holder in case of insolvency of account provider: We support that "harmonised loss sharing rule at EU-level would impinge on rules of national insolvency law addressing the issue" and therefore support the envisaged principle that "the national law should contain a clear and predictable solution, leaving the details and mechanisms of such solution should to national policy."

Q23: Instructions: we support that "An intermediary should neither be bound nor entitled to give effect to any "instruction in relation to account-held securities of an account holder given by any person other than that account holder."
Q24: Attachment by creditors of the account holder: we support the principle that "The national law should provide that Creditors of an account holder may attach account held securities only at the level of the account provider of that account holder."

Q30: Cross-border recognition of rights attached to securities: we support that the national law governing a securities issue as well as the national law governing the holding of securities should not discriminate against the exercise of rights attached to securities held in another jurisdiction on the sole grounds that the relevant securities are held in a specific manner.
We take the opportunity to stress the unfair treatment of investors when some rights are insured to holders to the same class of shares on the basis of their permanent registration ("actions au nominatif" in France) holding which de facto disenfranchises foreign holders of shares of companies listed in France from the benefit of the double voting right or of the increased dividend provisions. Similarly we take the opportunity to denounce the registered investor regime existing in the UK and France benefiting only to foreign shareholders entitled to benefit from permanent proxy representation based on a sole assessment of its proper identification by the CEO of the listed company.

We therefore support that "a general non-discrimination rule along the lines set out above will be useful"

Q31: we support that "if applicable a Principle along these lines have a positive repercussion on our business model as more investors would exercise their voting rights because of an insured fair treatment.

Q32: Passing on information:

Notably because of the importance of the basic shareholders information send from the issuer to the investor before the meeting we certainly support that "The national law should require that Information with respect to securities received by an account holder, which is not the ultimate account holder, from its account provider or from the issuer should be passed on to its account holder or, if possible, to the ultimate account holder without undue delay as far as information
(a) is necessary in order to exercise a right attached to the securities which exists against the issuer; and
(b) is directed to all legal holders of securities of that description."

Besides, and even more important, in order to insure the voting information flow from the investor back to the company , we also support that " The account provider of the ultimate account holder must pass on information with respect to the exercise of rights attached to securities received from the ultimate account holder to the issuer of the securities or, if applicable, the following account provider without undue delay, as far as information is provided by the ultimate account holder in the course of the exercise of a right attached to the securities."
While the flow of information and messages potentially available upstream and downstream might be considerable, it is certainly appropriate to limit the flow of information and messages to the "necessary", i.e. information relating to the exercise of or the receipt of a right attached to the relevant securities. If applicable, this Principle would have a positive repercussion on your business model provided that the cost issue be properly addressed. We here do not believe that it is appropriate to "leave the sharing of the financial burden to the market itself and control of the cost to open competition" for this has resulted in the last twenty years in an unjustified increased burden for the voting investor (see reply to Q 10).

Q33: We certainly welcome market-led standardisation regarding the passing on of information.
We support standardization procedures by groups made of investors, issuers and other market specialists, such as the EuropeanIssuers led General Meetings Markets Standards group in view to make sure that European investors benefit at last from an efficient and secure cross-border voting by Internet (which has been in place for a long time in the USA).

We recommend here the consideration of an promising innovation for the joint benefit of issuers, end investors and intermediaries : the "temporary unbundling" of part of the voting information flow from the investor back to the company : the shares voting shares entitlement part of the message is an account provider related information, and as such it should remain processed by the banking intermediary chain; the voting instruction part related to the same vote session is a message from the investor to the company and it can be sent directly to the issuer for a subsequent reconciliation and validation by the entitlement message on record date. In fact we do not see why this latter part should involve financial intermediaries at all.

Q34 Facilitation of the ultimate account holder's position:

We support that "The national law should require that the account provider of the ultimate account holder should be bound to facilitate the determination of the exercise of rights attached to securities by the ultimate account holder against the issuer or a third party as requested by the ultimate account holder."
We do not believe necessary however to develop a special status for omnibus banks as suggested in a "third method which evidences the position of the ultimate account holder *vis-à-vis* the issuer" for it would certainly create a substantial over-voting risk as has been evidenced in the United States in the last years . The use of bar-codes which might help processing conflicting potential votes does not in itself simplifies the problem created and is a paper related technology .

Conversely, the above mentioned "temporary unbundling" of part of the slow inter-bank shares voting shares from the vote instructions to the issuer is the perfect solution to the issue of the current pooling of votes by "omnibus banks".
Instead of creating an hybrid legal status to theses big accounts providers, technology solves the problem by allowing the Internet voting instructions to the issuer for a vote session started by the end investor or its proxy which entitlement will be processed through banks including "omnibus banks " and finally reconciled and validated by the omnibus banks voting investors list on record date.
Finally, in order to "avoid that dominant negotiating power of account providers *vis-à-vis* ultimate account holders, in particular retail investors, does not lead to a situation where cost structures effectively preclude the exercise of rights," we here again consider that the legal framework should insure that these entitlement costs borne by the account providers should be under European law included in general securities accounts basic fees with no specific or general opt-out possibility.

Q35: No comment as we are not account providers (but we all know that generally investors cannot exercise the rights attached to their cross-border holdings as efficiently as their domestic holdings)

Q36: Non-discriminatory charges:
We support that the national law should ensure that Charges levied by an account provider on its account holders for any service in respect of cross-border voting of securities should not only be the same as the charges levied by that account provider on its account holders in respect of comparable domestic voting of securities, but the same than the charges levied by that account provider on all other non voting account holders.

Some of the ESH members have encountered differing prices for the domestic and the cross-border exercise of rights attached to securities : specific fees are required for the registering of shares from France to Belgium Many of our members complain when they vote abroad of about voting charges that can reach up to 150€ per voting session.

Q39: Admitting that non-EU account providers cannot be reached by the planned legislation, which steps could be undertaken on the side of EU account providers involved in the holding in order to improve the exercise of rights attached to securities through a holding chain involving non-EU account providers?

Local EU account providers should:

1/ insure an efficient compensation of the share voting entitlements received (the list of valid identified shareholders) not only on record date (R.D.) but also on the days before (R.D.-1 , R.D. –2, R.D.-3 …) thereby better informing the issuer of the likely voting participation at the meeting and also thereby encouraging to omnibus banks to proceed similarly and offering daily voting positions and allowing the issuer to confirm the receipt of early and final entitlements.

2/ then adopt for themselves as the direct voting process described above. Major local account providers are often acting as registrar for local issuers, their adoption of the direct vote process insure a powerful emulation of the non-EU account provider, and this in turn should satisfy

Q40: Exercise by account provider on the basis of contract:
Since this possibility "bears the risk that ultimate account holders transfer the right to receive and exercise the rights in too extensive a manner," resulting either to systematic YES votes or to a fully automated proxy vote using cheap "box ticking" advice, again against the background of bargaining power and cost structures, we suggest that "detailed rules could define the limits of such transfer, in particular the formal requirements to be met by a general and permanent transfer of the right to exercise and receive the rights attached to the securities."

We think that a general authorization to exercise and receive rights given by the account holder should never benefit to the account provider because of the conflict of interest between its conservation mission and the proper voting of the shares.

Q42: we provide no comment as to state if MIFID would be an appropriate instrument to cover the authorization and supervision of account providers. Again, the information needed from the real (economic) holder of the securities to the issuer is not a "financial" service per se (more like the services provided by notaries for real assets), but the providers of such services need to be regulated and supervised as mentioned above.

Q43: We consider that the terms used in this glossary facilitate the understanding of the further envisaged Principles.

Q44: We support the recommendations of ICGS on this point.