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 (Text with EEA relevance)

DIRECTIVE (EU) 2017/828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 50 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Directive 2007/36/EC of the European Parliament and of the Council[(3)] establishes requirements in relation to the exercise of certain shareholder rights attached to voting shares in relation to general meetings of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.

(2) The financial crisis has revealed that shareholders in many cases supported managers' excessive short-term risk taking. Moreover, there is clear evidence that the current level of 'monitoring' of investee companies and engagement by institutional investors and asset managers is often inadequate and focuses too much on short-term returns, which may lead to suboptimal corporate governance and performance.

(3) In its communication of 12 December 2012 entitled 'Action Plan: European company law and corporate governance — a modern legal framework for more engaged shareholders and sustainable companies', the Commission announced a number of actions in the area of corporate governance, in particular to encourage long-term shareholder engagement and to enhance transparency between companies and investors.

(4) Shares of listed companies are often held through complex chains of intermediaries which render the exercise of shareholder rights more difficult and may act as an obstacle to shareholder engagement. Companies are often unable to identify their shareholders.

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The identification of shareholders is a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights and shareholder engagement. This is particularly relevant in cross-border situations and when using electronic means. Listed companies should therefore have the right to identify their shareholders in order to be able to communicate with them directly. Intermediaries should be required, upon the request of the company, to communicate to the company the information regarding shareholder identity. However, Member States should be allowed to exclude from the identification requirement shareholders holding only a small number of shares.

(5) In order to achieve that objective, a certain level of information on shareholder identity needs to be transmitted to the company. That information should include at least the name and contact details of the shareholder and, where the shareholder is a legal person, its registration number or, if no registration number is available, a unique identifier, such as the Legal Entity Identifier (LEI code), and the number of shares held by the shareholder as well as, if requested by the company, the categories or classes of shares held and the date of their acquisition. The transmission of less information would be insufficient to allow the company to identify its shareholders in order to communicate with them.

(6) Under this Directive, the personal data of shareholders should be processed to enable the company to identify its existing shareholders in order to communicate directly with them, with a view to facilitating the exercise of shareholder rights and shareholder engagement with the company. This is without prejudice to Member State law providing for processing of the personal data of shareholders for other purposes, such as to enable shareholders to cooperate with each other.

(7) In order to enable the company to communicate directly with its existing shareholders with a view to facilitating the exercise of shareholder rights and shareholder engagement, the company and the intermediaries should be allowed to store personal data relating to the shareholders for as long as they remain shareholders. However, companies and intermediaries 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. Companies and intermediaries should therefore be allowed to store personal data until the date on which they have become aware of the fact that a person has ceased to be a shareholder and for a maximum period of 12 months after becoming aware of that fact. This is without prejudice to the fact that the company or intermediary may need to store the personal data of persons who have ceased to be shareholders for other purposes, such as ensuring adequate records for the purposes of keeping track of succession in title of the shares of a company, maintaining necessary records in respect of general meetings, including in relation to the validity of its resolutions, fulfilling by the company of its obligations in respect of the payment of dividends or interest relating to shares or any other sums to be paid to former shareholders.

(8) The effective exercise of shareholder rights depends to a large extent on the efficiency of the chain of intermediaries maintaining securities accounts on behalf of shareholders or of other persons, especially in a cross-border context. 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. This Directive aims to improve the transmission of information along the chain of intermediaries to facilitate the exercise of shareholder rights.

(9) In view of their important role, intermediaries should be obliged to facilitate the exercise of rights by shareholders, whether shareholders exercise those rights themselves or nominate a third person to do so. When shareholders do not want to exercise the rights themselves and have nominated the intermediary to do so, the latter should exercise those rights upon the explicit authorisation and instruction of the shareholders and for their benefit.

(10) It is important to ensure that shareholders who engage with an investee company by voting know whether their votes have been correctly taken into account. Confirmation of receipt of votes should be provided in the case of electronic voting. In addition, each shareholder who casts a vote in a general meeting should at least have the possibility to verify after the general meeting whether the vote has been validly recorded and counted by the company.

(11) In order to promote equity investment throughout the Union and to facilitate the exercise of rights related to shares, this Directive should establish a high degree of transparency with regard to charges, including prices and fees, for the services provided by intermediaries. Discrimination between the charges levied for the exercise of shareholder rights domestically and on a cross-border basis is a deterrent to cross-border investment and the efficient functioning of the internal market and should be prohibited. Any differences between the charges levied for the domestic and the cross-border exercise of shareholder rights should be allowed only if they are duly justified and reflect the variation in actual costs incurred for delivering the services by intermediaries.

(12) The chain of intermediaries may include intermediaries that have neither their registered office nor their head office in the Union. Nevertheless, the activities carried out by third-country intermediaries could have effects on the long-term sustainability of Union companies and on corporate governance in the Union. Moreover, in order to achieve the objectives pursued by this Directive, it is necessary to ensure that information is transmitted throughout the chain of intermediaries. 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. Third-country intermediaries which provide services with respect to shares of companies that have their registered office in the Union and the shares of which are admitted to trading on a regulated market situated or operating within the Union should therefore be subject to the rules on shareholder identification, transmission of information, facilitation of shareholder rights, and transparency and

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non-discrimination of costs to ensure the effective application of the provisions on shares held via such intermediaries.

(13) This Directive is without prejudice to national law regulating the holding and ownership of securities and arrangements maintaining the integrity of securities and does not affect the beneficial owners or other persons who are not shareholders under the applicable national law.

(14) Effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the different organs and different stakeholders. Greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including as regards environmental, social and governance factors, in particular as referred to in the Principles for Responsible Investment, supported by the United Nations. In addition, greater involvement of all stakeholders, in particular employees, in corporate governance is an important factor in ensuring a more long-term approach by listed companies that needs to be encouraged and taken into consideration.

(15) Institutional investors and asset managers are often important shareholders of listed companies in the Union and can therefore play an important role in the corporate governance of those companies, but also more generally with regard to their strategy and long-term performance. However, the experience of the last years has shown that institutional investors and asset managers often do not engage with companies in which they hold shares and evidence shows that capital markets often exert pressure on companies to perform in the short term, which may jeopardise the long-term financial and non-financial performance of companies and may, among other negative consequences, lead to a suboptimal level of investments, for example in research and development, to the detriment of the long-term performance of both the companies and the investors.

(16) Institutional investors and asset managers are often not transparent about their investment strategies, their engagement policy and the implementation thereof. Public disclosure of such information could have a positive impact on investor awareness, enable ultimate beneficiaries such as future pensioners optimise investment decisions, facilitate the dialogue between companies and their shareholders, encourage shareholder engagement and strengthen their accountability to stakeholders and to civil society.

(17) Institutional investors and asset managers should therefore be more transparent as regards their approach to shareholder engagement. They should either develop and publicly disclose a policy on shareholder engagement or explain why they have chosen not to do so. The policy on shareholder engagement should describe how institutional investors and asset managers integrate shareholder engagement in their investment strategy, which different engagement activities they choose to carry out and how they do so. The engagement policy should also include policies to manage actual or potential conflicts of interests, in particular situations in which the institutional investors or asset managers or their affiliated undertakings have significant business relationships with

the investee company. The engagement policy or the explanation should be publicly available online.

(18) Institutional investors and asset managers should publicly disclose information about the implementation of their engagement policy and in particular how they have exercised their voting rights. However, with a view to reducing the possible administrative burden, investors should be able to decide not to publish every vote cast if the vote is considered to be insignificant due to the subject matter of the vote or to the size of the holding in the company. Such insignificant votes may include votes cast on purely procedural matters or votes cast in companies where the investor has a very minor stake compared to the investor's holdings in other investee companies. Investors should set their own criteria regarding which votes are insignificant on the basis of the subject matter of the vote or the size of the holding in the company, and apply them consistently.

(19) A medium to long-term approach is a key enabler of responsible stewardship of assets. The institutional investors should therefore disclose to the public, annually, information explaining how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities and how those elements contribute to the medium to long-term performance of their assets. Where they make use of an asset manager, either through discretionary mandates involving the management of assets on an individual basis or through pooled funds, institutional investors should disclose to the public certain key elements of the arrangement with the asset manager, in particular 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 particular long-term liabilities, how it evaluates the asset manager's performance, including its remuneration, how it monitors portfolio turnover costs incurred by the asset manager and how it incentivises the asset manager to engage in the best medium to long-term interest of the institutional investor. This would contribute to a proper alignment of interests between the final beneficiaries of institutional investors, the asset managers and the investee companies and potentially to the development of longer-term investment strategies and longer-term relationships with investee companies involving shareholder engagement.

(20) Asset managers should give information to the institutional investor that is sufficient to allow the latter to assess whether and how the manager acts in the best long-term interests of the investor and whether the asset manager pursues a strategy that provides for efficient shareholder engagement. In principle, the relationship between the asset manager and the institutional investor is a matter for bilateral contractual arrangements. However, although big institutional investors may be able to request detailed reporting from the asset manager, especially if the assets are managed on the basis of a discretionary mandate, for smaller and less sophisticated institutional investors it is crucial to set a minimum set of legal requirements, so that they can properly assess, and hold to account, the asset manager. Therefore, asset managers should be required to disclose to institutional investors how their investment strategy and the implementation thereof contribute to the medium to long-term performance of the assets of the institutional investor or of the fund. That disclosure should cover