

Directie Financiële Markten

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Onderwerp
European recommendation on shareholders' rights

Dear Mr. McCreedy,

I would like to inform you of the Dutch position regarding two subjects in the field of shareholders' rights, namely securities lending and the role of intermediaries in the voting process. Securities lending is currently much discussed in the Netherlands, mostly in relation to the activities of hedge funds. The role of intermediaries in the voting process has been an issue of major importance for the Netherlands during the negotiation process on the Shareholders' rights directive. Therefore, I appreciate it very much that the Commission has taken quick action in the follow-up of the shareholders' rights directive. I have received the Commission's recent consultation document on shareholders' rights, which deals with securities lending and the role of intermediaries and with depository receipts. Hereafter, I will refer to some of the questions posed in this document.

This letter is also sent to you on behalf of the Minister of Justice and the Minister of Economic Affairs of the Netherlands.

Securities lending

Regarding securities lending, in the Netherlands questions have been posed by the market and the parliament, mostly about the exercise of shareholders' rights on borrowed securities by hedge funds, or by active shareholders. Securities lending has also been subject of the recent advice of the Dutch Monitoring Commission Corporate Governance Code (the Monitoring commission), which recommends that, although securities lending as such has positive effects on for example the liquidity of markets, the scope for discouraging securities lending for the (exclusive) purpose of acquiring voting rights should be investigated. In relation hereto, the Monitoring commission states that express attention should be paid to international developments.

In line with the above mentioned advice I would like to state that I believe that securities lending should be addressed at EU level, given the amount of cross-border securities transactions and cross-border possession of securities. Nowadays, securities in foreign corporations are often the subject of securities lending agreements. In order to assess which measures would be appropriate, further research on securities lending and possible other situations in which the economic and legal ownership of shares diverge is necessary. With regard to measures suggested in the consultation document, I would like to make a distinction between transparency measures and material provisions with regard to lending agreements.

With regard to the first I believe that more transparency is needed for parties to lending agreements. I can support the proposal in the consultation document that parties should be properly informed of the effect of the lending agreement, and that the investor should have explicitly agreed to his securities being used for securities lending, to prevent that financial intermediaries lend out securities on their own initiative. Next to those measures I think that it is useful that the market (for instance other shareholders and the companies) is being informed as well about securities lending transactions. I would like to suggest that the practicability and the effect of such transparency provisions will be included in the research carried out by the Commission with regard to a future recommendation.

Further, with regard to material provisions, I believe that the proposal in the consultation document that borrowed shares should not be voted is interesting. Nevertheless further thought needs to be given to such provision. Firstly, the right to vote is considered to be an essential right of the shareholder, and a provision that borrowed shares should not be voted would have far-reaching consequences for the system of company law and the validity of decisions of the general meeting. Secondly, an unwanted side-effect of such prohibition can be that votes are being lost, because neither the borrower, nor the lender can exercise the voting rights. And finally, the nature of such provision (a prohibition or a best practice) and the enforcement are important issues too. I would like to ask you that, in the research carried out by the Commission with regard to a future recommendation, special thought will be given to these questions.

The role of intermediaries

The issue of the role of intermediaries in the voting process remains of great importance to the Netherlands. Often investors (or beneficial owners) are unable to exercise the voting rights themselves and rely on the intermediary to do so. In this situation the investor should be able to control the exercise of the vote by the intermediary. At the moment, this is problematic in cross-border situations, as there are many intermediaries in the chain between investor and issuer, and different legal systems apply. Given the amount of cross-border securities transactions and cross-border possession of securities I believe that EU-wide actions are necessary. A recommendation on this issue would be a good first step.

With regard to the proposals for a recommendation made in the consultation document, I support that transparency to clients (investors) is needed on the ability to exercise shareholders' rights, before they enter into an agreement. I can also support the proposed provision that clients (investors) should be entitled to give voting instructions, while the intermediary should vote according to these instructions, or should pass on the instructions to an intermediary higher in the chain. However, I would like to suggest that the future recommendation also takes into account other ways to reach the objective that the ultimate investor is able to control the voting right. In this respect, I refer to the different options on p. 32 of the report on cross-border voting by the Expert Group chaired by Prof. J. Winter, published August 2002. It may for example be provided that the intermediary also

complies with this provision when he issues a proxy to the client (investor) to exercise the voting rights, under the condition that the client (investor) explicitly agrees with the issue of a proxy, instead of controlling the voting process by means of voting instructions.

Depository receipts

With regard to the proposal for depository receipts (or: depository certificates), I would like to remark that Dutch company law takes as a starting point that the shareholder has the right to vote. At the same time however, it is recognized that holders of depository receipts have an economic interest in the shares. This is why the Dutch legislation offers them the possibility to vote by proxy if they wish, except in certain situations, for instance in case of a hostile take-over bid.

To conclude I wish to express my support for a European recommendation on shareholders' rights. I am looking forward to further information on the future recommendation, for instance to the results of the research carried out with regard to the future recommendation. I hope that my remarks are of help in the further process, and I remain at your disposal for further information and cooperation.

Yours sincerely,

Wouter Bos

Minister of Finance of the Netherlands