DANISH COMMITTEE
ON CORPORATE GOVERNANCE

The Committee on
FOUNDATION GOVERNANCE

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Feedback on the evaluation and potential review of the Shareholder Rights Directive

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The Danish Committee on Corporate Governance and the Danish Committee on Foundation Governance (hereafter "The Committees") welcome any initiative aimed at strengthening the European Union's competitiveness, encouraging private investment, and reducing fragmentation across European capital markets. The Committees support efforts to remove barriers that currently hinder cross-border investment within the Single Market.

The Danish Committee on Corporate Governance has been established to issue and update the Danish recommendations on Corporate Governance applicable to Danish publicly traded companies to ensure that the recommendations are appropriate for such companies and comply with Danish and EU company law, the OECD's Principles of Corporate Governance, and recognized best practice on governance and the protection of investors.

The Danish Committee on Foundation Governance has been established to issue and update the Danish recommendations on Foundation Governance applicable to Danish commercial foundations to ensure that the recommendations are appropriate for such foundations, comply with Danish and EU law, and recognized best practice on foundation governance.

In listed Danish companies the main shareholder is in many cases a commercial foundation, and the Danish Committee on Foundation Governance therefore has an interest in the evaluation and potential review of the Shareholder Rights Directive (SRD).

In this context, the Committees welcome the opportunity to provide feedback on the evaluation and potential review of the SRD.

The transparency of proxy advisors

Proxy advisors have gained considerable prominence in the EU in recent years as an increasing number of institutional investors rely on their services to fulfil their obligations to actively monitor their investments. As a result, proxy advisors are seen as capable of exercising considerable influence on corporate decision-making globally, an influence that is increased by the fact that this service is mainly provided by only two major service providers, Glass Lewis and ISS, respectively, who are furthermore based outside the EU and for that reason are relative newcomers to the EU and its many different traditions of corporate governance.

Considering the increasing importance of the influence exercised by proxy advisors, the Committees therefore welcome further regulation of this service, and the Committees identify several issues related to the current use of proxy advisors that merit attention in the present review.

The main issue, in The Committees' view, is that the use of proxy advisors has become so widespread and centered around the two service providers that their voting recommendations hold considerable influence on establishing corporate governance practices. The recommendations of the two main service providers reflect a common perception of corporate governance that is often alien to national European systems, including our own Nordic governance tradition, and constitute a coordination of market power that is troubling as it prevents the institutional investors from making their own informed decisions, which was the express purpose of the legislation adopted by the SRD2 amendments.

It is particularly troubling that the recommendations of these proxy advisors pursue policy objectives that appear to be contrary to established norms of governance in both EU and national law, and unconnected to any empirical justification. One example is their unfavourable view of multiple voting shares, which are a well-known and respected feature of many EU Member States and now subject to general harmonisation in the EU by Directive (2024/2810), a view that is combined with recommendations to vote against the board on various issues where such structures are in place that are unconnected with the particular issues and thus without any justification besides the general animosity of these structures.

The importance that proxy advisors would come to play, when institutional investors were encouraged to become more active in their attendance of the general meetings of their many portfolio companies, was anticipated in the SRD2, which for that reason requires proxy advisors to adequately inform their clients about the accuracy and reliability of their activities and to publicly disclose, on an annual basis, certain information in relation to the preparation of their research, advice, and voting recommendations. These existing provisions were intended to ensure that the advice offered the institutional investors would reflect evidence-based recommendations to enhance risk-control and performance and not merely pursue purely policy considerations.

Although proxy advisors comply with the disclosure requirement, it is often unclear to what extent relevant local market and regulatory conditions have been taken into account and how these factors have influenced the recommendations. This should be crystal clear. Consequently, the Committees find it imperative that these requirements are further strengthened to increase the use and transparency of evidence-based recommendations. Any recommendation must provide a clear and transparent explanation that links the aim of a recommendation with the reasoning behind it and the consideration of local market conditions. Only in this way can the institutional investors rely on and make use of the recommendations in fulfilling their obligations of stewardship.

As a participant in a smaller market, the Committees observe that local market conditions are not sufficiently taken into account. Issues that mainly concerns the

governance in American companies, for instance different voting power for different share classes, which is a relative new phenomenon there and as such is still considered controversial, appears to affect the voting recommendations provided for use at the general meeting of Danish companies. This occurs despite the fact that Danish governance includes effective and successful regulation allowing multiple voting classes, and that minority shareholders are generally content with the level of minority protection available.

This especially becomes an issue when the same voting guidelines are being used for a large geographical area for which voting policies are designed by global proxy advisors, who may have no knowledge of the relevant local jurisdictions, like Danish corporate governance. If proxy advisors are not able to fully understand and navigate the applicable governance system in a jurisdiction, they should adjust their recommendations in that jurisdiction correspondently and abstain from simply applying one-size-fits-all standards taken from major jurisdictions like the USA. They should therefore disclosure to what extent they have considered local conditions. For this reason, it is important that the regulation in the SRD is tailored to ensure that all recommendations provided are evidence-based and fully transparent and to ensure appropriate measures for national competent authorities to uphold these standards vis-à-vis the service providers.

As a part of this, it is also necessary to establish a prescriptive conduct requirement concerning proxy advisors' dialogue with companies. This should include obliging proxy advisors to enter into such dialogue and to provide a minimum period of time for companies to review the draft reports regarding voting at their general meeting and, at a minimum, have the opportunity to correct factual errors and provide comments on the reports. Proxy advisors should make sure that they have the relevant staff and recourses for such dialog. Where a company may face recommendations that appear to violate the basic standard of justification and transparency required, they should have the opportunity and time to alert the national competent authorities to intervene.

For any new rules to be effective, it is also important to define what a proxy advisor is and when the rules will apply. Many proxy advisors offer a wide range of institutional services, which often makes it unclear in what capacity a proxy advisor is acting. A licensing system may be contemplated to ensure the sufficient transparency and compliance with EU law in this area. In this respect, it should be noted that it is not uncommon for the same proxy advisor to offer institutional services regarding proxy voting to a listed company of a consultancy nature, while simultaneously offering voting recommendations to institutional investors voting at the same listed company's general meeting. This presents an obvious conflict of interest when the same firm offers advice on how to organise a company and at the same time offers advice on how shareholders in that company should perceive the organisation of the company.

By extension, it is therefore also important to establish rules on how a proxy advisor should disclose any conflict of interest and to whom, so it becomes clear to the market if there is an issue. This could, if appropriate, be incorporated into a general code of conduct for proxy advisers that was adopted either as a Commission'

recommendation or on level 2 to the SRD. This kind of regulation is in no way new, it has been tried and adopted in respect of auditors, who were also increasingly seen as having a conflict of interest between their statutory obligations to audit accounts and their lucrative consultancy services.

The Committees therefore suggest a review of the Shareholder Rights Directive that should include the following:

- A clear definition of what a proxy advisor is (and what it is not, to provide clarity on to whom the rules apply, possibly based on an authorization requirement.
- Rules on disclosure of the reasoning behind a proxy advisors voting recommendations,
- Rules about that the voting recommendations and the reasoning behind these should be published well in advance of the general meeting.
- Rules that enable companies to engage with, correct and, if needed, challenge these recommendations well in advance of the general meeting.
- Rules on what would be considered a conflict of interest for a proxy advisor in respect of their proxy advice and any consultancy services rendered, and how and to whom this should be disclosed.
- Application of a code of conduct as to what is best practice for proxy advisors adopted either as a Commission recommendation or on level 2 to the SRD.

The format of general meetings and the rights exercised by shareholders in connection with those meetings

Danish company law already safeguards shareholder engagement, including a high degree of digital interaction, as well as minority protection, especially the avoidance of majority abuse, and the Committees supplement this framework in its recommendations. In line with this, the Committees generally recommend that the board of directors organizes the company's general meeting in a manner that allows shareholders, who are unable to attend the meeting in person or are represented by proxy at the general meeting, to vote and raise questions to the management prior to or at the general meeting. The Committees recommend that the board of directors ensures that shareholders can observe the general meeting via webcast or other digital transmission.

The Committees recommend that proxies and postal votes is used at the general meeting, enabling the shareholders to consider each individual item on the agenda and exercise their voting rights on an informed basis.

The Committees generally emphasize that the company's general meeting is organized in a way that allows shareholders to challenge the board. The Committees see no problems with this in regard to the Danish companies but is positive about initiatives that ensures that shareholder rights and legal certainty are also respected in the case of virtual participation in general meetings across the European Union.

The Committees support harmonization where this is done with due knowledge and respect of national governance systems such as Danish system and corporate governance framework and look forward to participating in this endeavour in any way that it can.