Memorandum: The possibility of simplifying the proxy voting process in Denmark

The proxy voting process in Denmark is both complicated and inefficient – and for foreign private investors it is close to impossible to exercise their administrative rights. But there is light at the end of the tunnel since the amended Shareholders' Rights Directive adopted in April 2017 aims at strengthening shareholders' engagement in European companies. Therefore, the Directive establishes requirements in relation to the exercise of shareholder rights at general meetings of companies.

The content of the amended Directive provide possibilities to simplify the proxy voting process in Denmark – but it requires that Danish lawmakers address the relevant issues and wish to make the necessary amendments to existing Danish laws.

Below it is outlined how the simplification can be realised and what to be aware of when changing the Danish regulation.

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Background

During recent years, the interest in Danish listed companies held by foreign shareholders has increased considerably. As at the end of 2017, 55 per cent of the share capital issued through VP SECURITIES A/S was registered to foreign owners. The vast majority of this capital is registered to nominee accounts[1] in the VP system. This means that the de facto foreign shareholder is not registered by name in the relevant company's register of shareholders even if the shareholder may want to be registered by name and thereby retain his administrative rights.

In 2017, it is estimated that more than 50,000 foreign shareholders, mainly institutional investors, tried to exercise active ownership in the Danish companies they invested in.

Unfortunately, the effectiveness of the current proxy voting practice is low as around 30 per cent of all voting instructions are dismissed for non-compliance with formalities – mainly due to failure to obtain a proxy. In practice, the barriers experienced by private foreign investors are so high that they prevent them from exercising their administrative rights in most cases. Therefore, compared to the participating interest held by the foreign investors in the companies, they are still under-represented at the general meetings when viewed broadly across the companies.

[1] Also referred to as omnibus accounts or pooled accounts

Current practice

Today, the administrative rights of foreign shareholders are governed by section 80 of the Danish Companies Act (*selskabsloven*). It is stated in the explanatory notes to the Act that if a shareholder is represented by a nominee, the nominee must present a written and dated proxy to be able to vote at general meetings. This is a continuation of the practice applying under the former Companies Act. Furthermore, the annotated Companies Act (2nd edition) p. 255, 2nd column, states in a comment on section 52(1) of the Act that it is assumed that the registration of a named nominee does not suffice in terms of the nominee being entitled to exercise the administrative rights on behalf of the shareholder.

The de facto shareholder must therefore issue a proxy with a right of substitution to the Danish custody bank of the nominee account holder to allow the nominee to vote as instructed by the shareholder. The Danish custody bank will then pass on the proxy instrument and voting instructions to the service provider assisting the company with the general meeting.

Possibilities offered by the new amendments to the Shareholder Rights Directive

One of the purposes of the Directive is to facilitate the exercise of shareholder rights (e.g. paras (8) and (9) of the preamble and Article 3c). The Directive provides that it must be ensured that the intermediaries, like for instance the nominee account holder, facilitate the exercise of the rights by the shareholder, including the right to vote at general meetings. This may be ensured using as a basis Article 13(4) of the original Directive, which has already been implemented into the Companies Act via section 104(3), which provides that a shareholder acting in a professional capacity on behalf of other natural or legal persons is entitled to exercise the voting rights attaching to some of the shares in a manner that is not identical with the exercise of the voting rights attaching to other shares. According to the explanatory notes to this provision, one example could be a custody bank acting on behalf of a number of account holders. This is exactly what a nominee account holder does.

As the legislature decided to use the designation "a shareholder" instead of "a proxy" in section 104(3), the provision must be assumed to be a shareholder rule and not a proxy rule.

The idea is thus to use section 104(3) of the Companies Act as a basis for the "nominee shareholder" and for the nominee shareholder, like all other shareholders, to be authorised by virtue of section 84 of the Companies Act by being registered in the register of shareholders on the date of registration. As will be seen from the above, the explanatory notes to section 80 of the Companies Act and the comments in legal literature currently prevent this scenario.

If the idea is implemented, the nominee account holder registered in the company's register of shareholders and thus authorised as a shareholder will be able to vote. No proxy will thus have to be presented.

The nominee account holder will still have to vote according to the voting instructions upon express authority and instructions from the de facto shareholder, see Article 3c(1)(b) of the amending Directive. Like today, this depends on an agreement being made between the shareholder and the nominee account holder who is the shareholder's designated representative in the register of shareholders.

This construction already exists as all shareholders, see section 36 of the existing Executive Order on Registration (until 31 December 2017, and after that date VP's rule book), can register any name they want as shareholder in the company's register of shareholders. When this is done, a shareholder is created in the register of shareholders who is a shareholder in his own name for the account of another, i.e. a nominee variant. Today, this "shareholder" can simply exercise his administrative rights without presenting a proxy.

Issues for consideration

There are a number of issues worth considering in relation to the possible change of practice within the area, and the most important are outlined below:

- **Is there a risk of power concentration with the nominee account holder?**
  There are no changes in the independent decision-making right of the nominee account holder. Like today, the nominee account holder will vote as instructed by the de facto shareholder, the only difference being that he will vote as a shareholder and not as a proxy. If the nominee shareholder acquires the right to vote at his own discretion, a notice of significant shareholdings will have to be issued pursuant to section 55 of the Companies Act.

- **Will there be less transparency as seen from the company's perspective?**
  Not as an immediate consequence, as according to Article 3c(2) of the amending Directive it must be ensured that the de facto shareholder can obtain confirmation of his vote having been duly registered. That can only be ensured if the nominee account holder is required to specify for which shareholders votes are cast and for how many shares and if the company registers the specific votes cast.

- **What if the company has a restriction on voting rights?**
  The "nominee shareholder" will be caught by the voting right restriction. This situation may be resolved by having the Companies Act provide that the voting right restriction on the nominee shareholder is to be counted on the underlying de facto shareholders. This is analogous to the proxy, who may represent two or more shareholders and thus vote beyond the voting right restriction.

- **Are there any relevant money laundering or KYC issues?**
  The Shareholder Rights Directive applies to companies admitted to trading on a regulated market. These companies' shares are all dematerialised through a securities centre and the shares exist on an

account with a bank and with the relevant securities centre. As regards the foreign shareholders, the shares are registered via a hierarchy of intermediaries who are all subject to public regulation and the relevant country's money laundering legislation. Money laundering of a given investor takes place before the business relationship becomes a reality and thus before the shares appear in the customer relationship and the administrative rights come into play.

- **Will the burden on the intermediaries increase?**
  The burden will decrease or remain the same depending on where in the hierarchy the specific intermediary is. However, incorporating/adjusting the relationship in the agreement between the de facto shareholder and his bank will take some work.

Are there any benefits from a change of practice?

If lawmakers take to opportunity to change the current proxy voting practice the following benefits should be achieved:

- The fact that the presentation of the proxy is abolished is deemed to increase effectiveness to nearly all instructions being included. Thus, in 2017, an additional 15,000 shareholders' voting instructions would have been included at the general meetings.
- The sharpness in determining de facto ownership and the attaching rights will improve. The reason for this is that in most situations the deadline for issuance of voting instructions will be several days after the date of registration.

If you have questions or want to discuss the content of the memorandum, please contact:

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