Directive (EU) 2017 / 828 Member State Options

The text of each Article with Member State options from Directive (EU) 2017/8283 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC4 as regards the encouragement of long-term shareholder engagement are inserted in the table that follows. The options in each Article are shown in ***bold italicised text.***

Please include your response in the space underneath the relevant option, to set out/explain your views on each. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

When responding, please indicate whether you are responding as an individual or representing the views of an organisation.

Contact Details

Name:	Regina Breheny
Organisation:	Irish Association of Investment Managers (IAIM)
Email Address:	reginabreheny@iaim.ie
Telephone Number:	+353 1 6761919

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ARTICLE 3A

Identification of shareholders

1. Member States shall ensure that companies have the right to identify their shareholders. ***Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %.***

Question: Should Ireland avail of this option? If so, should the percentage holding be set at 5% or lower? If lower, what percentage do you suggest? Please give reasons for your answers.

Response: Yes, Ireland should avail of this option. The percentage holding should be set at 5%. In fact, under Takeover Panel Rules and EU transparency legislation, the percentages are already set at 1% and 3% over which shareholders are obliged to disclose their interest.

2. Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity.

3. Where there is more than one intermediary in a chain of intermediaries, Member States shall ensure that the request of the company, or of a third party nominated by the company, is transmitted between intermediaries without delay and that the information regarding shareholder identity is transmitted directly to the company or to a third party nominated by the company without delay by the intermediary who holds the requested information. Member States shall ensure that the company is able to obtain information regarding shareholder identity from any intermediary in the chain that holds the information.

Member States may provide for the company to be allowed to request the central securities depository or another intermediary or service provider to collect the information regarding shareholder identity, including from the intermediaries in the chain of intermediaries and to transmit the information to the company.

Member States may additionally provide that, at the request of the company, or of a third party nominated by the company, the intermediary is to communicate to the company without delay the details of the next intermediary in the chain of intermediaries.

Question: Article 3a (3) subparagraphs two and three provide for Member State options. Do you consider either or both should be implemented? Please explain your reasons.

Response: We consider that both options should be implemented as we believe that they reflect both a reasonable approach and current best practice. However, IAIM does not represent intermediaries and cannot speak for them.

4. The personal data of shareholders shall be processed pursuant to this Article in order to enable the company to identify its existing shareholders in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company. Without prejudice to any longer storage period laid down by any sector-specific Union legislative act, Member States shall ensure that companies and intermediaries do not store the personal data of shareholders transmitted to them in accordance with this Article for the purpose specified in this Article for longer than 12 months after they have become aware that the person concerned has ceased to be a shareholder.

Member States may provide by law for processing of the personal data of shareholders for other purposes.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer. If your answer is in the affirmative, please specify "the other purposes" you consider the personal data of shareholders should be used for.

Response: No, this option should not be implemented.

(The remaining paragraphs of this Article do not contain Member State options and are not reproduced here.)

ARTICLE 3C

Facilitation of the exercise of shareholder rights

1. Member States shall ensure that the intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings, ***which shall comprise at least one of the following:***

(a) the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights;

(b) the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for the shareholder's benefit.

Question: Should (a) or (b) or both be available to intermediaries. Please explain your reasoning.

Response: IAIM does not speak for intermediaries. However, it seems reasonable that (b) should be available to intermediaries as this position more closely reflects current best practice.

2. Member States shall ensure that when votes are cast electronically an electronic confirmation of receipt of the votes is sent to the person that casts the vote. Member States shall ensure that after the general meeting the shareholder or a third party nominated by the shareholder can obtain, at least upon request, confirmation that their votes have been validly recorded and counted by the company, unless that information is already available to them.

Member States may establish a deadline for requesting such confirmation. Such a deadline shall not be longer than three months from the date of the vote.

Where the intermediary receives confirmation as referred to in the first or second subparagraph, it shall transmit it without delay to the shareholder or a third party nominated by the shareholder. Where there is more than one intermediary in the chain of intermediaries the confirmation shall be transmitted between intermediaries without delay, unless the confirmation can be directly transmitted to the shareholder or a third party nominated by the shareholder.

Question: Should Ireland provide for a deadline that is shorter than three months? If so, please explain the reasons for tour answer.

Response: No, the deadline should not be shorter than three months.

The remaining paragraph of the Article is not reproduced here as it relates to powers of the Commission to adopt Implementing Acts

ARTICLE 3D

Non-discrimination, proportionality and transparency of costs

1. Member States shall require intermediaries to disclose publicly any applicable charges for services provided for under this Chapter separately for each service.

2. Member States shall ensure that any charges levied by an intermediary on shareholders, companies and other intermediaries shall be non-discriminatory and proportionate in relation to the actual costs incurred for delivering the services. Any differences between the charges levied between domestic and cross-border exercise of rights shall be permitted only where duly justified and where they reflect the variation in actual costs incurred for delivering the services.

3. Member States may prohibit intermediaries from charging fees for the services provided for under this Chapter.

Question: Should Ireland avail of the option to prohibit the charging of fees?

Although it is mandatory for Member States to ensure that costs are non- discriminatory and proportionate, your views on how best this might be achieved would be welcome. Please also provide examples of the cost differences in the delivery of services that may arise between domestic and cross-border exercises of rights?

Response: No, Member States should not prohibit intermediaries from charging fees for the services provided for under this Chapter. Such a prohibition may well be unfair to those parties whose fee models provide for performance related activities and where cost recovery for ancillary services is a separate issue.

ARTICLE 3G

Engagement policy

1. Member States shall ensure that institutional investors and asset managers either comply with the requirements set out in points (a) and (b) or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements.

(a) Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. The policy shall describe how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement.

(b) Institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors. They shall publicly disclose how they have cast votes in the general meetings of companies in which they hold shares. Such disclosure may exclude votes that are insignificant due to the subject matter of the vote or the size of the holding in the company.

2. The information referred to in paragraph 1 shall be available free of charge on the institutional investor's or asset manager's website.

Member States may provide for the information to be published, free of charge, by other means that are easily accessible online.

Where an asset manager implements the engagement policy, including voting, on behalf of an institutional investor, the institutional investor shall make a reference as to where such voting information has been published by the asset manager.

Question: What 'other online means' apart, from the institutional investor's or asset manager's website, might be appropriate? Please provide specific examples.

Response: Other online means could include a link to the appropriate document or to the websites of appropriate service provider's, parent's or affiliates.

ARTICLE 3H

Investment strategy of institutional investors and arrangements with asset managers

1. Member States shall ensure that institutional investors publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

2. Member States shall ensure that where an asset manager invests on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking, the institutional investor publicly discloses the following information regarding its arrangement with the asset manager: (a) how the arrangement with the asset manager 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; (b) how that arrangement incentivises the asset manager to make investment decisions based on assessments about medium to long-term financial and non-financial performance of the investee company and to engage with investee companies in order to improve their performance in the medium to long-term; (c) how the method and time horizon of the evaluation of the asset manager's performance and the remuneration for asset management services are in line with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities, and take absolute long-term performance into account; (d) how the institutional investor monitors portfolio turnover costs incurred by the asset manager and how it defines and monitors a targeted portfolio turnover or turnover range; (e) the duration of the arrangement with the asset manager. Where the arrangement with the asset manager does not contain one or more of such elements, the institutional investor shall give a clear and reasoned explanation why this is the case.

3. The information referred to in paragraphs 1 and 2 of this Article shall be available, free of charge, on the institutional investor's website and shall be updated annually unless there is no material change.

Member States may provide for that information to be available, free of charge, through other means that are easily accessible online.

Member States shall ensure that institutional investors regulated by Directive 2009/138/EC are allowed to include this information in their report on solvency and financial condition referred to in Article 51 of that Directive.

Question: What 'other online means' might be appropriate? Please provide specific examples.

Response: IAIM does not represent "institutional investors" as defined and cannot speak on their behalf. However, we suggest that other online means could include a link to the appropriate document (contract) or to the website of the appropriate asset manager.

ARTICLE 3I

Transparency of asset managers

1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. Such disclosure shall include reporting on the key material medium to long-term risks associated with the investments, on portfolio composition, turnover and turnover costs, on the use of proxy advisors for the purpose of engagement activities and their policy on securities lending and how it is applied to fulfil its engagement activities if applicable, particularly at the time of the general meeting of the investee companies. Such disclosure shall also include information on whether and, if so, how, they make investment decisions based on evaluation of medium to long-term performance of the investee company, including non-financial performance, and on whether and, if so, which conflicts of interests have arisen in connection with engagements activities and how the asset managers have dealt with them.

2. Member States may provide for the information in paragraph 1 to be disclosed together with the annual report referred to in Article 68 of Directive 2009/65/EC5 or in Article 22 of Directive 2011/61/EU6, or periodic communications referred to in Article 25(6) of Directive 2014/65/EU.7

Where the information disclosed pursuant to paragraph 1 is already publicly available, the asset manager is not required to provide the information to the institutional investor directly.

Question: Do you consider there is a benefit to linking the information to be disclosed with the referenced annual report publications and periodic communications? If so, please explain the reason for your answer?

Response: There is no benefit to linking the information to be disclosed with the referenced annual report publications and periodic communications. The issue is materiality, many investors would not exercise voting rights because the shareholding is too small.

3. Member States may where the asset manager does not manage the assets on a discretionary client-by-client basis, require that the information disclosed pursuant to paragraph 1 also be provided to other investors of the same fund at least upon request.

Question: Do you consider this option should be implemented, and if so, please explain the reasons for your answer.

Response: No, once again materiality is the issue.

ARTICLE 9A

Right to vote on the remuneration policy

1. Member States shall ensure that companies establish a remuneration policy as regards directors and that shareholders have the right to vote on the remuneration policy at the general meeting.

2. Member States shall ensure that the vote by the shareholders at the general meeting on the remuneration policy is binding. Companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been approved by the general meeting. Where no remuneration policy has been approved and the general meeting does not approve the proposed policy, the company may continue to pay remuneration to its directors in accordance with its existing practices and shall submit a revised policy for approval at the following general meeting. Where an approved remuneration policy exists, and the general meeting does not approve the proposed new policy, the company shall continue to pay remuneration to its directors in accordance with the existing approved policy and shall submit a revised policy for approval at the following general meeting.

3. However, Member States may provide for the vote at the general meeting on the remuneration policy to be advisory. In that case, companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been submitted to such a vote at the general meeting. Where the general meeting rejects the proposed remuneration policy, the company shall submit a revised policy to a vote at the following general meeting.

Question: Do you consider the vote should be binding or advisory? Please explain the reasons for your answer and give examples to support the position.

Response: The vote should be advisory. In general, transparency is ensured as Listing rules provide that the remuneration policy be detailed in the annual accounts that are approved by shareholders. In addition, the Corporate Governance Code provides recommended details of the principles and provisions related to remuneration policy. The Code specifically provides that "Shareholders should be invited specifically to approve all new long-term incentive schemes (as defined in the Listing Rules26) and significant changes to existing schemes, save in the circumstances permitted by the Listing Rules". We believe that there is already sufficient oversight.

4. Member States may allow companies, in exceptional circumstances, to temporarily derogate from the remuneration policy, provided that the policy includes the procedural conditions under which the derogation can be applied and specifies the elements of the policy from which a derogation is possible.

Exceptional circumstances as referred to in the first subparagraph shall cover only situations in which the derogation from the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability.

Question: Do you consider this option should be implemented, and if so, please explain the reasons for your answer. Please give examples of what you consider 'exceptional circumstances'?

Response: **Yes, this option should be implemented. An exceptional circumstance could be where the company is experiencing financial/cash flow difficulties or where significant changes in the business model occurs.**

The remaining paragraphs of this Article do not contain Member State options

ARTICLE 9B

Information to be provided in and right to vote on the remuneration report

1. Member States shall ensure that the company draws up a clear and understandable remuneration report, providing a comprehensive overview of the remuneration, including all benefits in whatever form, awarded or due during the most recent financial year to individual directors, including to newly recruited and to former directors, in accordance with the remuneration policy referred to in Article 9a. Where applicable, the remuneration report shall contain the following information regarding each individual director's remuneration: (a) the total remuneration split out by component, the relative proportion of fixed and variable remuneration, an explanation how the total remuneration complies with the adopted remuneration policy, including how it contributes to the long-term performance of the company, and information on how the performance criteria were applied; (b) the annual change of remuneration, of the performance of the company, and of average remuneration on a full-time equivalent basis of employees of the company other than directors over at least the five most recent financial years, presented together in a manner which permits comparison; (c) any remuneration from any undertaking belonging to the same group as defined in point (11) of Article 2 of Directive 2013/34/EU of the European Parliament and of the Council (*11); (d) the number of shares and share options granted or offered, and the main conditions for the exercise of the rights including the exercise price and date and any change thereof; (e) information on the use of the possibility to reclaim variable remuneration; (f) information on any deviations from the procedure for the implementation of the remuneration policy referred to in Article 9a(6) and on any derogations applied in accordance with Article 9a(4), including the explanation of the nature of the exceptional circumstances and the indication of the specific elements derogated from.

2. Member States shall ensure that companies do not include in the remuneration report special categories of personal data of individual directors within the meaning of Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council (*12) or personal data which refer to the family situation of individual directors.

3. Companies shall process the personal data of directors included in the remuneration report pursuant to this Article for the purpose of increasing corporate transparency as regards directors' remuneration with the view to enhancing directors' accountability and shareholder oversight over directors' remuneration. Without prejudice to any longer period laid down by any sector-specific Union legislative act, Member States shall ensure that companies no longer make publicly available pursuant to paragraph 5 of this Article the personal data of directors included in the remuneration report in accordance with this Article after 10 years from the publication of the remuneration report

Member States may provide by law for processing of the personal data of directors for other purposes.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer. If your answer is in the affirmative, please specify "the other purposes" you consider the personal data of directors should be used for.

<u>Response:</u> No, this option should not be implemented. Presumably GDPR will apply here.

4. Member States shall ensure that the annual general meeting has the right to hold an advisory vote on the remuneration report of the most recent financial year. The company shall explain in the following remuneration report how the vote by the general meeting has been taken into account.

However, for small and medium-sized companies as defined, respectively, in Article 3(2) and (3) of Directive 2013/34/EU, Member States may provide, as an alternative to a vote, for the remuneration report of the most recent financial year to be submitted for discussion in the annual general meeting as a separate item of the agenda. The company shall explain in the following remuneration report how the discussion in the general meeting has been taken into account.

Question: Do you consider this option for SMEs should be implemented, and if so, please explain the reasons for your answer.

Response: No, we do not consider that this option for SMEs should be implemented. The Directive applies to listed companies. It is not necessary to extend this to unlisted SMEs thus creating an unnecessary burden on the unlisted SME where the number and scope of shareholdings are limited.

The remaining paragraphs of this Article do not contain Member State options.

ARTICLE 9C

Transparency and approval of related party transactions

1. Member States shall define material transactions for the purposes of this Article, taking into account: (a) the influence that the information about the transaction may have on the economic decisions of shareholders of the company; (b) the risk that the transaction creates for the company and its shareholders who are not a related party, including minority shareholders.

When defining material transactions Member States shall set one or more quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation, including equity, or turnover of the company or take into account the nature of transaction and the position of the related party.

Member States may adopt different materiality definitions for the application of paragraph 4 than those for the application of paragraphs 2 and 3 and may differentiate the definitions according to the company size.

Questions: What is your understanding of 'material transaction'?

What quantitative ratios may be appropriate to set?

Should different ratios be applied for the purposes of paragraph 4 below?

Should definitions be differentiated by company size?

Please give reasons for your answer(s).

Response (s): **A transaction is material if its omission or misstatement could influence the economic decisions of users taken on the basis of the financial statements (IASB Framework).**

Within the accountancy industry such ratios are not prescribed. However commonly used "rules of thumb" include 1% of income or 5% of profit. Listing Rules prescribe for an impact of 25%+ for Class 1 transactions and an impact of 5%-25% for Class 2 transactions. Consideration needs to be given to the nature of the transaction and whether or not it occurs in the normal course of business.

No, different ratios should not be applied for the purposes of paragraph 4 below.

No, definitions should not be differentiated by company size.

2. Member States shall ensure that companies publicly announce material transactions with related parties at the latest at the time of the conclusion of the transaction. The announcement shall contain at least information on the nature of the related party relationship, the name of the related party, the date and the value of the transaction and other information necessary to assess whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders.

3. Member States may provide for the public announcement referred to in paragraph 2 to be accompanied by a report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders, and explaining the assumptions it is based upon together with the methods used. The report shall be produced by one of the following:

(a) an independent third party;

(b) the administrative or supervisory body of the company;

(c) the audit committee or any committee the majority of which is composed of independent directors.

Member States shall ensure that the related parties do not take part in the preparation of the report.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer.

Response: No, we believe the approach needs to be aligned with the requirements contained in Chapter 8 of the Listing Rules, in particular LR8.1.7 where related party transactions are adequately covered, and an additional report is not required. Any divergence from the rules as they currently apply would not be of benefit. The requirement to produce a report could lead to a potential delay in the release of information to the market. This would be of particular concern if details of the related party transaction are deemed to be inside information under the Market Abuse Regulation (MAR).

4. Member States shall ensure that material transactions with related parties are approved by the general meeting or by the administrative or supervisory body of the company according to procedures which prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of the shareholders who are not a related party, including minority shareholders.

Member States may provide for shareholders in the general meeting to have the right to vote on material transactions with related parties which have been approved by the administrative or supervisory body of the company.

Where the related party transaction involves a director or a shareholder, the director or shareholder shall not take part in the approval or the vote.

Member States may allow the shareholder who is a related party to take part in the vote provided that national law ensures appropriate safeguards which apply before or during the voting process to protect the interests of the company and of the shareholders who are not a related party, including minority shareholders, by preventing the related party from approving the transaction despite the opposing opinion of the majority of the shareholders who are not a related party or despite the opposing opinion of the majority of the independent directors.

Question: Do you consider either or both these options should be implemented? Please explain the reasons for your answer.

<u>Response:</u> In general, No. Shareholders should be informed but should only have the right to vote where the transaction is outside the normal course of events. A shareholder who is a related party should not take part in the vote.

5. Paragraphs 2, 3 and 4 shall not apply to transactions entered into in the ordinary course of business and concluded on normal market terms. For such transactions the administrative or supervisory body of the company shall establish an internal procedure to periodically assess whether these conditions are fulfilled. The related parties shall not take part in that assessment.

However, Member States may provide for companies to apply the requirements in paragraph 2, 3 or 4 to transactions entered into in the ordinary course of business and concluded on normal market terms.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer.

<u>Response:</u> No, we do not consider that this option should be implemented. Oversight by a professional Board should be sufficient.

6. Member States may exclude, or may allow companies to exclude, from the requirements in paragraphs 2, 3 and 4:

(a) transactions entered into between the company and its subsidiaries provided that they are wholly owned or that no other related party of the company has an interest in the subsidiary undertaking or that national law provides for adequate protection of interests of the company, of the subsidiary and of their shareholders who are not a related party, including minority shareholders in such transactions;

(b) clearly defined types of transactions for which national law requires approval by the general meeting, provided that fair treatment of all shareholders and the interests of the company and of the shareholders who are not a related party, including minority shareholders, are specifically addressed and adequately protected in such provisions of law;

(c) transactions regarding remuneration of directors, or certain elements of remuneration of directors, awarded or due in accordance with Article 9a;

(d) transactions entered into by credit institutions on the basis of measures, aiming at safeguarding their stability, adopted by the competent authority in charge of the prudential supervision within the meaning of Union law;

(e) transactions offered to all shareholders on the same terms where equal treatment of all shareholders and protection of the interests of the company is ensured.

Question: Should any or all the above transactions be excluded from the transparency requirements? Please give reasons for your answer. Please identify areas in national law that would result in the duplication of reporting requirements. Please provide specific examples.

<u>Response:</u> All of the above transactions should be excluded from the transparency requirements.

7. Member States shall ensure that companies publicly announce material transactions concluded between the related party of the company and that company's subsidiary.

Member States may also provide that the announcement is accompanied by a report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders and explaining the assumptions it is based upon together with the methods used. The exemptions provided in paragraph 5 and 6 shall also apply to the transactions specified in this paragraph.

Question: Do you consider there is added value in the publication of a report? Please explain the reasons for your answer.

Response: **No, we believe the approach needs to be aligned with the requirements contained in Chapter 8 of the Listing Rules where related party transactions are adequately covered and an additional report is not required.**