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**VOTING IN
AN EUROPEAN CONTEXT:**

**THE GENESIS OF
THE EU 2007/36
SHAREHOLDERS RIGHTS
DIRECTIVE**

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Institut Luxembourgeois
des Administrateurs

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The “Better Regulation” principle in action: Shareholders’ rights: a first public consultation.



- General objective: there is a need for enhancing shareholders’ rights in listed companies: right to ask questions, to table resolutions, to vote in absentia and to participate in general meetings via electronic means.
- Assumptions:
 - when companies are properly accountable to shareholders, there is less need for regulation [European versus American models of principles based or rules based company regulation].
 - Cost of capital is reduced as cross-border investment is facilitated.
- A first consultation was launched in 09/2004 on minimum standards at EU level.
- Responses generally:
 - Identifying existing national legal or practical obstacles to cross-border investment.
 - Concluding that non-resident investors have more difficulties exercising their rights than resident investors
 - Supporting EU initiative in this domain. Thus second more detailed consultation.

The 1st Consultation on shareholders' rights: coming with 5 basic sets of questions



- What do we **before** the General Meeting ?
- **Who** may participate in the General Meeting ?
- How and under what conditions may we use **proxies** ?
- What do we do **during** the General Meeting ?
- What do we do **after** the General Meeting ?



Keeping the momentum on shareholders' rights: a second public consultation [07/2005][1/10]



- **Scope:**

Applicable to companies formed under EC laws and whose securities are admitted to trading on an EU regulated market [excluding UCITS]

- **Ultimate investor**

Do you consider that there is a need to define the “ultimate investor” or “ultimate accountholder” as a legal enforceable right to direct how votes attached to shares credited to their accounts are cast is a prerequisite to cross-border voting?

- **Stock lending or issuance of Depositary Receipts**

Is the exercise of voting rights to be affected by stock lending or by issuance of depositary receipts?

Should minimum information standards be adopted?

Should holders of depositary receipts have alone the right to determine how the voting rights attached to the underlying shares represented by depositary receipts be exercised ?



A second public consultation [07/2005][2/10]: Pre-General Meeting Communications



- **Minimum notice period**

Should there be a minimum notice period for convening general assemblies? If so which one? If so should there be a difference between annual ordinary GM and extraordinary GM?

- **Minimum contents of notice**

Should assemblies notice indicate precisely the time, place and agenda of meeting and give precise description of voting procedures and requirements [including forms to vote by correspondence or by proxy]? Should it indicate where full unabridged text of resolutions and documents may be obtained?

- **Information relevant to the General Meeting:**

Do you agree that the full text of the resolutions and documents related to the agenda items and intended to be submitted to the General Meeting should be made available? If so, do you agree on a minimum time delay of 15 business days for Ordinary General Assembly and 10 business days for Extraordinary General Assemblies?



A second public consultation [07/2005][3/10]: Pre-General Meeting Communications



- **Dissemination and language of notice and materials**

Do you agree that any notice and any document shall be made available [*not only in the official language of the Member State but also*] in a language customary to the sphere of international finance, unless the GM decides otherwise?

- **Specific section of the issuer's website dedicated to the General Meeting**

Do you agree that Member States shall ensure that issuers post on their website the information relevant to the General Meetings at the same time as such notices are published and/or sent to issuers' shareholders ?

A second public consultation [07/2005][4/10]: Admission to the General Meeting



- **Admission to the General Assembly – Share blocking**

Do you agree to abolish to make the right to vote conditional on the immobilization of the corresponding shares for any period before the Meeting? [*Blocking shares*]

Do you agree that the right to vote at the General Meeting of a listed company shall be made conditional upon qualifying as a shareholder of that listed company on a given date prior to the relevant General Meeting? [*Record date*]



A second public consultation [07/2005][5/10]: Shareholders rights at the General Meeting



- **Electronic participation in General Meetings**

Do you agree that Member States should remove existing requirements that could act as barrier to the development of the participation of shareholders to the General Assembly by electronic means.

- **Right to ask questions**

Do you agree that shareholders shall have the right to ask questions at least in writing ahead of the General Meeting and obtain responses to their questions. Responses shall be made available to all investors.

Do you agree that the above principles are without prejudice to the measures which Member States may take [...] to ensure the good order of the General Meetings, the protection of confidentiality and the strategic interest of issuers.

A second public consultation [07/2005][6/10]: Shareholders rights at the General Meeting



- **Rights to add items to the agenda and table resolutions**

Do you agree with the following minimum standard? If not, please give your reasons.

1. Shareholders, acting individually or collectively, shall have the right to add items on the agenda of General Meetings and table resolutions at General Meetings. Such rights may be subject to the condition precedent that the relevant shareholder or shareholders hold a minimum stake in the share capital of the issuer.
2. Such minimum stake shall not exceed 5% of the share capital of the issuer or a value of € 10 million, whichever is the lower.
3. Such rights must be exercised sufficiently in advance of the date of the General Meeting, to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of the General Meeting.

- **Voting by correspondence**

Do you agree with the following minimum standard? Please give your reasons.

1. Member States shall ensure that shareholders of listed companies have the possibility to vote by correspondence.
2. Member States shall remove existing requirements [...] on companies which hinder or prohibit voting by electronic means at GM.

A second public consultation [07/2005][7/10]

On proxy voting



- **Proxy voting**

Do you agree with any, each, all, or the following minimum standards? [...]

1. Every shareholder shall have the right to appoint any other natural or legal person as a proxy to attend any General Meeting on his behalf.
2. No constraint or limitations shall be imposed other than provisions relating to the legal capacity of the person. In particular, [...] on persons who can be appointed as proxies and on the number of proxies any such person may hold.
3. [One] shall not be prevented from appointing representatives by electronic means.
4. Persons appointed as proxies shall enjoy the same rights to speak and ask question in General Meetings as those to which the shareholders they represent are entitled.
5. Issuers shall not themselves collect proxies in advance of General Meetings but shall entrust independent third parties with such collection.
6. All votes cast on each resolution submitted to a General Meeting shall be taken into account, irrespective of the means by which the votes are cast.

Do you consider that it would be appropriate to set up an EU proxy form [...] ?

A second public consultation [07/2005] [8/10]

On intermediaries in cross-border voting process



- **Definition of intermediary**

Do you agree that a legal or natural person who, as part of a regular activity, maintains securities accounts for the account of other legal or natural persons shall be considered as an intermediary. An intermediary may also maintain securities accounts for its own account.

- **Registration as nominee**

Do you agree that whenever an intermediary is registered as a shareholder in respect of shares which he/she/it actually holds for the account of another legal or natural person, a mention should be added in the relevant companies' shareholders registers that such intermediary hold the shares for the account of another person.

- **Being granted power of attorney**

Do you agree that where an intermediary is a shareholder in relation to shares which the intermediary holds for the account of another legal or natural person, that other legal or natural person shall have the right to be given a power of attorney by the intermediary to attend the General Meeting and act at the General Meeting as if he/she/it were a shareholder.



A second public consultation [07/2005] [9/10] On intermediaries in cross-border voting process



- **Voting upon instructions**

Do you agree with the following minimum standards?

1. Member States shall allow intermediaries to hold shares on behalf of their clients in collective or individual accounts.
2. Intermediaries shall have the right to cast votes upon their clients express instructions.
3. Where intermediaries hold on behalf of their clients shares in collective accounts, they shall be able to cast split votes. Do you agree that a legal or natural person who, as part of a regular activity, maintains securities accounts for the account of other legal or natural persons shall be considered as an intermediary. An intermediary may also maintain securities accounts for its own account.

A second public consultation [07/2005] [10/10] On communications following the General Meeting



- **Dissemination of the voting results**

Do you agree with the following minimum standard?

1. Within a reasonable period of time which shall not exceed **one month** following the General Meeting, the issuer shall make available to all shareholders information on the results of the votes on each resolution tabled at the General Meeting.
2. Such information, which shall include for each resolution, the number of voters, the number of voted shares, the percentages and numbers of votes in favour and against of each resolution and the percentages and numbers of abstentions, shall be posted on the issuer's website.



SECTION 3. [2/4]

European initiatives on behalf of Shareholders Rights

- The 2 consultations on shareholders rights
- Responses to the second consultation
- The current EC Directive 2007/36/EC on shareholders rights
- Future evolutions: possible EC recommendations



2nd Consultation: 146 responses from 19 countries: As many issuers as investors [institutional & private]



- **Scope:**
R/: 90% in favor of limiting it to publicly listed companies.
- **Concept of “ultimate investors/accountholders”**
R:/ Over 60% consider that granting direct rights to “ultimate investors” is not a pre-requisite to facilitate cross-border voting.
- **Stock lending minimum information standard**
R:/ Just over half in favor of proposed minimum information standard for every lending transaction. Plus significant number in favor of general “framework lending agreement”
- **Exercise of voting rights of shares under depositary receipts agreements to be determined by holder of depositary receipts.**
R:/ Just under a third in favor. Many qualified opinions.

2nd Consultation on shareholders rights: [2/7]

On Pre-general meeting communications



- **Minimum General Meetings notice period [OGM at 21 business days; EGM at 10 business days].**
R/ An overwhelming majority in favor of one set of minimum notice periods, but:
 - Disagreement on the choice of period, but most opinions around one month.
 - Many disagreed on making difference between ordinary annual and extraordinary general meetings.
- **On contents of the GM notice**
R:/ An overwhelming majority in favor of set a minimum notice content, but:
 - EC proposal is deemed insufficient. It should be completed by elements such as record date.
 - Resolutions should be sent to every recorded investors, not simply be made available.



On Pre-general meeting communications

- **On information relevant to GM [full text of documents at latest 15/10 days]**
R:/ Above 80-85% welcome or do not oppose introducing some standards but wide disagreement on either deadlines or on suggested contents. Some are insisting on electronic availability. Others are pointing to documents such as the corporate governance statement, explanatory memorandum or voting recommendations on resolutions, etc
- **On dissemination and language [at least in a language customary in the sphere of international finance].**
R:/ Fifty-fifty. Respondents against regulation are favoring leaving this issue in the hands of issuers and market discipline.
- **On admission to the GM: abolition of share blocking / Record date.**
R:/ 85% favorable. 5% in disagreement.
A third are taking stand on the Europe wide determination of the record date with diverging opinions such as [i] as close to GM as possible, [ii] longer period [between 10 to 30 days], [iii] leaving the matter to every single Member States.

2nd Consultation on shareholders rights: [4/7]

On exercise of shareholders rights at the GM



- **On electronic participation**

R:/ 80-85% support it. 7% oppose it.

Comments on shareholders identification and electronic security. Availability and reliability of electronic voting. Wider questions of vote “in absentia”.

- **On right to ask questions**

R:/ About two third of respondents support or do not oppose to a minimum standard. A quarter oppose it in principle but warnings on risk of abuse thus mitigation with arguments on relevance to agenda, on written form, on minimum shareholding, etc.

- **On rights to add items on agenda and table resolutions.**

R:/ Three quarters in support of minimum standards in principles, but:

- Several consider the 5% threshold too high [Plus possibilities for collective representation]
- Same remarks on the Euro 10 millions value threshold.
- Other are suggesting minimum deadline for submitting items [like 7 days after convening date].



2nd Consultation on shareholders rights: [5/7]

On exercise of shareholders rights at the GM



- **On voting by correspondence and electronically [removal of obstacles]**

R:/ Majority of respondents is positive. Opposition is based on comparative operational efficiency of proxy voting versus correspondence voting. Plus legal issues on votes not cast during general meetings.

- **On proxy voting [right to appoint a proxy]**

R:/ Overwhelming support for standards:

- More than 80% on standard n°1 [right to appoint], 2 [no limitations on proxy] and 4 [equality of rights of proxy and shareholders]
- More than 65% on standard n°3 [electronic appointment] and 6 [all votes taken into account be proxy or others]
- A majority of respondents [more than 50%] oppose standard n°5 [issuers shall not collect proxies and shall entrust such task to independent third parties]
- No clear support for the creation of an European proxy form.



On position of intermediaries

- **On definition of intermediaries**

R:/ Majority in favor. Some suggestions in favor of requirement of professional nature or regulated license of intermediaries.

- **On registration as nominee [explicit mention in the registrar]**

R:/ About half in support. However about one third oppose proposal.

- **On being granted power of attorney.**

R:/ Majority favorable.

- **On voting upon instructions [collective or individual accounts; cast vote upon express instructions; possibilities to cast split votes]**

R:/ All proposals are supported by a majority of respondents.

2nd Consultation on shareholders rights: [7/7]

On communications following general meetings



- **On dissemination of voting results [one month deadline; voting analysis + website]**

R: 70% in favor. 5% oppose it.

Comments on:

- Shortening the deadline.
- Questioning the relevance of some voting statistics
- Avoid requirement to send post GM information to every shareholders.



SECTION 4. [3/4]

European initiatives on behalf of Shareholders Rights

- The 2 consultations on shareholders rights
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- Future evolutions: possible EC recommendations



After a full “Better Regulation” process, a new Directive without too many surprises. [1/5]



Some clarifications:

- No mention of “ultimate investors” concept
- On security lending, reference to best practices, including ICGN standards.
- Exclusion of holders of depositary receipts.
- Clarified meaning of “proxy”
- Reminder that minimum standards do not preclude Member States to maintain or introduce provisions which are more favorable to shareholders.



After a full “Better Regulation” process, a new Directive without too many surprises. [2/5]



Article 1: Scope

- As expected: registered office and listed in MS.
Possible exemption for UCITS, CIS and cooperative societies.

Article 2: Definitions

- As expected

Article 3: More stringent national requirements

- As expected [May not prevent MS from imposing further obligations...]

Article 4: Equal treatment of shareholders

- As expected

Article 5: General meeting notice

- On general meeting notice and contents:
OK. 21 * days are adopted with no difference between OGM and EGM.
Electronic posting. Proxy forms are to be made electronically available.
- On language dissemination: no mention

* *Reduced to 14 days if electronic mean*



After a full “Better Regulation” process, a new Directive without too many surprises. [3/5]



Article 6: Right to add items to agenda and to table resolutions

- Principle and thresholds [relative and absolute] agreed as expected, ie documented, minimum stake set by MS [not higher than 5%], deadline set by MS,

Article 7: Admission to the general meeting

- As expected, prohibition of share blocking and adoption of record date.
- Setting of record date made by Member States, but not longer than 30 days, but possible difference between bearer and registered shares,
Each Member State will publish such date in the Official Journal of the EU

Article 8: Participation by electronic means

- As expected plus requirement of electronic and identification security.

Article 9: Right to ask questions

- As expected with clause to ensure the good order of general meeting and web availability of all questions and responses. Plus requirement of identification security, confidentiality and business interest.



After a full “Better Regulation” process, a new Directive without too many surprises. [4/5]



Article 10: Proxy voting

- As expected except that Member States may exclude voting rights from proxies in case of
 - Business, family or other relationships of the issuer
 - Being the controlling shareholder of the issuer
 - Belonging to the administrative, management or supervisory body of the issuer.
 - Employed or auditor of the company.

Article 11: Appointment of proxy holders

- As expected

Article 12: Voting by correspondence

- As expected

Article 14: Voting results

- As expected.
- As expected with deadline for publication on internet set at 15 calendar days and statistics limited to number of cast votes and percentages in favor and against each resolutions.

After a full “Better Regulation” process,
a new Directive without too many surprises. [5/5]



Article 15: Transposition

- Longer than expected: deadline August, 3rd 2009



SECTION 5. [4/4]

European initiatives on behalf of Shareholders Rights

- The 2 consultations on shareholders rights
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Unresolved questions:

Some further works: on stock lending



- **Alternatives:**

- Either maintain the present situation and leave it to market practices.
- Or introduce minimum standards of information [awareness of consequence of lending on voting rights]

- **Results of third consultation.**

A majority considers that stock lending, and in particular the borrowing of stock to vote in general meetings, should be addressed at EU level. [] Many respondents highlight the importance of stock lending in ensuring market liquidity and warn of measures that could reduce the attractiveness of stock lending. Respondents are generally opposed the suggestion that borrowers of stock should only vote if they obtain voting instructions from the lenders of the stock.

Unresolved questions:

Some further works: on depositary receipts



- **Alternatives:**

- Either maintain the present situation and rely on professional holders.
- Or grant them equal right as shareholders

- **Results of third consultation.**

A majority of respondents support the principle that depositary receipt holders, who alone run the financial risk of the investment, should have a right to direct how the votes attaching to the underlying shares are to be cast



Unresolved questions:

Some further works: on the utilization of languages



- **Alternatives:**

- Either maintain the present situation [often national language only]
- Or introduce a mandatory second financial communication language.

- **Results of third consultation.**

Support for an EU intervention in this field is not very strong, as large listed companies tend to translate their meeting documents on a voluntary basis and stock exchange rules often provide for the translation of meeting documents. The carve-out for smaller listed companies is well received on principle but raises doubts among many respondents as to its implementation.



Unresolved questions: Results of third consultation on other issues



- ***Duties of intermediaries.***

A large majority of respondents considers that EU action is needed in this area, notably to enhance transparency, ensure that intermediaries fulfil their duties in the voting process and keep records of instructions. []

- ***Disclosure of investors.***

A majority of respondents considers that the operation of the Transparency Directive should be assessed first, before any further initiative is taken at EU level on the disclosure of investors.

- ***Management companies.***

A large majority of respondents consider that management companies should be considered as 'clients' vis-à-vis intermediaries and should be allowed to split their votes.



- First EC consultation on Shareholders Rights
[16/09/2004]:
Text: http://ec.europa.eu/internal_market/company/docs/shareholders/consultation_en.pdf
Responses: http://ec.europa.eu/internal_market/company/docs/shareholders/consultation-synthesis_en.pdf
- Second EC consultation on Shareholders Rights
[13/05/2005]
Consultation: http://ec.europa.eu/internal_market/company/docs/shareholders/consultation2_en.pdf
Responses: http://ec.europa.eu/internal_market/company/docs/shareholders/consultation2_report_en.pdf
- Draft Directive of the EP and EC on the exercise of voting rights by shareholders
EC proposal: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0685:EN:NOT>

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