



EUROPEAN COMMISSION

Internal Market and Services DG

FREE MOVEMENT OF CAPITAL, COMPANY LAW AND CORPORATE GOVERNANCE
Company law, corporate governance and financial crime

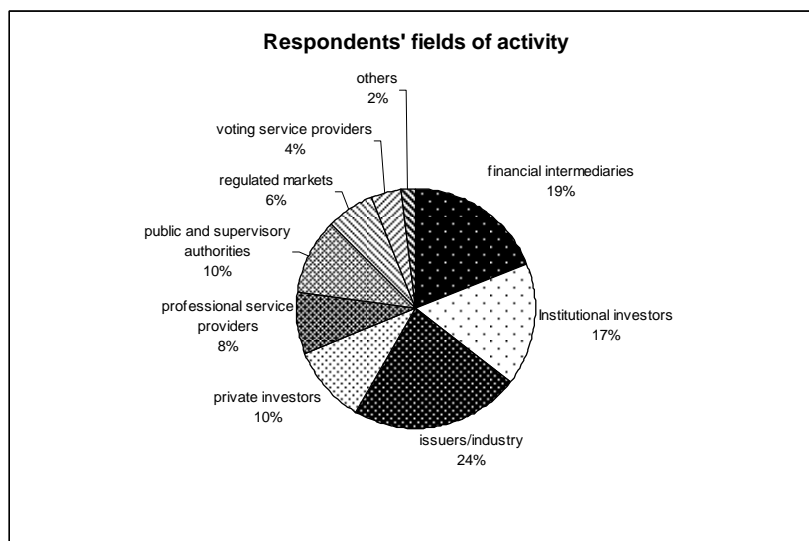
**SYNTHESIS OF THE COMMENTS ON THE THIRD
CONSULTATION DOCUMENT OF
THE INTERNAL MARKET AND SERVICES
DIRECTORATE-GENERAL**

**“FOSTERING AN APPROPRIATE REGIME FOR
SHAREHOLDERS’ RIGHTS”**

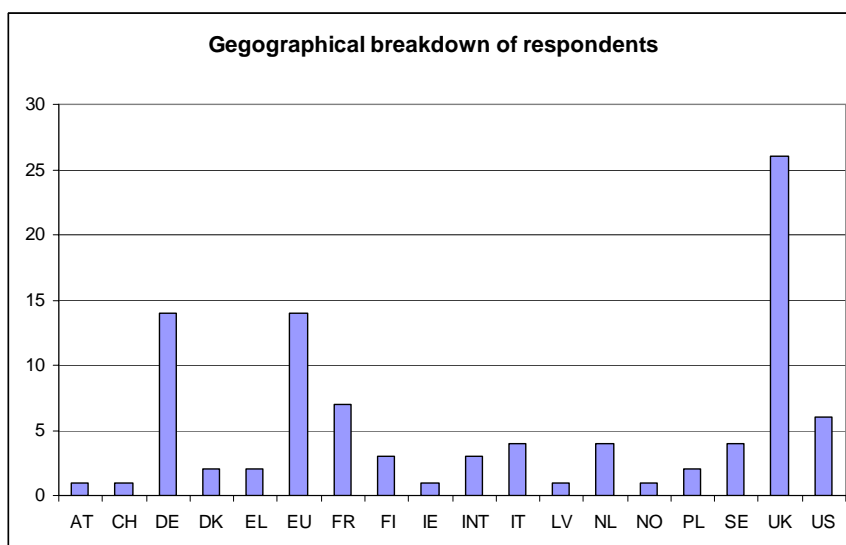
SEPTEMBER 2007

Following two rounds of public consultation and an impact assessment, the Commission issued in January 2006 a proposal for a directive on the exercise of shareholders' voting rights. The European Parliament reached agreement on the proposal in a single reading in February 2007 and the Directive was formally adopted in July 2007. In the explanatory memorandum to the Directive, the Commission had indicated that certain issues which were indirectly relevant to the exercise of voting rights and which had been addressed in the two rounds of public consultations were not covered by the proposed Directive. Instead, the Commission suggested that these could be addressed in a Commission recommendation.

In May 2007, the Services of the Internal Market and Services Directorate launched a public consultation on those items that could possibly be addressed in a recommendation. Responses had to be sent by 27 July 2007. 98 responses were received in total.



Contributions were received from 16 countries including 13 Member States. A number of contributions were also submitted by European and international bodies and associations.



DG MARKT would like to thank the interested parties who responded to this third consultation for the detail and thoroughness of the contributions.

This report summarises the results of the consultation undertaken by DG MARKT to assess the need for a recommendation. It report seeks to provide a survey of the main comments received by DG MARKT. It does not provide detailed statistical data, but rather seeks to present a qualitative assessment of the contributions received. It does not give any indication of potential initiatives, if any, which the Commission may undertake in the future.

1. EXECUTIVE SUMMARY

- **Language of meeting documents.** 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.
- **Depository receipts.** A majority of respondents support the principle that depository 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.
- **Stock lending.** A majority considers that stock lending, and in particular the borrowing of stock to vote in general meetings, should be addressed at EU level. There is a general support for measures enhancing transparency, though 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.
- **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. However, fewer respondents support recommendation that fees charged by intermediaries for the services referred to above do not exceed substantially actual costs incurred and that intermediaries should register their clients with the issuer.
- **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.

2. LANGUAGE OF MEETING DOCUMENTS

Question 1:

Q 1.1.: Do you think there is a need for action in that area?

About 53% of the respondents to this question (representing about 46% of the total number of respondents) consider that there is a need for EU action with regard to the language of meeting documents.

The respondents who do not favour any intervention in this field often consider that the decision to have documents translated should be left to companies. In their view, companies which have a broad foreign shareholder base voluntarily translate the documents which they submit to the general meeting. A few respondents also indicate that stock exchange rules already contain rules or guidelines for the translation of meeting documents, so that no extra action at EU level is required. Some respondents add that any action undertaken at EU level with regard to the language of meeting documents would amount to overregulation and prove costly for companies, not least smaller listed companies.

The respondents who, by a small majority, favour Community action with regard to the language of meeting documents often consider that a recommendation in this regard could provide useful guidance, even though large listed companies have meeting documents translated as a matter of common practice. Some also consider that the harmonisation of requirements could be helpful.

Q 1.2.: If your answer is yes, do you think a recommendation along the following lines would go into the right direction?

"1. Companies should make available to their shareholders the convocation for a general meeting, the meeting agenda and the documents to be submitted to the general meeting at least also in a language customary in the sphere of international finance, unless the General Meeting decides to the contrary.

Some 55% of the interested parties who comment on point 1 (representing some 40% of the total number of respondents) globally support the suggested recommendation, though about a third of these respondents qualify their response.

Respondents often highlight the risk of legal claims arising from discrepancies between the original documents and their translations. They suggest, therefore, that a statement be included in point 1 that the translation should have no legal force and be only for the convenience of shareholders. A few respondents disagree with this approach and argue that investors should not be exposed to adverse financial consequences because of inaccurate translations by issuers.

Comments are also made with regard to the documents to be translated. A number of the respondents point to the cost of extensive translation obligations and consider, therefore, that only a limited number of documents should be translated, e.g., the meeting convocation and the resolutions proposed by the company. Some take the view that there should be no list of documents, but that the matter should be left to the management of

companies who is best placed to assess the necessity and desirability of translations, depending on the circumstances. Other respondents take the opposite view and consider that at least companies' articles of association, board charters, corporate social responsibility reports, etc. should also be translated, as they are fundamental to the exercise shareholders' rights. These respondents also often consider that any decision of the general meeting not to have documents translated should require a two thirds' or a three quarters' rather than a simple majority as suggested in the consultation paper.

Lastly, some respondents feel that a "language customary in the sphere of international finance" is somewhat vague and that point 1 should either expressly refer to 'English' or contain a list of languages.

Some 45% of the interested parties who comment on point 1 (representing just over 30% of the total number of respondents to the consultation) are opposed to the suggested recommendation. The comment most often made is that translating documents should not be automatic but should require a positive decision of the general meeting. The last part of the text in point 1, therefore, should read 'if the general meeting so decides', rather than 'unless the general meeting decides to the contrary'.

2. Point 1 should not apply to companies

- that fulfil at least two of the criteria established by Article 11 of the Fourth Company law Directive on annual accounts (not exceeding a balance sheet total of EUR 3 650 000, a net turnover of EUR 7 300 000 and an average number of employees during the financial year of 50), or
- that neither have a wide foreign shareholder base (on average under 10% of the subscribed capital) nor are actively seeking foreign investment.

For these companies, the obligation referred to in point 1 should only apply where this is requested by shareholders representing at least 1/3 of the subscribed capital."

About 60% of the respondents who commented on point 2 (representing about 35% of the total number of respondents) express global support for the suggested recommendation. Some of these respondents, however, qualify their support.

Certain respondents indicate that the concept of 'actively seeking foreign investment' is unclear and may be difficult to enforce. It should be indicated at which point in time the active seeking of foreign investment should be assessed. The same remark is made about the 'wide foreign shareholder base' criterion, which is difficult to implement as the capital ownership of listed companies fluctuates constantly.

Other find multiple criteria complicated and suggest replacing them with a single criterion, such as a minimum threshold of capitalisation, combined with the possibility for the shareholders of such small companies to submit a resolution at the general meeting to obtain translations. The remark is also made that the size of a listed company is no indication of the percentage of foreign shareholders the company may have. Certain respondents argue that a company which has a broad foreign shareholder base but does not actively seek foreign investment should nonetheless provide translated documents to its shareholders.

The comment is also made that listed companies that are part of a group should be taken into account and that the criteria in point 2 should be assessed on a consolidated basis. The same respondent considers that the threshold of 1/3 of the subscribed capital, which is higher than or equal to mandatory bid thresholds is much too high and should be reduced to 20-25%.

The respondents who do not support the criteria in point 2 often find these too rigid, complicated and difficult to manage, as companies do not always know the identity, let alone the nationality, of their shareholders. Some respondents consider that the criteria miss the point, as company size in their view gives no indication of the kind of shareholder base – foreign or domestic – a company may have.

3. DEPOSITARY RECEIPTS

Question 2: Do you think a recommendation along the following lines would go into the right direction?

"The depositary agreement should provide that the depositary is not allowed to vote on the shares without instructions given by the depositary receipt holder, unless the latter has given the depositary explicitly such discretion."

Some 80% of the respondents who responded to this question (representing about 60% of all the respondents to the consultation) globally support the suggested recommendation, though many consider that the recommendation should go further and indicate that depositary receipt holders should have the right to issue voting instructions. Some insist that this should be the case regardless of whether there is any depositary agreement between the issuer and the depositary. As one respondent puts it, depositary receipt holders are exposed to the same financial risks as shareholders and should, therefore, enjoy the same rights. This would mean that the underlying shares should not be voted unless the depositary has received specific voting instructions or has been granted discretion to vote by the depositary receipt holder.

A comment often made by the respondents who support the suggested recommendation is that it should be made clear that discretion to vote may be granted on a permanent basis and need not be renewed periodically. Others add that depositary receipt holders should be able at any time to revoke the voting discretion they have given to the depositary. Some insist that such consent should not take the form of a standard clause in the depositary agreement and that depositary holders should have to expressly consent to granting discretion to vote to the depositary. Other respondents argue that depositaries who hold more than 5% of the capital of the company as a shareholder should not be able to cast any discretionary vote on shares they hold as depositaries.

Some respondents consider that it should be clarified whether the suggested standard applies only to future depositary agreements or also to existing agreements. The point is also being made that a breach by the depositary of its obligation should have no impact on the validity of the vote.

Most respondents who disagree with the suggested recommendation consider that there is no need for EU action in this area. Some consider that there is no evidence of market failure justifying an intervention and that the substance of the suggested recommendation is already established practice. Others indicate that the terms and conditions governing

voting rights in relation to depositary receipts are essentially a contractual matter in which there should be no regulatory intervention. The point is also made that such a recommendation would be difficult to implement; it should be made clear, in particular, to which depositary receipts it would apply. No recommendation could apply to all depositary receipts as many fall under non EU jurisdictions and only regulating part of the depositary receipts would risk creating competition issues between depositaries.

4. STOCK LENDING

Question 3:

Q 3.1: Do you believe that stock lending needs to be addressed at EU level? Please give your reasons.

About 57% of the respondents to this question (representing slightly more than half of the total number of respondents) believe that stock lending needs to be addressed at EU level. About 43% of the respondents (representing some 37% of the total number of respondents) do not favour such action.

Those respondents who do not think that any action is needed point to the importance of stock lending in ensuring market liquidity and warn of the adverse consequences of any action that could make stock lending less attractive. In addition, stock lending is a matter for experienced and professional investors who do not need any specific protection. Moreover, stock lending is successfully regulated by market codes of practice. In these respondents' view, there is no evidence of any market failure that would justify regulatory intervention and the ensuing limitation of contractual freedom. If there is a surge in stock lending ahead of general meetings, this would be often much more linked to dividend payments than to voting.

The majority of respondents who consider that stock lending should be addressed at EU level also insist on the fact that stock lending serves a useful purpose in terms of market liquidity. They also recognise the contractual nature of stock lending. But they consider that the matter should be addressed at EU level to prevent abusive stock lending to influence the outcome of General Meetings and to protect shareholder democracy. A number of respondents give precise examples of such abusive practices. Others note that "lost votes" (due to the fact that borrowed shares often are not voted) threaten shareholder democracy as much as abusive voting. Other respondents deplore the fact that issuers are unaware of the lending activity that surrounds their stock and support the publication of 'short interest' positions. Others see a justification for EU action in the increasing mobility of capital, which has made of stock lending a feature of cross-border investment. In this context, it is important that there should be a common approach throughout the EU and a recommendation could help towards the convergence of key standards.

Some respondents, both among those who favour a recommendation and those who do not, consider that stock lending at the time of the general meeting could be effectively discouraged if issuers set a date for the entitlement to the payment of dividends which would be different from the record date. While this might not provide a response to stock borrowing for the purposes of influencing the outcome of the general meeting, it could help address the issue of lost votes.

Another remark that is being made is that stock lending is only one of the means offered to investors of temporarily exchanging securities. The issues raised by stock lending exist also in relation to other means of exchanging securities. This topic, therefore, should be approached from a broader perspective.

Q 3.2: If your answer is yes, would you support recommendations along the following lines?

1. Stock lending agreements should contain provisions informing the relevant parties of the effect of the agreement with regard to the voting rights attaching to the transferred shares.

About 65% of the respondents who took position on this point (representing less than 50% of the total number of respondents to the consultation) can either support or accept a recommendation along the lines of point 1. In addition, some interested parties who do not favour an EU intervention on stock lending could nonetheless accept a recommendation along the lines of point 1, should the Commission nevertheless go ahead with a recommendation on stock lending.

The comment made most often by the respondents who consider point 1 favourably is that such a standard would cater for an appropriate level of transparency and clarity, which can only be positive. A few respondents, however, indicate that there should be no requirement that the provisions informing the relevant parties of the effect of the agreement with regard to the voting rights be inserted in each stock lending agreement. It should be sufficient that these provisions be included in the framework agreement. A few other respondents consider that issuers should be informed about the levels of lending of their own stock.

The respondents who oppose a recommendation along the lines of point 1 consider that there is no need for such a recommendation as stock lending agreements as a matter of common practice contain information about the effects of stock lending on voting rights. Furthermore, stock lending is a matter for professional investors who are fully aware of its consequences. One respondent takes the view that transparency is mainly required vis-à-vis the issuer and that this should be covered by the Transparency Directive, so that no further action in this field should be undertaken before the Transparency Directive has been assessed.

2. Member States should ensure that shares can only be lent by financial intermediaries where the investor has explicitly agreed to his shares being used for stock lending in the framework agreement with his financial intermediary.

Just under 70% of the respondents to this question (representing about 47% of all respondents) support a recommendation along the lines of point 2. In addition, some respondents who oppose a Commission recommendation on stock lending (representing 7% of the total number of respondents) could nevertheless accept a recommendation such as that suggested in point 2, should the Commission decide to adopt a recommendation.

Some of the respondents who support point 2 consider that such express agreement of the investor is needed in particular where the investor's shares are held in an omnibus account. Beyond investors' agreement to the lending of their shares, investors (or management companies acting on investors' behalf) should be informed rapidly every time their shares are lent, to avoid that investors' votes are

invalidated because the number of votes cast does not match the number of shares actually held. Some respondents indicate that the investor's consent should be capable of being given in the general stock lending agreement while others express doubts as to how this provision could be implemented.

The respondents who are not favourable to point 2 most often argue that a recommendation along those lines is not necessary as seeking investor consent prior to lending securities already is common market practice.

3. Borrowed shares should not be voted, except where the voting rights are exercised on instructions from the lender.

Some 65% of the respondents to point 3 (representing about 45% of the total number of respondents) oppose the suggested recommendation. The comment made most often is that the effect of stock lending is to transfer the legal title to the shares to the borrower who then has full discretion over the exercise of the voting rights. Suggesting that the borrower should have to seek the lender's instructions would go against market practice, create legal uncertainty and, in any event, would be impossible to monitor. Moreover, any such rule would make stock lending cumbersome and adversely affect market liquidity. Some respondents consider that the objective of preventing the abusive exercise of voting rights attached to borrowed shares can be reached by more proportionate measures, namely encouraging investors to recall their lent stock and, more importantly, encouraging issuers to introduce a date for the eligibility to dividends that is different from the record date.

The minority of respondents who would welcome the recommendation suggested in point 3, consider that such a recommendation would effectively address the issue of distorted votes. Many add, however, that it should be made clear that violation by the borrower of his obligations has no impact on the validity of the resolution voted at the general meeting. Other respondents support the objective of the suggested recommendation but consider that the text should be rephrased to put the onus on the lender to discourage the borrower from borrowing shares to vote.

4. Stock lending agreements should provide that borrowers have to return equivalent shares to those borrowed promptly upon the lender's request.

About 55% of the respondents to point 4 (representing about 38% of the total number of respondents) support the suggested recommendation and consider that such a recommendation would improve the current situation. Many of these respondents, however, add that the text is somewhat vague and that the word 'promptly' should be defined. One respondent adds that if the Commission decides not to take any recommendation along the lines suggested in point 4, it would still make sense to ensure that investors can recall their shares during a period of time between the convocation to a general meeting and the date of the meeting, as this would contribute to preventing abusive stock lending for the purposes of voting.

Those respondents who oppose the recommendation suggested in point 4 often consider that the matter should be left to the market and to the parties to the stock lending agreement who should have the freedom to determine the conditions attached to the agreement, including the recall of shares. Some add that the

provision for the recall of shares is current market practice, so that no regulatory intervention is needed.

5. CHAIN OF INTERMEDIARIES

5.1. Duties of intermediaries

Question 4:

Q 4.1: Do you consider that the duties of intermediaries in the voting process need addressing?

About 80% of the interested parties who respond to this question (representing about 70% of the total number of respondents) consider that the duties of intermediaries in the voting process should be addressed at EU level. In these respondents' view, the good functioning of the chain of intermediaries is essential to cross-border voting and this issue, which is international by nature, cannot be solved at national level. Respondents highlight the fact that the execution of investors' votes is entirely dependent on the good functioning of the chain of intermediaries and that failures are often reported. Investors have difficulties receiving information through the chain of intermediaries and obtaining any confirmation that their vote has been executed in line with their instructions. One respondent argues that the duties of intermediaries go beyond the communication of voting instructions and should also cover the issuance and communication to the issuer of a certificate confirming that the shareholder held shares on the record date, the transmission of attendance cards and proxy forms, etc...Another respondent suggests that an alternative should be found to channelling the information through the chain of intermediaries, which will always be slow and complex. On the contrary, bypassing the chain and seeking to introduce direct communication between issuers and their shareholders would be much more efficient.

The dissenting minority (20% of the respondents to this question, representing some 13% of the total number of respondents) argues that voting is already catered for in existing custody agreements and that an EU recommendation will only add more red tape and administrative burdens. Some respondents consider that voting is well addressed in their national legislation so that no further action is needed at EU level. Others consider that nothing can be done with regard to the duties of intermediaries as long as there is no EU definition of "shareholder".

A question that has been put both by supporters of, and opponents to, EU action with regard to intermediaries' duties is to which intermediaries the recommendation should apply. Certain respondents consider that Central Securities Depositories should be covered by any measure.

Q 4.2: If your answer is yes, would you consider recommendations along the following lines as adequate?

"1. Member States should ensure that before entering into relevant agreements, intermediaries explain to clients whether, and if so how, they will be able to give instructions about the exercise of voting rights.

More than 70% of the respondents to this question (representing just over 50% of the respondents to the consultation) support a recommendation along the lines of

the text in point 1, mainly on the ground that transparency is required and that investors should be made aware of their rights. One respondent warns that the suggested recommendation should not be capable of being construed as giving intermediaries a monopoly over the voting process. Investors should be under no obligation to vote via their intermediary but should have the possibility of choosing other providers.

Some of the respondents who disagree with the suggested recommendation consider that it is not sufficiently far reaching. These respondents consider that intermediaries should be obliged to communicate their clients' voting instructions to other intermediaries in the chain and ensure that their clients' votes are exercised according to instructions. Others take the opposite view, i.e., that there is no need for such a recommendation because existing custody agreements are sufficient and/or because this matter would already be covered by the Markets in Financial Instruments Directive (MiFID).

2. Where a client is entitled to give instructions about the exercise of the voting right, Member States should ensure that financial intermediaries that are part of the chain of intermediaries between that client and the issuer either cast votes attached to shares in accordance with the clients' voting instructions or transfer the voting instructions to another intermediary higher up in the chain.

More than 90% of the respondents to this question (representing about 60% of the total number of respondents to the consultation) express their support for the recommendation suggested in point 2. These respondents, however, often qualify their support. A number of respondents, for instance, find that the beginning of the sentence "where a client is entitled to give instructions about the exercise of the voting right..." gives the impression that the client may not always have the right to direct how the voting rights attaching to his shares are to be exercised. They consider that the wording of the suggested text should be changed to make it clear that it is always the client's right to give voting instructions and the intermediary's duty to execute them. Other respondents indicate that an intermediary may only cast votes on behalf of its client if it is given a proxy to do so. The suggested recommendation should not be read as implying that the intermediary has any right to cast votes on behalf of his client.

The respondents who oppose the suggested recommendation (about 5% the respondents to the consultation) often consider that the suggested recommendation is too detailed and prescriptive and constitutes an unacceptable intrusion in private contractual relationships.

3. Financial intermediaries should keep a record of the instructions and provide confirmation that they have been carried out or passed on for a period of at least one year.

70% of the respondents to this question (representing over 50% of all respondents to the consultation) expressed support for the recommendation suggested in point 3. Respondents often qualify their support. Comments are made mainly with regard to the confirmation given by the intermediaries and to the record keeping period.

With regard to the confirmation given by the intermediaries, a group of respondents insist that it should be made clear that confirmation must be given by the intermediary and that this entails no duty whatsoever on the part of the issuer.

Issuers should not have to monitor in detail whether intermediaries vote on behalf of their clients. This view is not shared by other respondents who argue that investors need confirmation that their votes have actually been executed at the general meeting and that such confirmation cannot be given unless the issuer confirms the execution of the vote. Some respondents insist that votes should be traceable throughout the chain of intermediaries, which should include also voting intermediaries.

With regard to the record keeping period, some respondents consider that records of instructions should be kept for more than one year. Suggestions range from 18 months to 5 years, 3 years being the period most often suggested as appropriate.

The respondents who do not support the recommendation suggested in point 3 oppose it essentially for two reasons. The first reason is that it is common market practice for intermediaries to keep records of their clients' voting instructions, so that there is no need for a recommendation on this point. The second reason is that clients often are not interested in having such confirmation. Confirmation, therefore, should be given only upon request by the client and this should be made clear in the text of the recommendation.

4. Member States should ensure that fees charged by intermediaries for the services referred to above do not exceed substantially the actual costs incurred by that intermediary.

About 54% of the respondents to this question (representing about 36% of the total number of respondents to the consultation) support the recommendation suggested in point 4. 46% (representing about 31% of the total number of respondents to the consultation) oppose it. In addition, some of the respondents who oppose a recommendation on intermediaries nonetheless take position with regard to point 4. Of these respondents, respondents representing 7% of the total number of respondents are opposed to the recommendation suggested in point 4.

The main comment made by the respondents who oppose the suggested recommendation is that the issue of fees should be left to market forces. Should there be any competition issue in connection with the fees charged by intermediaries, this should be a matter for competition authorities. A few other comments are made. One respondent explains that the problem is not so much the level of the fees charged by intermediaries for the voting service but the fact that intermediaries bundle their services, so that clients do not know what they actually pay for. Often, clients would not be able to make a free choice between service providers. A few other respondents consider that if price regulation is deemed necessary, it should be left to professional associations. The remark is also made that costs should actually be borne by the issuers.

Many of the respondents who support some form of limitation on the cost of intermediaries' services nonetheless believe that the suggested recommendation should be reworded and recommend that intermediaries use the "least expensive and most efficient channels" for providing their services. Some of these respondents consider that intermediaries should also be encouraged to adopt common messaging standards.

5. Member States should ensure that intermediaries take the necessary measures to have the client's name registered in the register of companies which have issued registered shares. This obligation should not apply where the client objects to his name being registered.

About 55% of the respondents who commented on this point (representing just over 40% of the total number of respondents to the consultation) support the suggested recommendation.

A comment often made by respondents is that issuers should have a right to know who their shareholders are. The advantage of registered shares, according to these respondents, is that they allow for a direct contact between issuers and their shareholders, provided, of course, these are registered. Some, however, regret that the registration duty would apply only to registered shares, while others stress that shareholders wishing to remain anonymous should have the right to do so. Other respondents comment that intermediaries should be under an obligation to register their clients and that a client's objection to registration should be express. A few respondents also consider that intermediaries charge excessive fees for registration.

Those who oppose a recommendation along the lines suggested in point 5 (about 45% of the respondents to this question representing slightly less than 30% the total number of respondents to the consultation), often argue that such a system would be costly and cumbersome to operate. They also often say that the current system functions well and that, in any event, shareholders who want to benefit from such a service can enter into a contractual agreement with their intermediary. A number of respondents also consider that the suggested recommendation could lead to legal difficulties as only shareholders should be registered as such. If an intermediary is registered as a shareholder for shares it holds for the account of clients, those clients' names should not appear on the register of shareholders as they are not shareholders. Other respondents fear that such a recommendation could lead to the suppression of omnibus accounts which are simple and cheap to manage.

6. "Client" within the meaning of this provision is the natural or legal person on whose behalf another natural or legal person holds shares in the course of a business."

About 40% of the respondents to the consultation do not take any position with regard to the definition suggested in point 6. Of the respondents who take position on this point, about 85% welcome the suggested definition in substance. However, both supporters and opponents of the suggested definition consider that the definition could be improved and sometimes make similar comments.

A respondent argues that the words "holding shares" should be restricted to shareholders and that the appropriate reference for clients should be to "holding a securities account". This is echoed by another respondent who suggests that intermediary should be defined as "the legal person who in the course of a business provides securities accounts to a shareholder or another legal person who provides securities accounts". Thus, the last part of the sentence should read "maintains a securities account of the shares in the course of a business", rather than "holds shares in the course of a business". Another comment made is that the current wording would give the impression that only intermediaries that hold shares are

covered, when actually all intermediaries in the voting process should be covered by the recommendation.

5.2. Disclosure of investors

Question 5: Would you agree that the transparency directive, once implemented, will give a breakdown of voting rights and that further action at EU level would be premature?

More than 70% of the interested parties who responded to question 5 (representing about 56% of the total number of respondents) agree that the implementation of the Transparency Directive should be reviewed before any further action is undertaken at EU level. However, some of these respondents consider that this should not stop the Commission from exploring certain issues. This view is shared by a number of the respondents who consider that, precisely for that reason, further action is needed at EU level.

The main issue which is raised relates to the identification of shareholders. Respondents often consider that while the Transparency Directive will give a breakdown of holders of voting rights, it will only inform issuers about major holdings. Some respondents find the lowest threshold of 5% very high, while others argue that minimum harmonisation which allows Member States to opt for lower thresholds than those of the Directive, generates too many differences between Member States. Those respondents argue in favour of a single EU regime.

Some respondents suggest that the Commission should explore the possibility of introducing a provision at EU level allowing issuers to have a complete breakdown of their share capital. Section 793 of the UK Companies Act 2006 and Article L 228-2 of the French Commerce Code are often cited as examples.

Other respondents consider that the Commission should address the issues raised by derivatives such as contracts for difference. Such derivatives, in their view, should be covered by disclosure obligations.

6. MANAGEMENT COMPANIES OF INVESTMENT SCHEMES

Question 6: Do you think there is a need for a recommendation along the following lines?

"1. Management companies, the regular business of which is the management of collective investment schemes, shall be deemed to be 'clients' for the purposes of the draft recommendations set out in section V.1.

2. Member States should ensure that management companies referred to in point 1 shall be permitted to cast votes attaching to some of the shares differently from votes attaching to the other shares."

More than 80% of the respondents who responded to this question (representing over 60% of the total number of respondents) expressed support for the recommendation suggested in point 1. Respondents did not add comments to their responses.

Just under 85% of the respondents who responded to this question (representing over 70% of the total number of respondents) supported the recommendation in point 2. Very few comments are made with regard to point 2. Among the parties who would favour such a recommendation, some consider that different votes should be possible depending on the fund profile and voting policies and that any recommendation should maintain this freedom. Two other respondents take the view that split voting should be permitted in relation to two or more funds managed by the same management company only if the company is able to demonstrate that the organisational structures and the decision making process of the funds are segregated; split voting in relation to the shares of the same fund should not be allowed.

Very few of the 15% of respondents who do not think that a recommendation along the lines of point 2 is needed add comments to their response. One of the comments made is that rules providing that investment schemes must exercise voting rights in the exclusive interest of the holders of the scheme units or shares and imposing on management companies the obligation to issue a report on their voting policies are beneficial to issuers and investors. This respondent adds that their extension to all markets in the EU should be explored.

7. OTHER SUGGESTIONS

About a third of all respondents to the consultation consider that other aspects should be taken into account.

A number of suggestions relate to legal aspects. Some respondents consider that the Commission should examine the impact which the ratification of the Hague Convention would have on shareholders rights. The Convention has opted for the law expressed in the relevant account agreement. It would, therefore, allow for European accounts to be governed by non European laws, which would give rise to numerous issues, as it could have some impact on the way voting rights are to be exercised. Moreover, it would enable a few global players to impose their choice of law. Other respondents urge the Commission to take account of the work carried out by the Legal Certainty Group.

Another group of suggestions related to the organisation of the general meeting and of the cross-border voting process, e.g.:

- There should be identical quorum requirements across the EU;
- The record date should apply also to registered shares and not only to bearer shares;
- Requirements for powers of attorney should be eliminated, or at least requirements for the renewal of powers of attorney;
- The client should be able to exercise his voting rights directly or attend the general meeting;
- Voting forms should be harmonised at EU level;
- The conditions in which voting agencies operate should be examined;

- The Commission should examine custodian cut-off dates;
- Minutes of general meetings should reflect not only the results of each vote but also the discussions which took place at the general meeting.

The following suggestions are made with regard to the substantive rights of shareholders:

- The Commission should push ahead towards proportionality of ownership and control;
- Action must be taken to give shareholders throughout Europe more certainty with regard to "actions in concert".

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