The Association of Corporate Treasurers

Comments in response to the Consultative Document *Proposal for a Directive on the exercise of voting rights by shareholders* The Department of Trade and Industry, October 2006

January 2007

The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance.

The ACT generally comments on policy and technical matters from the point of view of non-financial corporations.

Further information is provided at the end of these comments and on our website www.treasurers.org.

Contact details and how we consulted members on this topic are also at the end of these comments.

General

The ACT welcomes the opportunity to comment on this matter.

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Comments

General

In our responses to the Commission's own consultations, we welcomed proposals to widen the practical availability of shareholder rights while seeking to ensure that the practical efficacy and relatively low cost of the approach in the UK was not undermined. Our position is that any directive should concentrate on removal of barriers to exercise of shareholder rights, rather than prescriptive rules as to how they are to be exercised.

Accordingly we welcome the Government's position as stated in paragraph 2.11 of the Consultative Document.

Specific questions

Article 1 Subject-matter and scope

1. *Do you agree with the scope of the directive?*

   Yes. This directive should apply only to share traded on regulated markets. Caution should be exercised in disturbing the position for issuers on other markets.

   However, after experience has been gained with implementation and efficient, cost-effective channels have been created for compliance with the requirements, consideration should be given to including all companies with shares (not debt instruments only) publicly traded on any EU market, not just regulated markets.

2. *Do you consider that we should exercise the exemption of UCITS in Article 1, para 2?*

   Yes, UCITS as issuers should be exempted in the United Kingdom. The relationship of the parties is in a special category.

Article 2 Definitions

3. *Do you agree with the definitions of 'shareholder' and 'proxy'? If not, how should they be modified? Do you agree with the alternative approach suggested in relation to the definition of 'shareholder'?*

   Re *shareholder*

   We agree with your proposal that the definition of shareholder should be as in domestic law of the Member state of incorporation of the issuer. Clarity over the definition of shareholder is important for issuers. Issues which arise in any chain of holdings should be a matter between those parties, not the company.

   Re *proxy*

   We find the proposed definition of *proxy* uncongenial. Use in UK English is well established and to bring in an approach from other language groups is not helpful. However, normal usage will doubtless be unchanged, for example "proxy holder" will surely be called just "proxy", so no UK firepower should be used in resisting it.

Article 3 More stringent national requirements

4. *What do you think about the suggested wording? Do you have any other comments on Article 3?*

   We agree with your concerns about the original wording and support your proposed amendment

Article 4 – Equal treatment of shareholders

5. *Do you think that it is useful to include a statement of principle such as Article 4 and, if so, are you content with the current wording?*

   A statement of principle would be of value. However, in this case it is dependent on the definition of shareholder (see under Article 2 above) and what is understood by "in the same position". On balance, we feel that the gain from a general statement would be worthwhile if the definition of shareholder is amended as you propose under Article 2. If not, it may cause problems in application.

Article 5 – General meeting notice

6. *Is a 30 day notice period for all meetings appropriate? If not, what would you consider to be the minimum notice period appropriate to the cross-border context? Should there be a minimum single notice period for all general meetings or should it be possible to call some kinds of meetings on shorter notice – and, if so, which kinds of meetings and on what period of notice?*

   As UK shareholders may be consulted on more issues (especially under the Listing Rules) than in other Member States, this is a major issue for UK stakeholders. Particularly, issuers are concerned not to extend the timetables for shareholder approvals, for example to Class 1 transactions.

   We acknowledge the Commission's concerns about cross-border communication and the need for intermediaries to seek instructions. However, communication arrangements between intermediaries and investors and between intermediaries are a matter of private contract. Media for rapid communications are available at low cost.

   Accordingly, we seen no reason to prolong the times set in the UK.

   Such prolongation would be contrary to shareholders' interests.

   First, UK companies undertaking large transactions needing shareholder consent (Class 1 transactions) already suffer a handicap in their timetable for the transaction to become unconditional versus competitors from jurisdictions with no need for such consultation[1]. Extension of the delay to achieve shareholder consent is undesirable.

   Second, when seeking approval for transactions which are being underwritten there is a direct additional cost if the period of that underwriting is extended.

[1] Transaction counter-parties see it as the UK company demanding a free option over entering into the contract. The fiduciary duty of directors of UK companies mean that directors cannot undertake to recommend approval at the EGM called to approve it if events prior to the vote mean that they form the view that the deal is no longer in the company's interest [To be clear, we are in favour of the UK's requirements for shareholder agreement to large transactions.]

We acknowledge the concerns of the Commission (and others) on timing in cross-border situations. We argued to the Commission in response to their consultation that UK-type notice periods should be allowed where companies provide for electronic communication of information and votes. We point out in relation to this that there is an inconsistency in the Commissions approach here. On the one hand they are seeking to speed up communications between companies and their shareholders by encouraging electronic communication, while on the other hand they seem to be allowing for quite extended notice periods prior to meetings

We understand such a compromise is currently under consideration.

7. *Is the scope of the information and method of its delivery to shareholders adequately defined?*

No, this needs to be expanded to include reference to whom the notice should be sent, as you say. This is presumably left to local company law under the draft you refer to. As this directive seeks to facilitate shareholders exercise of their voting rights some minimum standard would seem to be desirable.

Article 6 – Right to add items to the agenda of general meetings and to table draft resolutions

8. *Do you agree that rights for shareholders to add items to the agenda of general meetings and table draft resolutions at EGMs should be restricted?*

Yes. It is a useful mechanism for reducing the number of purely nuisance items.

9. *Are the proposed thresholds for exercising the rights specified in the Article set at an appropriate level? Is it necessary to have a threshold expressed in terms of nominal value, as well as proportion, of shares?*

We consider the 5% threshold a reasonable balance between encouraging shareholders to exercise their rights and the need to restrict such matters to important matters.

Introduction of an alternative, monetary limit would imply that the 5% threshold for larger companies is unreasonable. We do not agree. Given the large size variations in listed companies, and, indeed of particular companies over time, for good or ill, a monetary limit cannot be specified as sensible. For a company of any size, a €10m limit scarcely constitutes a barrier at all. A monetary limit simply looks foolish

Our comment is based on a registered share system, Provided that members are not fettered in communicating with each other, a shareholder should be able to drum up support from 5% of holders for serious matters.

Where the permitting of anonymous shareholders or bearer shares or other factors inhibiting the communication among shareholders exist, these should be tackled directly, not by reducing minimum stake requirements as otherwise there is a danger of vexatious activity by holders of minimal stakes.

Additional topics related to this Article

We note your comments in 3.19 (roman numbering added for convenience)

…(i) *Nevertheless, the Article as drafted does not provide shareholders with a right to call meetings, or require issuers to do so at shareholders' request.* (ii) *In addition, the rights to add items to the agenda would seem to be unfettered and would therefore apply to EGMs, which might have detrimental effects in terms of costs and the efficient running of these meetings.*

Re (i). we regard the absence of requirement for a right for shareholders (albeit qualified by a percentage held requirement) as a serious deficiency. It substantially devalues the shareholders' rights in any country where the right to call meetings is not provided in domestic company law.

Re (ii), as regards EGMs, these are normally called for specific purposes. Addition of unrelated matter would potentially be disruptive, especially given the need to circulate draft resolutions to members. Delay in consideration of matter by EGMs can be damaging to the issuer. Members should not be able to "piggy-back" new topics into EGMs, but, using the first (would be) right referred to in (i) above, a sufficient group of them should call a fresh EGM if the matter could not wait until the next AGM.

The right to add new items are stated as having to 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. This could be problematic. The days notice implied should not be such as to force a deferral of the originally called meeting. This makes even more important the right of shareholders (representing at least a qualifying level of holding) to requisition a new meeting.

Article 7 – Admission to the general meeting

Comment on this Article
We are strong supporters of the ending of share blocking.

10. *Do you agree with the maximum 30 day record date period? Should the directive prescribe any other parameter for the setting of record dates (for example, that the record dates must be at least a certain number of days after the date on which the notice of a meeting is issued)?*

In view of the efficiency of modern systems, 30 days is excessive. The shareholder record used for voting/admission to the general meeting should be as up to date as practically possible at the meeting date. Therefore there should be as short a period as possible between the record date and the meeting date.

The record date should certainly not be prior to the issue of notice of the meeting. Indeed, there should be a minimum number of days between the notice being issued and the record date. Shareholders should have the opportunity to buy and sell shares in the light of the knowledge of the forthcoming meeting. Incumbent management should not alone be able to arrange "friendly" transactions prior to the record date. The proposed gap between notice and record date is to allow others to do the same. If the 14 day notice for EGMs is agreed, perhaps 8 days after the issue of the notice would be appropriate – 6 days before the meeting. This (6 days) would be an approximate maximum before any general meeting.

Article 9 – Right to ask questions

11. *Is it necessary or appropriate to regulate the asking and answering of questions in the context of company meetings in this way?*

In the last paragraph, the Article calls for responses (importantly, not questions) to be made available on the website. This can present practical issues and we doubt its value.

Accuracy of unprepared responses to unexpected oral questions may not be reliable. Responses can be very rambling. Companies must be able to edit and group responses to avoid error, prolixity, confusion and repetition.

We are concerned that the current wording on making responses available may not provide sufficient safeguards.

Overall, given that, in any case, if responses contain price sensitive information, this must be announced to the market promptly, we very much doubt the value in practice of requiring publication of responses.

As regards the right to ask questions, there is the potential for mischief here, although, in principle, shareholders should have the right at AGMs.

In our evidence to the Commission we proposed that this be left to good practice rather than requirement – shareholders will certainly react to managements they consider not sufficiently forthcoming. By now it is probably too late to achieve this.

The Chairman should, in any case, not accept duplicate questions or questions not related to the business of the meeting or to the company, defamatory questions, etc., of course. The company should respond to relevant questions properly put – but not usually include commercially/legally sensitive matter or data affecting an individual publication of which would be contrary to relevant data protection laws or contracts, etc..

EGMs present a more difficult case. EGMs are convened for particular purposes and questions should be further limited to those relevant to those purposes.

There are also issues of practicality in the running of meetings, but the Article's reference to "good order" etc. seems to be permissive of appropriate safeguards at member state and company level.

Article 10 – Proxy voting

12. *Is the system of proxy voting set out in Article 10 sufficiently liberal, or are some of the restrictions provided for in it inappropriate?*

We are unable to perceive any justification for these restrictions (1 (a), (b) and (c)).

They seem to be an unreasonable limit to shareholders' rights to be represented by whomsoever they choose. If shareholders choose to give discretion over their voting rights to a party with other interests, while that may be foolish, even reckless under some circumstances, why should it be prohibited?

As regards the last sentence in the first paragraph, "A shareholder may only appoint one person to act for him as a proxy holder in relation to any one general

meeting" this may be too restrictive. The provision is basically an important safeguard, of course. But

- First, where a person holds shares in different capacities – e.g. for his own account and as a trustee different proxies should be allowed. (Such shareholding would normally be separately registered in registered share systems.)

- Second, the limitation to appointing just one person is too restrictive since it does not seem to allow for the appointments of one person X, *or in his absence another person Y*

Article 11 – Appointment of proxy holder

13. *Does Article 11 strike the right balance between ease of appointment and investor security?*

    At the EU level, yes.

Article 12 – Voting in absentia

14. *Is the ability to vote by post necessary and should it be made mandatory either for Member States to permit it or for companies to offer it to their shareholders?*

    It is not necessary as the proxy system and electronic voting are available alternatives.

    However it is desirable to provide alternatives to encourage voting. Accordingly Member States should permit it. Companies should judge whether it is appropriate or not as communication media and voting traditions among the bulk of their shareholders develop.

    Your commentary implies that companies would not be obliged to offer postal voting and we support that stance. However the draft Article 11 as worded does require the possibility of postal voting. We believe postal voting could end up an unduly cumbersome process and would recommend that the article is permissive rather than mandatory.

Article 13 – Voting upon instructions

15. *Article 13 aims to ensure that the rights conferred by the directive can be effectively exercised in cases where shares are held through intermediaries acting on behalf of a number of different clients. Do you think that it covers the right ground to achieve this aim? Would you support further measures that deal with the passing of instructions between intermediaries in the voting chain, as recommended by the European Corporate Governance Forum?*

    We are aware that there is continuing consideration of omnibus accounts and underlying shareholder issues. However, we are concerned that awaiting the outcome of these may result in continuing disenfranchisements in some Member States.

    We consider that the issuer should only have to concern itself with instructions received from the shareholder and that matters between the shareholder (and other intermediaries where relevant) and beneficial holders is a matter between the latter and not for the company.

Article 14 – Counting of votes

You ask no question on this Article directly.

However, we are concerned that the interpretation of "all votes cast in relation to... " is "*properly* cast etc.". Issuers require certainty in the outcome of votes and they should not have to count votes which, on their face, are invalid for procedural reasons or because they purport to cast more votes than a shareholder (or proxy) has at their disposal. If this would not be the natural interpretation of the language, it should be amended accordingly.

Article 15 – Information after the general meeting

16. *Should companies be required to count and publish voting results on their websites in the level of detail required by Articles 14and 15?*

Yes provided that this does not automatically require a poll for each vote.

While polls may appear to be democratic, the best interests of members are in the efficient despatch of business at meetings and polls are time consuming. The alleged advantages of "transparency" in requiring a poll for each vote are entirely spurious.

Most business transacted at most company meetings is routine and non-controversial.

Accordingly, it is important to allow retention of the ability of the chairman of the meeting to allow the meeting to vote on a show of hands as we currently enjoy in the UK, or by acclamation.

To minimise delays in proceedings caused by polls, they should be called only when participants in the meeting representing a material percentage of shares demand them[2] or the chairman decides that the issue requires a poll for any reason.

Persons voting in advance could be permitted to call for a poll if the vote on a show of hands goes a particular way to make it less easy to pack a meeting with voters favourable or unfavourable to a particular proposal.

Article 17 – Amendments

17. Do you agree with the approach set out in Articles 16 and 17?

Yes

[2] We recognise that this would be a change for the UK.

The Association of Corporate Treasurers

The ACT is the international body for finance professionals working in treasury, risk and corporate finance. Through the ACT we come together as practitioners, technical experts and educators in a range of disciplines that underpin the financial security and prosperity of an organisation.

The ACT defines and promotes best practice in treasury and makes representations to government, regulators and standard setters.

We are also the world's leading examining body for treasury, providing benchmark qualifications and continuing development through training, conferences, publications, including *The Treasurer* magazine and the annual *Treasurer's Handbook*, and online.

Our 3,600 members work widely in companies of all sizes through industry, commerce, financial institutions and professional service firms.

Our guidelines on policy and technical matters are available at http://www.treasurers.org/technical/resources/manifestosept2006.pdf. We canvassed the opinion of our members on the EU's shareholder rights proposals through our monthly e-newsletter to members and others, *The Treasurer* magazine and our Policy and Technical Committee.

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