

Michael Kempe
The Registry
34 Beckenham Road
Beckenham
Kent BR3 4TU
Direct Line: 020 8639 1234
E-mail: michael.kempe@capita.co.uk

Ms Verena Ross
Executive Director
European Securities and Markets Authority
103 Rue de Grenelle 75007
Paris
France

25 November 2011

Dear Ms Ross

Call for evidence on Empty Voting

We are delighted to be given the opportunity to provide a response on behalf of the Registrars Group of the Institute of Chartered Secretaries and Administrators (ICSA) to the above named call for evidence.

The Institute of Chartered Secretaries and Administrators Registrars Group (ICSA) represents the major service registrars in the United Kingdom whose members are outsourced registrars for more than 99% of all quoted companies in the UK. The three major Registrars are Capita Registrars, Computershare Investor Services and Equiniti. The ICSA is responsible for formulating policy and best practice guidelines in all areas relating to share registration.

<p>Q1. Please identify the different types of empty voting practices and the frequency with which you think they occur within the EU. Where possible, please provide data supporting your response.</p>
--

We would define empty voting as the consequence of:

- 1) contractual arrangements including securities lending, where one party borrows securities prior to a voting entitlement qualification date in order to exercise voting rights attached to those securities, retaining no ongoing economic interest in the shares, or contracts for difference, where a party without the economic entitlement may be able to exercise influence over the securities held by another party as collateral; and
- 2) situations where investors dispose of their economic interest in shares between the voting entitlement qualification date and a general meeting and yet still exercise their voting right.

It could be argued that the situation is similar to that of a shareholder who is intending to sell the shares he holds shortly after the general meeting takes place, but this is not the case. Such a shareholder may also not have a long-term economic interest relating to the shares, but the differentiating factor is that, in this case, the price at which the shares will be sold will reflect the outcome of the vote whereas, in the other, it is unlikely to be affected by the outcome.

Whilst we recognise the potential risk for empty voting arising from the two scenarios outlined above, we would conclude that there is a lack of evidence to suggest that it is a common occurrence in our market.

Empty voting attributable to the second category above (i.e. sale of shares between record date and meeting date) is likely to be more prevalent in markets where there is a significant duration between the voting

entitlement qualification date (in advance of the meeting) and the meeting itself. In the UK this form of empty voting is considered to be less of a concern because the entitlement to attend and vote at general meetings is determined a maximum of 48 hours prior to the meeting itself (under the UK Companies Act), minimising the potential for a voting shareholder to have disposed of their shares in the period between their entitlement crystallising and the meeting taking place.

Whilst we recognise the potential risk for empty voting arising from the two scenarios outlined above, we would conclude that there is a lack of evidence to suggest that it is a common occurrence in our market.

As a result of the development of the European Market Standards for General Meetings, there is some pressure for the UK to change the current process and timescales with the stated aim of simplifying the situation for intermediaries or other investors but we believe that this reflects a misunderstanding of the UK market process, and the advantages of so-doing (which can be achieved in other ways) are out-weighed by the increased scope for empty voting which would arise.

For example, in other European countries, where the voting entitlement qualification is determined further in advance of the meeting itself, the risk of this form of empty voting is clearly much more significant. To minimise this impact we believe record dates should be as close to the record date as possible. In a T+2 environment we believe that 'no more than 48 hours before the meeting' is the standard to which all Member State markets should aspire.

Q2. Please identify specific examples where empty voting practices have occurred within the EU. Where possible, please provide data supporting your response.

We believe it is difficult to measure the frequency and scale of empty voting across the EU. Complex investment structures and arrangements make it difficult to obtain a clear picture of whether the ultimate owners of the securities are those actually exercising the right to vote. For one specific example, see our response to Q4 below.

Q3. a) What in your view are the negative consequences that can occur as a result of empty voting (relating to e.g. transparency, corporate governance, market abuse)?

Empty voting gives rise to a number of potential concerns:

- 1) An issuer's ability to engage with its shareholders is a requirement of good corporate governance. Empty voting, in either of the two guises outlined in our response to Q1, should be a concern for issuers in relation to ensuring they engage with the correct shareholder representatives.
- 2) Similarly, there is a concern that empty voting may result in one party being able to influence the management decision making process and voting in relation to shares they either no longer hold, or where they retain no long term interest in the business.
- 3) There is the potential for empty voting to distort voting outcomes, with a party being able to exert influence over decisions being made that is disproportionate to their economic interest.

b) To what extent do you consider those consequences to occur in practice?

We are not able to provide a definitive answer to this question across the EU as a whole. The presence of empty voting is very much dependent on local market factors in relation to how their general meetings operate. A short amount of time between the voting entitlement qualification date and the meeting, as is evident in the UK and Irish markets, represents a useful control against the potential for empty voting, if not a complete solution. With the one exception noted below, we have seen no evidence of empty voting in the UK and Irish markets.

We do witness certain contractual arrangements (CFDs for example) that could give rise to empty voting, though it is not possible to measure how widespread this is. Improved transparency would allow a better understanding in this area.

c) To what extent have you encountered those consequences in your own experience?

Please see our response to (b)

Q4. a) Do you believe that empty voting has influenced the results of voting at the general meeting of shareholders within the EU?

We are aware of only one instance in the UK where the practice of 'empty voting' was used to try and influence the outcome of a general meeting. In 2002 the activist investor, Laxey Partners, borrowed and voted on nine per cent of the voting rights of British Land in spite of owning a long term interest of only one per cent of the shares in issue.

b) Has this ever occurred in your own experience?

Please see our response to (a).

Q5. What kind of internal policies, if any, do you have governing the exercise of voting rights in respect of securities held as collateral or as a hedge against positions with another counterparty?

This question does not fall under the activities of our members and we are therefore not best placed to respond.

Q6. Do you think that regulatory action is needed and justifiable in cost-benefit terms? If so, which type of empty voting should be addressed and what are the potential options that could be used to do this? Please provide reasons for your answer. Kindly also provide an estimate of the associated costs and benefits in case of any regulatory action.

On the basis of our experience, we are not persuaded that there is a problem that justifies regulatory action. Empty voting is certainly a concern for some issuers and markets in the EU, but any regulatory action would need to be very carefully considered. Simply banning empty voting would be very difficult, particularly in bearer markets. It is crucial to maintain the integrity of the voting process by ensuring that there are very clear rules in each market regarding who is entitled to vote. There also needs to be a balance between operational and legal certainty of entitlement to vote and the policy concerns which ESMA seeks to address. We therefore think it is extremely important that ESMA should identify more precisely the behaviour that causes a problem; why it is a problem; and the best way to tackle the problem, before proposing any regulatory measure.

Given the variation of market structures across Member States, empty voting is consequently best addressed at a local market level, if necessary, based on the perceived scale of the issue in that market; particularly in light of a lack of evidence indicating this is a widespread problem. In the UK & Irish markets we do not see empty voting as a concern and we would be worried by any regulation that could have a negative impact on current controls. We also believe the 'registered' nature of the market and the resultant transparency of share ownership is beneficial for limiting the scope and potential for empty voting.

If you wish to discuss this matter further, please do not hesitate to contact me on 020 8639 1234 or by e-mail to michael.kempe@capita.co.uk.

Yours sincerely

Michael Kempe
Chairman of the ICSA Registrars Group