

Comments

On the Call for Evidence on Empty Voting by the European Securities and Markets Authority of 14 September 2011 (ESMA 2011/288)

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,200 banks.

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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 proposed regulatory action.

We do not think that regulatory action on empty voting is needed, either in the form of a ban or by introducing special transparency mechanisms.

The fact that voting rights may be decoupled from economic ownership is the intended consequence of the decision to introduce the record date principle in the Shareholders' Rights Directive (2007/36/EC), which took effect only in 2007. Under Article 7(1b) of this directive, the right of shareholders to sell or otherwise transfer their shares during the period between the record date and the general meeting to which it applies may not be subject to any restriction to which they are not subject at other times. This provision was introduced to meet the market's need for shares to be tradable and liquid at all times, including the period prior to a shareholders' meeting. It eliminated the hitherto not unusual practice of share blocking. The associated ability to exercise voting rights at a general meeting without carrying the economic exposure attached to the shares is therefore not only permissible, but a desired consequence of the record date principle. Prohibiting the exercise of voting rights at a general meeting by investors who do not bear the economic risk associated with ownership of the shares would devalue the record date principle introduced in the Shareholders' Rights Directive. There should consequently be no ban on empty voting.

Nor do we see a need for special disclosure requirements for empty voting. Every acquisition or sale of voting rights which triggers a threshold under Articles 9ff. of the Transparency Directive already has to be disclosed. This includes acquisitions and sales which take place between the record date and general meeting.

The Transparency Directive's notification requirements do not, however, as things stand, cover a lender's right to recall securities on loan. Should it be considered necessary to introduce such a requirement in order to close this transparency gap, the requirement should apply at all times, not just to a certain period ahead of general meetings. Otherwise, market participants who were interested not in empty voting but in building up a hedging position, for instance, would always have to operate with one eye on the general meeting calendar. The introduction of a general requirement to disclose lenders' rights to recall securities in a securities lending transaction was already considered by the European Commission during the Transparency Directive review.¹ Questions concerning empty voting were also addressed in the course of this consultation process. Any further consideration of regulatory action on empty voting in the form of additional disclosure requirements relating, for example, to the lender's right to recall securities or other derivative instruments under Articles 9ff. of the Transparency Directive should therefore be left to the European Commission.

¹ Cf. question 12.2 of the DG Internal Market and Services consultation document of 27 May 2010 entitled "Consultation document on the modernisation of the Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market" (D 1031A-2010).