Call for evidence by ESMA on Empty Voting

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.

Empty voting may occur where a shareholder sells the share after the record date for the general meeting (21 days before the general meeting in the case of listed German stock companies with bearer shares) and is, thus, still entitled to exercise the voting right on the share that he no longer owns. It also occurs where shares are transferred to a third party under a share lending or repurchase agreement for the record date and the date of the general meeting.

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

See answer to question 1

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)?

As a general matter, empty voting may bear the risk that the person exercising the voting right is not acting in the best interest of the issuer because he no longer is economically interested in it.

However, we think that the situation where a person has economically a negative position in an issuer (i.e. a net short position) is more relevant when determining whether such person may have a conflict of interest when voting in the issuer's general meeting. Whereas "empty voting" describes situations where the shareholder or the person exercising the voting right does not have an economic interest in the share, this generally captures situation where the interest of such person vis-à-vis the issuer is neutral. In contrast, a person with a net short position does have an interest in the issuer's share price decreasing. Net short positions do, in general, not concur with empty voting. E.g. if A holds 100 shares in B and put options relating to 200 shares in B, A has a net short position of 100 shares in B. However, with respect to the 100 shares that A holds, A is legal and beneficial owner, and therefore – depending on definitions - may not fall in any "empty voting" scenario.

b) To what extent do you consider those consequences to occur in practice?
We are not in the position to evaluate any voting practice where a conflict of interest has materialized because the owner of the voting right did not also have an economic interest in the share, potentially also due to a lack of transparency.

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

We have not yet encountered those consequences, potentially also due to a lack of transparency.

Where possible, please provide data supporting your response.

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

See answer to question 3b).

b) Has this ever occurred in your own experience?

See answer to question 3b).

Where possible, please provide data supporting your response (including the type of empty voting that you are referring to)

Q5. What kind of international 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?

Our members who responded to the Call for Advice generally do not hold shares as collateral because of their high volatility compared with other collateral. Therefore, no policies for the exercise of voting rights in respect of securities held as collateral are in place.

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.…

As laid out above, we believe that the potential conflicts of interests that are discussed in the context of empty voting rather occur in cases where a person has a negative interest (rather that just a neutral interest) in an issuer. Those situations will be made transparent under the new disclosure regime for net short selling positions, which is already today part of national regulation in many European member states. Since the threshold for the disclosure of net short positions to the public (and, thus, also to the issuer) will be set at 0.5%, the issuer will obtain a transparent view on the amount of votes represented in the general meeting that are being exercised by persons with a negative interest in the issuer. As such disclosure of net short selling positions will only become effective shortly, an analysis of the then available data will show the practical relevance and will help to assess the need for any further regulation.

Another aspect similar to the problem posed by empty voting – i.e. the hidden (economic) ownership of the share by a third party that is not the legal owner of the share – will be sufficiently addressed by the improved reporting of long positions deriving, inter alia, from cash settled derivatives that is proposed in the review of the Transparency Directive. If such long positions are made transparent at a sufficient level, the “empty voting” position of the legal owner should not be of additional interest and therefore not require its own reporting. Again the impact of the new disclosure regime for long positions should be evaluated before creating new disclosure obligations.

Nevertheless, it would be of high interest to capture in the context of the registration for the attendance of the general meeting – in addition to the disclosure of major long positions and of net short positions – the amount of votes that are being exercised through empty voting (especially cases of share lending and repurchase agreements), in order to further assess the relevance of empty voting for decisions taken in general meetings. This could be ensured at relatively low cost by introducing a new requirement for the registration for attendance of the issuer’s general meeting. As an additional item, shareholders registering for the attendance of the general meeting should be required to indicate whether they hold the

shares for which they register through a share lending or repurchase agreement or not. Incorrect or missing answers should in a first instance not be sanctioned with the loss of the voting right, but only with an administrative fine. This requirement would enable issuers, and in a broader picture also the legislator, to get a view on the relevance of empty voting, and to assess – in a second step – any consequences of it.

Costs associated to such reporting that is integrated in the registration for the attendance for the general meeting would have to reflect processes at the level of the issuer to aggregate the information given, and at the level of the investor to give the required information.

Beyond that we do not see the need for any new regulation with respect to empty voting as this may pose additional and unnecessary bureaucratic burden on the issuers and investors. Where regulation would tempt to restrict the exercise of (empty) voting rights – be it as such or as sanction in case of non respect of notification obligations – the issuer would not just have to implement processes for its general meeting to keep track of such shares, but would also face an increased risk to have decisions taken by the general meeting challenged in court. Additional notification requirements (i.e. not connected to the registration for the general meeting as proposed above) for empty voting should not be created as they impose additional bureaucratic burden on the investors without additional benefit for the issuer or the transparency of financial markets.

More generally, however, as an issuer we welcome initiatives that lead to more transparency with regard to the identification of the shareholders. Currently, the exchange of shareholder identification data via Central Securities Depositories (CSD) on a cross-border basis faces many obstacles. To remove these obstacles and improve the cross-border shareholder transparency through harmonized rules on shareholder disclosure within the chain of custody is a key issue to improve corporate governance.