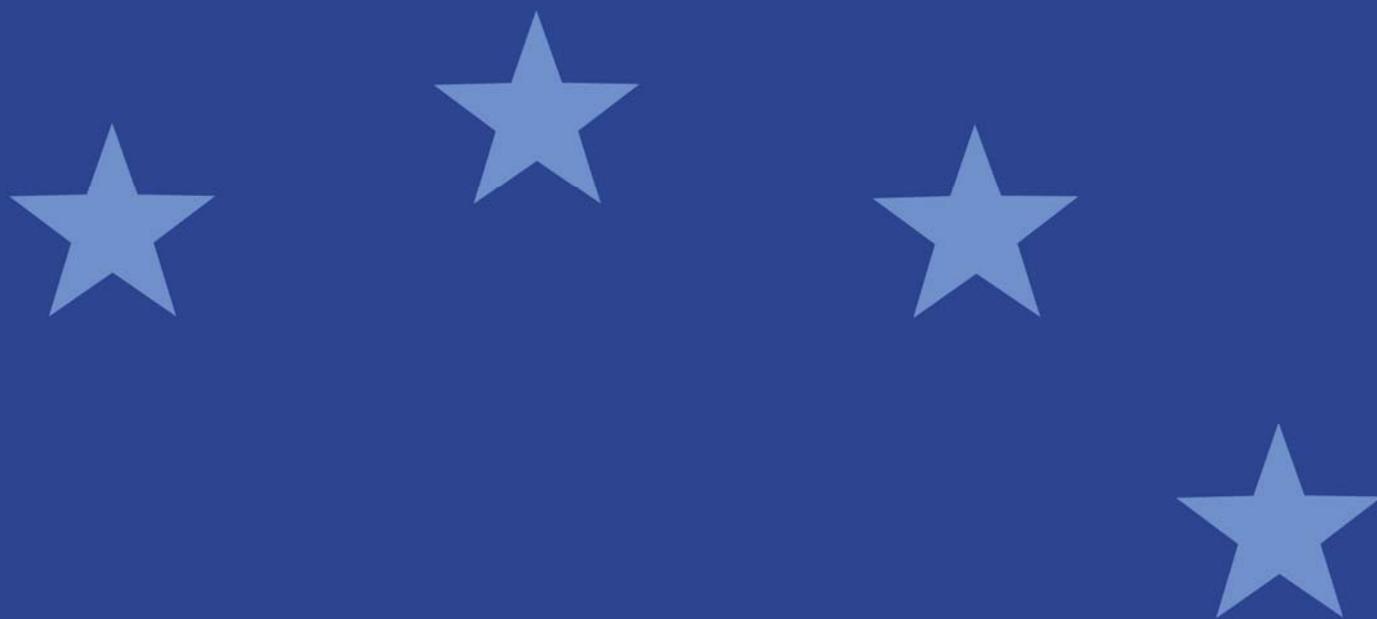




European Securities and
Markets Authority

Call for evidence

Empty voting



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions presented below in Chapter IV. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **25 November 2011**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

Who should read this paper

This paper will be of interest to investors (both institutional and retail), companies admitted to trading on regulated markets, associations or other bodies representing them as well as academics.



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Acronyms used

ESMA	European Securities and Markets Authority
TD	Transparency Directive (Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC)

I. Executive Summary

Reasons for publication

In recent years there has been discussion on possible regulatory reaction to the decoupling of voting rights. In this context, issues and potential problems relating to empty voting (i.e. having voting rights attached to shares without corresponding economic exposure) have also been raised.

Currently there are no specific rules relating to empty voting at the European level. Two Member States, however, have taken or are planning to take steps to address empty voting. ESMA has decided to issue this call for evidence in order to collect information and evidence on the extent to which empty voting practices exist in practice and the effects of such practices.

Next steps

Responses to this call for evidence will help ESMA to assess whether there is need for further ESMA work with regard to empty voting.

II. Introduction

1. In recent years, there has been discussion on possible regulatory reaction to the decoupling of voting rights. Derivative instruments and trading strategies used in the securities markets have made it possible to separate the economic interest relating to shares from their voting interest.
2. Although these instruments are usually used for fully legitimate purposes, ESMA notes that they may potentially be used to exercise influence in a company without having any economic interest in the company (“empty voting”). In this context, conflict of interest issues with regard to shareholders with economic interests in the company may arise. While empty voting may impact any public company, ESMA’s interest is specifically with regard to how it impacts companies with securities admitted to trading on regulated market.
3. Currently there are no specific rules relating to empty voting at the European level. Two Member States, however, have taken or are planning to take steps to address empty voting by e.g. establishing specific disclosure requirements regarding empty voting.¹
4. This call for evidence seeks to collect information and evidence on the extent to which empty voting practices exist in practice and the effects of such practices. On the basis of the information gathered, ESMA will assess whether there is need for further work in this area.
5. This call for evidence has been prepared by ESMA’s Corporate Finance Standing Committee.

III. Background

6. Discussion on empty voting is often connected to discussion on hidden ownership. Whereas empty voting relates to situations where shareholders have voting power without corresponding economic interest, hidden ownership relates to situations where investors have long economic exposure to a company without having corresponding voting power. Empty voting and hidden ownership can be (although they are not necessarily) mirror images of a single transaction.

Examples of empty voting situations:

Example 1: An investor borrows shares in order to vote at the general meeting of shareholders of a company. Under the agreement, his economic exposure relating to the shares does not correspond to the amount of voting power he holds and he is not exposed to the long-term economic risk relating to the shares.

Example 2: An investor votes at the general meeting of shareholders even though he has sold his shares after the record date.

7. Some analysts and stakeholders consider that empty voting may cause problems with regard to the transparency of the voting structures of listed companies, corporate governance and to the market

¹ In France, there is a disclosure requirement relating to temporary interest in voting rights at the date of the general meeting of shareholders. In Portugal, anyone who has declared the intention to participate in a general meeting, but has passed the ownership of the shares to a different holder between the record date and the end of the general meeting, is required to notify immediately the fact to the General Meeting and the CMVM. The CMVM is still considering the possibility of taking further regulatory action towards empty voting.

for corporate control. For example, empty voting may result in a situation where an investor votes against the interest of the company and/or its other shareholders without or at minimal financial exposure in order to further his own interests. This is considered to be a particular problem when the voting rights are obtained purely for the purpose of voting at the general meeting of shareholders.

8. In the European legislative framework, these issues may fall under the Transparency Directive (2004/109/EC), the Takeover Bids Directive (2004/25/EC) and Company Law Directives, e.g. the Directive on Shareholders' Rights (2007/36/EC).
9. The Commission report on the operation of the TD² and the related staff working document³ identified, inter alia, a number of possible regulatory issues relating to empty voting and hidden ownership. The Commission consultation on the modernization of the TD⁴ also raised a number of questions relating to these issues.
10. On the basis of the feedback statement⁵ published by the Commission, it seems that while there was support for enhancing the transparency of hidden ownership, the majority of the respondents did not support the introduction of mechanisms to enhance the transparency of empty voting.⁶
11. Moreover, the Commission Green Paper on the EU corporate governance framework⁷ addresses in general terms issues relating to identification of shareholders by listed companies.
12. ESMA considers it important to assess issues relating to empty voting as a whole. Therefore, this call for evidence is not restricted to transparency or corporate governance issues, or to a specific piece of European legislation. Rather, ESMA seeks views in a broader context on the occurrence of empty voting and the possible market failures that may arise from the current situation.

IV. Questions

13. ESMA's objective is to collect information and evidence on the extent to which empty voting practices exist in practice within the EU and the effects of such practices.

Ways of exercising 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.

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

² COM(2010) 243 final. See http://ec.europa.eu/internal_market/securities/docs/transparency/directive/com-2010-243_en.pdf.

³ SEC(2009) 611. See http://ec.europa.eu/internal_market/securities/docs/transparency/directive/sec-2010_611_en.pdf.

⁴ See http://ec.europa.eu/internal_market/securities/docs/transparency/directive/consultation_questions_en.pdf.

⁵ See http://ec.europa.eu/internal_market/securities/docs/transparency/transparency-consultation-summary_en.pdf.

⁶ "A majority of the respondents to this question believed that a specific disclosure mechanism for holders of voting rights who do not hold shares after the record date for the shareholders general meeting would be neither useful nor effective to prevent empty voting practices. Such a disclosure requirement was seen as onerous, easy to circumvent and difficult to enforce as well as providing an implicit endorsement of empty voting practices. Also, it could result in a de facto share blocking, which would be counterproductive."

⁷ COM(2011) 164 final. See http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf#page=2.

Consequences of empty voting

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)?

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

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

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?

b) Has this ever occurred in your own experience?

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

Internal policies relating to voting practices

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?

Need for regulatory action

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.