

**Implementation of the Directive on the exercise of certain  
rights of shareholders in listed companies**

**GOVERNMENT RESPONSE TO CONSULTATION**

**July 2009**

# Implementation of the Directive on the exercise of certain rights of shareholders in listed companies

## Response to consultation

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# Implementation of the Directive on the exercise of certain rights of shareholders in listed companies

## Response to consultation

### Introduction

1. In October 2008 the Department for Business, Enterprise and Regulatory Reform published a consultation document seeking views on the implementation of the Directive 2007/36/EC on the Exercise of Certain Rights of Shareholders in Listed Companies (“the Directive”) and on the making of related changes to legislative provisions on shareholder rights in the Companies Act 2006. The consultation document is available from:

<http://www.berr.gov.uk/consultations/page48666.html>

2. The consultation closed on 30 January 2009. BERR received a total of 53 responses from a variety of interested parties. BERR also held meetings with stakeholders to discuss their responses. A full list of respondents is attached at Annex A. BERR is grateful for all responses received.

### Summary of those responding to the consultation

Category of respondent	Number
Listed company	20
Trade association	10
Law Firm	7
Professional body	6
Investor	2
Registrar	2
Proxy voting service	3
Other	3

3. The views expressed were analysed and as a result a number of changes were made to the draft implementing regulations, better reflect both the aims of the Directive and the needs of stakeholders.

4. The revised draft regulations were then published on the Department’s website, allowing one week for further public comment. This consultation closed on 29 May 2009. Seventeen responses were received. The draft regulations were subsequently further amended to take account of points made in the responses.

### Background

4. The Commission’s proposal for the Directive was adopted on 11 July 2007. The Directive aims to improve corporate governance in EU companies traded on regulated markets by enabling shareholders to exercise their voting

rights and rights to information more easily. In particular, it seeks to achieve this by overcoming the obstacles that shareholders owning shares in companies registered in another Member State face when voting at company meetings. The text of the Directive is available from:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:184:0017:0024:EN:PDF>

5. The key provisions in the Directive address the following four areas:
  - sufficient advance notice and prior information for meetings;
  - the abolition of share-blocking;
  - removal of legal obstacles to electronic participation;
  - the right to ask questions; and
  - voting by correspondence.
  
6. The implementing regulations are to be made under section 2(2) of the European Communities Act 1972 which will amend the Companies Act 2006.

### **What happens next?**

7. The implementing regulations will be made in July and will come into force on 3 August 2009.

## **Summary of responses to questions and other issues raised by respondents**

### **Regulation 2: Voting on a show of hands**

#### **Q1: Do you agree that this is an effective way of enabling the splitting of votes under the Companies Act 2006?**

The provisions regarding proxy voting in the Companies Act 2006 have caused some confusion as to how many votes proxies have on a vote taken on a show of hands. Respondents acknowledged that clarification is needed in this area, but there is a tension between the desire for legal clarity and certainty on the one hand, and maintaining the ability for votes on shows of hands to be undertaken quickly and easily on the other.

A number of respondents agreed that the wording is satisfactory, but there was the potential for some practical difficulties. Many respondents considered, however, that these difficulties could be overcome using the Chairman's discretion to call a poll and shareholders ability to call a poll under section 321.

There was nevertheless considerable support for deleting subsection 2 of section 285. This section states that where a member appoints more than one proxy, subsection (1) applies as if the references to the proxy were to all the proxies taken together. Feedback indicates that this section will be too hard to monitor and control in practice, and it would be better for each proxy to have one vote on a show of hands, relying on the Chairman to use the poll procedure if they feel the show of hands vote was not representative of the views of the members.

The Government understands the practical difficulties section 285 as drafted will create for companies and intends to allow each appointed proxy one vote, unless the proxy is appointed by more than one member, in which case the proxy has one vote for and one vote against if the proxy has been instructed by one or more members to vote for the resolution and one or more members to vote against. This approach will facilitate vote-splitting, ensuring the requirements of Article 13.4 of the Directive are met. It should also be kept in mind that a chairman has the discretion to call a poll and shareholders can also call a poll under section 321.

### **Regulation 6: Representation of corporations at meetings**

#### **Q2: Do you agree that these changes permit corporate representatives to vote in different ways at company meetings?**

Respondents largely agreed that new subsection 323(5) as set out in the consultation text did achieve the purpose, in that the amendments would allow

corporate representatives to vote in different ways in company meetings, but considered the drafting could be clearer.

Section 323 has now been redrafted so that a vote on a show of hands, each authorised person has the same voting rights to which the corporation would be entitled, but where a corporation authorises more than one person to act as its representative, those representatives must exercise powers in respect of the same shares in the same way.

### **Regulation 5: Advance voting on a poll**

**Q3: Do you agree that the right to demand a poll should also be available by correspondence in advance?**

There was a general feeling amongst respondents that advance voting is unnecessary in the UK as a remote system of voting is already in place in the UK – the proxy system. Many thought the proxy system achieves the aims of Directive.

Some nevertheless felt that if advance voting is allowed then as a consequence the ability to call a poll in advance should also be available. However, others noted that the Directive does not require it and the ability to call a poll in advance introduces unnecessary practical difficulties.

The Government's view is that legal clarity is needed in order to permit companies to offer voting in advance.

The Directive does not however require Member States to permit companies to provide the right to demand a poll by correspondence in advance and the Government will not pursue this matter further.

### **Regulation 7: Obligations of proxies**

**Q4: Do you agree that the obligations of proxies need to be stated in this way?**

Regulation 7 states that a proxy must act in accordance with any instructions given by the member by whom the proxy is appointed. Whilst many respondents agreed with expressing the obligation in this way, a significant number of respondents consider a statutory statement unnecessary as UK common law already satisfies the requirement in Article 10(4) of the Directive.

The Government's view is that the Directive calls for this principle to be stated clearly. Regulation 7 has been amended to better track the wording in the Directive, so that the obligation is limited to voting instructions.

### **Regulation 8: Electronic meetings and voting**

**Q5: We would welcome your views on how to define “electronic means accessible to all shareholders”.**

Most respondents wanted this phrase defined, to clarify what it means in practice. The majority also want it defined in such a way that appointment of a proxy via CREST (or similar facility) fulfils the requirement. There is concern that if the definition demanded electronic voting via a website this would be onerous, particularly for smaller or traded companies.

The Commission however has indicated that the Directive requires companies to offer their shareholders the ability to appoint a proxy via a website and regulations have been drafted in order to achieve this minimum criterion. It should be noted that companies need only offer the facility to appoint a proxy by electronic means for the general meeting which they intend to hold at 14 days’ notice.

Respondents helpfully brought to our attention the need to clarify that the rules in regulation 8 relating to notice of general meetings do not apply to class meetings, and meetings in the context of the Takeovers Directive (2004/25/EC). Relevant amendments were made to the drafting of the regulations.

**Regulation 9: Traded companies: notice of general meetings**

**Q6: Do you agree that resolutions to permit companies to continue holding EGMs at 14 days’ notice should be passed on the basis of two thirds of the voting rights of those who vote at the meeting or should it be 75% as for other special resolutions?**

Approximately two thirds of respondents favoured treating the resolution for holding general meetings at 14 days notice as a special resolution and thus 75% of the voting rights of those who vote at the meeting. This is favoured for consistency with the Companies Act 2006 and to avoid creating a new category of resolution.

Other respondents favoured a two-thirds majority primarily because this is the minimum requirement of the Directive, and UK law should not be stricter, and also because it is thought most companies will want to retain the ability to call meetings at 14 days notice and would like the resolution to be as easy as possible to pass.

The Government prefers to avoid creating a further category of resolution, and for this reason the regulations will require the resolution to be passed as a special resolution.

Many respondents questioned why the resolution to allow general meetings at 14 days’ notice needs to be unanimous if conducted on show of hands. On reflection the Government does not think this is necessary; the majority

should be 75% whether the vote is conducted on a poll or show of hands (as it is now).

Respondents also consider section 307A(5) too restrictive in imposing a minimum notice period for adjourned meetings, and have suggested that the minimum notice period should apply only to meetings adjourned for lack of a quorum. The Government agrees and this is reflected in the revised regulations.

### **Regulation 12: Traded companies: questions at meetings**

#### **Q7: Do you agree that the asking and answering of questions at meetings of traded companies requires implementation in this way?**

There was a mixed response to this question. Many respondents thought the common law dealt with the asking and answering of questions adequately and that no clarification is necessary, and moreover statutory clarification may result in confusion.

Other respondents were happy with the proposed implementation (as they felt it simply reflects current UK law and practice) but questioned why the further protections in the Directive were not reflected in the draft regulations. These are: to permit a company to not answer a question in order to protect the business interests of the company; and to allow companies to provide one overall answer to questions having the same content.

The Government is concerned that the term “business interests” is too broad and indefinable, and therefore has reservations about including “business interests” as a statutory reason for a company to not answer a question. However, in response to stakeholder concerns that the grounds for refusal to answer are too restrictive, new section 319A has been amended to allow companies to refuse to answer a question if to do so would not be in the company’s interests. This amendment, in conjunction with relevant common law, will enable companies to deal appropriately with questions at meetings. Also, the Government does not believe companies are precluded from providing one overall answer to questions having the same content and feels including a statement to that effect in the regulations is unnecessary.

A number of respondents asked if questions could also be put by proxies and wanted clarification that they may ask questions on behalf of the member. The Government’s view is that the ability to ask questions is inherent in a proxy’s right to speak in section 324.

### **Regulation 16: notice of AGM and Regulation 17: other matters to be included in AGM**

The draft regulations set a 14 day deadline for traded companies to receive requests for members’ resolutions and requests to include other matters in the

business to be dealt with at the AGM. The Act currently sets a deadline of 6 weeks (for members' resolutions; the right to request other matters to be included in the AGM's business is a new provision). Respondents were clear that the 6 week deadline is an absolute minimum and is already difficult to achieve.

In light of the problems a 14 day deadline would create the Government will not set a different deadline for traded companies. Hence, the deadline for companies to receive requests from shareholders for resolutions, and to include other matters in the AGM's business, will be 6 weeks.

**Regulation 19: Traded companies: expenses of circulating members' resolutions for AGM**

**Q8: Do you agree that the members of a traded company should not have to pay the expenses of circulation?**

Respondents overwhelmingly favoured retaining the regime in section 340 of the Companies Act 2006 – that is, expenses need not be paid by the members who requested the circulation of the resolution if the request is received before the end of the financial year preceding the meeting.

In view of the fact that the Directive does not require the company to pay the expenses of circulation and stakeholders are against any such requirement, the Government will not set a different expenses regime for traded companies for the circulation of resolutions.

## **Annex A List of respondents**

1. Amlin plc
2. Association of British Insurers
3. Association of Chartered Certified Accountants
4. Association of Investment Companies
5. Association of Private Client Investment Managers
6. Aviva plc
7. Barclays plc
8. Berwin Leighton Paisner LLP
9. BP plc
10. British Airways plc
11. British Bankers Association
12. Broadridge
13. BT Group plc
14. Cadbury plc
15. Chancery Bar Association
16. Computershare Investor Services
17. Confederation of British Industry
18. Dechert LLP
19. Diageo PLC
20. Dickson Minto W.S.
21. Equiniti Ltd
22. Euroclear UK and Ireland Ltd
23. Eversheds LLP
24. GC100
25. General Council of the Bar
26. GlaxoSmithKline plc
27. Hermes Equity Ownership Services
28. Institute of Chartered Accountants of England and Wales
29. Institute of Chartered Secretaries and Administrators
30. International Securities Lending Association
31. Investment Management Association
32. Law firms combined response\*

33. Law Society
34. Law Society of Scotland
35. London Stock Exchange
36. Manifest Information Services Ltd
37. Marks and Spencer plc
38. Mercator Gold plc
39. National Association of Pension Funds
40. Nestor Healthcare Group plc
41. Norton Rose LLP
42. Old Mutual plc
43. Prism Communications and Management Ltd
44. Prudential plc
45. Quoted Companies Alliance
46. RiskMetrics Group
47. Royal Bank of Scotland Group plc
48. SAB Miller PLC
49. Shaftesbury PLC
50. Standard Chartered plc
51. Standard Life plc
52. The Share Centre
53. UK Shareholders Association

\* Reflects the majority views of Allen & Overy, Ashursts, Clifford Chance, Freshfields Bruckhaus Deringer, Herbert Smith, Linklaters, Lovells, Shepherd and Wedderburn and Slaughter and May