

**WODC**  
**Onderzoeksnotities**

**2002/6**

# **Cross-Border Voting in Europe**

**The Expert Group on Cross-  
Border Voting in Europe**  
Final report



**Wetenschappelijk  
Onderzoek- en  
Documentatiecentrum**

## Expert Group on Cross-Border Voting in Europe

Chairman Jaap Winter	Professor at the Erasmus University of Rotterdam and legal advisor Unilever, The Netherlands
Ulrich Noack	Professor at the University of Düsseldorf, Germany
Philippe Bissara	Secretary-General of the Association Nationale des Sociétés par Actions, France
Dario Trevisan	Lawyer at Trevisan & Partners, Milan, Italy
Jonathan Bates	Managing director at Institutional Design, London, United Kingdom
Jan Schans Christensen	Professor at the University of Copenhagen, Denmark
Secretary Marnix van Ginneken	Legal advisor Akzo Nobel and lecturer at the Erasmus University of Rotterdam, The Netherlands



## Letter of the Chairman

The Expert Group on Cross-Border Voting in Europe was set up by the Dutch Minister of Justice in January 2002. Attached you will find the Final Report of the Group. It makes a number of specific recommendations for European regulation dealing with the legal obstacles to cross-border voting in Europe. The Final Report has been submitted to the Minister of Justice and to the High Level Group of Company Law Experts set up by the European Commission. The Group hopes its recommendations will form the basis of a European solution for the problems of cross-border voting, which is much and urgently needed.

On behalf of the Group I would like to take the opportunity to thank the Minister of Justice for setting up the Group to address these issues and for providing the Group with excellent support from the Ministry. In particular Miss Corinne van Ginkel has helped us tremendously and cheerfully by arranging the meetings of the Group and the consultative hearing we conducted and by taking care of all the practical details involved. Miss Gerry ter Huurne participated in all the meetings of the Group.

I would also like to thank the participants in the consultative hearing and all those who have responded to our consultative document. Their contributions were excellent and much of their views is reflected in the Final Report.

A special word of thanks is due to our secretary, Mr. Marnix van Ginneken, who prepared the various drafts of the Consultative Document and the Final Report and co-ordinated our comments. I would also like to thank Michael Beurskens, Caspar Bunke and Niklas Mairose of the University of Düsseldorf, who prepared an extensive overview of the written responses to the Consultative Document, a summary of which is included in the Final Report as Annex 3.

Finally, I would like to thank the other Members of the Group, each of whose expertise, efforts and creativity have greatly contributed to the work of the Group. It was an honour and pleasure to chair this Group of excellent people.

Jaap Winter, Amsterdam, August 2002



# Contents

	<b>Executive Summary</b>	<b>1</b>
<b>1</b>	<b>Introduction</b>	<b>9</b>
<b>2</b>	<b>The Problems of Cross-Border Voting in Europe</b>	<b>11</b>
2.1	Introduction	11
2.2	Bearer share systems	11
2.3	Registered share systems	12
2.4	Cross-border shareholding in Europe	13
2.5	The problems of cross-border shareholding in Europe	14
2.6	Conclusion	16
<b>3</b>	<b>The three major issues</b>	<b>17</b>
<b>4</b>	<b>Entitlement to Control the Voting Right</b>	<b>19</b>
4.1	Introduction	19
4.2	The Primary Rule	20
4.3	The Supplementary Rule	23
4.4	No requirement for Ultimate Accountholders to disclose identity of clients	26
<b>5</b>	<b>Voting</b>	<b>29</b>
5.1	Introduction	29
5.2	Exercise of the entitlement to control the voting right by the Ultimate Accountholder	29
5.3	The moment determining the entitlement to control the voting right	33
5.4	Authentication of the Ultimate Accountholder	36
<b>6</b>	<b>Information</b>	<b>39</b>
6.1	Introduction	39
6.2	"Pushing" information	41
<b>7</b>	<b>Settlement Times and Securities Lending</b>	<b>45</b>
7.1	Introduction	45
7.2	Settlement Times	45
7.3	Securities Lending	46
<b>8</b>	<b>Conclusion</b>	<b>49</b>
	<b>Samenvatting (summary in Dutch)</b>	<b>51</b>

## **Annexes**

1	Mandate of the Expert Group	53
2	Working methods of the Expert Group	55
3	Summary and Analysis of the written comments on the Consultative Document	57
4	List of parties that submitted written comments to the Consultative Document	69

# Executive Summary

Cross-border voting by shareholders in Europe raises a number of practical and legal questions. This is due to the broad variety of regulation and practices that exists in European Union Member States with respect to the organisation of Annual General Meetings of Shareholders (“AGMs”) and the present securities holding systems, through which the vast majority of shareholders today hold their shares. The Expert Group on Cross-Border Voting (“the Group”) has been asked to investigate the practices, experiences and legal barriers to cross-border voting in Europe. The scope of the analysis by the Group is restricted to the specific issues that are related to listed companies with dispersed (international) share ownership and arise from the fact that the shares of these companies are traded and held through modern securities holding systems. In such securities holding systems shareholders hold shares through securities accounts with securities intermediaries. Transactions in shares are effectuated by crediting and debiting these accounts. The vast majority of shares that are held by investors in other jurisdictions than the jurisdiction of the issuing company are held through securities holding systems, often via complex chains of securities intermediaries.

The Group has identified a number of legal obstacles in the regulations of securities holding systems and in the company laws of Member States that complicate, and often render impossible the exercise of voting rights across borders in the European Union (*Section 2 of the Final Report*). The Group has made a number of recommendations, which are directed to remove these obstacles and create a legal environment which allows for the effective exercise of voting rights across borders with an appropriate level of legal certainty for all involved. The recommendations relate to elements of company law but mostly deal with the rights of accountholders and the obligations of securities intermediaries in securities holding systems.

The Group has identified three major issues that will have to be addressed in order to ensure that shareholders can vote across borders in an efficient way (*Section 3 of the Final Report*).

- a Throughout Europe it should be made clear who is entitled to vote or should have the right to determine how the votes are executed (*Entitlement to control the voting right*);
- b These persons or entities should be enabled to exercise their voting rights (*Voting*); and
- c It should be ensured that these persons or entities receive the relevant information to exercise their voting rights in an informed manner (*Information*).

These three issues are steps in the process of ensuring that investors can exercise the voting rights attached to the shares they hold. To a large extent

all three steps boil down to the role and obligations of securities intermediaries in securities holding systems in Europe. They are vital in determining the accountholders in securities holding systems who could or should be entitled to control the voting rights and in certifying their shareholdings. They may perform a role also in the actual process of informing shareholders and ensuring that their votes are actually cast. The European rules that the Group envisages should define the Securities Holding Systems that are subject to the rules, the Securities Intermediaries that participate in these systems and the Ultimate Accountholders who hold accounts in these systems and are not Securities Intermediaries as defined.

**Ad a Entitlement to control the voting rights (Section 4 of the Final Report)**

The Group considers the legal uncertainty over who in cross-border situations is entitled to determine how the shares are voted and how this must be realised as the main problem for cross-border voting in Europe. The Group has reached the conclusion that the solution for this problem requires regulation by the European Union and has formulated three objectives any solution must meet. First of all, any proposed solution must create certainty about who is entitled to control the voting right. Secondly, the proposed solution should attribute the entitlement to control the voting right as close as possible to the person or entity who really holds the economic interest in the shares. Finally, the proposed solution should not only function well within the jurisdiction of the European Union, but should also be practical and workable in cross-border situations relating to jurisdictions outside the European Union, especially with the United States.

On the basis of the Group's analysis of the problems and the above mentioned objectives, the Group makes the following recommendation.

*Recommendation 1:*

*Member States must ensure that Ultimate Accountholders in Securities Holding Systems are acknowledged to be entitled to control the voting right attached to shares held through Securities Holding Systems (the primary rule)*

The Ultimate Accountholder as defined will usually be the person or entity that has the economic interest in the shares, but this will not necessarily be the case. It is possible that the Ultimate Accountholder is an intermediary outside the Securities Holding Systems that are subject to the European Union rules. In this case the entitlement to control the voting right does not attribute to the person or entity with the economic interest in the shares. In order to make it possible to place the entitlement to control the voting rights as close as possible to the person or entity having the economic interest in the shares, a supplementary rule should be formulated that Member States must ensure that the Ultimate Accountholder in a Securities Holding System is authorised to designate clients as entitled to control the voting right, who will as a result be acknowledged as such. This supplementary rule opens the

window to look beyond the Ultimate Accountholder in European Securities Holding Systems, also outside the jurisdiction of the European Union.

*Recommendation 2:*

*Member States must ensure that the Ultimate Accountholder in a Securities Holding System is authorised to designate clients as entitled to control the voting right, who will as a result be acknowledged as such (the supplementary rule)*

The supplementary rule could be taken a step further, in the sense that the person or entity identified by operation of the primary rule as the Ultimate Accountholder can be required to disclose the identity of its clients at the request of the issuing company that suspects that the Ultimate Accountholder is not the ultimate investor, but an intermediary holding the shares on behalf of others. However, the Group believes such a rule should not be imposed on a European wide basis and therefore recommends that the European Union does not impose such an obligation on Ultimate Accountholders who are intermediaries. The Group does believe that Member States should be free to introduce such an obligation on Ultimate Accountholders holding shares in issuing companies subject to their jurisdiction.

*Recommendation 3:*

*The European Union should not impose an obligation on Ultimate Accountholders who are intermediaries (but not Securities Intermediaries as defined) to disclose the identity of their clients to issuing companies, but Member States should be free to introduce such an obligation on Ultimate Accountholders holding shares in issuing companies subject to their jurisdiction*

**Ad b Voting (Section 5 of the Final Report)**

*Exercise of the entitlement to control the voting right by the Ultimate Accountholder*

The Group believes that the adoption and implementation of the primary rule and the supplementary rule will be an important step towards an efficient infrastructure for voting at AGMs throughout Europe. However, the proposed rules alone are not sufficient. Additional measures will have to be taken in each Member State to ensure that the Ultimate Accountholder can effectuate his entitlement to control the voting right. The Group believes that this can be done without changing national company laws with respect to the formal voting right.

*Recommendation 4:*

*Member States must ensure that Ultimate Accountholders (or their designees under the supplementary rule) can exercise the entitlement to control the voting right through one of several options:*

- a The Ultimate Accountholder is acknowledged as shareholder entitled to vote*
- b The Ultimate Accountholder is designated in the shareholders register as entitled to vote*
- c The Ultimate Accountholder is given a power of attorney by the Securities Intermediary formally entitled to vote*
- d The Ultimate Accountholder instructs the Securities Intermediary who is the formal shareholder to vote as instructed*

*Option d) should always be available to Ultimate Accountholders. In order to allow for this Member States must ensure that split votes cast by Securities Intermediaries are accepted as valid votes*

Each of these options in itself should be sufficient to ensure that the Ultimate Accountholder will be able to exercise the entitlement to control the voting right. Each Member State should be free to implement the solution(s) that best fit(s) its present legal infrastructure. Member States should implement at least one of the suggested measures.

Options b), c) and d) require Securities Intermediaries to perform certain services to Ultimate Accountholders to ensure that they can exercise their entitlement to control the voting right.

The Group believes that the obligation of Securities Intermediaries to positively provide services to Ultimate Accountholders to ensure that they can control the voting right should be complemented by a negative obligation of Securities Intermediaries not to exercise the voting rights on shares held for others if they are formally entitled to do so, unless on the basis of specific instructions of Ultimate Accountholders or when Ultimate Accountholders have explicitly allowed the Securities Intermediary to exercise the voting right without any instructions.

*Recommendation 5:*

*Member States must ensure that Securities Intermediaries provide the options to control the voting right available under the laws of the relevant issuing company to the Ultimate Accountholder and that Securities Intermediaries are not allowed to exercise voting rights unless on the basis of specific instructions of Ultimate Accountholders or on the basis of an explicit agreement with Ultimate Accountholders*

*The moment determining the entitlement to control the voting right*

In determining who is formally entitled to vote as shareholder, company law inevitably has to decide at what time one has to be shareholder in order to have the voting right. In this respect the laws in the Member States are different. Generally speaking, there are two systems: systems where shareholders are required to be shareholder at the moment of the

shareholders meeting to be entitled to vote at that meeting and systems where the decisive date is set some time before the meeting, so-called record date systems.

The present company law rules that determine at what time the shareholder must hold the shares in order to be entitled to vote should also apply to Ultimate Accountholders to determine which Ultimate Accountholder is entitled to control the voting right. The Group believes that at this point in time it is neither necessary nor opportune to propose to harmonise the company laws of the Member States on this issue. The Group does feel, however, that the requirement of share blocking as a condition to participation in the vote is an overly restrictive and disproportionate condition that seriously reduces the ability of shareholders to participate in the vote effectively. Share blocking requirements constitute a major impediment to effective cross-border voting by shareholders. Moreover, as alternatives like a short cut-off time before the meeting and a record date are available and can be operated efficiently with the help of currently existing technology, blocking requirements are no longer necessary to ascertain that someone is entitled to vote at the right time.

*Recommendation 6:*

*Member States must prohibit the application of a share blocking requirement as a condition for shareholders and Ultimate Accountholders to participate in the vote at the shareholders meeting*

*Authentication of the Ultimate Accountholder*

Where shares are held through Securities Holding Systems it is unavoidable that Securities Intermediaries will have to authenticate which accountholders hold which shares at what time. In a fully dematerialised system and a system based on globalisation by definition, and in systems based on immobilisation as a practical matter, there is no other evidence available of share ownership and entitlement to control the voting right than statements made by Securities Intermediaries that a certain accountholder holds a certain number of shares in its account.

Under the proposed rules with respect to the Ultimate Accountholder the holding of the Ultimate Accountholder who participates in the vote will have to be authenticated and certified to the issuing company.

The Group believes that, at least for the time being, an approach which requires an authentication trail through the chain of Securities Intermediaries and certification by the Securities Intermediary at the top of the chain (seen from the perspective of the issuing company), is to be preferred over an approach which would only require authentication and certification by the Securities Intermediary with whom the Ultimate Accountholder holds the account.

The authentication process should be carried out at the request of the Ultimate Accountholder. The issuing company may and must rely on the certificate of the Securities Intermediary at the top of the chain.

*Recommendation 7:*

*Member States must ensure that Securities Intermediaries at the request of Ultimate Accountholders who wish to exercise their entitlement to control the voting right, pass on authentication confirmation to the next Securities Intermediary with whom they hold accounts. The Securities Intermediary at the top of the chain is required to certify the holdership of the Ultimate Accountholder to the issuing company, which may and must rely on this certification*

**Ad c Information (Section 6 of the Final Report)**

An important aspect of the exercise of voting rights is that the persons or entities making the voting decision, the Ultimate Accountholders, are provided with the relevant information about the resolutions on which they will vote. It is evident that modern means of communication will play an increasingly important role in this information process. By making the relevant information widely accessible, for example via the website of the company, it will become easier for interested parties to become informed. Informing the Ultimate Accountholders will become an issue of informing them where they can obtain the relevant information ("pulling" information by the Ultimate Accountholder) rather than sending the information to them ("pushing" information by the company).

Based on the Group's analysis, it makes the following recommendation with respect to the information process.

*Recommendation 8:*

*The European Union should ensure that Member States enable listed companies to communicate with their shareholders and Ultimate Accountholders via electronic means, including websites, as an alternative to traditional means. Member States should ensure that issuing companies are required to publish on their website which rules and procedures have to be followed by shareholders in order to be able to exercise their voting rights, what facilities are available for Ultimate Accountholders to exercise their entitlement to control the voting right and what they must do in order to be admitted to the vote (either by participating in the meeting or by voting in absentia)*

Despite the fact that pulling of information from the company's website by shareholders will increasingly become the normal way of communicating with shareholders, there still will be situations in which companies desire or will be required to inform shareholders individually. In line with the other recommendations, the Group believes this information process will have to be aimed at informing the Ultimate Accountholder. This can be done in various ways, and the Group takes the view that the European Union should not prescribe any particular approach as the single approach to be adopted. The Group does believe that in every Member State at least the possibility should be created for issuing companies to communicate with Ultimate Accountholders directly, with appropriate safeguards to protect their privacy.

*Recommendation 9:*

*Member States must ensure that Securities Intermediaries at the request of issuing companies disclose the identity and contact details of Ultimate Accountholders to issuing companies. The privacy of Ultimate Accountholders should preferably be protected by giving them the ability to opt-out of identification procedures. Further review as to whether an opt-out system sufficiently deals with the privacy issues and bank secrecy rules is to be conducted before such a rule is introduced across the European Union*

Finally, the Group addresses two aspects of current securities practice that potentially complicate cross-border voting in Europe (*Section 7 of the Final Report*).

The first aspect relates to the differences in settlement times of securities transactions processed through stock exchanges and their clearing and settlement systems in the different Member States. Based on the information at hand, the Group does not feel there is a necessity to propose any regulatory measures on the issue of the differences in settlement times from the perspective only of the problems of cross-border voting. Having said this, it must be noted that a number of respondents have put forward that harmonisation of settlement times is desirable to avoid any complications with respect to voting entitlement, as well as to solve other problems related to the differences in market practices. However, the expectation is that it will not be possible to realise this harmonisation within the European Union on the short term. These issues are currently being analysed by the Giovannini Group, which is looking into the current cross-border clearing and settlement arrangements in the European Union and the complications that arise as a result of the different market practices. The Group therefore will refrain from making any general recommendations about the differences in settlement times.

The second aspect is the practice of securities lending. The Group has been informed that in practice the effect of securities lending is that the lender loses the control rights. The Group does not disagree with this outcome. If complications do arise from securities lending, the Group would like to note that these complications are a result of an arrangement by investors who enter into a securities lending agreement at their own free will in order to receive lending fees. There are ways of contracting around any potential problems with respect to voting issues.



# 1 Introduction

Cross-border voting by shareholders in Europe raises a number of practical and legal questions. This is due partly to the broad variety of regulation and practices that exists in the European Union member states with respect to the organisation of Annual General Meetings of Shareholders (“AGMs”) and partly to the complexity of the present securities holding systems, through which the vast majority of shareholders today hold their shares.

These issues have been acknowledged by the Dutch government, which is seeking to facilitate the proxy voting procedures set up in the Netherlands. They have also been identified by the European Commission, which has included the subject of cross-border voting in the mandate of the High Level Group of Company Law Experts set up to advise on modernising European company law. The European Commission and the Dutch Government have agreed that the particular issues relating to cross-border voting would be addressed by a specific group of experts, supported by the Dutch government. As a result, the Dutch Minister of Justice formed an international group of experts on cross-border voting by shareholders of listed companies in Europe in January 2002 (hereafter referred to as the “Group”). The final recommendations of the Group as put forward in this Final Report will be submitted to the Dutch Minister of Justice and the High Level Group of Company Law Experts. The High Level Group of Company Law Experts is due to submit its final report to the European Commission in the fall of 2002. Two members of the High Level Group participate in this expert group, Jan Schans Christensen and Jaap Winter. The latter is chairman of both expert groups.

The Group has been asked to investigate the practices, experiences and legal barriers to cross-border voting in Europe. Annex 1 contains the press release of the Ministry of Justice, which includes the mandate of the Group and an overview of the members of the Group.

The scope of the analysis by the Group is restricted to the specific issues that are related to listed companies with dispersed (international) share ownership and arise from the fact that the shares of these companies are traded and held through modern securities holding systems. In such securities holding systems shareholders hold shares through securities accounts with securities intermediaries. Transactions in shares are reflected by crediting and debiting such securities accounts. The vast majority of shares that are held by investors in jurisdictions other than the jurisdiction of the issuing company are held through such securities holding systems. The Group believes that cross-border voting is problematic in Europe and that if an efficient structure were to be devised that would facilitate the exercise of voting rights on shares held through such securities holding systems across Europe, a substantial contribution would be made to solving the problems.

Modern information and communication technology will be essential in providing for efficient systems of shareholder information, communication and voting, in particular in cross-border situations. However, in this report the Group addresses the underlying legal problems of cross-border voting which cannot be solved by modern technology as such but require regulation. Only when these problems are solved investors, both national and international, and companies will be able to reap the full fruit of modern technology.

In order to achieve an overview of the relevant issues and of the various existing viewpoints on cross-border voting in Europe, the Group has published a Consultative Document in April 2002, which described various issues related to cross-border voting in Europe and included a number of specific questions on these issues. The Consultative Document was placed on the website of the Dutch Ministry of Justice and market participants and other interested parties were invited to give their reactions. In total, the Group received 27 written comments. A summary of the written responses is attached to this report as Annex 3. In addition to the Consultative Document, the Group has also conducted a Consultative Hearing on May 2, 2002 at Schiphol Airport in Amsterdam.

The Group would hereby like to express its gratitude to all parties that have participated in the Consultative Hearing and/or have given their reactions to the Consultative Document. The extensive and thoughtful input from various interested parties with various forms of experience in practice has been of great value to the Group in its deliberations. Where relevant, the specific reactions will be discussed in this Final Report.

## 2 The Problems of Cross-Border Voting in Europe

### 2.1 Introduction

As a result of the way in which shares are held in the modern securities world, it is complicated to ascertain who are the actual shareholders of listed companies in Europe, and therefore hold the voting rights attached to these shares. Firstly, section 2.2 and 2.3 will describe the way shares are held in bearer share systems and registered share systems respectively. In section 2.4 the modern cross-border shareholding structures in Europe will be discussed after which section 2.5 will give an overview of the problems that arise as a result thereof.

### 2.2 Bearer share systems

Originally, in systems with bearer shares, the physical share certificates played an important role in the identification of the shareholders: he who possessed the share certificate was considered to be the owner, entitled to exercise the rights attached to the shares. The shares were transferred by placing the certificate in the possession of the acquirer. However, with the increase in stock market trading the printing of bearer certificates, the custody of bearer certificates and the physical transfer of ownership after stock exchange transactions has become more expensive and cumbersome. The securities industry has an interest in ensuring that the physical certificates and their handling are limited as much as possible. An important step in limiting the burdens associated with physical certificates has been the immobilisation of the securities. At present the physical securities are held almost exclusively by professional custody firms, and not by individual investors. The custodians in turn often place the certificates in the custody of a central giral institution, generally referred to as Central Securities Depositories ("CSDs"). Examples of CSDs in Europe are Crest in the UK, Euroclear France in France (formerly SICOVAM), Clearstream Banking in Germany (formerly Deutsche Börse Clearing) and Necigef in the Netherlands. Instead of physically holding their own share certificates, investors hold a securities account with their bank or stockbroker in which the number of shares they have placed in custody are administered. These banks and stockbrokers are either affiliated to the CSD themselves, or have a securities account with a bank or stockbroker that is affiliated with the CSD. In such a securities holding system shares are transferred by means of book-entries, by crediting the account of the buyer and debiting the account of the seller, rather than by the physical movement of the securities between buyer and seller.

A step further than immobilisation is the globalisation of securities. In many cases, the number of existing share certificates is minimised by the use of so-

called global certificates. This means that all outstanding securities of a certain class are embodied in one share certificate, which is usually placed in custody with a CSD. Physical certificates that could be held by individual investors are no longer available.

Even more efficient is a complete dematerialisation, which is the complete abolition of all physical share certificates. Sometimes the dematerialisation is effected by a conversion of bearer shares into registered shares. In other cases the bearer shares in name continue to exist after dematerialisation, although physical certificates no longer exist. In France for example, where a full dematerialisation was achieved two decades ago, bearer shares continue to exist to indicate shares which are held through an account with a bank in France, as opposed to registered shares which are held in a register of the company.

However, it must also be noted that some systems still retain the traditional form of bearer shares, with the certificates serving as the sole identification measure of the shareholder. In these systems bearer shares and registered shares often coexist, with bearer shares only filling a niche, while registered shares are employed for mass transaction on the capital market.

### 2.3 Registered share systems

The system described above for bearer shares in practice operates similarly for registered shares. Generally speaking, the proof of share ownership of registered shares lies in the fact that the shareholder's name is entered in the shareholders register maintained by, or on behalf of, the issuing company. In legal systems using registered shares, the burden of keeping the shareholders register up to date following stock exchange transactions has led to systems comparable to systems created by the immobilisation of bearer shares. This is for example the case in the United States. To by-pass the administrative burden of including all changes in ownership in the shareholders register, Cede & Co., the nominee of the national CSD (the Depository Trust and Clearing Company ("DTC")), is registered in the shareholders register for most of the shares that are traded at national stock exchanges, thereby becoming the formal shareholder entitled to vote for all these shares.<sup>1</sup> The physical share certificates, if any, are placed in custody with this institution by its participants or members. The participants or members are usually banks or stockbrokers. The investors hold securities accounts with these banks or stockbrokers, either directly or via a (chain of other) intermediar(y)(ies). These banks and stockbrokers administer the number of shares to which each account holder is entitled. In this way, shares can be transferred by means of book-entries alone. The millions of share transactions on the stock exchange can take place without major day-to-day changes in the shareholders register. Accordingly, Cede & Co. is the largest registered shareholder in most American listed companies. Foreign shareholders almost exclusively hold shares in US companies through

<sup>1</sup> However, it must be noted that Cede & Co does not actually exercise the voting right but assigns its rights to banks and brokers by an 'omnibus proxy'.

accounts with intermediaries in their own jurisdiction, who in turn hold accounts with banks or brokers who participate in the DTC. They are not legal owners of the shares.

In the United Kingdom all shareholders (members) of the company are still included in the shareholders register and the CSD (CREST) has not taken their place. However, many investors no longer are included in the register themselves, but hold their shares in accounts with brokers and banks, who in turn hold nominee or pooled accounts in CREST and through CREST in the shareholders register. It is also possible that these brokers and banks are included in the register directly if they are members of CREST. Foreign shareholders typically hold shares in UK companies through a securities intermediary in their own jurisdiction, which in turn holds an account with a UK bank or broker, which holds a nominee or pooled account in CREST. The foreign shareholder is not the legal owner.<sup>2</sup>

Finally, in some countries (e.g. Germany, Sweden, Finland, Denmark, Italy) the national CSDs facilitate the operation of a shareholders register in which all investors who hold shares through securities accounts with banks and brokers, are included. Foreign shareholders who do not have an account with a bank or broker participating in the CSD but hold shares in an account with an intermediary in their own jurisdiction, however, are not included in the shareholders register.

## **2.4 Cross-border shareholding in Europe**

In the European Union, there are at present a large number of CSDs, each playing an important role in their own securities holding system, usually constricted to their national markets. To facilitate cross-border shareholding the CSDs in the various member states have entered into alliances with each other, making cross-border clearing and settlement possible. They do this by holding securities accounts with each other, so that an investor in one country can hold shares in companies in another country via the securities holding system. In addition to the CSDs there are two International Central Securities Depositories ("ICSDs") operating in Europe, Euroclear and Clearstream, which hold accounts with all local CSDs, thus also facilitating the cross-border clearing and settlement of securities transactions. The clients of the ICSDs are mainly professional securities intermediaries in and outside Europe.

In today's practice it is common for large international investors to hold their investments via one or more intermediaries, especially when investing across borders. Institutional investors increasingly use so-called global custodians to take care of the holding of their giral securities and the clearing and settlement of their securities transactions. The use of a global custodian relieves investors from having to maintain relationships with local custodians in various countries where they invest as these relationships are maintained

<sup>2</sup> Indeed, as a result of recent regulatory change in the UK, the CSD is required to keep the record of uncertificated securities (dematerialised holders) and the issuer the record for certificated securities.

for them by the global custodian. Global custodians operate via their own network of sub-custodians in the countries concerned and hold shares for their clients in accounts in the global custodian's name with various local custodians who are members of or participants in the various national CSDs. These local sub-custodians are not always local agents, but can also be local branches or subsidiaries of the global custodian. To further facilitate cross-border clearing and settlement of securities, the global custodians in general also hold accounts with the two ICSDs in Europe. As already mentioned, global custodians often use pooled or 'omnibus' accounts with local custodians and ICSDs in their own names in which the investments of their clients are administered jointly. This is mainly done for efficiency reasons. Not only global custodians use omnibus accounts in their own name, this is also often done by other intermediaries involved in cross-border chains. These omnibus accounts often increase the existing problems in cross-border voting, to be described hereafter.

In light of the above, it is clear that cross-border shareholding in Europe generally involves chains of securities intermediaries who participate in national or international CSDs, which result in several layers of intermediaries between the ultimate investor and the issuing company. In many cases, the investor will be the last accountholder in the chain of these securities holding systems, as seen from the perspective of the issuing company. However, this last accountholder in the securities holding system may be a fund manager or trustee who operates an investment fund for the benefit of others (investors in the fund, employees of pension fund). The analysis of the Group does not extend to the relationship between the fund manager or the trustee and his beneficiaries, which in many cases are contractual, but can also be fiduciary relationships as a matter of law.

## **2.5 The problems of cross-border shareholding in Europe**

The Giovannini Report on Cross-Border Clearing and Settlement Arrangements in the European Union concludes that the fragmentation in the EU clearing and settlement infrastructure significantly complicates the post-trade processing of cross-border securities transactions.<sup>3</sup> Complications arise because of the need of access to many national systems with different requirements and practices. This fragmentation not only complicates the processing of cross-border securities transactions, but also complicates cross-border voting. Moreover, in some cases, the rules and practices that have been developed to allow ultimate investors to exercise voting rights have also been developed in a national context and do not particularly facilitate and often even hinder voting by shareholders in other jurisdictions.

<sup>3</sup> The Giovannini Group, Cross-Border Clearing and Settlement Arrangements in the European Union, November 2001, p. ii. The Giovannini Group is a group of financial-market participants, under the chairmanship of Alberto Giovannini, which advises the European Commission on financial market issues.

In securities holding systems where shares are held via chains of intermediaries that cross borders, the question arises who the shareholder is, or, put differently, who is entitled to vote. If the links in the chain are established in different countries, then the first question that arises is according to the laws of which country one should assess who is entitled to vote. The applicable law as regards the person to whom the voting right accrues in the shareholders' meeting is the law that governs the legal status of the company and its internal relationships, the *lex societatis*. National company laws in Europe usually determine that the voting right accrues to the shareholder. In registered share systems, the shareholders are usually, but not always, defined as those who are included in the shareholders register. However, as we have seen, the ultimate investor in cross-border situations is usually not in the register and therefore not recognised as a shareholder with the power to exercise voting rights. The ultimate investor can only prove his right to the shares by reference to his account with a securities intermediary. In bearer share systems the holder of the share certificate is usually seen as the owner of the share. In today's securities holding systems the ultimate investor is unable to produce a share certificate and can only prove his right to the shares by reference to his account with a securities intermediary.

Therefore, in both registered share systems and bearer share systems it is unclear how foreign shareholders holding through chains of intermediaries should and could provide sufficient proof that they are entitled to exercise the right to vote, to the exclusion of other holders in the chain, either by casting the vote directly, or by casting a vote on the basis of a power of attorney from the formal legal owner, or by giving voting instructions to the formal legal owner how to vote on its behalf. The position of the ultimate investor is formally not different from the securities intermediaries who are accountholders higher up in the chain. As accountholders they may all, based on the applicable laws of the jurisdictions in which they hold their accounts, be entitled to exercise the rights attached to the shares held in their accounts. This leads to a potential cumulation of claims to exercise such rights and possibly conflicting, mutually exclusive rights. Currently, there is no rule of national or international private law in Europe on the basis of which it can be ascertained that the ultimate investor in a cross-border situation can exercise voting rights, either directly, or through a (chain of) powers of attorney or by giving voting instructions. Issuing companies confronted with these uncertainties are likely to follow their national rules, which will often mean that they will consider one of the links near the top of the chain to be formally entitled to vote. As a consequence, if the company wants to give the ultimate investor at the end of the chain the opportunity to vote at the AGM, a link between the party recognised as the formal shareholder and the ultimate investor must be established through the chain of intermediaries in between. In practice however, this will be difficult to achieve. Due to the fact that it is hard to trace the complete chain and due to the cumulative and conflicting claims in the part of the chain outside the jurisdiction of the issuing company, it will often be impossible to establish with certainty which party ultimately would have to provide the power of attorney to the ultimate investor. Modern technology, as a number of respondents have pointed out,

could help deal with the actual complications in ascertaining what the relevant chain looks like and in collecting the required power of attorney or voting instructions in good time, but the difficulties of ensuring seamless electronic communications between securities intermediaries across the European Union must not be underestimated. It may take a while before securities intermediaries across Europe will effectively be able to communicate with each other electronically. But even then, in many cases it can not be established with certainty that the investor with a written power of attorney or a chain of powers of attorney is lawfully participating in the decision-making at the meeting of the AGM.

## **2.6 Conclusion**

The way shares are held at present in Europe leads to problems for companies and shareholders. Investors domiciled in other jurisdictions than the company in which they have invested will find it complicated if not impossible to execute the voting rights they assume are attached to the shares, and to receive timely, accurate information on the resolutions to be voted on. Likewise, European companies of which shares are held through securities holding systems in various member states, will find it difficult if not impossible to communicate with their shareholders and to ascertain that the votes exercised are actually exercised by those entitled to vote.

These problems prevent the operation of an efficient system of proxy voting or other means of voting in absentia across the European Union. At the same time, due to the continuous growth of cross-border investment, the possibility of voting in absentia is of increasing importance to shareholders across Europe. The Group believes these problems require a solution. In many cases in practice, they actually prevent foreign investors from being able to cast their vote, or at least make it very difficult. This prevents a proper functioning of the AGM, while recent corporate governance developments increase the importance of the AGM in the governance of companies. If the functioning of the AGM is not improved substantially and shareholders in foreign jurisdictions continue to be unable to participate in it, the AGM will not be able to live up to the increased expectations. A solution is urgently required.

### 3 The three major issues

The Group acknowledges that the differences in national company law complicate cross-border voting in modern securities holding systems. Among other things, the legal distinction between registered shares and bearer shares and the way shareholders registers are operated create confusion for cross-border investors. Besides this, the obligations of securities intermediaries in relation to voting by their clients vary per jurisdiction. Ideally, seen from a cross-border voting perspective alone, the systems should be harmonised, together with all practices and procedures connected to the organisation of the AGM. However, the Group feels that such a far-reaching solution is not necessary to solve the problems of cross-border voting. The Group is convinced these problems can be solved to a large extent without it being necessary to fundamentally overhaul existing company laws of the various Member States.

The Group is of the opinion that in order to ensure that shareholders in Europe can vote across borders in an efficient way a number of issues will have to be addressed. The Group has identified three main issues:

- a Throughout Europe it should be made clear who is entitled to vote or should have the right to determine how the votes are executed. We will refer to this issue as the issue of the entitlement to control the voting right (see section 4 hereafter, *Entitlement to control the voting right*);
- b These persons or entities should be enabled to exercise their voting rights (see section 5 hereafter, *Voting*); and
- c It should be ensured that these persons or entities receive the relevant information to exercise their voting rights in an informed manner (see section 6 hereafter, *Information*).

These three issues are steps in the process of ensuring that investors can exercise the voting rights attached to the shares they hold. In the end all three steps boil down to the role and obligations of securities intermediaries in securities holding systems in Europe. They are vital in determining the accountholders in securities holding systems who could or should be entitled to control the voting rights and in certifying their shareholdings. They may perform a role also in the actual process of informing shareholders and ensuring that their votes are actually cast.

There was general agreement among the participants in the Consultative Hearing and the respondents to the Consultative Document that these three issues are the core issues to be solved in Europe in order to facilitate cross-border voting. That does not necessarily mean that all three of them should be solved in the same way, in particular by some form of regulation by the European Union. The general feeling expressed during the consultation was that the first issue does require some form of European Union regulation, but

that the second and third issues could probably be resolved efficiently by developing market practices. We will elaborate on this in following sections.

# 4 Entitlement to Control the Voting Right

## 4.1 Introduction

The heart of the problem of the uncertainty as to who is entitled to vote flows from the fact that the person or entity that has the legal entitlement to vote according to national company laws generally is not the person or entity with the economic interest in the shares. As we have described, there are differences in national company laws as to who is legally entitled to vote, generally arising from the distinction between registered share systems and bearer share systems. However, in all jurisdictions, whether they use registered shares or bearer shares, the legal entitlement to vote is often separated from the economic interest in the shares in the case of cross-border investment. In registered share systems the entitlement is mostly linked to inclusion in the shareholders register, as a result of which a securities intermediary near the top of the chain, close to the issuing company, will usually be considered to be entitled to vote. This is generally also the case in bearer share systems. However, as we have seen, the ultimate investor with the economic interest in the shares is located at the end of the chain. Certainly in cross-border situations the legal shareholder according to the *lex societatis* and the ultimate investor are separated by several layers of securities intermediaries. The Group considers the resulting legal confusion over who in cross-border chains across Europe is entitled to determine how the shares are voted and how this must be realised, described above in Section 2, as the main problem for cross-border voting in Europe. Therefore, the Group believes that the first and foremost objective should be to create certainty across Europe who is entitled to determine how shares are to be voted, i.e. who is entitled to control the voting right. If a rule is agreed according to which it can be established who is the person entitled to control the voting right, it does not necessarily follow that such person should always be considered to be the shareholder who is formally entitled to vote and must be accepted as such by the company. There are other options that could be made available to the person entitled to control the voting right which would ensure that his votes will be exercised. We will elaborate in more detail below.

Taking into account the responses to the Consultative Document and the reactions expressed at the Consultative Hearing, the Group is of the opinion that the solution to this problem requires regulation by the European Union. The current difficulties and uncertainties show us that the problems cannot be solved by market forces alone. This has been confirmed by most reactions to the Consultative Document. The reactions have furthermore strengthened the Group in its belief that this issue must be solved on a European Union-level. If regulation as to who is entitled to control the voting rights is left up

to all Member States individually, the present problems of cross-border voting will not be solved. Member States could choose different solutions, which viewed separately could seem appropriate but which would still leave great uncertainty and possibly lead to conflicting entitlements when they operate in a cross-border context. Moreover, there would be no basis on which investors in one Member State could require securities intermediaries up-the-chain in other Member States to co-operate with them to ensure that their votes are cast in another Member State. Therefore, the Group feels that a European Union rule should ensure that in all Member States the same rule determines who is entitled to control the voting right

In addition to the first objective, to create certainty about who is entitled to control the voting right, the Group believes the proposed solution should attribute the entitlement to control the voting right as close as possible to the person or entity who really holds the economic interest in the shares. Finally, the Group believes the proposed solution should not only be able to function well within the jurisdiction of the European Union, but should also be practical and workable in cross-border situations relating to jurisdictions outside the European Union.

In line with these three criteria, the Group recommends the following.

#### **4.2 The Primary Rule**

European Union rules should provide that the accountholder in securities holding systems who is not a securities intermediary within these systems, is entitled to determine how the voting rights attached to the shares in his account are exercised. The Group defines this entitlement as the entitlement to control the voting right. In cross-border chains of intermediaries such an accountholder who is not a securities intermediary in these systems is the last accountholder in the chain, or in other words: in the European securities holding systems, the chain stops with this accountholder who is not a securities intermediary. We will refer to this person or entity, the last accountholder in the European securities holding systems, not being a securities intermediary within these systems, as the "Ultimate Accountholder". The European Union rules should define the "Securities Holding Systems" which are subject to them. They should include securities holding systems operated in Europe by a CSD or ICSD. The rules should also define the "Securities Intermediary", which at least should include all who have been admitted as participants by CSDs or ICSDs in Securities Holding Systems as defined. We emphasise it is not so much the nationality of the Securities Intermediary which is relevant for this definition, but the fact that the Securities Intermediary is formally admitted to and operates as participant in CSDs and ICSDs in European Securities Holding Systems. For example, some US banks have subsidiaries which are participants in (one or more) European Securities Holding Systems. Under the proposed rule these subsidiaries would be considered to be Securities Intermediaries, and their clients would be considered to be Ultimate Accountholders entitled to control the voting right (to the extent they themselves are not Securities Intermediaries in European Securities Holding Systems). When formulating

these definitions, the various definitions used in other European Union legislation, like the Finality Directive<sup>4</sup> and the draft Directive on Financial Collateral<sup>5</sup>, should be taken into account where possible.

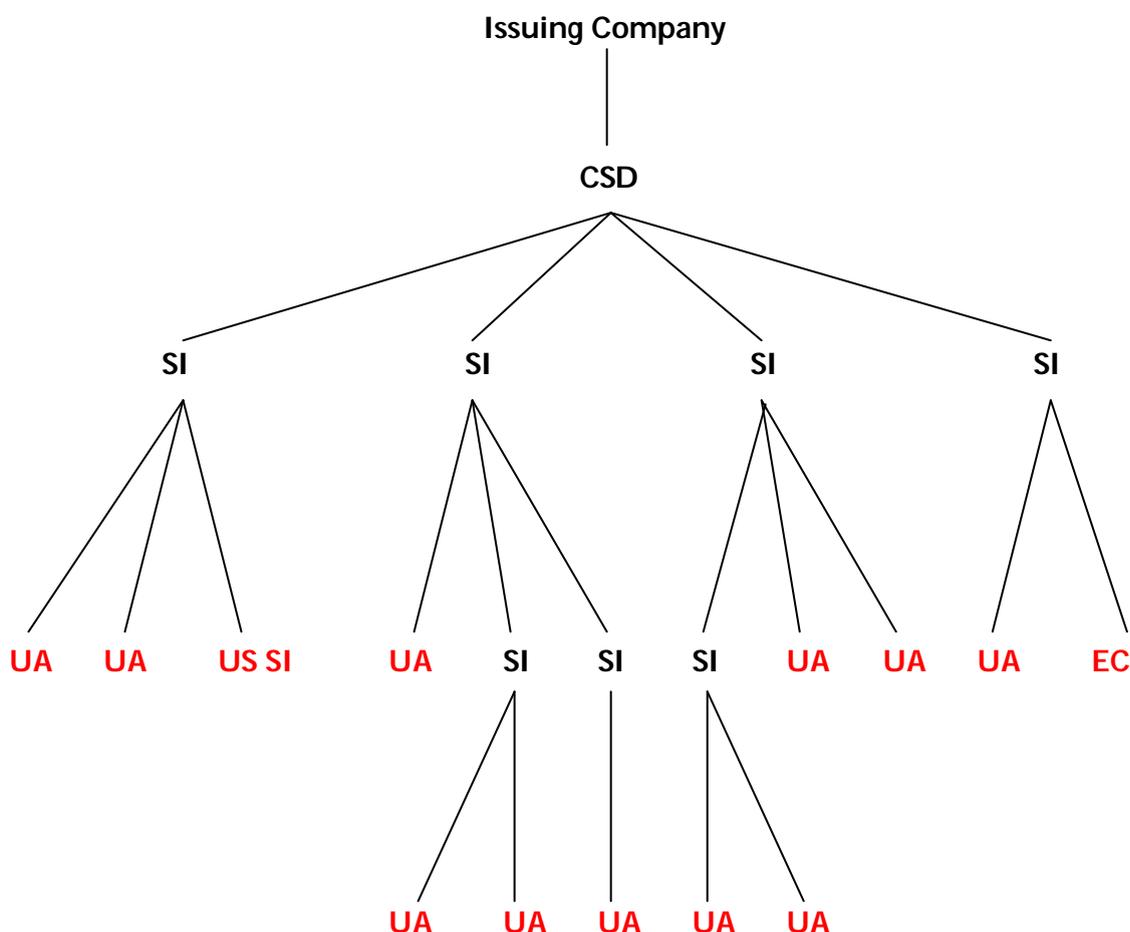
Schedule 1 gives a simplified schematic overview of the implications of the primary rule. The parties in red are entitled to control the voting rights.

The Ultimate Accountholder, as defined here, will as a result of this mandatory rule in the EU regulation have the entitlement to control the voting right, regardless of whether it holds an account with a Securities Intermediary in the jurisdiction of the issuing company or in another jurisdiction within the European Union. This will be the case also regardless of whether the issuing company has issued registered shares or bearer shares. The Group notes that having the entitlement to control the voting right does not necessarily imply having the direct right to exercise the voting right towards the company (see section 5.2 below).

<sup>4</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45.

<sup>5</sup> This Directive aims to lay down a Community regime applicable to financial collateral arrangements. The most recent draft of this directive was published in OJ C 119 E, 22.5.2002, p. 12.

## Schedule 1



**CSD** =Central Securities Depository

**SI** =Securities Intermediary in a European Securities Holding System

**UA** =Ultimate Accountholder in the European Securities Holding Systems,  
entitled to control the voting right

**US SI** =US securities intermediary, entitled to control the voting right

**EC** =European custodian, not Securities Intermediary, entitled to control the  
voting right

Some respondents to the Consultative Document have commented that the European rules to be introduced should not stop at defining the Ultimate Accountholder and granting him the entitlement to control the voting right, but should seek to include all ultimate investors, who have the real economic interest in the shares in the definition and to grant the entitlement to control the voting right to such ultimate investors directly. The Group has discussed this alternative and felt that it would not be possible to provide a clear definition of ultimate investor in that sense, which could be applied with a sufficient level of legal certainty in all Member States and which would include all investors with the real economic interest and would exclude all others in the chain. In addition, such an approach would also relate to types

of share ownership based in jurisdictions outside the European Union, which introduces a further level of uncertainty. The definition of Ultimate Accountholder has the important benefit of providing a clear definition, which can be applied in all Member States with a sufficient level of legal certainty. In the majority of cases the Ultimate Accountholder will indeed be the ultimate investor with the real economic interest in the shares. Where this is not the case, the Group believes this can be addressed by introducing a supplementary rule (see par. 4.3 below). The combination of the primary rule and the supplementary rule will allow for all investors with the economic interest in the shares to control the voting right in a way which provides the level of certainty which is required. The Group prefers such a two-step approach which offers legal certainty over an approach which tries to get to the ultimate investor directly but leaves a substantial level of uncertainty as to who are and can be included in the definition.

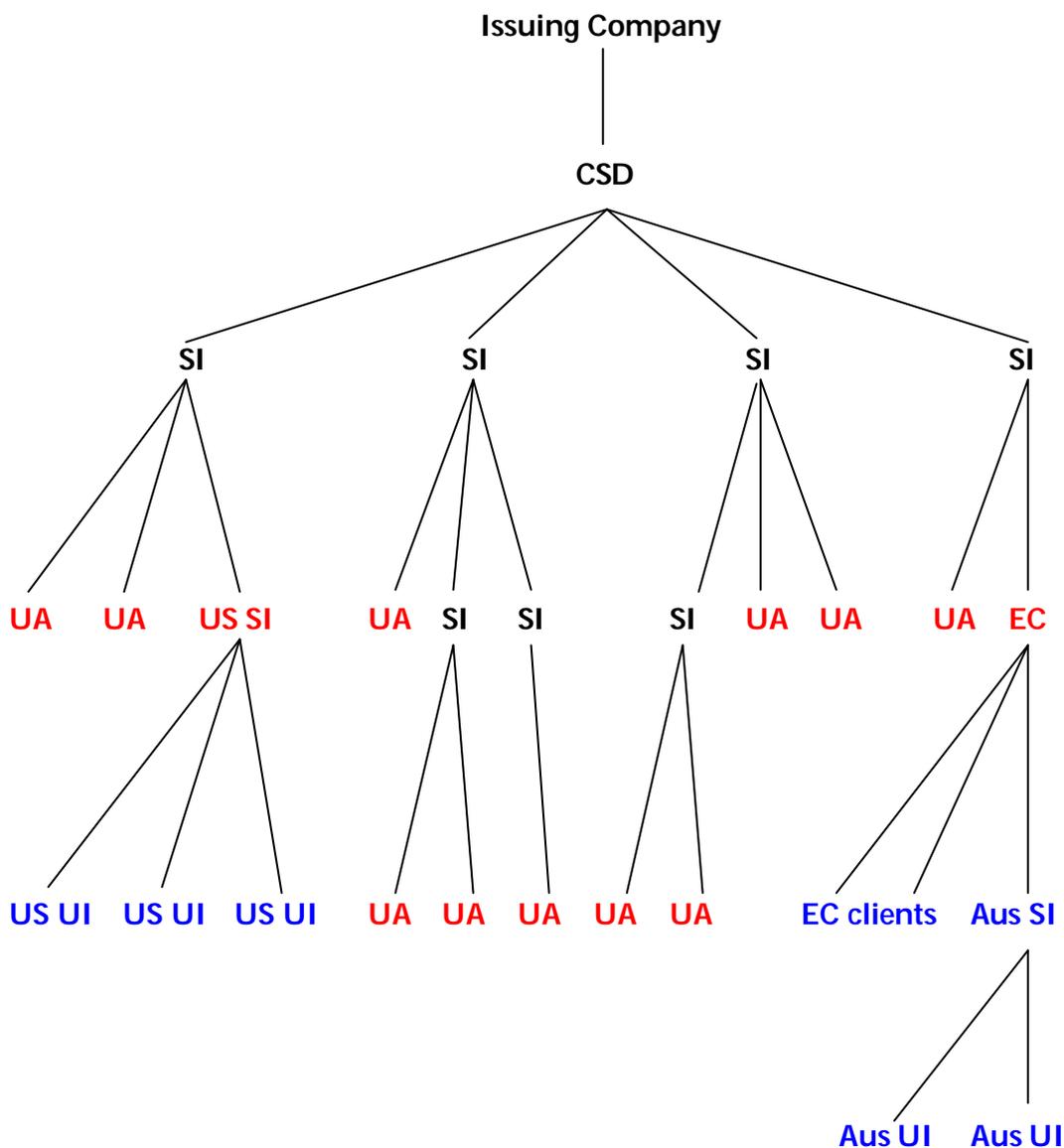
**RECOMMENDATION 1:**

**MEMBER STATES MUST ENSURE THAT ULTIMATE ACCOUNTHOLDERS IN SECURITIES HOLDING SYSTEMS ARE ACKNOWLEDGED TO BE ENTITLED TO CONTROL THE VOTING RIGHT ATTACHED TO SHARES HELD THROUGH SECURITIES HOLDING SYSTEMS (THE PRIMARY RULE)**

#### **4.3 The Supplementary Rule**

The Ultimate Accountholder as defined above will usually be the person or entity that has the economic interest in the shares, i.e. that makes the ultimate investment decision, but this will not necessarily be the case. As defined, the Ultimate Accountholder cannot be a Securities Intermediary within a European Securities Holding System, but it is possible that the Ultimate Accountholder is an intermediary outside these systems. It can, for example, be a securities intermediary in the United States, who is not itself a participant in European Securities Holding Systems but holds European shares on behalf of its US clients through an account with a European Securities Intermediary. Similarly, the Ultimate Accountholder can be a European custodian who is not a Securities Intermediary as defined but does provide securities holding services to clients like pension funds. The US intermediary and the European custodian in these examples would be considered to be the Ultimate Accountholder holding the entitlement to control the voting right under the proposed rule. However, it is likely that they will not want to execute these rights themselves but that their clients will want determine how the shares are voted. As it is the aim not only to provide a practical solution, but also to grant the entitlement to control the voting right to the widest possible extent to those who have the economic interest in the shares, the Group proposes a supplementary rule according to which an Ultimate Accountholder who is an intermediary on behalf of third parties (but not a Securities Intermediary as defined), may designate its clients in its place, thus making these clients entitled to control the voting right. This rule is worked out schematically in Schedule 2.

## Schedule 2



- CSD** = Central Securities Depository
- SI** = Securities Intermediary in a European Securities Holding System
- UA** = **Ultimate Accountholder in the European Securities Holding Systems, entitled to control the voting right**
- US SI** = **US securities intermediary, entitled to control the voting right**
- EC** = **European custodian, not Securities Intermediary, entitled to control the voting right**
- US UI** = **ultimate investor in the US securities holding system, designated by US SI as entitled to control the voting right**
- EC clients** = **clients of the European custodian, designated by EC as entitled to control the voting right**
- Aus SI** = **Australian securities intermediary, designated by EC as entitled to control the voting right**
- Aus UI** = **ultimate investors in the Australian securities holding system, designated by EC and Aus SI as entitled to vote**

The US securities intermediary and the European custodian (in red, both the last accountholder not being a Securities Intermediary in the European Securities Holding System) hold the entitlement to control the voting right, but have designated their clients (in blue) to have these rights. In the case of the European custodian, one of its clients is an Australian securities intermediary, who in turn has designated its clients as entitled to control the voting right. In this way it is possible to grant the entitlement to control the vote to those parties with the economic interest in the shares who are not the Ultimate Accountholder as defined. It depends on the relationship between the Ultimate Accountholder and its clients who can initiate such a designation of the clients as the holders of the entitlement to control the voting right. Normally the right to initiate such designation in the relationship between the US securities intermediary and its clients would rest with the clients. If they wish to be designated as directly entitled to vote, the US securities intermediary would normally be required to designate them. In general the same is true for others who hold shares on behalf of third parties, but this would depend on the particular contractual relationship. The purpose of this supplementary rule in the European system is to ensure that such a US securities intermediary or other holding on behalf of third parties, and who as a result of the primary rule is considered to be the person or entity entitled to control the voting right, is allowed to designate its clients (again, normally upon their request), and that upon such designation these clients have to be accepted as the ones entitled to control the voting right. In a sense, the supplementary rule opens the window to look beyond the Ultimate Accountholder in the European Securities Holding Systems, also outside the jurisdiction of the European Union.

**RECOMMENDATION 2:**

**MEMBER STATES MUST ENSURE THAT THE ULTIMATE ACCOUNTHOLDER IN A SECURITIES HOLDING SYSTEM IS AUTHORISED TO DESIGNATE CLIENTS AS ENTITLED TO CONTROL THE VOTING RIGHT, WHO WILL AS A RESULT BE ACKNOWLEDGED AS SUCH (THE SUPPLEMENTARY RULE)**

The Group has discussed whether, as some have suggested to it, the concept of Ultimate Accountholder is not too narrow and would in particular restrict the ability of investors outside the European Union to exercise their voting rights on European shares. Should a European rule not seek to grant the entitlement to control the voting right to the real ultimate investor with the economic interest in the shares, regardless of whether he is an accountholder in any securities holding system, in the European Union or outside it. The Group believes such a rule would lead to a high level of uncertainty and scope for dispute. Determining who should be seen as the ultimate investor with the real economic interest in the shares is often a matter of contract between two or more parties, with potentially an enormous variety, and generally applicable local laws. Who is to say that under a certain type of relationship between e.g. a Colombian investor and his local custodian the entitlement to control the voting right on a European share should be granted to the investor rather than the custodian? In order to reduce the

uncertainty the European rule could provide in general terms what criteria it would consider to be decisive for assuming ultimate investorship. But even then the merits of every individual type of share ownership and relationship between client and intermediary would have to be reviewed in order to determine who can be qualified as ultimate investor on the basis of these criteria. The result would still be an unacceptable level of uncertainty and scope for dispute, which would defeat the whole purpose of the proposed rule.

The Group believes the primary and supplementary rules it proposes offer a better balance between certainty and reliability on the one hand and flexibility on the other hand, which are both needed to create an efficient system for cross-border voting in Europe. The primary rule would establish without doubt that the Ultimate Accountholder, as an accountholder who is not a Securities Intermediary as defined in the rule, has the entitlement to control the voting right, while the supplementary rule would give the flexibility to allow such Ultimate Accountholder to designate clients (or clients' clients, etc.) as the persons with the entitlement to control the voting right. The rights of designees are derived from the entitlement of the Ultimate Accountholder about which there is no doubt and should in principle be accepted on the sole basis of that designation, i.e. without further investigation into whether the relationship between the designees and the Ultimate Accountholder (potentially indirectly through chains of other intermediaries) justify such designation. Similarly, if the Ultimate Accountholder does not designate others as the persons entitled to control the voting right, the primary rule ensures that the votes cast by or on behalf of the Ultimate Accountholder are valid, without investigation into whether the Ultimate Accountholder should have designated others as the persons entitled to control the voting right.

#### **4.4 No requirement for Ultimate Accountholders to disclose identity of clients**

In its Consultative Document the Group raised the question whether the European Union should also adopt a rule similar to that recently introduced in France, requiring the person or entity identified by operation of the primary rule as the Ultimate Accountholder to disclose the identity of its clients at the request of the issuing company that suspects the Ultimate Accountholder is not the ultimate investor but holds on behalf of others. The sanction for not disclosing the identity of clients would be that the issuing company can disregard the votes cast on the shares held by the Ultimate Accountholder (Question 6 of the Consultative Document). The Group believes such a rule should not be imposed on a European Union wide basis and the consultation showed little support for such a European rule. There may be perfectly sound reasons why parties using services of intermediaries who are considered to be Ultimate Accountholder under the primary rule, do not want to make use of the right of the Ultimate Accountholder to designate them as persons entitled to control the voting right and are happy for the Ultimate Accountholder to exercise its right itself, whether or not on their

instruction. We do not believe that the entitlement to control the voting right must be pushed by force of sanctions to the level of the ultimate investor if he is not the Ultimate Accountholder. It would also interfere with the relationships between the Ultimate Accountholder and its clients (and clients' clients etc.), which in themselves are not subject to the European rule. Finally, it would introduce a substantial level of uncertainty and scope for dispute into the European wide system for cross-border voting if the mere suspicion of the issuing company could require Ultimate Accountholders to disclose the identity of clients sanctioned by the disregard of the votes of the Ultimate Accountholder. On the other hand, we also see no need for the European Union to prohibit Member States to introduce such a rule. The effects of the new French rule are yet unclear as it has just been introduced. It may offer a further incentive (by stick rather than by carrot) to have the ultimate investors actually exercise the voting rights. If that is the effect of such a rule, there does not seem to be a good reason why Member States should be prohibited from introducing such a rule. The European Union may therefore reconsider introducing this rule on all Member States in the future if beneficial effects of the French rule have been established.

For the avoidance of doubt, this question is different from the question discussed below in section 6 as to whether Securities Intermediaries should disclose the identities of Ultimate Accountholders to the issuing company on its request. Securities Intermediaries do not have the entitlement to control the voting right as a result of the primary rule.

**RECOMMENDATION 3:**

**THE EUROPEAN UNION SHOULD NOT IMPOSE AN OBLIGATION ON ULTIMATE ACCOUNTHOLDERS WHO ARE INTERMEDIARIES (BUT NOT SECURITIES INTERMEDIARIES AS DEFINED) TO DISCLOSE THE IDENTITY OF THEIR CLIENTS TO ISSUING COMPANIES, BUT MEMBER STATES SHOULD BE FREE TO INTRODUCE SUCH AN OBLIGATION ON ULTIMATE ACCOUNTHOLDERS HOLDING SHARES IN ISSUING COMPANIES SUBJECT TO THEIR JURISDICTION**



# 5 Voting

## 5.1 Introduction

The rules proposed in Section 4 will bring certainty as to who is entitled to control the voting right in Securities Holding Systems in Europe and would end the existing uncertainty in cross-border situations. Where the Ultimate Accountholder is also the investor with the economic interest in the shares, as will often be the case, the primary rule brings the entitlement to control the voting right directly to the ultimate investor. Where this is not the case, the supplementary rule will allow to pass on the entitlement to control the voting right to the ultimate investor. The Group believes that the adoption and implementation of these rules will be an important step towards an efficient infrastructure for voting at AGMs throughout Europe. However, the proposed rules alone are not sufficient. Additional measures will have to be taken in each Member State to ensure that the Ultimate Accountholder can effectuate his entitlement to control the voting right. This can be done without changing national company laws with respect to the formal voting right. This issue will be addressed in section 5.2. In section 5.3 the issue of the time at which the Ultimate Accountholder must be the Ultimate Accountholder in order to have the entitlement to control the voting right will be covered. Finally, the various aspects related to the authentication of the Ultimate Accountholder entitled to control the voting right will be discussed in section 5.4.

## 5.2 Exercise of the entitlement to control the voting right by the Ultimate Accountholder

Some respondents to our Consultative Document have raised concerns if the intended effect of the primary and supplementary rule would be that in all Member States issuing companies would have to acknowledge Ultimate Accountholders as formal shareholders, with the formal right to vote in the shareholders meeting. Such an effect would go against, in particular, the company laws of those Member States that provide that persons included in the shareholders register are the formal shareholder entitled to vote.

The Group believes it is not necessary to prescribe at the European Union level that the Ultimate Accountholder as a matter of company law must be acknowledged in all Member States as the formal shareholder with the formal right to vote in the shareholders meeting in order to ensure that the Ultimate Accountholder can effectuate his entitlement to control the voting right in every Member State. Member States should and would be able to require issuing companies subject to their company law to acknowledge an Ultimate Accountholder, wherever in Europe he holds his securities account with a Securities Intermediary, as formal shareholder entitled to vote (option a) below). A Member State that does not want to follow this route, however, should be required to take measures that ensure that the Ultimate

Accountholder can exercise the entitlement to control the voting right through the Securities Intermediary that under the company law of that Member State is considered to be the formal shareholder with the voting right. This can be achieved through a number of different measures as described below in options b), c) and d), each of which in itself should be sufficient to ensure that the Ultimate Accountholder will be able to exercise the entitlement to control the voting right. The various measures are designed to be compatible with different systems and regulations that already exist in the Member States. Each Member State can choose to implement the solution that best fits its present legal infrastructure. In principle, Member States should be free to choose which measure(s) they wish to implement. The European Union rules should require Member States to implement at least one of the suggested options, thereby ensuring that Ultimate Accountholders in all Member States are able to exercise their entitlement to control the voting right in one way or the other. In some Member States it may not be necessary to implement any new options, as measures similar to the proposed might already exist. The proposed options will mainly concern the regulation of Securities Holding Systems and the responsibilities of Securities Intermediaries within these systems to ensure that their clients (and clients' clients) can exercise their entitlement to control the voting right as Ultimate Accountholders. The effect of the supplementary rule is that such options are also available to those who have been designated by the Ultimate Accountholder as entitled to control the voting right.

The Group proposes that the European Union rules present Member States with the choice between the following options.

*a The Ultimate Accountholder is acknowledged as shareholder entitled to vote*

The first option is particularly suitable for systems traditionally based on bearer shares, in which the legal entitlement to vote does not follow from inclusion in the shareholders register. As a consequence of the dematerialisation of the shareholding process, the legal entitlement to vote in these systems nowadays is no longer linked to the possession of any share certificate either. The determination of who is entitled to vote is usually less dogmatic than in registered share systems and is often simply a matter of choice, often made either by legislation or by judicial decision. Usually an accountholder with a Securities Intermediary in the national Securities Holding System is considered to be the formal shareholder entitled to vote. For Member States with these systems it would not be a fundamental change in law to provide that the Ultimate Accountholder as defined, being an accountholder in the national or in another Securities Holding System in the European Union, is to be regarded as the formal shareholder with the voting right. This would ensure a very efficient system for allowing investors holding accounts in other Member States to exercise their voting rights. They would be considered to be direct shareholders with their proper entitlement to vote, which is not in any way derived from the right of another, formal shareholder. Such a system would also reduce the involvement and responsibilities of the Securities Intermediaries, who are only involved in the authentication process (section 5.4) but do not have to provide additional

services to ensure that Ultimate Accountholders can exercise their entitlement to control the voting right. The other alternatives described below would all require Securities Intermediaries to perform such services. In some Member States direct acknowledgement of the Ultimate Accountholder as the formal shareholder entitled to vote could have further implications, e.g. tax reporting rules, which could prevent these Member States to choose this option. Option b, c and d would then be available.

*b The Ultimate Accountholder is designated in the shareholders register as entitled to vote*

The second possibility to ensure that the Ultimate Accountholder can exercise the entitlement to control the voting right could be especially suitable for registered share systems where Securities Intermediaries are included in the shareholders register and as a consequence are legally entitled to vote. In some cases these systems make it possible for Securities Intermediaries to have their clients designated in the shareholders register as holders of the entitlement to control the voting right (and possibly other rights, such as the right to receive dividends directly from the company), as a result of which their clients are legally entitled to vote. In line with this, Member States could provide that Securities Intermediaries included in shareholders registers are required to have Ultimate Accountholders at their request designated in the shareholders register as entitled to control the voting right, if such a facility is offered under the law governing the issuing company. In this way the Ultimate Accountholder will at his request acquire the legal entitlement to vote, without fundamentally changing the company law regime with respect to registered shares which governs the issuing company.

*c The Ultimate Accountholder is given a power of attorney by the Securities Intermediary formally entitled to vote*

In this approach, the legal entitlement to vote remains with the registered shareholders, also where they are Securities Intermediaries. There is no direct acknowledgement of the Ultimate Accountholder as the formal shareholder entitled to vote nor is the Ultimate Accountholder designated in the shareholders register as entitled to control the voting right. The Securities Intermediary who is considered to be formal shareholder as a matter of the *lex societatis* of the issuing company (either because it is on the shareholders register or because the relevant law acknowledges the accountholder with a participant in the national Securities Holding System as formal shareholder) has the formal voting right. In these systems the Securities Intermediaries could give a power of attorney to the Ultimate Accountholder to vote on the shares the Securities Intermediary holds as formal shareholder for the Ultimate Accountholder. Where options a) and b) are not available Securities Intermediaries should be required to give Ultimate Accountholders at their request a power of attorney to vote in the shareholders meeting. On the basis of this power of attorney the Ultimate Accountholder can exercise the voting right directly towards the issuing company.

*d The Ultimate Accountholder instructs the Securities Intermediary who is the formal shareholder to vote as instructed*

A further option in case a Securities Intermediary is considered to be the formal shareholder entitled to vote, is to ensure for the Securities Intermediary to exercise its voting rights in accordance with the instructions given by the Ultimate Accountholder. In this approach the Ultimate Accountholder does not exercise voting rights directly towards the issuing company, but the Securities Intermediary exercises voting rights on behalf of Ultimate Accountholders.

The Group believes that it should always be possible for Ultimate Accountholders who are not considered to be formal shareholders, to exercise their entitlement to control the voting right by instructing the Securities Intermediary to vote on its behalf and in accordance with its instructions. Ultimate Accountholders should not be forced to vote themselves directly towards the company by being designated as entitled to control the voting right in the shareholders register (option b) or on the basis of a power of attorney (option c). This means that the Group is of the opinion that option d) should always be available to Ultimate Accountholders. The European Union rules should therefore oblige Member States to always at least implement option d)

In order for Securities Intermediaries to be able to vote on the instructions of Ultimate Accountholders, Member States should be required to ensure that split votes cast by Securities Intermediaries (i.e. the votes of the Securities Intermediary as formal shareholder include x votes in favour, y votes against and z abstentions, as determined by the instructions of the various clients of the Securities Intermediary) are accepted as valid votes by the issuing companies in their jurisdictions.

**RECOMMENDATION 4:**

**MEMBER STATES MUST ENSURE THAT ULTIMATE ACCOUNTHOLDERS (OR THEIR DESIGNEES UNDER THE SUPPLEMENTARY RULE) CAN EXERCISE THE ENTITLEMENT TO CONTROL THE VOTING RIGHT THROUGH ONE OF SEVERAL OPTIONS:**

- a THE ULTIMATE ACCOUNTHOLDER IS ACKNOWLEDGED AS SHAREHOLDER ENTITLED TO VOTE**
- b THE ULTIMATE ACCOUNTHOLDER IS DESIGNATED IN THE SHAREHOLDERS REGISTER AS ENTITLED TO VOTE**
- c THE ULTIMATE ACCOUNTHOLDER IS GIVEN A POWER OF ATTORNEY BY THE SECURITIES INTERMEDIARY FORMALLY ENTITLED TO VOTE**
- d THE ULTIMATE ACCOUNTHOLDER INSTRUCTS THE SECURITIES INTERMEDIARY WHO IS THE FORMAL SHAREHOLDER TO VOTE AS INSTRUCTED**

**OPTION d) SHOULD ALWAYS BE AVAILABLE TO ULTIMATE ACCOUNTHOLDERS. IN ORDER TO ALLOW FOR THIS, MEMBER STATES MUST ENSURE THAT SPLIT VOTES CAST BY SECURITIES INTERMEDIARIES ARE ACCEPTED AS VALID VOTES**

Options b), c) and d) require the Securities Intermediaries to perform certain services to Ultimate Accountholders to ensure that they can exercise their entitlement to control the voting right (having the Ultimate Accountholder designated in the shareholders register as entitled to control the voting right,

giving the Ultimate Accountholder a power of attorney to vote, voting in accordance with the instructions of the Ultimate Accountholder). The European Union rule should provide that Member States are required to ensure that Securities Intermediaries subject to their laws must provide the services which are available under the laws of the relevant issuing company to the Ultimate Accountholder.

The Group believes that the obligation of Securities Intermediaries to positively provide services to Ultimate Accountholders to ensure that they can control the voting right, should be complemented by a negative obligation of Securities Intermediaries not to exercise voting rights if they are formally entitled to do so, unless on the basis of specific instructions of Ultimate Accountholders (which is in fact option d) described above) or unless Ultimate Accountholders have explicitly allowed the Securities Intermediary to exercise the voting right without any instruction. Securities Intermediaries do not have a right of their own to exercise voting rights attached to shares. Where they happen to be in a position to have the formal right to vote, they only are in that position because of and on behalf of their clients, the Ultimate Accountholders. It is not the proper role for Securities Intermediaries to exercise voting rights independently of the clients for whom they hold shares. Where European Union rules as proposed can ensure that all Ultimate Accountholders have the ability to actually control the voting right by one of the options described above, Securities Intermediaries should no longer have the right to exercise voting rights, unless on the basis of specific instructions of Ultimate Accountholders or on the basis of an explicit agreement with Ultimate Accountholders to exercise such rights without instructions.<sup>6</sup>

**RECOMMENDATION 5:**

**MEMBER STATES MUST ENSURE THAT SECURITIES INTERMEDIARIES PROVIDE THE OPTIONS TO CONTROL THE VOTING RIGHT AVAILABLE UNDER THE LAWS OF THE RELEVANT ISSUING COMPANY TO THE ULTIMATE ACCOUNTHOLDER AND THAT SECURITIES INTERMEDIARIES ARE NOT ALLOWED TO EXERCISE VOTING RIGHTS UNLESS ON THE BASIS OF SPECIFIC INSTRUCTIONS OF ULTIMATE ACCOUNTHOLDERS OR ON THE BASIS OF AN EXPLICIT AGREEMENT WITH ULTIMATE ACCOUNTHOLDERS**

### 5.3 The moment determining the entitlement to control the voting right

When determining who is formally entitled to vote as shareholder, company law inevitably has to decide at what time a person or entity has to be the shareholder in order to have the voting right. In this respect the laws in the Member States are different. Generally speaking, there are two systems: systems where shareholders are required to be shareholder at the moment of the shareholders meeting to be entitled to vote at that meeting and systems

<sup>6</sup> Obviously Securities Intermediaries should be entitled to control the voting right on shares they hold for their own account.

where the decisive date is set some time before the meeting, so-called record date systems.

In systems where the date of the shareholders meeting is decisive, several methods are currently applied to ensure that only shareholders at the day of the meeting are accepted to participate in the vote. In bearer share systems the method traditionally applied is to require the deposit of share certificates with the company or a designated bank, which will block the shares up to and including the date of the meeting. As the certificate is held in custody the shareholder who has indicated that he wishes to participate in the meeting can no longer transfer his shares to a third party. In the immobilised and dematerialised securities holding systems of today this means that securities intermediaries provide declarations stating the number of shares registered in the name of their clients and that these shares will be blocked up to and including the date of the shareholders meeting. Generally speaking, investors - especially institutional investors - consider blocking requirements to be burdensome and constraining, because they lose the possibility to sell their shares during the period the shares are blocked. Blocking requirements of this kind have been identified by respondents to our Consultative Document as a major impediment to effective cross-border voting by investors.

A second method currently applied is to reconcile all share transactions right up to the date of the shareholders meeting, in that way ensuring that only those who are really shareholders at the time of the meeting participate in the decision-making. The reconciliation of share ownership held through securities holding systems will have to be done by the securities intermediaries and (where this is relevant, the registrar of the shareholders register). It is practically impossible to process all share transactions up to and including the date of the shareholders meeting and usually one sees a cut-off time of 24 or 48 hours prior to the meeting. Share transactions taking place after this moment no longer affect the votes cast by those who were shareholders at the cut-off time. This system is practically very similar to a record date system where the record date is very close to the date of the meeting.

In a record date system, one is required to be registered as a shareholder on a certain date prior to the meeting in order to be entitled to vote. The (maximum) time permitted between the record date and the date of the shareholders meeting varies in practice. Some Member States allow for record dates relatively close to the meeting, between 5 and 15 days. State company laws in the United States usually allow for a record date to be set prior to the notification of the meeting, with a maximum of up to 50 or 60 days prior to the meeting. This allows to identify the shareholders only once and to disregard any share transactions taking place after such a record date. If a record date can not be set longer than, say 10 days prior to the meeting, in practice this will result in a reconciliation by securities intermediaries of share ownership being required as per that record date, after the shareholders have been first identified for the purposes of determining who is to receive the information relevant for the meeting.

Blocking of shares and reconciliation of share ownership require a continued involvement of securities intermediaries in the process. As we have said, the

blocking of shares in general is considered burdensome and constraining for investors. With the use of modern technology, it should at some stage become relatively straightforward and simple to achieve a full reconciliation of all share transactions up to very close to the meeting itself. Certain practical issues, like the reconciliation of share positions which are combined in omnibus accounts as mentioned above, and other administrative and cost implications of such an approach must be taken into account. Especially the continued involvement of the securities intermediaries could imply high costs. The alternative of a record date system, allowing for a record date to be set prior to the notification of the shareholders meeting, is a clear and cost-effective system and could well be combined with a direct approach to the issue of informing shareholders with an entitlement to vote. However, some respondents to the Consultative Document have expressed a reluctance to grant voting rights to investors who are deemed to be shareholders entitled to vote because they held shares a substantial time before the actual date of the meeting.

The present company law rules that determine at what time the shareholder must hold the shares in order to be entitled to vote should obviously also apply to Ultimate Accountholders to determine which Ultimate Accountholder is entitled to control the voting right. The Group believes that at this point in time it is not opportune to propose to harmonise the company laws of the Member States on this issue as the views as to what is the appropriate system are likely to differ too widely. Also, harmonisation of the time decisive for the entitlement to vote and to control the voting right, although in principle welcome as a further reduction of the complexity involved in cross-border voting, does not seem to be absolutely necessary to solve the core problems of cross-border voting. If the rules proposed by the Group are implemented and the different practices on the issue of time decisive for entitlement to vote and to control the voting right are well published and disclosed to market participants, it will in the Group's view be possible for investors to vote across borders even though the time at which they will have to be Ultimate Accountholder may vary from issuing company to issuing company. The Group does feel however that the requirement of share blocking as a condition to participation in the vote is an overly restrictive and disproportionate condition for investors that seriously reduces their ability to participate in the vote effectively. Share blocking requirements constitute a major impediment to effective cross-border voting by investors. Moreover, as alternatives like a short cut-off time before the meeting and a record date are available and can be operated efficiently with the help of currently existing technology, blocking requirements are no longer necessary to ascertain that someone is entitled to vote at the right time. The Group therefore recommends that Member States must prohibit the application of a share blocking requirement as a condition for shareholders and Ultimate Accountholders to participate in the vote at the shareholders meeting.

**RECOMMENDATION 6:  
MEMBER STATES MUST PROHIBIT THE APPLICATION OF A SHARE BLOCKING  
REQUIREMENT AS A CONDITION FOR SHAREHOLDERS AND ULTIMATE  
ACCONTHOLDERS TO PARTICIPATE IN THE VOTE AT THE SHAREHOLDERS MEETING**

#### **5.4 Authentication of the Ultimate Accountholder**

Where shares are held through securities holding systems it is unavoidable that securities intermediaries will have to authenticate which accountholders hold which shares at what time. In a fully dematerialised system by definition, and in systems based on immobilisation as a practical matter, there is no other evidence of share ownership and entitlement to control the voting right available than statements made by securities intermediaries that a certain accountholder holds a certain number of shares in its account. In a number of Member States this reality has been accepted by providing that issuing companies may and must rely on the certification by securities intermediaries of holdership through securities accounts.

Under the proposed rules with respect to the Ultimate Accountholder, the holding of the Ultimate Accountholder that participates in the vote will have to be authenticated and certified to the issuing company. In all the options suggested for ensuring that the Ultimate Accountholder can effectively exercise his entitlement to control the voting right, it must be established that the person or entity exercising this entitlement is indeed the Ultimate Accountholder at the time decisive for such entitlement. The authentication of the Ultimate Accountholders with the entitlement to control the voting right will have to be carried out by the Securities Intermediaries in Securities Holding Systems.

The question then arises which Securities Intermediary is responsible for the authentication, or, to put it differently, on the certification of which Securities Intermediary the issuing company may and must rely. It is clear that the last Securities Intermediary in the chain, with whom the Ultimate Accountholder holds the account, must be involved in the authentication of the Ultimate Accountholder and the number of shares in its account. In one approach it would suffice for this last Securities Intermediary with whom the Ultimate Accountholder holds the account, to authenticate and certify this to the issuing company. The issuing company in this approach may and must rely on this sole certification when deciding on the admission of Ultimate Accountholders to the vote. A different approach would be to require an authentication trail from this last Securities Intermediary up to the first Securities Intermediary, which is the Securities Intermediary closest to the issuing company, which Securities Intermediary would formally certify the holdership of the Ultimate Accountholder to the issuing company. This first Securities Intermediary may be included in the shareholders register in registered share systems, or may be the Securities Intermediary who is participant in the CSD through which the issuing company has issued its shares. In this approach, every Securities Intermediary in the chain will have

to pass on authentication confirmation from the Securities Accountholder that holds an account with it, to the Securities Accountholder above it in the chain with whom it holds an account itself, up to the Securities Intermediary at the top of the chain.

In choosing the preferred approach to the issue of authentication, the costs and the administrative burdens related to the various approaches must be taken into account. Furthermore, an important aspect is obviously the reliability of the authentication. The company must be able to rely on the authentication provided for. The possibility that shares are voted twice must be excluded.

The Group believes that, at least for the time being, the approach which requires an authentication trail through the chain and certification by the Securities Intermediary at the top of the chain, is to be preferred over the approach which would only require authentication and certification by the last Securities Intermediary with whom the Ultimate Accountholder holds the account. The reasons for this preference are twofold. Firstly, this approach appears to give more certainty that the shares held by the Ultimate Accountholder can only be voted upon by that Ultimate Accountholder. If only the last Securities Intermediary would authenticate and certify the holdership of the Ultimate Accountholder, it would be possible that through transactions or mistake higher up in the chain, an Ultimate Accountholder is certified to be entitled to control the voting right attached to shares for which a third person will be certified as Ultimate Accountholder as well. Requiring an authentication trail through the chain will reduce this risk, as all Securities Intermediaries in the chain will have to confirm the holdership of others down the chain and irregularities should come to the surface. Secondly, the Group believes that modern technology should make it possible for Securities Intermediaries to communicate with each other quickly, efficiently and with minimum cost to authenticate the entitlement of the Ultimate Accountholder up through the chain. This view is supported by various reactions received from respondents to the Consultative Document.

The authentication process should be carried out at the request of the Ultimate Accountholder. If an Ultimate Accountholder wishes to exercise his entitlement to control the voting right, he will notify the Securities Intermediary with which he holds his account. This Securities Intermediary and all Securities Intermediaries up through the chain should be required to pass on authentication confirmation to Securities Intermediaries higher in the chain. The Securities Intermediary who happens to be at the top of the chain, should be required to authenticate and certify to the issuing company the holdership of the Ultimate Accountholder through its account with its Securities Intermediary. The issuing company may and must rely on the certificate of this Securities Intermediary at the top of the chain.

**RECOMMENDATION 7:**

**MEMBER STATES MUST ENSURE THAT SECURITIES INTERMEDIARIES AT THE REQUEST OF ULTIMATE ACCOUNTHOLDERS WHO WISH TO EXERCISE THEIR ENTITLEMENT TO CONTROL THE VOTING RIGHT, PASS ON AUTHENTICATION CONFIRMATION TO THE NEXT SECURITIES INTERMEDIARY WITH WHOM THEY HOLD ACCOUNTS. THE SECURITIES INTERMEDIARY AT THE TOP OF THE CHAIN IS REQUIRED TO CERTIFY THE HOLDERSHIP OF THE ULTIMATE ACCOUNTHOLDER TO THE ISSUING COMPANY, WHICH MAY AND MUST RELY ON THIS CERTIFICATION**

# 6 Information

## 6.1 Introduction

An important aspect of the exercise of voting rights is that the persons or entities making the voting decision, the Ultimate Accountholders, are provided with the relevant information about the resolutions on which they will vote. It is evident that modern means of communication will play an increasingly important role in this information process. By making the relevant information widely accessible, for example via the website of the company, it will become easier for interested parties to become informed. Informing the Ultimate Accountholders will become an issue of informing them where they can obtain the relevant information (“pulling” information by the Ultimate Accountholder) rather than sending the information to them (“pushing” information by the company). In jurisdictions where some form of electronic proxy voting already takes place, shareholders are directed to the company’s website for the relevant information. It will probably only be a matter of time until all listed companies follow this practice, as least as an alternative to sending paper information to shareholders. Both the Consultative Document of the High Level Group of Company Level Experts on a Modern Regulatory Framework for Company Law in Europe, as well as the Second Consultative Document of the European Commission on Ongoing Transparency Obligations for Publicly Traded Companies deal with this issue.<sup>7</sup> The Group has not dealt with this issue specifically, but assumes that as a matter of practice or law listed companies in the near future will publish all relevant meeting materials on their websites and shareholders will be able to pull such information from the company’s website directly, quickly and at little cost. In light of these developments the Group believes it is not appropriate for the European Union to impose an obligation on listed companies to actively push information and to ensure that meeting materials are sent in physical form to Ultimate Accountholders. In addition to the initiatives already undertaken by the European Commission, the Group would like to point out specifically that it is important that information to be published on the company’s website include detailed information on the applicable rules and procedures that have to be applied by shareholders in order to be able to exercise their voting rights. The issuing company should clarify what facilities Ultimate Accountholders have in order to exercise their entitlement to control the voting right and what they must do in order to be

<sup>7</sup> Both documents can be found and downloaded from the European Commission’s website ([http://europa.eu.int/comm/internal\\_market/en/company/company/modern/index.htm](http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm) and [http://europa.eu.int/comm/internal\\_market/en/finances/mobil/transparency/index.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/transparency/index.htm) respectively)

admitted to the vote (either by participating in the meeting or by voting in absentia).

**RECOMMENDATION 8:**

**THE EUROPEAN UNION SHOULD ENSURE THAT MEMBER STATES ENABLE LISTED COMPANIES TO COMMUNICATE WITH THEIR SHAREHOLDERS AND ULTIMATE ACCOUNTHOLDERS VIA ELECTRONIC MEANS, INCLUDING WEBSITES, AS AN ALTERNATIVE TO TRADITIONAL MEANS. MEMBER STATES SHOULD ENSURE THAT ISSUING COMPANIES ARE REQUIRED TO PUBLISH ON THEIR WEBSITE WHICH RULES AND PROCEDURES HAVE TO BE FOLLOWED BY SHAREHOLDERS IN ORDER TO BE ABLE TO EXERCISE THEIR VOTING RIGHTS, WHAT FACILITIES ARE AVAILABLE FOR ULTIMATE ACCOUNTHOLDERS TO EXERCISE THEIR ENTITLEMENT TO CONTROL THE VOTING RIGHT AND WHAT THEY MUST DO IN ORDER TO BE ADMITTED TO THE VOTE (EITHER BY PARTICIPATING IN THE MEETING OR BY VOTING IN ABSENTIA)**

Although the Group assumes that pulling of information by shareholders will become the normal type of informing shareholders on meeting-related issues, we acknowledge that companies may desire and at some stage (by individual Member States) may be required to ensure that Ultimate Accountholders actually receive specific information about the shareholders meeting and the issues on the agenda. The Group will elaborate on this concept of pushing of information in section 6.2.

The Group would like to emphasise that it acknowledges that when speaking about listed companies communicating with shareholders, the issue of communication among shareholders arises as well. In view of good corporate governance practices, it is essential that shareholders are not only informed by the (management of the) company. In order to be able to make a well informed decision and to maintain a certain balance of power between management and shareholders, shareholders must also be able to receive information from other shareholders who might have different views on certain issues. The Group believes that, due to a shift, at least in part, to voting in absentia and the facilities offered by modern technology, the whole process of deliberation and discussion between management and shareholders and among shareholders will increasingly take place prior to the actual meeting. It is important that there should not be obstacles to the development of facilities for shareholders to communicate with the company, but also to communicate with each other and to influence each others' opinions.

Another important aspect of the information process is the quality of the information. The information that is communicated to shareholders, whether by management or by other shareholders, must meet certain requirements in order to ensure that shareholders are informed correctly.

In a number of Member States these issues are regulated already, but this is not the case in every Member State. Given the fact that the importance of voting in absentia will increase and therefore these issues will become more relevant, they will most likely have to be addressed in all Member States in the near future. A regulation of these issues will have to be embedded in the

various national company and securities laws and will therefore be specific for each Member State. The Group has not deliberated whether or not a form of regulation of these issues at the European Union level would be required or desired, as these issues lie outside its mandate. We would like to stress, however, that any regulatory initiative on these questions, whether at the European Union level or by individual Member States, should be aimed at providing information or granting access to information and communication to Ultimate Accountholders, who have the entitlement to control the voting rights.

## **6.2 “Pushing” information**

As mentioned above, despite the fact that pulling information from the company’s website by shareholders will increasingly become the normal way of communicating with shareholders, there still will be situations in which companies desire or will be required to inform the shareholders individually. In light of the proposals made in Section 4, the Group believes this information process will have to be aimed at informing the Ultimate Accountholder. When speaking about actively pushing relevant information to the Ultimate Accountholders, there are, generally speaking, two possible approaches: ‘the chain approach’ and ‘the direct approach’.

In the chain approach, the whole process is the responsibility of the Securities Intermediaries. They have an obligation to forward the relevant information from the issuing company down the chain to the Ultimate Accountholder. In general, the chain approach is traditionally more suitable for systems where the formal entitlement to vote is deemed to be concentrated in the top of the chain of Securities Intermediaries, seen from the point of view of the issuing company. Securities Intermediaries in the chain until the Ultimate Accountholders pass on the meeting information to the next Securities Intermediary down the chain, until it reaches the Ultimate Accountholder. At first sight, it seems unnecessarily time consuming, burdensome and expensive to require Securities Intermediaries throughout the chain to forward meeting information to clients if the Ultimate Accountholder is entitled to control the voting right directly. However, as some respondents to our Consultative Document have pointed out, in practice Securities Intermediaries will not actually pass down the physical meeting information to the next Securities Intermediary, but will communicate with each other to allow for straight through processing to the Ultimate Accountholders, who will receive the information. The only difference with the direct approach as set out below is that the company does not necessarily have to get to know the identity of its Ultimate Accountholders and does not have to play an active role. The full burden of the exercise is on the Securities Intermediaries in Securities Holding Systems.

In the direct approach the issuing company is responsible for reaching the Ultimate Accountholders. It does so by communicating with its Ultimate Accountholders directly and by the Ultimate Accountholders exercising their voting rights directly towards the issuing company. The company will have to

rely on the Securities Intermediaries to identify the Ultimate Accountholders and their shareholdings. The Securities Intermediaries in this approach are required to inform the issuing company of the identity and shareholdings of the Ultimate Accountholders. Once the Ultimate Accountholders have been identified to the issuing company the information and communication process is the responsibility of the issuing company. The Securities Intermediaries in the chain will not have to pass on information to Ultimate Accountholders. The direct approach raises privacy issues, as the identity of Ultimate Accountholders will be disclosed to the issuing company. In jurisdictions where issuing companies have a right to be informed about the identity of ultimate accountholders, this privacy is usually protected by an opt-out or an opt-in system. In an opt-out system accountholders who do not wish their identities to be disclosed to the issuing company can indicate this to their securities intermediary and their identities will not be disclosed. In an opt-in system securities intermediaries will only disclose the names of accountholders that have explicitly opted for inclusion. There is general agreement, also among the respondents to our Consultative Document, that in an opt-out system far more accountholders will be included than in an opt-in system.

Both the chain approach and the direct approach will require certain regulation of Securities Intermediaries in Security Holding Systems. In the chain approach Securities Intermediaries have to be required to forward all relevant meeting information down the chain, or at least to communicate with each other to allow straight through processing, until it reaches the Ultimate Accountholder. In the direct approach, Securities Intermediaries have to be required to identify Ultimate Accountholders to the issuing company, on the basis of which the company can send information to the Ultimate Accountholders. Both approaches have different implications in terms of the administrative burdens of Securities Intermediaries and the time and costs involved in the operation of the processes. At first sight, it appears that the direct approach puts fewer administrative burdens on the Securities Intermediaries. The information process appears to take less time in the direct approach and trigger less costs. However, the differences with straight through processing in the chain approach may be minimal.

The responses to both types of approaches as described in the Consultative Document have been mixed. Generally securities intermediaries were in favour of the chain approach, others, including investors, favoured the direct approach. It has also been pointed out that the issue of how issuing companies should inform their shareholders and Ultimate Investors should and could be left to the market, where Securities Intermediaries could provide competitive information services to shareholders. In light of these comments and the potentially limited differences between the two approaches, the Group takes the view that the European Union should not prescribe either of the two approaches as the single approach to be followed. We do believe, however, that in every Member State at least the possibilities should be created for issuing companies to communicate with the Ultimate Accountholders directly. Communication with the Ultimate Accountholders

is of great importance for good corporate governance and the Group believes that direct communication is the most efficient way to enhance communication between the company and the Ultimate Accountholders. To achieve this possibility of direct communication Member States should ensure that Securities Intermediaries are required to provide issuing companies with all relevant information to identify the Ultimate Accountholders so that the companies can communicate with them directly. Such obligations to provide information to issuers exist in some Member States today. The privacy of investors must be addressed when such a rule is introduced. The Group would generally favour the protection of the privacy through an opt-out system, which would ensure the widest possible reach to Ultimate Accountholders. Ultimate Accountholders who do not wish to be identified to issuing companies in identification procedures on the basis of the proposed rule, can opt-out by notifying their Securities Intermediaries to that effect. Some respondents to the Consultative Document have pointed out that current bank secrecy laws in some Member States may not allow for the adoption of an opt-out system. An opt-in system, whereby the accountholder explicitly has to agree to being included in the identification process, may be more appropriate to deal with these concerns. This is an issue which requires further review and we recommend that this review be conducted before deciding at the European Union level to introduce a requirement for Securities Intermediaries to identify Ultimate Accountholders to issuing companies.

**RECOMMENDATION 9:**

**MEMBER STATES MUST ENSURE THAT SECURITIES INTERMEDIARIES AT THE REQUEST OF ISSUING COMPANIES DISCLOSE THE IDENTITY AND CONTACT DETAILS OF ULTIMATE ACCOUNTHOLDERS TO ISSUING COMPANIES. THE PRIVACY OF ULTIMATE ACCOUNTHOLDERS SHOULD PREFERABLY BE PROTECTED BY GIVING THEM THE ABILITY TO OPT-OUT OF IDENTIFICATION PROCEDURES. FURTHER REVIEW AS TO WHETHER AN OPT-OUT SYSTEM SUFFICIENTLY DEALS WITH THE PRIVACY ISSUES AND BANK SECRECY RULES IS TO BE CONDUCTED BEFORE SUCH A RULE IS INTRODUCED ON ACROSS THE EUROPEAN UNION**



# 7 Settlement Times and Securities Lending

## 7.1 Introduction

In the Consultative Document, the Group addressed two aspects of current securities practice that potentially complicate cross-border voting in Europe. The first aspect are the differences in settlement times of securities transactions processed through stock exchanges and their clearing and settlement systems in the different Member States. The second aspect is the practice of securities lending. The Group stated that although these issues do not form the core problems of cross-border voting, they could complicate cross-border voting in practice and should be taken into account when proposing possible solutions to the various problems. Having discussed the responses received by the respondents, the Group has reached the following conclusions. The issue of settlement times will be addressed in section 7.2. The issue of securities lending will be discussed in section 7.3.

## 7.2 Settlement Times

After a securities transaction has been effectuated on a stock exchange, it has to be settled: the seller should deliver the securities he has sold and receive the agreed price, whilst the buyer should pay the price and receive the securities. Despite the modern technology that is used today to effectuate these transactions, this settlement process takes time. The settlement times vary between the different systems. On some exchanges transactions are settled three days after the day of the buy-and-sell-transaction (T+3), on other exchanges they are settled on T+5 or T+1. In the Consultative Document, the Group raised the issue whether these differences in settlement times could mean that in the case of cross-border transactions the securities could be credited in the buyer's account before they are debited from the seller's account, as a result of which there are two investors in different countries who at the same time are regarded as the persons with an entitlement to the same securities. Alternatively, in case of a transaction in the opposite direction, the Group suggested there might be a period of a few days in which no one is regarded as having entitlement to the securities. The Group stated that if this were to be the case, this could create complications for cross-border voting and to possible solutions to the problems of cross-border voting.

In their reactions to the Consultative Document, a majority of respondents has informed the Group that in practice, the differences in settlement times do not cause any problems with respect to the voting rights. Apparently, it is common practice that a cross-border transaction is settled on one of the settlement times of the two securities holding systems involved, e.g. either

T+3 or T+5. The securities intermediaries in the respective securities holding systems who are involved in the cross-border transaction should then credit and debit the accounts on this agreed settlement date. Market participants have assured that a securities transaction within the European Union will settle on a single well-defined date irrespective of local market conventions, and there is no ambiguity over voting rights. The Group is inclined to be reassured by the respondents that the problems suggested in the Consultative Document do not exist, but must note that it did not have the time or the resources to verify the specific details of the practice of settlement times. The Group also notes that there is some evidence that not all securities intermediaries in all securities holding systems may apply the agreed settlement date in a cross-border transaction and may credit or debit accounts according to the rules of their local securities holding system. The Group has not been in a position to assess whether these are mere incidents or indicate a wider problem with cross-border transactions. Based on the information at hand, the Group does not feel there is a necessity to propose any regulatory measures on this issue from the perspective only of the problems of cross-border voting. Having said this, it must be noted that a number of respondents have indicated that harmonisation of settlement times is desirable to avoid any complications with respect to voting entitlement, as well as to solve other problems related to the differences in market practices. However, the expectation is that it will not be possible to realise this harmonisation within the European Union on short term. These issues are currently being analysed by the Giovanninni Group, which is looking into the current cross-border clearing and settlement arrangements in the European Union and the complications that arise as a result of the different market practices. The Group therefore will refrain from making any general recommendations about the differences in settlement times.

### **7.3 Securities Lending**

The second aspect addressed in the Consultative Document was the practice of securities lending. CSDs and securities intermediaries who are confronted with differing settlement times in cross-border transactions may be faced with the problem that their books do not tally during the period between the moment when they have to deliver shares (by crediting them to the securities account of their affiliated institution/client) and the moment when those shares are delivered to them (by being credited to their own securities account). There is also a wide practice of short selling in anticipation of certain share price movements. When they have to deliver shares they do not have, they borrow shares from some clients who hold securities accounts with them in order to bridge the period. Similarly, other market parties such as global custodians and asset managers who regularly have obligations to deliver without having the actual shares in their possession borrow shares from account holders to cover these short positions. The borrowing of securities, or securities lending, is the oil that lubricates the stock market. It is estimated that a significant part of the total number of daily securities transactions involves securities lending. To enable the borrowing of securities, securities intermediaries enter into securities lending agreements

with each other and institutional investors. These investors are willing, in return for a fee, to lend their securities temporarily to the securities intermediary who administers their securities account, provided that sufficient guarantee is given that the securities will be returned. The practice is that on the basis of such an agreement the borrower is entitled to lend the securities at any moment. The systems of the securities intermediary automatically debit securities from the accounts of clients when the intermediary decides to borrow. As a result, the lender loses his property-law claim to the securities, yet without this being preceded by a specific transaction by that lender. Instead, the lender has a contractual claim against the borrower that the securities will be delivered back to him, and that claim can be covered by collateral security. In some cases, the lender does not know that securities are being borrowed from his securities account. He is only informed after the event. Having said this, the Group understands that it also occurs that securities lending is based on specific agreements, whereby the lender is aware of the actual lending.

In the Consultative Document, the Group raised the issue whether the practice of securities lending created problems for cross-border voting and for possible solutions to other issues related to cross-border voting. The response was varied, that is to say some respondents felt regulation of some kind was necessary whilst others renounced the idea of regulation. The Group has discussed the various responses and has decided not to recommend any regulation on the issue of securities lending. The Group understands the effect of securities lending in most if not all securities holding systems is that the securities account of the lender is debited, as a result of which he will no longer be recognised as the party with a property-law entitlement to the shares and consequentially loses any voting rights attached to the shares. There is usually no ambiguity as to who is entitled to exercise possible voting rights. Generally speaking, the borrower is entitled to exercise voting rights attached to the borrowed shares credited to his account. The Group agrees with this outcome, that is to say, it believes that the effect of securities lending in general should be that the lender loses the control rights. Consequently, there is no reason to implement regulation, as the issue can apparently be solved by market participants to everybody's satisfaction. Furthermore, if complications do arise from securities lending, the Group would like to note that these complications are a result of an arrangement by investors who enter into a securities lending agreement at their own free will in order to receive lending fees. Investors who agree to lend their shares to their securities intermediaries cannot have their cake and eat it. If lenders wish to retain the voting rights they have the option to achieve this by contract. The parties involved can agree that the borrower will exercise any voting rights as instructed on behalf of the lender. Alternatively, the lender and borrower can agree that the borrower will return the shares at the instruction of the lender, if the lender needs to hold the shares at a certain time for voting purposes.



## 8 Conclusion

The Group has identified a number of legal obstacles in the regulations of securities holding systems and in the company laws of Member States that complicate, and often render impossible the exercise of voting rights across borders in the European Union. The recommendations of the Group are directed to remove these obstacles and create a legal environment which allows for the effective exercise of voting rights across borders with an appropriate level of legal certainty for all involved. The recommendations relate to elements of company law (acceptance of shareholding on basis of statements by Securities Intermediaries, prohibition of blocking of shares as a condition for exercise of voting rights, acceptance of split votes by Securities Intermediaries as valid votes) but mostly deal with the rights of accountholders and the obligations of Securities Intermediaries in Securities Holding Systems.

The Group believes the problems of cross-border voting as set out in this report need to be addressed urgently in order for shareholders in and outside Europe to be able to effectively exercise their voting rights in European listed companies. The Group is confident that implementation of its recommendations will result into a major and much needed improvement of the ability of shareholders to exercise their voting rights. This would also serve as a basis for solving a number of practical issues that are relevant to cross-border voting, like the issue of language and the alignment of modern technology systems used by securities intermediaries, investors and companies, to name only a few.

A European Union Directive would normally be the legal instrument best suited to implement recommendations such as made by the Group, as it would ensure that the principle rules facilitating cross-border voting in Europe would be applied in all Member States but would leave it to Member States to determine the specific form of implementation in line with their national company laws and regulations of securities holding systems. As a number of related issues are currently on the agenda of the High Level Group of Company Law Experts, the Giovannini Group and other initiatives taken by the European Commission, it may be fitting to combine these where possible. However, the Group stresses that its recommendations are seeking an integrated solution to the legal problems of cross-border voting and that such a solution is required urgently. If combination with other, related issues would result into a substantial delay of a solution for cross-border voting, the Group believes the legal problems of cross-border voting should be addressed separately. Finally, the Group would like to recommend that the European Commission, when considering a Directive to deal with these issues, closely consult with investors, the securities industry and listed companies to make use of their wide practical experience in these matters in order to build a system, which effectively ensures the rights of investors to exercise voting

rights across borders and which is practically manageable, both with a view to administrative burdens and costs, for securities intermediaries and listed companies.

## Samenvatting (summary in Dutch)

# Grensoverschrijdend stemmen in Europa

Grensoverschrijdend stemmen op aandeelhoudersvergaderingen in Europa roept een aantal praktische en juridische vragen op. Dit komt door de vele verschillen in regelgeving en gebruiken die zich in de verschillende Lid Staten van de Europese Unie voordoen met betrekking tot de organisatie van de aandeelhoudersvergadering en door de wijze waarop aandelen in beursgenoteerde vennootschappen tegenwoordig worden gehouden en verhandeld. In de praktijk gebeurt dit in girale effectensystemen, waarin aandelen worden gehouden via rekeningen bij effectenintermediairs. De aan- en verkoop van aandelen geschiedt door bij- en afschrijving op effectenrekeningen. In grensoverschrijdende situaties worden de problemen vergroot doordat aandelen in dergelijke gevallen vrijwel altijd worden gehouden via een keten van effectenintermediairs, waardoor onduidelijkheid bestaat over de vraag wie gerechtigd is stemrecht uit te oefenen en over de te volgen procedures. Het resultaat is dat stemmen op aandelen gehouden in het buitenland praktisch gesproken zeer bezwaarlijk of zelfs onmogelijk is.

De Groep heeft een aantal concrete aanbevelingen gedaan die er op zijn gericht de bestaande problemen op te lossen en binnen de Europese Unie een wettelijke infrastructuur te realiseren die grensoverschrijdend stemmen op effectieve wijze mogelijk maakt. De aanbevelingen hebben betrekking op enkele gebieden van vennootschapsrecht, maar raken voornamelijk de rechten van rekeninghouders en de verplichtingen van effectenintermediairs. De kern van de aanbevelingen is het creëren van zekerheid over wie in girale effectensystemen gerechtigd is te bepalen hoe het stemrecht op de aandelen wordt uitgeoefend. De Groep acht het hierbij wenselijk dat dit recht zoveel als mogelijk toekomt aan de partij die het economisch belang heeft in de aandelen. Tevens houdt de Groep er rekening mee dat deze oplossing niet alleen binnen de Europese Unie moet functioneren, maar ook praktisch en werkbaar moet zijn voor aandeelhouders buiten de Europese Unie, waarbij in de praktijk de Verenigde Staten het belangrijkste zijn. Met inachtnaam van het voorgaande beveelt de Groep aan een Europese regel te introduceren die bepaalt dat de laatste rekeninghouder in girale effectensystemen binnen de Europese Unie gerechtigd is te bepalen hoe het stemrecht op de aandelen wordt uitgeoefend. Indien de laatste rekeninghouder in de Europese Unie bijv. een Amerikaanse effectenintermediair is, moet deze de mogelijkheid hebben zijn cliënten aan te wijzen als gerechtigden om te bepalen hoe het stemrecht wordt uitgeoefend.

Teneinde te verzekeren dat de laatste rekeninghouder (of degene die door hem wordt aangewezen) ook daadwerkelijk in de gelegenheid is dit recht uit te oefenen beveelt de Groep voorts aan dat Lid Staten worden verplicht

maatregelen te nemen die dit bewerkstelligen. Hiervoor reikt de Groep een aantal opties aan, waarvan de Lid Staten er tenminste één in hun nationale wetgeving zouden moeten implementeren. De opties zijn zo gekozen dat het voor de Lid Staten mogelijk is om aan hun verplichtingen te voldoen zonder dat het nationale vennootschapsrecht dat bepaalt wie formeel stemgerechtigd is behoeft te worden gewijzigd.

De Groep is van mening dat een Europese Richtlijn het beste wettelijke instrument zou vormen om deze aanbevelingen te verwezenlijken, daar het zou verzekeren dat de belangrijkste regels die grensoverschrijdend stemmen mogelijk maken in alle Lid Staten worden geïmplementeerd, terwijl het aan de Lid Staten wordt overgelaten op welke specifieke wijze zij deze in hun nationale vennootschapsrecht en regelgeving voor effectenintermediairs wensen in te bedden.

De Groep benadrukt dat de problematiek van het grensoverschrijdend stemmen, zoals in het rapport beschreven, snel aangepakt dient te worden om aandeelhouders, zowel binnen als buiten Europa, in staat te stellen op efficiënte wijze hun stemrechten uit te oefenen in Europese beursgenoteerde ondernemingen. De Groep vertrouwt erop dat implementatie van zijn aanbevelingen zal resulteren in een belangrijke en noodzakelijke verbetering van het recht van aandeelhouders om hun stemrecht uit te oefenen.

# Annex 1 Mandate of the Expert Group

## Press release Ministry of Justice of 28-02-2002

Installation of International Group of Experts on Cross-border Voting by shareholders

Minister Benk Korthals (Justice) of The Netherlands has set up the international group of experts on cross-border voting by shareholders of companies. The group is to investigate the practices, experiences and legal barriers to cross-border voting in Europe. It will present recommendations for legislative steps, either at a national or at European level. The findings of the group will be put to the High Level Group of Company Law Experts, which was set up by the European Commission to report on several company law matters.

The Group will investigate and make recommendations on the legal and practical problems:

of identification of shareholders who should be entitled to vote where shares are held through chains of intermediaries across borders,  
caused by current formalities for the exercise of voting rights,  
caused by differences in settlement times of share transfers across borders,  
caused by the practice of stock lending,  
the relevance for each of these problems of the distinction between registered and bearer shares,  
the impact of dematerialisation of shares and the requirement to protect the privacy of securities account holders  
as well as the way modern information and communication technology can be used efficiently to help overcome any of these problems.

The Group will prepare a consultative document indicating the problems it investigates and alternatives for solutions. The Group will organise a hearing. The Group will formulate its conclusions and recommendations in a final report, which is to be submitted to the Minister of Justice in the month of June.

The Group of Experts consists of:

Chairman Jaap Winter	Professor at the Erasmus University of Rotterdam and legal advisor Unilever, The Netherlands
Ulrich Noack	Professor at the University of Düsseldorf, Germany
Philippe Bissara	Secretary-General of the Association Nationale des Sociétés par Actions, France
Dario Trevisan	Lawyer at Trevisan & Partners, Milan, Italy
Jonathan Bates	Managing director at Institutional Design, London, United Kingdom
Jan Schans Christensen	Professor at the University of Copenhagen, Denmark
Secretary Marnix van Ginneken	Legal advisor Akzo Nobel and lecturer at the Erasmus University of Rotterdam, The Netherlands

## **Annex 2      Working methods of the Expert Group**

The Expert Group on Cross-Border Voting in Europe was formed by the Dutch Minister of Justice in January 2002.

In total, the Group held five full-day meetings at Schiphol Airport in Amsterdam. The meetings were held on February 19, March 7, March 27, May 3 and June 17, 2002.

After the third meeting the Group published a Consultative Document in April 2002 that described the various issues related to cross-border voting in Europe and included a number of specific questions on these issues. The Consultative Document was posted on the website of the Dutch Ministry of Justice and market participants and other interested parties were invited to give their reactions before June 3, 2002.

In addition to the Consultative Document, the Group conducted a full-day Consultative Hearing on May 2, 2002 at Schiphol Airport in Amsterdam, at which a number of representatives of market participants and other interested parties were present. At the Consultative Hearing the issues mentioned in the Consultative Document were discussed extensively. The Group distributed a summary of some of the issues discussed at the Consultative Hearing to the participants in June 2002.

In total the Group received 27 written comments to the Consultative Document. A general summary of the written comments is attached to this report as Annex 3.



## **Annex 3      Summary and Analysis of the written comments on the Consultative Document**

### **Question 1**

**Do the problems associated with cross-border voting described in the Consultative Document require regulation, or can they be solved efficiently and in due course by market forces?**

The majority believed that market forces alone cannot solve the problems stated in the consultation document. Therefore even though market forces should be regarded as valuable, regulations should be put into effect. A number of statements recommended a combination of regulation and market forces. There was broad consensus that the right of the ultimate shareholders to vote in absentia or in form of proxy voting can only be improved upon by regulations, especially in regard to electronic communication and voting. A few statements suggested that the identification and registration process can be solved by market forces, because investors who are improperly informed will move on to other intermediaries and thereby ensure that they will get the needed information in time on the next occasion. The market should be given more time to find its own solution according to these comments. Another argument brought up in that context was that regulation would require too many changes in the different legal systems. Remarkably, most of the statements from the UK pointed out that the problems stated in the consultative document are not as severe there as in other legislations. Therefore they believed changes in their legal system to be unnecessary.

### **Question 2**

**If the problems associated with cross-border voting require regulation, do they require regulation on a European level or should and could regulation be left to the individual member states?**

The statements favouring regulation widely agreed that some form of regulation needs to be implemented on a European level in order to establish harmonization of national laws. Without uniform standards a solution to these problems stated was considered unlikely. However, several commentators pointed out that European regulation should not go into too much detail to avoid discrepancies with the basic structures of national laws. Only unification of the core rules was deemed necessary, to allow the national law-makers sufficient room for adjustments. Some commentators suggested that due to the global importance of cross-border voting a common approach with the US law-maker and US-based companies should be considered.

### Question 3

**Do you agree with the assumptions put forward in the Consultative Document as a basis for regulation of the problems associated with cross-border voting?**

Assumption a, regarding the investors right to receive all information of importance as well as his right to vote directly, in absentia or via proxy was widely being agreed upon. This would lead to a strengthening of the ultimate investor's rights, while reducing the cost- and time-requirements. Some comments, however, pointed out that direct communication between the issuing company and the ultimate investor is not generally necessary. A chain approach via intermediaries would in their view work just as efficient, while not requiring as many legal changes in the different national laws.

Assumption b, concerning the ultimate investor being seen as the shareholder, was heavily debated. A lot of statements disagreed. It was suggested to differentiate the entitlement to vote from the concept of legal ownership. A differentiation between normal "voting" and special corporate situations (e.g. major corporate or structural changes or changes in Articles of Association) was also considered. They pointed out that there is no need for the issuing company to know the identity of the ultimate investor unless he chooses to let them know. The right to privacy of the ultimate investor should be respected. Allowing the ultimate investor to vote directly was also not always seen as the best solution. A chain approach via intermediaries would serve the ultimate investor just as well if he is entitled to vote in absentia or via proxy. A number of statements also questioned the effect on national laws, if the ultimate investor was to be considered the shareholder in each national law. The differences between the national laws of the member states were seen as too severe for a common approach.

Another point of view was that improvement on the ultimate shareholders rights is already progressing because of recent technology advancement, at least in the UK. Regulation may therefore serve as an obstacle to further improvement.

### Question 4

**Do you think that the definitions and the principal rule as described in the Consultative Document should be introduced in all member states of the European Union through a European Directive or Regulation?**

There was a broad consensus, that in order to implement uniform rules it is essential to introduce a well-defined system of concepts reusing definitions from existing directives. It was remarked that even though regulation at the European level could help, several options rather than a mandatory rule would be required to take local discrepancies into account. It was also noted that an EC regulation would only affect member states. Therefore all definitions would only affect residents of the member states, e.g. leading to the "ultimate investor" being an "European Beneficial Voter".

Defining "Securities intermediaries" as "members or participants of CSDs and ICSDs" was seen as too limiting. For example in Germany certain banks (Sparkassen, Genossenschaftsbanken) are not themselves members of a CSD,

but instead employ a central authority. It was therefore proposed not to distinguish between securities intermediaries and other entities at all. It was also pointed out that no practical legal definition of the "Ultimate Investor" in European law was at hand. If the definition relies solely on private contracts, its use is questionable, as the definition should not create scope for dispute as to the identity of the person entitled to vote. Such uncertainty could be exploited e.g. in a takeover. It was suggested to define the "ultimate investor" as "the person or entity that has identified itself to its intermediary as a person with a right to vote shares". Thus, each intermediary would recognise the next intermediary down the chain as entitled to vote all the way down to the ultimate investor no matter how long the chain is.

It was heavily debated, in how far it is necessary to disclose the identity of (all) shareholders. It was suggested that intermediaries should only be required to produce identities and shareholdings of those ultimate investors that participate in the voting process. It was pointed out that only investors wishing to personally attend the meeting must make themselves known, while anonymity must not be given up for proxy or remote voting. Finally, it was suggested that shareholders should be able to transfer the right to vote by a single instruction to their intermediary for all future votes without requiring individual permissions.

Most comments agreed that the identification process should be carried out by the securities intermediaries. The contribution of the chain of securities intermediaries as third party identification witnesses between the investor and the issuing company was considered a good standard for the quality of the process and for the integrity of the shareholders meeting. However, the problem in requiring them to determine the ultimate investors is that they have no way of compelling entities located outside the EU to disclose information with respect to ultimate investors. In addition the costs for the security intermediaries and the issuers were brought up.

Additionally, clear definitions of the custodian's duty toward the company (obligation to identify, authenticate and disclose the ultimate investor to the company) and an analysis of his duties toward its (immediate or indirect) customers (duty of care, required activities) were deemed necessary.

#### Question 5

**Do you think in the member states of the European Union a possibility should be introduced for an ultimate investor under the definition given in the Consultative Document, who is an intermediary on behalf of other parties but not a securities intermediary as defined in the Consultative Document, to designate its clients as those who are entitled to vote? How should such designation by intermediaries practically be effected?**

The question was closely connected to the definition of the "ultimate investor" in the rule stated before. Those comments that denied the rule consequently saw no need for its extension. Some others remarked that market forces would make (complex) legislation obsolete, when there is a need to communicate with the ultimate beneficial owner. The naming of an

ultimate investor that votes was seen as globally possible already. As long as the relationship between investors and their intermediary remains under private contractual terms legislation would be unnecessary. If investors were located in the EU, the intermediary would legally be required to look at their accountholders, in other countries it would depend on local law or contract. It was also remarked, that the practical consequences of the rule could not be foreseen, yet.

Those comments that defined the "ultimate investor" as the "real ultimate investor" and included all "legal entities" as "securities intermediaries" consequently saw no need for an additional rule. The definition of the "ultimate investor" as the final EU investor was seen as an unnecessary layer of complexity. It was noted that according to most legal systems the right to vote with registered shares currently only depends on registration, without regards to the custody chain. The change to the "ultimate investor"-system was put in question because of the resulting inefficiencies.

A few statements agreed that while disclosure policies are beneficial in general an obligation to name the "real ultimate investor" is not desirable. A wide variety of relationships may exist between the ultimate investor under the definition and its client, each governed by its own (national and possibly contractual) rules. An obligation would risk intruding on the characteristics envisaged by the parties to such a relationship. It was proposed that each person in the chain should ascertain or designate a client as the person who is to be entitled to vote unless it points to someone else, with the issuer being bound by this designation process without a right to oppose to it. One comment, however, requested that securities intermediaries should not be authorized to vote unless they have specific authorization or proxy of their client. Pension funds, investment trusts and insurers should be legally required vote in the best interest of the beneficiary.

Two comments believed that it would be best for the identification process to be initiated by direct or indirect request from the investor himself, naming his custodian. From there on the company would contact that custodian, with the identification moving from custodian to custodian until it reaches the issuer's registrar through the securities institutions who are members of this original securities clearing system (i.e. a "reverse chain approach").

#### Question 6

**Do you think a disclosure rule for securities intermediaries as described in the Consultative Document should be implemented in all member states of the European Union? Under what circumstances could an issuing company require an ultimate investor under the definition given in the Consultative Document to disclose its clients outside the European securities holding systems? Do you think disallowing the votes cast by such an ultimate investor is an appropriate sanction for not disclosing who its clients are?**

A few comments noted that disclosure rules are not directly related to voting at all. Communication with and among the investors does not require their identity to be known by the issuer, as intermediaries would forward information. It was also remarked that disclosure rules must oblige the issuer

to make the investor's identity available to the other shareholders or to the public. Otherwise they may lead to an unjust advantage of the management over the shareholders.

While a few comments (mainly from France and Great Britain) agreed that disclosure-rules would be useful and unenforceable without sanctions, most of the others feared abuse. It was assumed that the issuer should generally be able to trust state-acknowledged and supervised Securities Intermediaries. Consequently it was assumed that whoever owns the bearer shares or is registered should be able to vote regardless of the issuing company's subjective view about his motives for casting the vote. There may be legitimate reasons for an investor to avoid disclosure of its name to the issuing company. The veil of anonymity is currently only be lifted when the rights of other shareholders or public interest may be affected.

When intermediaries outside the EU are involved, they will not be required to disclose the name of their accountholder. In fact, in a number of jurisdictions (even inside the EU), it would be a violation of bank secrecy if an intermediary did disclose the name of its accountholder. Finally, the need and effectiveness of a sanctioning system was questioned. Sanctions may affect the wrong person, as shares may be transferred shortly after the denial of disclosure. Apart from disallowing votes proposed sanctions included stopping dividend-payment or even full disenfranchisement of the shares.

#### Question 7

**Which of the two approaches to the distribution of information, the chain approach and the direct approach, is preferable? Is there an alternative approach?**

Most comments preferred the chain approach, at least unless the ultimate investor has given special approval for the direct approach. Disclosure or identification of the underlying investor was believed to be unnecessary as the practised chain approach works adequately. Intermediaries can develop a system whereby any information received from the issuer is automatically forwarded to the identified ultimate investor, whilst the cost is deemed to be minimal. One comment noted that in practice information is sent directly to the ultimate investor by the shareholder of record, bypassing the other intermediaries in the chain. In the chain approach the issuer may rely on the registered shareholder whereas in the direct approach the company has to identify and address the ultimate investor. In addition, the direct approach was rejected since it requires the issuer to create and maintain, on an ongoing basis, a parallel register to gather data on the ultimate investors, increasing costs and adding administrative burden on the issuer and the securities intermediaries. Finally, several comments noted that the direct approach would undermine privacy and thereby might have a chilling effect on investor activity and might eventually affect corporate governance. Furthermore, it was noted that in the direct approach EU intermediaries could be required to violate privacy laws of other jurisdictions by demanding identity data from their clients. In addition, the direct approach would require amendment or revision of bank secrecy laws in most Member States.

Only few comments supported the direct approach, arguing that the system of communicating one link at a time is prone to breakdown at each of the many steps involved, resulting in a lower safety standard. The chain approach is also considered to be slower, and to place substantial limitations upon voting where time may be of the essence. Finally, a direct system of notification would directly attribute the costs to the issuer or the shareholder. Some comments considered the two approaches not being an either or situation but, in the end, preferred to leave it to the issuer, intermediaries or ultimate investors to decide whether the investor is placed in direct communication with the issuer or whether AGM-information passes sequentially through the chain of intermediaries. Some statements deemed it sufficient if the relevant information concerning the AGM is published on a website that is accessible to the (registered) shareholder or the ultimate investor (furnished with a password or other token that legitimates him to the company) so that it is placed upon the shareholder or investor to "pull" the information directly from the electronic source. Others stated that the "pull"-approach is insufficient to ensure universal information delivery, and suggested an electronic message to be sent to the ultimate investor to make him aware of their existence. Further it was assumed that it will take several years before all investors will be electronically enabled, thus requiring traditional paper delivery of documents and voting instruction forms.

#### **Question 8**

##### **What type of rules must be implemented to make the preferred approach of the distribution of information possible?**

It was debated in how far existing regulation is sufficient. Consequently one participant suggested leaving most issues with the individual jurisdiction. More transparency in the obligations of all actors was commonly requested, especially regarding a uniform standard for timely delivery of information to shareholders. It was recommended to require the issuer to publish the relevant information in at least one internationally-accepted language. It was noted that e-mail should eventually replace paper mail. However, it was debated whether the shareholder should specifically request e-mail notification or should be required to actively decline it. Some suggested to require the issuer to make all necessary information available on the company website and demanding the intermediaries to notify their accountholders only about the location of that information. It was also remarked that ultimate investors should be given the opportunity to communicate among each other without obstacles. Finally, a sanctioning system was proposed.

One major issue with the direct approach was the desire for appropriate protection of the investor's privacy. It was also remarked that information in the register must not be used by the company to influence the outcome of the shareholder meeting. One opinion denied the need to protect the privacy of the ultimate investor however, at least those with a significant stake in the company.

The supporters of the chain-approach requested to furnish all record-shareholders (both intermediaries and investors with direct holdings) with

information concerning all issues to be voted on (like the current UK-system). They would then be obliged to pass the information on to their clients. It was also proposed to oblige the issuer to supply the intermediaries with appropriate quantities of meeting materials and pay a uniform fee per shareholder serviced.

#### Question 9

**If regulation is introduced that makes it possible to identify the ultimate investors, should there be an opt-in or an opt-out possibility? Which do you prefer?**

The necessity of either opt-in- or opt-out-requirements was doubted in some statements, as both rules would make the system more expensive and inefficient. One comment offered a compromise insofar as investors not affirmatively acting to release their identity to the issuer should receive information from their intermediary. It was remarked that as long as the register of a company is open to public inspection, it should not name to the ultimate investor.

Most statements preferred the opt-out approach. It was noted that an opt-out system would further the cause of shareholder democracy, as more shareholders would vote if their interest in voting was assumed by law. Only few shareholders would undergo the trouble of affirmatively communicating their desire to be eligible to vote. Experience in other markets has shown that this approach will ensure maximum participation by shareholders. An opt-out system would result in greater transparency of a corporation's shareholder register. The operation of an opt-out system would allow the shareholders of a company to feel reasonably sure that the company and its registrar had gone to a reasonable effort to enfranchise all interested shareholders.

Other comments preferred regulations to be introduced on an opt-in basis. These comments saw little demand or interest from beneficial shareholders to vote the shares they buy. They believe that an opt-out approach would involve unnecessary work forcing every intermediary to identify the ultimate shareholder wherever he may be in the chain often to find that they wish to remain anonymous. An opt-in approach would reduce the level of wastage and inefficiency that will be caused by including investors who do not wish to receive shareholder communications. They believe that it is the ultimate responsibility of the investor itself to determine whether it is desirable for him to provide identity data to the issuer. A shareholder risking its full money should remain free of voting or not voting, of appearing or not on the company's attendance list. Some comments requested to formally associate voting to disclosure of the shareholder to the company and all shareholders on the attendance list.

### Question 10

**Do you agree that the securities intermediaries should be required to certify, at the request of the issuing company, who the ultimate investor is and for how many shares he is entitled to vote, on which certification the issuing company may and must rely in determining the entitlement to vote at AGMs? Which of the approaches do you then prefer, the direct approach, the chain approach, a combination or an alternative approach?**

The majority of comments was in favour of a duty to certify the ultimate investor. Only a minority (mainly from the UK) opposed it, preferring to rely on the corporate register as the ultimate record of who has legal ownership of registered shares. Issuers would only look for registered owners in determining voting rights, while registered banks must request voting instructions from their accountholders. One comment believed the duty to be unnecessary, as any intermediary transmitting voting instructions would be required to ensure that they come from a legitimate accountholder anyway. A few comments believed the issuer should only be allowed to request information from or with support from the ultimate investor.

Some comments favoured direct communication between the securities intermediary holding the investors depository account and the issuer. Due to long chains of authorizations, the chain approach was assumed to be too burdensome and time consuming. The issuer would be able to choose the method to activate its shareholders and costs would be transparent as the issuer has to organize and pay the process of voting. Others favoured the chain approach for its reliability and traceability. Due to market forces, common standards are assumed to be established by involved parties such as service providers. A single opinion suggested the direct and chain approaches to work together in tandem.

### Question 11

**To what extent does an efficient regulation of the issues mentioned in the sections B (The problems of cross-border voting in Europe) and D (The three major issues) of the Consultative Document require a record date system? Do you think that reconciliation up to the date of the AGM is practically achievable and efficient, with the use of modern technology?**

There was general agreement that blocking should be abolished as soon as possible, as it is restricting liquidity and trading and is unnecessary given existing technology. Most comments additionally believed a record date system to be more efficient than a system of permanent reconciliation. Real-time reconciliation at the date of the AGM was considered impossible. Some comments were undetermined, assuming that the decision between a record date system and a system of permanent reconciliation should be left to the statutes of the company or to the securities intermediaries and their clients and that both system could be made workable in practice.

However, it was pointed out that reconciliation of all share transactions should be possible with a cut-off time of no more than 48 hours before the

meeting, which was technically proven in the UK. An earlier record date, set e.g. 50 days before the publication of the notice of meeting (like in the US) was considered unacceptable in a modern securities industry. Some comments suggested another record date about 30 to 40 days before the AGM for the information-process. A single opinion suggested a central record date of up to 40 days before the AGM for voting and for information.

### **Question 12**

**Do you think there should be one uniform system in the European Union with respect to the issues raised in questions 10 and 11?**

Most of the comments were in favour of a uniform European system. This would support the transparency of voting processes for cross-border shareholders. Some of the commentators emphasized that this system should try to reach the highest level of service standards and efficiency, and should not settle at the lowest common denominator.

Those comments not seeing the necessity of a uniform system emphasized the alleged lack of practical value in enforcing uniformity in the EU compared to the disadvantages. Standardisation was feared to damage markets where good solutions already exist. It was therefore suggested that harmonisation could be reached by recommendations, too.

### **Question 13**

**Do registered shares and bearer shares require a different kind of regulation of the issues mentioned in the sections B (The problems of cross-border voting in Europe) and D (The three major issues) of the Consultative Document?**

There is a broad consensus that uniformity of legal regulation for securities is desirable, as all systems show identical limitations in identification of the "ultimate investor". It was pointed out however, that the assumption that the distinction between various shares loses its relevance in securities holding system does not hold true in all cases. It was underlined that materialized bearer shares ("paper shares") need special legal treatment.

Some comments suggested to drop bearer shares in general, as different kinds of shares within the same class create problems regarding the legal status of different voters, pricing variations, and settlement problems. It was noted that there may be practical differentiations between registered holders and holders of bearer shares. Registered shareholders could benefit from a better level of communication and/or service as identification of the corresponding shareholders is simple. A special rule was requested to legally require the registrar to adjust the number of its registered shares with the total number of shares freely traded by the clearing system

## Question 14

**How should the issues of different settlement times and securities lending be solved? Do you believe that they should be solved in one uniform way within the European Union?**

### 1 *Settlement Times*

It was remarked that two investors cannot have different settlement dates. Although the settlement times do differ between member states, in cross-border transactions a contractual settlement date is followed. The sale of securities may be T+2 or T+3, but it will never be T+2 for one party and T+3 for the counterparty. In addition it was pointed out that the “investor-issuer” process in a chain-approach would reduce the occurrence of conflicts and offer a checking trail for any discussion of the shareholder’s identification through the custodian at the top of the chain, the clearing intermediary. It was also suggested to determine the moment of transfer as if the transaction took place in the home country of the corporation.

On the other hand several comments suggested uniform settlement dates (probably T+2) across the EU for voting entitlement. However, they agreed that such regulation would take time and may be futile due to technological advances and market forces, which are believed to eventually solve this problem. Alternatively a record date at least 6 workdays before the AGM was suggested. A proposal currently being discussed within the UK would note voting-rights as reserved for a third party in the register. Finally, it was suggested that the expert group should investigate US practice, as it is assumed that the cost of settlement in the US is substantially lower than in the EU countries.

### 2 *Securities Lending*

Many comments believed that brokerage lending should continue in the accepted practice by passing all ownership rights to the borrower. Legal regulation was considered unnecessary if the decision to trade such rights for the lending fees gained is a conscious choice on the part of the lender. He may prevent the exercise of rights or give instructions to vote on his behalf by individual contract. Ultimately he may withdraw the loan to exercise his voting rights. It was, however, deemed necessary to inform the lender which part of his holding is out on loan, as problems arise when the intermediary does not tell the beneficial owner that part of their holding is out on loan. On the other hand it was suggested to prohibit securities lending during the AGM period, as lending does not allow proper exercise of fiduciary duties and has an impact on the price of the borrowed securities. Another radical solution would see the lender of the shares remain “owner” of all legal rights related to the shares. Some comments suggested to require, as with dividends, a beneficiary’s shares to be lent only with contractual stipulation to the exercise of voting right. That would be difficult to achieve in practise however, as detaching a voting right from a share in the manner of a dividend coupon was seen as a cumbersome and expensive solution. Intermediaries would not be able to further hypothecate securities without

knowing which shares have voting rights attached and which have not. An electronic marker, indicating whether the share has been voted and by whom, was seen as a possible, future solution. Furthermore it was suggested to prohibit the voting exercise of borrowed shares by the borrower. One comment suggested legally obliging a custodian receiving shares in a swap not to confirm the borrower as the "final shareholder" to the issuer.



## **Annex 4 List of parties that submitted written comments to the Consultative Document**

- 1 ABP Investments/SCGOP, Geert Raaijmakers, Heerlen, The Netherlands
- 2 ADP Investor Communication Services, Harry L. Frost II, London
- 3 Mathias M. Siems, Hochschule für Rechtswissenschaft, Hamburg
- 4 London Stock Exchange, J. Tanner, London
- 5 Deminor Nederland, Paul Frentrop, Amsterdam
- 6 Crest Co Limited, Michael Kempe, London
- 7 Computershare Investor Services PLC, Torn Morrison, United Kingdom
- 8 Danish Securities Services, R. la Cour, Tastrup, Denmark
- 9 BNP Paribas Securities Services, Paola Cremonesi, Antonella Galli, Milan, Axelle Wurmser, Paris
- 10 The International Corporate Governance Network, Peter Clapman, John Wilcox, London/TIAA-CREF, Andrew Clearfield, New York
- 11 Proxinvest, Pierre Henry Leroy, Paris
- 12 Association of Global Custodians, Daniel L. Goelzer, Washington DC, USA
- 13 British Bankers Association, Simon Hills, London
- 14 Vereniging Effecten Uitgevende Ondernemingen, S.E. Eisma, The Hague
- 15 VNO-NCW, C. Oudshoorn, The Hague
- 16 Lloyds TSB Registrars, P. Swabey, Worthing, United Kingdom
- 17 Bundesverband deutscher Banken, Thomas Weisgerber, Oliver Wagner, Berlin
- 18 National Association of Pension Funds, David Gould, London
- 19 AFG-ASFI, Patrick Vlaisloir, Paris
- 20 The Nokia Group, Marianna Uotinen-Tarkoma, Finland
- 21 Vereinigung Institutioneller Privatanleger, Hans-martin Buhlmann, Bonn
- 22 Euroclear Group, Kristin Geyer, Brussels
- 23 Bundesministerium der Justiz, Ulrich Seibert, Berlin
- 24 Pension Investment Research Consultants, Paul Marsland, London
- 25 Vereniging van Effectenbezitters, P.P.F. de Vries, Mw C.H. van der Giessen, The Hague
- 26 Take Over Panel, Charles Crawshay, United Kingdom
- 27 D. Zetsche and C. Bunke, Heinrich Heine University, Düsseldorf

