



Euroshareholders' reply to ESMA call for evidence on Empty Voting

25th November 2011

Euroshareholders is the organisation of European shareholders associations. It was founded in 1992. At present Euroshareholders gathers around 30 national shareholders associations all over Europe, which count in turn more than 2.5 million individual members.

The main objectives of Euroshareholders are:

- to protect and represent the interests of shareholders and other investors in listed securities;*
- to enhance shareholders' value;*
- to guarantee equal treatment of all shareholders;*
- to support harmonization at the EU level on appropriate issues;*
- to support corporate governance principles at the European level;*
- to promote financial education and scientific research on capital market and shareholder value, e.g. in the regulatory area*



Summary & general comments

Euroshareholders welcomes the call for evidence on Empty Voting launched by ESMA. The whole issue of voting rights and who can and cannot exercise them is of vital concern to Euroshareholders, our member organizations and all European individual shareholders, as it is one of the issues harming shareholder engagement and therefore good corporate governance. Some of member organizations believe that empty voting is significant but it is something which goes on without anyone (or very few) being able to measure it or see it in action. What is certain though is that many asset managers are very active in securities lending, especially around the date of the dividend payment¹, without properly informing the fund investors and keeping part or all of the profit from securities lending although the funding and the risk are born by the end investors.

Nevertheless, we believe that depositaries, securities lending agents and company registrars must have some idea when it is happening. Moreover, ESMA and the Member States' supervisors are in a good position to collect evidence on empty voting practices by consulting the books of the central depositories of general meetings and should do that without waiting for investors to complain and scandals to happen.

In order to insure transparency of voting conditions, good corporate governance in listed companies as well as the growth of the companies and economy as a whole, we would recommend introducing a European-level legislation requiring at least the disclosure of securities lending activities by third-party asset managers, and of voting on borrowed shares as well as immediate notification of the General Assembly and the national supervisor by a person who declared intention to participate in a general meeting but has passed the ownership of the shares to a different holder between the record date and the end of the AGM. Additionally, we would suggest shortening the period between the record date and the date of the AGM in certain member states, as well as separating as much as possible the record date of the AGM from the record date of any dividend payment. After examining the scale of the empty voting practices and of their impact, it could be advisable to consider the total ban of rights to vote on borrowed shares.

Q1. Please identify the different types of empty voting practices and the frequency with which you think they occur within the EU. Where possible, please provide data supporting your response.

It can be easy to vote on borrowed shares without telling anybody, that the shares (or the voting rights) are borrowed. In order to present different kinds of empty voting, we will first refer to different ways of voting at the AGM:

¹ Probably mainly for tax reasons, but this should be investigated by supervisors.



- a) The owner can participate in the GA and vote
- b) The owner can send somebody with full power to vote on his behalf
- c) The owner can give proxy to another participant in the GA who then will carry the votes

The owner is in all three cases free to decide how his votes shall be used. He could get the idea about how to vote from another shareholder.

- (1) The owner could vote (in one of the ways mentioned as (a), (b) and (c)) in the way another person wants.
- (2) The owner vote like in (1) against payment from a third party
- (3) The owner could loan his shares (against payment or free) to another person who then is able to vote as he likes. In this case we can also differentiate two options:

- Another person borrows the shares just for the purpose of exercising the voting right and possibly influencing the control of management of the company (which could be especially dangerous in case of competitors)
- Another person borrows the shares in order to sell them short and in the mean time manages to exercise the vote but having another goal than long-term investors

- (4) The shareowner can sell his shares after the record date and still exercise the vote, even though he is not the shareowner anymore

If voting on borrowed shares (3) would have to be disclosed still options (1) or (2) can be used by the interested parties. Nevertheless, the disclosure requirement or possibly a ban of voting on borrowed shares together with shortening of the span between the record date and the AGM in certain member states² would surely diminish the scale of the empty voting practices.

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

Our member organizations (shareholders organizations throughout Europe) from whom we have received feedback on this issue, say that personally they did not encounter this kind of practices. But that might be due to the fact that share lending operations are private and confidential which makes it difficult or even impossible to obtain evidence with the current legislative framework.

There is a higher probably for the empty voting to occur in countries with a long period between the record date for shares registration and the general meeting (e.g. Germany where the record date is 21 days before the meeting). Therefore, it would be advisable to shorten the period between the record

² For example it is 21 days in Germany versus 3 days in France



date and the general assembly meeting. Moreover, in order to further discourage the share lending we would recommend to split as much as possible the record date of the AGM from the record date of the dividend payment.

Last but not least, we would like to point out that ESMA and national supervisors are in a good position to collect evidence on empty voting practices by consulting the books of the central depositories of general meetings and should do that without waiting for investors to complain.

Q3. a) What in your view are the negative consequences that can occur as a result of empty voting (relating to e.g. transparency, corporate governance, market abuse)?

We believe that in order to ensure good corporate governance, growth and sustainability of listed companies, as well as value creation for the company owners, voting rights shall be aligned to the economic interest in the company (and preferably long-term). Empty voting can cause misleading information, illegitimate voting results and worst of all can lead to situations when the company is not really controlled by the real beneficial owners and to strategically important decisions being taken by speculators or even competitors! This can be not only to the detriment of the company in question, but to the real beneficial owners and in case if this phenomenon spreads around, to the detriment of the whole economy. If we want to insure sustainability of capital markets and not to discourage companies to go public, we need to fight market abuse and other unfair practices. And in order to do that, in the first place we need the adequate financial regulation.

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

We think that the scale of the empty voting phenomenon might be significant. It would be advisable that ESMA collects evidence on empty voting practices (by consulting the books of the central depositories of general meetings) and takes needed regulatory demarche without waiting for investors to complain.

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

Where possible, please provide data supporting your response.

As mentioned in answers to previous questions, we cannot provide ESMA with the concrete examples. Nevertheless, he heard of instances when the investor with big share ownership reveals that he prefers to maximize the rapid income by lending the shares.

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

Yes.



b) Has this ever occurred in your own experience? Where possible, please provide data supporting your response (including the type of empty voting that you are referring to).

As mentioned in the answer to question 2, our member organizations that provided us with a feedback, did not personally experience this kind of situations, but that is very probably be due to the fact that share lending is private and confidential and obviously investors borrowing shares in order to influence company management, especially if to its detriment, do not admit that.

Nevertheless, there are some publicly know cases of sneaking shareholding of Wendel into SaintGobain or of LVMH into Hermes International, or of Havas or Eiffage – in those cases the national regulator questioned the attendance list of AGMs as well as the nature of some of its registered holdings.

Q5. What kind of internal policies, if any, do you have governing the exercise of voting rights in respect of securities held as collateral or as a hedge against positions with another counterparty?

As a non-profit international organization representing individual shareholders on the European level, we do have [European-wide voting guidelines](#), but - as of today – we do not have any above mentioned policies, as we cannot access information on borrowed or collateralized shares.

Q6. Do you think that regulatory action is needed and justifiable in cost-benefit terms? If so, which type of empty voting should be addressed and what are the potential options that could be used to do this? Please provide reasons for your answer. Kindly also provide an estimate of the associated costs and benefits in case of any proposed regulatory action.

Yes, we do believe that regulatory action is needed in order to insure transparency of voting conditions, good corporate governance practices in listed companies as well as the growth of the companies and economy as a whole. Regarding types of empty voting that shall be addressed please see answer to the question 1. We recommend introducing the European-level legislation requiring at least the disclosure of securities lending activities and results of third-party asset managers, and of voting on borrowed shares as well as immediate notification of the General Assembly and the national supervisor³ by a person who declared intention to participate in a general meeting but has passed the ownership of the shares to a different holder between the record date and the end of the AGM. Additionally, we would suggest shortening the period between the record date and the date of the AGM in certain Member States, as well as separating as much as possible the record date of the AGM from the record date of any dividend payment. After examining the scale of the empty voting practices and of their impact, it would be advisable to consider the total ban of exercising the vote on borrowed shares.

We, as a non-profit organization, have not means to estimate of the associated costs and benefits in case of any proposed regulatory action. We believe it is a task of the relevant services providers

³ As mentioned in ESMA call for evidence on empty voting with regard to Portuguese regulation



controlled by the regulatory authority to provide that. Nevertheless, we can predict that such measure could reduce the share lending during AGM, transparency of voting conditions, better corporate governance practices and that the company is controlled by the real, beneficial owners who have interest in the growth of the company.