



**FBE's response to the EU Commission's second consultation of 13 May 2005 on  
FOSTERING AN APPROPRIATE REGIME FOR SHAREHOLDERS' RIGHTS**

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*The **European Banking Federation (FBE)** is the voice of the European banking sector. It represents the interests of over 4500 European banks, large and small, from 27 national Banking Associations, with assets of more than EUR 20 000 billion and over 2.3 million employees.*

As a preliminary remark, the FBE wishes to reiterate its preference for a Recommendation as the vehicle of choice for the proposed measure, which would be consistent with the other measures taken so far (Directors' remuneration, and responsibility of board members) and facilitate the absorption of the measure in Member States where the subject is governed in very different sources of law or even 'soft law' (primary, secondary and self-regulatory).

Regarding the second Commission's second consultation paper of 13 May 2005, the FBE has the following comments:

### **1. SCOPE**

Do you agree with the proposed scope for any future measure at EU level, if any, establishing minimum standards for shareholders' rights? If not, please give your reasons.

*Any potential measure at EU level establishing minimum standards for shareholders' rights should apply solely to companies formed under the laws of a Member State and whose securities are admitted to trading on a regulated market in one or more Member States within the meaning of Council Directive 2004/39/EC.*

*UCITS (of the corporate type) falling within the scope of Art. 1(2) of Directive 85/611/EEC, and equivalent funds, should be excluded from the scope of any such measure.*

The FBE agrees with the proposed scope, which consists of restricting any potential measure that the European Commission may propose to apply only to companies that have been (i) formed in accordance with the company laws of the relevant Member State and (ii) listed on one or more regulated markets in the EU.

We also fully support the exclusion of collective investment schemes of the corporate type (UCITS or equivalent Non-UCITS) from the scope of any potential measure, as collective investment schemes are governed by separate and distinct legislation and regulation designed to protect the investor/shareholder.

However, we do not support the option whereby it is left up to Member States to extend the proposed measure to include non-listed companies. The minimum harmonisation model

leaving Member States' room for discretion to apply stricter provisions has hitherto not been very helpful towards the convergence of approaches and practices across the EU.

## 2. THE “ULTIMATE INVESTOR” OR “ULTIMATE ACCOUNTHOLDER”

1. Do you consider that granting 'ultimate investors' at EU level a legal enforceable right to direct how votes attached to shares credited to their accounts are cast, is a pre-requisite to facilitating cross-border voting?

2. If so, do you agree with the following proposal, based on the works of UNIDROIT: “the legal or natural person that holds a securities account for its own account shall have the right to determine how votes attached to shares credited to its securities account are to be cast”? Please give your reasons.

The FBE agrees with the European Commission that introducing a unitary definition of “ultimate investor” may not be crucial for the purpose of fostering cross-border shareholder voting.

We therefore also share the view of the Commission that identifying said definition in a satisfactory manner should be a medium/long-term project, which should be closely interrelated to the findings of the Legal Certainty Group within the scope of the Commission's clearing and settlement work.

We also commend the efforts made by UNIDROIT in proposing a definition of “ultimate investor”, but the question of whether this definition can serve as a basis for any proposed EU measures is difficult to predict at this stage given that the 1<sup>st</sup> meeting of governmental experts of May 2005 has led to a review of the initial draft text. The next meeting of governmental experts has been scheduled for early 2006 and thus we believe it is too early to decide on this question at an EU level. We support, however, the idea of following the UNIDROIT developments closely, with a view to favouring consistency in this field of the law.

We request the Commission, for future purposes, to consider whether the concept of “ultimate investor” – based on the economic principle of who bears the risk attached to the relevant shares – fully concurs with the ownership criteria (full/beneficial ownership), which in many countries is still the common denominator for identifying shareholders.

When the Commission determines who is or how to identify the "ultimate investor" it must be kept in mind that in many countries most investors' shares are held through a chain of custodian banks, which tend to use omnibus accounts - one account containing all the shares held for another bank - in order to keep costs low. In practice, this means that frequently the ultimate investor is known only by his "local" bank. Developing a new system, where the names of all the "ultimate investors" are registered throughout the whole chain of custodians and the (I)CSDs, will be disproportionately onerous. The FBE calls on the Commission not to lose sight of this circumstance as in the end such costs will have to be borne by the investors.

## 3. STOCK LENDING AND DEPOSITARY RECEIPTS

### 3.1. Stock lending

Do you agree with the following minimum standard? If you do not agree or agree only partially, please give your reasons.

1. *Agreements providing for the temporary transfer for consideration of shares shall*

*contain provisions informing the relevant parties to the agreement of the effect of the agreement with regard to the voting rights attaching to the transferred shares.*

*2. Where an intermediary enters into such an agreement in relation to shares which the intermediary holds on behalf of another person, or which are held in a securities account in the name of another person, the intermediary shall, prior to entering into the agreement, duly inform that person or its representatives of its intention to enter into such an agreement and the effects of the agreement with regard to the voting rights attaching to the relevant shares.*

Although the FBE agrees with the objective of transparency in stock lending arrangements as regards the right to exercise the voting right at meetings, such transparency should be commensurate with the level of sophistication/professionalism among parties. Given that institutional investors are the major lenders of stock, the FBE does not believe that corresponding provisions are necessary.

However, we point out that the freedom to contract as to who is to exercise the right to vote - the lender or the borrower of the stock - could raise considerable difficulties for depositaries and for companies themselves in determining who among them is the legitimate holder of the right to vote. As an alternative, it might be better for there to be a minimum standard stating who shall exercise the voting rights. As the Commission has acknowledged in its own introductory comment, in practice this right is transferred with the transfer of the shares ("voting rights pass with the transfer of the securities").

### **3.2. Depositary receipts**

Do you agree with the following minimum standard? If not, please give your reasons.

*Holders of depositary receipts shall alone have the right to determine how the voting rights attached to underlying shares represented by depositary receipts are exercised.*

The FBE agrees with the proposed minimum standard and remarks that it is coherent with the principle laid down in the Transparency Directive that the holder of a depositary receipt must be treated as a shareholder.

However, having ascertained where the right resides in the context of a depositary receipt we are not clear as to whether the Commission intends to say: (i) that the holder of the depositary receipt must expressly authorise the depositary to exercise the voting rights (as the comment indicates); or (ii) that the holder of the receipt can indicate how the rights are to be exercised.

Essentially, it is unclear whether the holder of the depositary receipt himself can vote, or whether he must exercise those rights through the depositary, who can vote on his/belief. It would be important to avoid that votes are cast for the depositary receipts as well as for the underlying shares.

## **4. PRE GENERAL MEETING COMMUNICATIONS**

As a general remark in the context of pre- and post-General Meeting communications to the shareholder, the FBE would like to emphasise that the preferred channel for such communications should be via the issuer's web site - if available -, thus minimising the need for the physical remittance of the information to all shareholders.

### **4.1. Notice periods for convening a General Meeting**

Do you agree with the following minimum standards? If not, please give your reasons.

*1. Annual General Meetings of listed companies shall be convened on a first call with no less than 21 business days notice.*

*2. Other Shareholders' Meetings shall be convened on a first call with no less than 10 business days notice.*

The FBE can agree with the proposed minimum standard of convening at least 21 business days before the (annual) General Meeting, and by the minimum of 10 business days notice period for other shareholders' Meetings, insofar as registered shares are concerned. In this case the issuer is generally able to forward the notice directly to the shareholder.

Insofar as bearer shares are concerned the proposed minimum standard of 10 business days notice period for other shareholders' Meeting is probably too short. We believe that reconstructing the chain of holdings in a cross-border context will probably render the proposed 10-day notice period meaningless. Consequently, the FBE suggests applying the 21-day period to both ordinary and extraordinary shareholder Meetings, unless there are other reasons to differentiate the periods.

We would also recommend specifying in Standard n. 2 that whenever national bank holidays, which vary from one Member State to the next, would fall within the notice period, that period should be extended by the corresponding number of business days.

Lastly, we anticipate that the proposed minimum standard may give rise to difficulties in some Member States as the suggested changes to notice periods frequently form part of the national company law and related provisions.

#### **4.2. Content of the notice**

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons.

*Any notice convening a General Meeting shall at least:*

*- indicate precisely the place, time and agenda of the meeting and give a clear and precise description of participation and voting procedures and requirements for voting at the General Meeting. Alternatively, it may indicate where such information may be obtained.*

*- indicate where the full, unabridged text of the resolutions and the documents intended to be submitted to the General Meeting may be obtained.*

The FBE agrees with the minimum standard proposed and wishes to underline that the most relevant requirements regarding the notice of a general meeting should continue to reside in the Transparency Directive.

We support the preference for an "opt in" solution rather than the "opt out", to which the first consultation document referred.

The FBE assumes that the "*clear description of the voting procedures*" as mentioned in the consultation paper would include the mention of important dates such as the record date and the last registration date. Should this not be the case, we would recommend their inclusion.

### 4.3. Information relevant to the General Meeting

Do you agree with the following minimum standard with regard to the time at which GM-related documents should be made available? If not, please give your reasons.

*The full text of the resolutions and documents related to the agenda items and intended to be submitted to the General Meeting shall be made available at the latest 15 business days before any Annual General Meeting, and at latest 10 business days before any other General Meeting.*

The FBE supports the proposed minimum standard provided that the definition of “making available” does not entail the creation of any specific obligations upon credit institutions and intermediaries to deliver such relevant information to the shareholder, including cross border ones. Information concerning the General Meeting should either be published on the issuing company's website or sent directly from the issuer to the shareholder. Intermediaries should remain free to provide such information in the form of a value added service and against consideration.

Should however such an obligation be introduced, the FBE is concerned and believes that the proposed periods may be too short, especially in a cross-border context. Alternatively, if the making available simply means that the resolutions/documents can be obtained by the shareholders (e.g. upon request to the issuer and/or by downloading them from the issuer's website), then the proposed periods appear feasible.

The above remarks evidently apply only to registered shareholdings. Indeed, in case of bearer shares other solutions would be needed in order to avoid both conflicts with banking secrecy rules and onerous, unnecessary administrative/technical burden for intermediaries. Moreover, the proposed time limits appear wholly inadequate for this latter type of shareholding.

### 4.4. Dissemination, and language, of the meeting notice and materials

Do you agree with the following minimum standard? If not, please give your reasons.

*Any notice convening a General Meeting and any document intended to be submitted to the General Meeting shall be made available in a language customary in the sphere of international finance, unless the General Meeting decides to the contrary.*

The FBE cannot support this minimum standard as long as it is compulsory, as the translation into another language (customary in the sphere of international finance) of the original General Meeting documents will introduce an additional factor of legal risk, either for the issuer or for the intermediary.

We remark with some concern that the introductory comments argue for an optional regime at the discretion of the issuer's shareholders, whereas the minimum standard proposed amounts to a “default” standard requiring original documents to be translated into another language customary in the sphere of international finance unless the General Meeting decides to the contrary. The FBE would encourage the Commission to remain consistent in its argumentation and to accept the general cost/benefit considerations it has itself put forward and to refrain from turning the requirement for the original documents to be translated into the default situation. It should remain at the issuer's discretion to decide to do so in light of particular circumstances, such as the desire to cater for existing, or to attract more prospective, cross border shareholders.

### 4.5. Specific section of the issuer's website dedicated to the General Meeting

Do you agree with the following minimum standards? If not, please give your reasons.

*1. Member States shall ensure that issuers post on their websites the information relevant to General Meetings at the same time as such notices are published and/or sent to the issuers' shareholders.*

*2. Such information shall include at least: the notice of the meeting, the full text of the resolutions intended to be submitted to the General Meeting and other documents relevant to the General Meeting, a precise description of the means given to shareholders to participate in the General Meeting and cast their vote and the forms to be used to vote by correspondence and/or by proxy.*

The FBE fully supports the above minimum standard under point n° 1 regarding a dedicated General Meeting section on an issuer's website. However, we have some concerns regarding the requirements under point 2, should they be of a mandatory nature.

## **5. ADMISSION TO THE GENERAL MEETING - SHARE BLOCKING**

Do you agree with the following minimum standards? Please give your reasons.

*1. Provisions making the right to vote in a General Meeting conditional, or allowing the right to vote to be made conditional, on the immobilisation of the corresponding shares for any period prior to the Meeting shall be abolished.*

*2. The right to vote at the General Meeting of a listed company shall be made conditional upon qualifying as a shareholder of that listed company on a given date prior to the relevant General Meeting.*

The FBE agrees with the proposal to introduce a record date mechanism, provided that it does not require intermediaries to notify the issuer of any transfer of securities subsequent to the date established. This could also contribute to raising the willingness of securities' intermediaries and institutional investors to exercise the voting rights since the practice of depositing shares, which is frequently erroneously perceived as share blocking, has proved an obstacle in this respect up to now. The record date system should, however, be confined to bearer shares.

A further point should also be considered before introducing a standard pan-European record date. The length of time needed between the record date and a General Meeting will depend, among other things, on whether the company law of the Member State involved requires intermediaries to forward invitations and other documents related to a General Meeting to shareholders and/or offer to be appointed and act as proxies (i.e. *push model*). This is a time-consuming process and will necessitate an earlier record date than in a Member State where there are no such requirements (i.e. *pull model*).

However, we must re-emphasize that for individual Member States the adaptation to these standards would entail the necessity of checking the continuing validity and applicability of a series of laws and regulations concerning the legitimate title to exercise the rights attaching to securities. In some European jurisdictions, in fact, corporate rights (above all that to challenge the legitimacy of resolutions passed by the meeting) can be exercised only by those who have the status of shareholder.

Moreover, the consultation document makes no mention of a mechanism for authenticating shareholders as of the record date. Any such a mechanism should be easy to use and

based on clear, unequivocal principles so as to benefit the operations of intermediaries and issuers alike. For example, it needs to be made clear whether in verifying holdings of shares at the record date intermediaries must refer to data registered in connection with the trade date or the actual settlement date. Whatever mechanism is used it is important that it does not give rise to legal uncertainty and the Commission should ensure that this does not occur.

## 6. SHAREHOLDERS RIGHTS IN RELATION TO THE GENERAL MEETING

### 6.1. Electronic participation in General Meetings

Do you agree with the following minimum standard? If not, please give your reasons.

*Member States shall remove existing requirements, and shall not impose new requirements, that act or would act as a barrier to the development of the participation of shareholders to the general meeting via electronic means.*

The FBE agrees with the proposed minimum standard to abolish existing barriers and refrain from imposing new ones to electronic voting and communication at shareholder meetings.

Nevertheless, we consider it useful to emphasise that while national legislation must not prevent nor limit with the effect of rendering the utilisation of electronic means for participating in the General Meeting impossible, it is clear that the use of such alternative systems is a choice made at the discretion of the issuer. This can only be the choice of the listed company itself, which evaluates the costs and benefits (the possible appreciation of the shares, an assessment of the type of shareholder desired, etc.).

Similarly, the use of electronic means of communication should be encouraged provided that the technology can guarantee a safe and efficient conduct of general meetings. The issuer will have to have taken into account the relevant technical problems as well as any doubts regarding the legal certainty of proceedings as a result of those problems.

We would also re-emphasise that any future measure should concern itself first and foremost with removing existing obstacles to the exercise of voting rights in a cross-border context. It should not, however, attempt to establish European standards that would introduce a requirement to offer the possibility of electronic participation and thus prompt a shift away from the physical attendance by shareholders at General Meetings. This is another instance where there is a danger of interference in one aspect of company law that may trigger numerous problems in the system as a whole.

### 6.2. Right to ask questions

Do you agree with the following minimum standard? If not, please give your reasons.

*Shareholders shall have the right to ask questions at least in writing ahead of the General Meeting and obtain responses to their questions. Responses to shareholders questions in General Meetings shall be made available to all shareholders.*

*The above principles are without prejudice to the measures which Member States may take, or allow issuers to take, to ensure the good order of General Meetings and the protection of confidentiality and strategic interests of issuers.*

The FBE agrees that asking questions and taking the floor at a General Meeting are fundamental shareholder rights and worthy of protection, but we cannot agree with the above minimum standard, which we feel goes too far.

However, one should always take account of the following aspects that are not dealt with in the consultation document and yet are instrumental to a precise delimitation of the perimeter of the scope of this future measure:

- First, the right to ask questions is a right to be exercised at the Meeting and not earlier. This does not prevent the submission of documents concerning the agenda items in which the queries that the shareholder will raise at the Meeting are anticipated.
- Second, the right to ask questions at the Meeting should ideally be limited to the matters on the agenda.
- Third, broad latitude must be left to the independent self-organisation of the issuer to allow for “the good order of the General Meeting” and accordingly to make sure that the exercise of shareholder’s rights does not become an abuse to the detriment of other shareholders (the anonymity of the Internet does bring with it an increased nuisance potential for electronic questions). Considering that the potential satisfaction of the interests of all shareholders in participating actively in the discussion cannot be attained by the regulation, or possibly the limitation, of the rights of each, it is best that the concrete implementation of the principles be entrusted, in the forms and ambits allowed by the law and the corporate by-laws, to the judgment of the Chairman as guarantor of the orderly conduct of the Meeting.

Lastly, the FBE wishes to point out that irrespective of the fundamental right of shareholders to pose questions there are certain subject matters that cannot be revealed to shareholders (such as business secrets, ...) without becoming potentially harmful to the business of the company. It may be advisable to provide some criteria to identify areas that would not be open to questioning at a General Meeting.

We do not agree with a requirement to make the responses to questions available to all shareholders. It would be necessary to prepare an exact transcript of the Meeting and make it available to shareholders on request. This would be extremely onerous for the company and disproportionate to any benefit thus gained.

### 6.3. Rights to add items to the agenda and table resolutions

Do you agree with the following minimum standard? If not, please give your reasons.

*1. Shareholders, acting individually or collectively, shall have the right to add items on the agenda of General Meetings and table resolutions at General Meetings. Such rights may be subject to the condition precedent that the relevant shareholder or shareholders hold a minimum stake in the share capital of the issuer.*

*2. Such minimum stake shall not exceed 5% of the share capital of the issuer or a value of € 10 million, whichever is the lower.*

*3. Such rights must be exercised sufficiently in advance of the date of the General Meeting, to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of the General Meeting.*

The FBE can agree with the proposed minimum standards regarding the rights to add items to the agenda and to table resolutions, with the following observations:

- Any proposed measure should specify that the shareholders in question are only those with the right to vote at the Meeting. This principle might well be considered also as regards many other matters included in the consultation, but here it is of special importance because it concerns a right that is exercised outside the Meeting itself; it would not make sense for a shareholder to be able to add items to the agenda of a meeting which he cannot attend or, under some national legal systems, that he can attend but at which he cannot vote.
- Reference to a defined percentage of share capital is preferable than providing the option between such percentage and a given “value” of share capital, which may give rise to uncertainty (it may be subject to fluctuations, rules should be provided for setting out the time for measuring said value as well as the criteria for the evaluation). 5% appears to be an acceptable measure both for smaller and larger sized issuers.
- The right to add agenda items must not be recognised as regards matters on which by law the Meeting deliberates on a motion presented by the Board of Directors or on the basis of a project or a report by the Board<sup>1</sup>.

There is concern among FBE Members, however, that the proposed minimum standards regarding the rights to add items to the agenda and to table resolutions may result in an unhinging of the balance struck in Member States’ company law structures aiming to reconcile the interests of shareholders with those of the company.

## 6.4. Voting

### 6.4.1 Voting by correspondence

Do you agree with the following minimum standard? Please give your reasons.

*1. Member States shall ensure that shareholders of listed companies have the possibility to vote by correspondence.*

*2. Member States shall remove existing requirements, and shall not impose new requirements, on companies which hinder or prohibit voting by electronic means at General Meetings.*

The FBE does not support the proposed minimum standard n° 1. It should remain at the discretion of the issuer whether it wishes to offer the possibility to “vote by proxy” or “in absentia”. Moreover, the possibility to vote by correspondence runs counter to the underlying principle of collective action by shareholders, whereby those shareholders who vote by correspondence do so together with and simultaneously with the others nor have they taken part, even silently, in the discussion. In this sense enabling the vote by correspondence certainly does not foster the shareholder’s right to participate in the life of the company as this is understood in the consultation document.

The FBE does, however, fully support the proposed minimum standard n° 2 whereby Member States are called on to remove existing and refrain from imposing new requirements on companies that hinder or prohibit voting by electronic means at General Meetings.

Here, too, the aim must be merely to eliminate obstacles, not to establish new European standards. An objective could be formulated to the effect that it should be possible for shareholders to exercise their voting rights without having to be physically present at the

<sup>1</sup> In Italy, for instance, this is the case of splits, mergers, capital reductions due to losses, capital increases without option rights

General Meeting. National legislators could then seek a solution that would be consistent with their company law.

#### 6.4.2. Proxy voting

Do you agree with any, each, all, or the following minimum standards? Please give your reasons in each case. In particular, where you believe that certain constraints should be maintained, please justify your opinion.

*1. Every shareholder shall have the right to appoint any other natural or legal person as a proxy to attend any General Meeting on his behalf.*

*2. No constraint or limitations shall be imposed other than provisions relating to the legal capacity of the person. In particular, there shall be no limitations on the persons who can be appointed as proxies and on the number of proxies any such person may hold.*

*3. Shareholders shall not be prevented from appointing their representatives by electronic means.*

*4. Persons appointed as proxies shall enjoy the same rights to speak and ask question in General Meetings as those to which the shareholders they represent are entitled.*

*5. Issuers shall not themselves collect proxies in advance of General Meetings but shall entrust independent third parties with such collection.*

*6. All votes cast on each resolution submitted to a General Meeting shall be taken into account, irrespective of the means by which the votes are cast.*

*Do interested parties consider that it would be appropriate to set up an EU proxy form that would have to be accepted by all issuers in all Member States while not excluding the use of other formats allowed for under Member States' laws?*

The FBE believes that the proposed future standards under 1, 2, 4 and 6 are reasonable. However, some observations are nevertheless in order:

With regard to standard n° 3, we disagree. Member States should be able to regulate the appointment of proxies on the basis of general rules. In principle, the effectiveness of a good proxy depends on general civil rules on proxies. If these require the appointment to be in writing, the company should be able to specify less stringent requirements in its articles of association and thus make it possible to grant a proxy (to the company's representative, for example) by electronic means. This is another example of a situation where an individual legal issue should not be considered in isolation from the overall regime. Otherwise it is no longer possible for interlocking areas of law to govern the issue concerned in a coherent manner.

With regard to standard n° 4, we wonder whether the proposed formulation will not conflict with proxies given under specific terms or instructions, in which case the rights that a proxy enjoys will not necessarily coincide entirely with those of the shareholder.

With regard to standard n° 5, we disagree. There should be no general ban on employees of the issuer acting as proxies at the General Meeting. A representative appointed by the issuer should be able to act as proxy if the shareholder has issued explicit voting instructions. As long as appropriate steps are taken to avoid a conflict of interests on the part of the company proxy, this kind of arrangement should be permitted. A major argument in favour of a representative appointed by the issuer is that it has the potential to boost attendance at General Meetings. Naturally, the company is also at liberty to entrust

independent third parties with the task of acting as proxy. General rules on proxies should apply here.

- The provision that there is no limit on the number of proxies that can be exercised by a single person demands careful attention in view of the risk of abuse. Needless to say, if no limitation is provided to the number of proxies that one person can collect, conflict of interest provisions should be considered.
- Some “subjective” limits could well be considered. For instance, who are “independent third parties”? Would directors be able to carry out such a collection?
- Must the proxy be granted for just one meeting or not? Must an indication of how to vote be given or not? Should blank proxies be allowed (e.g. under contractual agreements within the scope of Master Agreements)? In the affirmative, should an information obligation be placed on said intermediaries to inform beneficial owners of the material details concerning each meeting in order for them to be able to direct vote on the shares?

The FBE regards the question as to whether it would be considered appropriate to set up an EU proxy form that would have to be accepted by all issuers in all Member States (even while not excluding the use of other formats allowed for under Member States’ laws) as a classic situation of overregulation. Such a proxy form would interfere unnecessarily in Member States’ national rules on proxies since the form would either have to comply with all national legal regimes or enforce exemptions from the national law applicable in the issuer’s home state.

## 7. POSITION OF INTERMEDIARIES IN THE CROSS-BORDER VOTING PROCESS

### 7.1. Definition of intermediary

Do you agree with the following definition? Please give your reasons.

*A legal or natural person who, as part of a regular activity, maintains securities accounts for the account of other legal or natural persons shall be considered as an intermediary. An intermediary may also maintain securities accounts for its own account.*

The FBE can agree to the proposed definition of an intermediary, but the proposal to use the definition of the UNIDROIT Convention extends the concept of an intermediary, something that does not appear to follow from the reading of the text proposed by the consultation. The current wording comprises also central securities depositories, which form the infrastructure of the system of central securities management and settlement systems and which can attain the status of intermediary only in some European countries.

As already mentioned above, we believe that it is premature to request for agreement with the proposed UNIDROIT definition in that the draft text to the convention is under review. In any case, any definition of intermediary should refer to the fact that the holding of a securities account is an activity that the intermediary performs “during the course of business” and not merely “as part of a regular activity”.

### 7.2 Registration as nominees

Do you agree with the following minimum standards? If not, please give your reasons.

*Whenever an intermediary is registered as a shareholder in respect of shares which he/she/it actually holds for the account of another legal or natural person, a mention should be added in the relevant companies’ shareholders registers that such intermediary holds*

*the shares for the account of another person.*

The FBE agrees with the proposed minimum standard, but may wish to revisit this point at a later stage when the Commission has issued a concrete proposal.

### **7.3. Being granted a power of attorney**

Do you agree with the following minimum standard? If not, please give your reasons.

*Where an intermediary is a shareholder in relation to shares which the intermediary holds for the account of another legal or natural person, that other legal or natural person shall have the right to be given a power of attorney by the intermediary to attend the General Meeting and act at the General Meeting as if he/she/it were a shareholder.*

The FBE remarks that this minimum standard offers a practical solution to actual interested parties wishing to participate in General Meetings without being registered with the issuer as shareholders.

Indeed the provision of a power of attorney by the intermediary/shareholder to its client who has an actual interest in participating in the General Meeting would be simpler and more cost effective than, e.g., a transfer of shares by the prescribed deadline from the shareholder/intermediary to its client for the purpose of the latter being acknowledged as shareholder admitted to the General Meeting.

In that respect we support the introduction of this standard, but would recommend that the Commission carefully verifies the compatibility of such a mechanism with provisions regulating the power of attorney, which would be determined by the law applicable to the issuer.

We also draw the Commission's attention to the risk that whenever an intermediary has the obligation to provide a power of attorney to each of its clients who have an actual interest in exercising voting rights and wish to attend the same General Meeting, such votes may end up being cast in contradictory manners in the name of the same intermediary/shareholder.

### **7.4. Voting upon instructions**

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons

- 1. Member States shall allow intermediaries to hold shares on behalf of their clients in collective or individual accounts.*
- 2. Intermediaries shall have the right to cast votes upon their clients express instructions.*
- 3. Where intermediaries hold on behalf of their clients shares in collective accounts, they shall be able to cast split votes.*

The FBE agrees with the proposed minimum standards, but may wish to revisit this point at a later stage when the Commission has issued a concrete proposal.

## **8. COMMUNICATIONS FOLLOWING THE GENERAL MEETING**

## Dissemination of the voting results

Do you agree with the following minimum standard? If not, please give your reasons

- 1. Within a reasonable period of time which shall not exceed one month following the General Meeting, the issuer shall make available to all shareholders information on the results of the votes on each resolution tabled at the General Meeting.*
- 2. Such information, which shall include for each resolution, the number of voters, the number of voted shares, the percentages and numbers of votes in favour and against of each resolution and the percentages and numbers of abstentions, shall be posted on the issuer's website.*

The FBE agrees with the standards proposed and we reiterate the earlier general remark in the context of pre- and post-General Meeting communications to the shareholder, according to which the FBE would like to emphasise that the preferred channel for such communications should be via the issuer's website, thus minimising the need for the physical remittance of the information to all shareholders.

In principle, the FBE can support a minimum standard on making voting results public. But we do not believe it is necessary to regulate each and every detail of what has to be disclosed. We do not, for example, understand the need to include the number of voters. This is often impossible to calculate exactly since proxies can act on behalf of an unknown number of individuals. The number of abstentions is also superfluous, in our view, particularly as they are not counted under the present method of calculating results.

## 9. OTHER SUGGESTIONS

None.

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