UK RESPONSE TO EUROPEAN COMMISSION
CONSULTATION “FACILITATING THE EXERCISE OF
SHAREHOLDERS’ RIGHTS IN LISTED COMPANIES” (13 MAY 2005)

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.

Yes.

2. **The “ultimate investor” or “ultimate accountholder”**

Do you consider, contrary to the views expressed above, 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?

We agree with the Commission’s assessment that it is not necessary to confer rights on “ultimate investors” using legislation at EU level. The key reasons for this are given in our responses to the first consultation. But please also see our answers to section 7 of this consultation.

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.

In view of the answer above, not applicable. We doubt that there is any single definition which can accurately capture the wide variety of
situations in which the ultimate investor might be identified. As indicated in our previous response, we do not think that this proposed definition would be satisfactory.

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.**

We agree that transparency in stock lending arrangements is very important. The difficulty arises in attempting to regulate the activities of those involved without introducing hindrances which would slow the process down and therefore potentially limit the benefits of stock lending.

In the UK the “Stock lending and Repo Committee” chaired by the Bank of England oversees the functioning of stock lending. The SLRC has issued the “Securities Borrowing and Lending Code of Guidance” which recommends that stock lending should be subject to written legal agreement between the parties concerned. A Global Master Securities Lending Agreement has been developed as a market standard. This agreement includes provisions which:

- Provide for the votes attached to lent stock to be exercised according to the wishes of the lender; or,
- Provide for the temporary owner to seek instructions from the lender on how to vote; or,
- Enable the lender automatically to reacquire the lent shares if votes need to be exercised.
Ultimately it is for those involved in lending transactions to decide on their approach these matters. It is, of course, beneficial if these decisions are made in an informed way. Whilst we would not want to see a regulatory approach which might have undesirable consequences, this could be an area where the Commission might consider a Recommendation in order to improve transparency and understanding.

3.2 Depository 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.

As in our answer above, we agree that transparency here is important, but to introduce legislation might easily result in practical difficulties. To begin with, the term “depository receipt holder” would need to be more specifically defined as often there will be a chain of intermediaries in which depository receipt holders might well hold depository receipts on behalf of other investors.

4. Pre-General Meeting Communications

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 that 10 business days notice.

Clearly a balance will need to be struck here and it is important that enough time is permitted for information about notices of meetings to pass down a cross-border chain of intermediaries. Nevertheless, if a directive is going to set minimum standards in this area, then it should allow time for efficient communication. We therefore agree the minimum standard of 21 days for AGMs, but would recommend a slightly longer period, say 14 days, for other shareholder meetings. However, we suggest that “calendar days” are used as:
(a) it might prove difficult to define a “business day” across the EU; and,
(b) public holidays do not occur at the same times in Member States, so using “calendar days” would ensure that the notice period would be equivalent and readily understood across the EU.

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 most important information to be communicated is the place, time and date of the meeting, and the agenda, or a description of the business of the meeting, including the resolutions and related documents. It is not adequate for the notice only to state where this information might be obtained as this might still leave unnecessary obstacles to shareholders wishing access to this information. However, we support the idea of website publication of AGM documents where shareholders have agreed to electronic and website forms of communication.

We are not clear what is added by requiring a “clear and precise description of participation and voting procedures and requirements for voting” as this could lead to lengthy and unnecessary technical explanations: this information is less important than the information described in the above paragraph.

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.

It is not clear why separate dates for the calling of the notice and the issue of the related documents are being suggested. A more efficient and less costly solution for companies and their shareholders would be for this information to be available at the time the notice of the meeting is issued. This allows for prompt dissemination of the meeting documentation. We would therefore suggest minimum standards of 21 and 14 calendar days.

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.

This is a potentially time consuming and costly measure and we are not convinced of the benefits. There is no necessary correlation between the languages understood by cross-border shareholders and languages “customary in the sphere of international finance”. If investors in one country purchase shares in another, then they will expect the GM documentation to be in the language of that country and will need to make their own arrangements for translation into their own language. We see this as an area where market practice is more likely to develop appropriate norms. Companies seeking to attract international investment will wish to differentiate themselves by issuing general meeting documents in languages to suit their cross-border shareholders.

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.

Yes, save to say that this standard should not restrict this information to the company’s website. The wording should refer to “a” website so as to ensure electronic access to the information without restricting market developments.

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.

1. Yes, shareblocking/immobilisation should be prohibited.

2. A “record date” system offers a more flexible and efficient alternative to shareblocking. Given that many listed companies now operate an electronic register which is continually updated, any provisions in this area will need to be flexible enough to take advantage of developments in technology, and allow for accurate representation at the meeting. We therefore suggest that in this case it would be preferable for a Directive to establish a maximum “record date” period in advance of a General Meeting, which we suggest should be no greater than 7 calendar days.

6. Shareholders in relation to the General Meeting

6.1 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.

Yes. As already stated we believe that legislative provisions should be drafted to permit market and technological developments. In this case care will need to be taken to ensure that any provision does not require companies to communicate with and/or facilitate the participation of shareholders in meetings in a specific way, whether electronically, or by other means.

6.2 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 key issue here is that the General Meeting is used for the fullest benefit to the company and its shareholders. This means having an informed discussion of matters relevant to the business of the company, and building a long term dialogue of good quality. Shareholders clearly have rights to receive information from the company. We also agree that shareholders should have the rights to inspect minutes of the GM. However, an unrestricted right to ask and receive answers to questions is not necessarily conducive to the effective running of the GM or having a good quality of dialogue. It also has the potential to significantly increase costs in terms of the dissemination of information. This is why the second paragraph of the minimum standard is very important. Any provisions in this area must take account of the orderly running of the GM and support the role of the chairman in enabling this to happen.

6.3 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.

1. Yes, this is an essential shareholder right for AGMs. Other GMs, however, are usually called to discuss a discrete item of business and shareholders should have the right to table statements in relation to this item.

2. Expressing the alternative measure to percentage of share capital “minimum stake” entirely in purely monetary terms could create inflexibility and uncertainty as the market valuation will change over time. An effective alternative would be to express this minimum stake in terms of a minimum number of shareholders, each holding, on average, shares whose paid up value is not less than a given amount. The Second Directive (Article 9.1) requires shares in public companies to be paid up to not less than 25% of their nominal value, so such a test should be applicable in all Member States.

3. To enable the effective exercise of these rights, it would be preferable to express this time period as a minimum standard – ie. not less than six weeks.

6.4 Voting

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.

1. Yes. The phrase “voting by correspondence” needs to be more fully defined so that it is clear that it includes voting by proxy in advance of the General Meeting, whether electronically or by post. It is important that any new regulation in this area does not impose another alternative method of voting, which will add to costs and complexity.

2. Yes.

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.

Yes.

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.

Yes. It would be useful to have further explanation about what is meant by “provisions relating to the legal capacity of the person”. It should be clear that any minimum standard should also permit that only one proxy can be appointed for each share, and that one person can be a proxy for more than one shareholder.

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

Yes. Any minimum standard should refer to proxies (as opposed to representatives).
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.**

Yes.

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

Unless we have misunderstood the intention of this proposal, issuers should not be prevented from collecting proxies (or, indeed from maintaining their own registers, which would ultimately be the effect of such a measure). In addition, the definition of “independent third party” is very important. In the UK, most large listed companies use a registrar to maintain the register and perform other functions in relation to the General Meeting, including collecting proxies. If these registrars were deemed not to be “independent third parties” this would have significant market implications (and cost implications for smaller listed companies). We assume that this is not was intended. Any perceived problems with conflicts of interest could be dealt with by a requirement for an independent scrutiny of a vote. Some companies choose to use a proxy collecting agency for handling the voting at their General Meetings, but we see no justification for companies being required to do so on a mandatory basis.

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.**

This minimum standard raises a number of questions about intentions and definitions. We agree that all votes cast at a GM, whether in person or by proxy, for resolutions on the agenda should be counted and registered. We would not, however, wish to see a measure which abolished votes taken on a show of hands, which has great benefits in terms of speed and cost, and is particularly suitable for uncontroversial resolutions.

*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?*
We believe that this is an area where market practice is much more likely to develop an appropriate documentation which will be able to be more easily amended as market practice changes.

7. **Position of intermediaries in the cross-border voting process**

**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.*

We do not believe that this definition can cover the full range of situations and relationships in the “investment chain”. We are not clear what advantages a definition brings in this context.

**Registration as nominee**

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 hold the shares for the account of another person.*

Again, we are not clear what advantages such a measure would achieve. In the UK issuers are already able to require those with interests in their shares to confirm their interest, which enables issuers to monitor the composition of the register, particularly in terms of the beneficial owners. What is prohibited, however, is for a notice of trust to be entered on the register; this creates complex legal problems for the issuer, and would be the effect of this minimum standard.

The UK’s latest Company Law Reform proposals deal with this issue by enabling the company to recognise the rights of beneficial owners where the registered shareholder notifies the company of an interest in shares, but still without entering a record of their rights on the
register. We recommend that any EU minimum standard in this area is restricted to this type of measure.

Being granted 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.

This proposal is likely to cause considerable legal difficulties in practice, chiefly since it appears to assume that there is only one intermediary in the chain between the registered shareholder and the ultimate beneficiary. This is very often not the case. In addition, it is difficult to see how such a right would be enforced. It seems that the intermediary would be required, in its contract with the “other legal or natural person”, to include terms which permit that person to demand a power of attorney and participate in the General Meeting accordingly. For the reasons given in the above answer, it is important that this should not involve the issuer.

We believe that an effective proxy appointment process would mean that such proposed measures are not necessary. In the case of the UK’s company law reform proposals above, if the company has been notified by the registered shareholder that voting rights on a share have been delegated to a beneficiary, then a power of attorney will not be necessary.

Finally, we would emphasise that the combined effect of the proposals in Section 7 of this consultation would seem to replicate the problems which the Commission identified in respect of Section 2. We strongly recommend that the Commission reconsider the minimum standards proposed in Section 7.

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.

Yes to all three. Clarification is needed in respect of (2). We consider that where no instructions are expressly given, intermediaries should still be able to exercise their right to vote the share.

8. Communication following the General Meeting

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.

Yes. With regard to (2) we would repeat what we said in section 4 – that the website need not necessarily be the issuer’s website.