
European Company Law

A Response by

The United Kingdom Shareholders' Association (UKSA)

**to the European Commission
Consultation Paper
on Company Law**

22 July 1997

INTRODUCTION

1. The UK Shareholders' Association is the only independent body in the UK run by and for private shareholders and maintaining accountability to its membership through regular elections.
2. As such, we have a major interest in the framework of company law as a mechanism by which the rights, responsibilities and concerns of private shareholders are balanced against the need to allow company managements to run our companies efficiently and effectively.
3. We have decided to follow the suggested format of answering the specific questions as they appear in the Consultation Paper. To prevent confusion, we have only identified each section by question-number. We have not answered those questions that appear to us to fall outside our frame of reference, or where we do not have sufficient expertise to respond usefully in the time available.

CHAPTER A

Question A1.2

Do you agree that a legal framework at Community level is necessary in order that existing companies might be able to (a) merge across frontiers and (b) transfer their seat from one Member State to another? If you support this idea in principle, albeit subject to certain conditions, please indicate in each case what in your view are the most important conditions.

We do not object in principle to legal frameworks at Community level that would allow companies to merge or transfer across borders, where they wish to do so. We strongly support the freedom of member states to frame their own company law in accordance with national circumstances, and we would in general oppose the replacement of national company law with European company law, although we fully expect harmonization to occur gradually.

Most European companies are listed in only one country, but are able to trade throughout the EC. Equally, investors in any one country are increasingly able to invest throughout the EC. The variety of legislatures under which European companies operate in effect creates a variety of markets. We would expect investors' funds to flow increasingly towards those markets that command the greatest confidence.

We strongly support such a competitive environment, in which countries with better legal frameworks attract more funds, creating pressure on other countries to adapt and improve their own legal frameworks: the long-term effect will be to raise standards throughout the EC.

We also believe that countries with very different traditions of capital fund-raising and corporate governance (such as Germany and the UK) should be able to frame national company law in a manner that best suits national circumstances.

However, we recognise the possibility that some degree of company law may be introduced at Community level; should this occur, we would wish to see the principles described in the remainder of this document observed.

CHAPTER B

No.1. Corporate governance, guiding principles, economic criteria

No.1.1. Do you think that the system of corporate governance should be determined by the company's form alone?

No

No.1.2. Do you think that the equity ownership structure should be taken into consideration?

Yes

No.1.3. Do you think that the corporation's size should be taken into consideration?

Not for companies listed on junior or senior markets (we cannot comment on unlisted companies).

No.1.4. Can you think of any other possible criteria? If so, which?

Yes. The degree of regulation for listed companies should depend on whether a company is listed on a junior or a senior market - see also our response to No.3.3, below.

No.1.5. ...Do you think that rules should be adopted

- | | |
|---------------------|-----|
| - at European level | No |
| - at National level | Yes |

No.2. Open Company (company with widely held shares)

No.2.2. A standard definition of 'open' company might be as follows: the public nature of the offer results from the distribution of securities representing the capital to a group of more than 300 persons, or from the use, in connection with their placement, of financial intermediaries or any advertising or canvassing methods whatsoever.

Does this approach strike you as satisfactory?

We are not happy with this proposed definition. Any company listed on a recognised Exchange should be considered 'open': some at least of these shares must be definition be available for buying or selling through the Exchange, and private shareholders with holdings in these companies rely on publicly available information and on common standards of corporate governance to protect their investments.

A listed company's shares, even if originally distributed to a very small number of parties, may come to be owned by large numbers of investors. A private company may come to a stock market by way of an 'introduction', which does not involve any public offer of shares at all, but may eventually acquire a large shareholder base through trading in the market. These companies are beyond question 'open', but would fail to meet the proposed definition.

Also, the recent growth of nominee accounts means that hundreds of private shareholders may be represented on a share register under one name, so the definition that capital is distributed to more than 300 persons might wrongly exclude many smaller listed companies where a large underlying shareholder base appears as a small number of nominee accounts.

No.2.3. Do you wish to propose any other criteria or a different approach. If so, which?

We propose that any company listed on a recognised Stock Exchange should be defined as an 'open' company. We have no comment on other criteria by which further companies might also be included.

No.3. Concept of large company

...depending on the criteria adopted, an 'open' or a close company would be deemed to be large and would have to comply with the corporate governance and supervision requirements where two of the following three conditions are exceeded:

- | | |
|------------------------------|------------|
| - number of employees: | 250 |
| - balance sheet total (ecus) | 40,000,000 |
| - total turnover (ecus) | 27,000,000 |

No.3.1. Do the above-mentioned criteria strike you as appropriate?

No

No.3.2. Do the thresholds proposed for these criteria strike you as appropriate?

No

No.3.3. If they do not strike you as appropriate, what values or what other criteria would you propose?

We can only comment on the criteria for ‘open’ companies. We believe that quantitative criteria are not appropriate.

A number of Stock Exchanges operate ‘junior’ and ‘senior’ markets. Companies listed on the senior market are required to accept a higher level of regulatory control than companies on the junior market; in return, they benefit from greater credibility and easier access to capital than companies on the junior markets.

This approach has proven highly successful. Some very large companies have chosen to list on junior markets, and some much smaller companies have listed successfully on senior markets.

We believe that the size of a company should be immaterial: the degree of regulation should depend on whether a company is listed on a junior or a senior market.

No.5 Management, internal supervision: large companies: harmonization principle

No.5.1. Do you think that a unified system is desirable at European Union level?

No

No.5.2. Do you think that harmonization is desirable at European Union level?

No

No.5.3. Comments, or other suggestions:

Harmonization of corporate governance rules would substantially reduce the abilities of governments to address corporate governance problems as they arose, and particularly problems that were not community-wide.

Our experience is that some rules intended to improve corporate governance have been highly successful, while others have not.

We would prefer that countries and Stock Exchanges have the flexibility to adopt corporate governance rules that have proven successful elsewhere, and to discard national or Stock Exchange rules that have proven cumbersome, ineffective or even counter-productive.

We are particularly concerned to retain the relative protection of the interests of private and minority shareholders provided by existing UK structures; we would strongly oppose any reforms that weakened that protection.

No.6. Frequency of management board meetings

No.6.1. Do you think that management organs should meet more often? Should this be recommended or mandatory?

We agree with the study report: while recommendations may be made along these lines, one should avoid being prescriptive; existing laws generally afford managers the flexibility they need when deciding what is best for their companies.

No. 7. Representation of minority shareholders in management organs

No.7.1. Do you think that minority shareholders should, above a certain threshold of participation in the capital, be compulsorily represented in the management organs?

No. While we would like to see boards of directors that were more closely allied with the interests of shareholders, it is absolutely fundamental that the shareholder body as a whole should elect the board of directors. There will be instances where a substantial stake in a company is held by a competitor, or by some other faction that does not have the best interests of shareholders at heart.

No.8. Supervisory Committees

No.8.1. Are you in favour, in the case of large corporations, of the setting-up of the following committees. (Obligatory or Recommended)

- | | |
|-----------------------------------|-------------|
| - Audit committee | Recommended |
| - Committee on risks and accounts | Recommended |
| - Compensation committee | Recommended |
| - Ethics committee | Recommended |

No.10 Shareholders, voting rights, share transfers

No.10.1. Do you agree that the protection of shareholders must be tailored according to whether the equity ownership structure is open (listed corporation or corporation making a public call for funds) or closed (small number of shareholders)?

It is not appropriate for us to comment on the protection appropriate to non-listed companies, but a certain minimum level of protection is essential to all listed companies. A higher level of protection is appropriate to companies listed on a more senior stock market.

No.10.2. If your answer to the previous question was 'yes', do you think that rules should be adopted

- | | |
|---------------------|-----|
| - at European level | no |
| - at national level | yes |

The levels of protection applied to each stock market should be determined by the stock exchange or national government concerned.

No.11. Open companies: Information

No.11.1. The following suggestion is made: a summary of the annual accounts should be transmitted automatically to the shareholders. At the same time, at the registered office, a detailed analysis would be available for experts, upon request. Are you in favour of this proposal?

No. All shareholders, including a private shareholders, must be entitled to receive the full annual report and accounts unless they have explicitly authorised the company to send them only a summary.

Any suggestion that some shareholders or analysts ('experts') should be entitled to information not available to other shareholders is utterly unacceptable.

At present, UK 'preliminary' reports and accounts are made available to a limited circle weeks before annual reports are published and released to all shareholders. In effect, the recipients have privileged information that is not available to most shareholders. These preliminary reports should, at the very least, be made available free of charge to all interested parties on the internet, and announcements that the reports have been released should be more widely published as public service information.

No.11.2. A shareholders' guidebook might be produced by the stock exchange authorities of each State of the European Union. Are you in favour of this proposal?

Yes.

No.12. Protection of minority shareholders

No.12.1. Are you in favour of the following principles:

- **the recognition of certain rights (e.g. the possibility of requesting the holding of a general meeting) where minority shareholders hold a certain percentage of share capital (5 or 10%)?** Yes
- **the right, in open or close companies, for minority shareholders to join forces in associations intended to represent their interest in the corporation?** Yes
- **the right to demand that their shares be bought back from them where the majority shareholder's equity stake reaches or exceeds 95%** Yes
- **the possibility of excluding minority shareholders below a certain threshold (mandatory minority buy-out) is provided for in certain Member States. Do you think that this right of exclusion should be provided for**
 - **in each Member State** Yes, subject to safeguards determined nationally
 - **at Community level** No

No.12.2. If your answer to the previous question was ‘Yes’, do you think that rules should be adopted

- at European level? No
- at national level? Yes

No.13. Voting rights

No.13.1. Are you in favour of the principle of proportionality between voting rights and subscribed capital?

Yes

No.13.2. If so, do you think that the principle should be applied:

- strictly? See comments below
- or with a degree of flexibility See comments below

No.13.3. More specifically, please state whether you are in favour of abolishing:

- shares with double voting rights? Yes
- shares with multiple voting rights? Yes
- shares with voting right ceilings? Yes
- shares without voting rights? Yes

No.13.4. Must any clauses in the articles of association and by-laws relating to voting rights be published?

Yes

No.13. Comments

We do not approve of the issuing of shares with multiple/double/ceiling/no voting rights. However, there is clear evidence that market pressures are resulting in the disappearance of these structures from the UK markets, as most investors are not prepared to provide fresh funding for companies that retain these structures.

We also note that there are companies with complex capital structures, such as split-capital investment trusts, where the capital structure serves a legitimate purpose, and where the interests of each class of shareholder are protected by the articles of association. We would not wish to see such structures restricted or abolished.

We therefore do not believe that regulatory enforcement in this area is either necessary or appropriate, although we strongly welcome the market-driven move away from discriminatory voting structures.

No.14. Exercise of voting rights

No.14.1. Are you in favour of the principle of facilitating the exercise of voting rights?

Yes

No.14.2. If so, specify:

- | | |
|---|-----|
| - by correspondence | Yes |
| - by proxy, without any limits as to who may act as the proxy | Yes |
| - by fax | Yes |
| - by videoconference | Yes |
| - by other modern technological means | Yes |

No.15. General meeting

No.15.1. Are you in favour of abolishing the quorum requirement in open corporations?

No. A quorum requirement can be an essential protection against the holding of company meetings in inaccessible locations, at difficult times or without adequate notification of shareholders.

No.19. Access to information

No.19.1. Are you in favour of the creation of a single standardised multilingual document, accessible in all the Member States, such as might improve the information furnished by commercial registers?

No. We would encourage companies that wish to develop or maintain a broad multi-national shareholder body to publish annual reports to a common European standard, and to publish these reports in as many languages as they might consider appropriate. However, it would be grotesquely inappropriate for smaller, regional companies and the costs and practicalities of making this a general requirement do not bear thinking about.

No.19.2. Are you in favour of better access to information on the main national characteristics of company law?

Yes.
