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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Company Law (Attachés)
Subject:	Presidency Flash - 09/01/2024 Company Law WP meeting (Attachés)

Delegations will find attached the Presidency Flash in view of the Company Law Working Party meeting (Attachés) on 9th January 2024.

Presidency Flash Note

Multiple-vote share structures

03 January 2024

Dear colleagues,

Before anything else, we want to wish you a very happy 2024!

It is with great pleasure and excitement that we provide you with the first Flash of the Belgian Presidency for the discussion on the Directive on Multiple Vote Share Structures in companies that seek the admission to trading of their shares on an SME growth market (MVSS).

During the second political trilogue on MVSS, that took place on 14 December 2023, the two core differences between the co-legislators' positions were – once again – outlined: the scope and the safeguards (Articles 1 and 5 of MVSS). The approaches defended by the EP and the Council were so divergent that it was not possible to reach an agreement. During the trilogue, the EP made another compromise proposal and asked us to submit it to you as a potential way forward.

The aim of this note is to provide some explanation about two distinct possible package solutions as a way forward. We would like to hear your position, by indicating clearly what you can accept, as well as your degree of flexibility. It would also be useful if you could give us clear red lines on the file, as we will not have much time to try to reach an agreement. We really hope that this will help to have a fruitful discussion. The lines mentioned below refer to the last four-column table that was circulated (15371/23).

Thank you in advance for your discretion on the information provided, so as to not jeopardise the chance of success of the negotiations.

We very much look forward to seeing you on 9 January 2024!

The Belgian Presidency Team

Points for discussion

- I. FIRST PACKAGE SOLUTION: EXTENDING THE SCOPE ONLY TO MTFs (with possible future extension to regulated markets subject to a review clause)

I.1. Approach.

Context. Council's approach, like the Commission's proposal, is articulated on the basis of a scope covering only companies applying for admission of their shares to trading on an SME growth market. In contrast, the EP proposal creates a scope of application covering a wide variety of markets (regulated markets, SME growth markets and any other multilateral trading facility). This difference has a logical impact on the safeguards (originally intended to be limited in scope) and on the validity of the impact assessment that underpins the proposal.

Solution proposed. For the sake of compromise, the PCY could consider a middle ground approach. This means expanding the scope to encompass not only SME growth markets, but also any other relevant multilateral trading facility (MTFs that admit to trading SME shares). This extension builds on the logic advocated by the Commission, according to which there are currently markets which also target SMEs – in line with the proposal – but which do not formally operate as SME growth markets. This allows for a proportionate approach to the identified problem and would not significantly alter the logic by which the safeguards were originally designed.

Implications:

- Risk: stronger safeguards could have an impact on the systems already in place at national level.
- Advantages:
 - (1) it entails a more gradual approach for the introduction of these systems in particular in those Member States that have no experience with them;
 - (2) it offers a more proportionate (legislative) response to the identified issue (mainly targeted at SMEs);
 - (3) the conclusions of the impact assessment would still be valid; and
 - (4) a higher degree of harmonisation would be ensured, further limiting the negative impacts of the unlevel playing field.

I.2. Details.

Scope – article 1

In line 29, the scope would be adapted to an extension for MTFs. The proposed wording is subject to further fine-tuning.

Proposed wording:

Line 29 of the EP mandate – *"This Directive lays down common rules on multiple-vote share structures in companies that seek the admission to trading of their shares on ~~a regulated market~~, an SME growth market, **or any other multilateral trading facility**, in one or more Member States and that do not have shares already admitted to trading on any trading venue."*

A possible future extension of the scope to regulated markets would be subject of the review clause (art. 7).

Adoption and modification of MVSS – article 4 (compromise of technical nature)

The PCY considers that there is room for a middle ground with the EP mandate (see line 43a of the EP text) for this aspect of the proposal. In this sense, the safeguard established by the Council in line 46 could be combined with Article 4 (adoption of multiple-vote share structures):

Proposed wording:

Line 41 of the Council mandate – *"Member States shall ensure that a company that does not have shares that are admitted to trading on a regulated market or an MTF has the right to adopt a multiple-vote share structure for the admission to trading of its shares on an SME growth market **or any other MTF**. Member States shall ensure that the company's decision to adopt a multiple-vote share structure is taken by the general meeting by at least a qualified majority as specified in national law. Member States shall not make the adoption of such a structure conditional upon the provision of enhanced economic rights for shares without enhanced voting rights. For the purposes of the first subparagraph, where there are several classes of shares, the decision to adopt a multiple-vote share structure shall also be subject to a separate vote in each class of shares the rights of which are affected.*

This paragraph should also apply to a company that does not have shares that are admitted to trading on a regulated market or an MTF, when it decides to modify a multiple-vote share structure already in place in view of its admission to trading of its shares on an SME growth market or any other MTF."

In consequence, line 43a of EP mandate should be deleted, as it would be redundant with the modified line 41 of the Council mandate.

Safeguards – article 5

Under this option, it is proposed to keep all the mandatory safeguards of the Council compromise text (no modifications are proposed). It is only suggested, similarly to what is also proposed under option 2 (EP's compromise proposal),

to add an optional (flexible) safeguard on the environment and human rights. Furthermore, we would include optional safeguards in the operative part of the proposal, in a spirit of compromise.

- Cumulative vs non-cumulative condition - safeguard 5.1.b (lines 48 and following).

The Council's mandate imposes a restriction on the design of the MVSS. Member States must either set a maximum voting ratio or a restriction for (most of the) qualified majority decisions by the general meeting. These two alternative conditions ("*at least one of the following*" reference) are included in lines 48 to 50b of the Council mandate. The PCY proposes to keep the wording of the Council mandate, so lines 48 to 50b of the Council would essentially remain the same. The addition in line 50 has a technical nature (no change of substance) and would clarify that the safeguard would not apply in case of a capital majority, because in such a case, the enhanced voting rights would not impact the vote.

Proposed wording:

Lines 48, 49 and 50 of the Council mandate – "*(b) limit the impact of the multiple-vote shares on the decision-making process at the general meeting by introducing at least one of the following:*

- (i) *a maximum ratio of the number of votes attached to multiple-vote shares to the votes attached to shares with the least voting rights;*
- (ii) *a requirement that decisions by the general meeting subject to qualified majority **of the votes cast as specified in national law, not including excluding** the appointment and dismissal of directors as well as operational decisions to be taken by directors and that are submitted to the general meeting for approval, are to be adopted by (...)*

- Maximum voting ratio – article 5(1) (b) (i) (line 49)

In line 46 of the EP mandate, the EP sets a maximum voting ratio (1/2 to 1/12) and limits the maximum percentage of the outstanding share capital that multiple-vote shares can represent. In the working party of 16 November 2023, Member States declared that they considered these combined conditions too burdensome. The PCY would suggest that the safeguard remains as it was included in the Council compromise text:

- (1) the maximum voting ratio is part of the above non-cumulative condition;
- (2) the maximum ratio of the number of votes attached to multiple vote shares is left to the discretion of Member States;
- (3) no limitation on the maximum percentage of the outstanding share capital that multiple-vote shares can represent.

Proposed wording:

Line 49 of the Council mandate – “(i) a maximum ratio of the number of votes attached to multiple-vote shares to the votes attached to shares with the least voting rights;”

In consequence, line 46 of the EP mandate should be deleted – “~~(a) introduce a maximum voting ratio ranging from one to two to one to twelve and a limit on the maximum percentage of the outstanding share capital that the total amount of multiple vote shares can represent.~~”

- **Optional sustainability safeguard – article 5(1) (ba) (line 50a)**

In line 50a of the EP mandate, the EP establishes a new (mandatory) safeguard to exclude the use of enhanced voting rights attached to multiple-vote shares at general meetings of shareholders during the votes on resolutions tabled by shareholders in accordance with Article 6(1) of Directive 2007/36/EC. During an Interinstitutional Technical Meeting, the EP proposed a new wording – dropping the shareholders Resolution reference, with the aim of giving full flexibility to Member States on how to act in the spirit of the directive, while ensuring that multiple-vote share structures do not undermine EU rules on human rights and the environment. The PCY would like to include this safeguard in the list of optional safeguards in Article 5(2). The final wording of this approach would be subject to further fine-tuning.

Tentative proposed wording:

Article 5 (2), point (d): “measures to ensure that the exercise of the enhanced voting rights attached to multiple-vote shares does not impede the adoption of decisions aimed at preventing, reducing or eliminating negative impacts on human rights and the environment related to the company’s operations.”

Alternative tentative proposed wording:

Article 5 (2), point (d): “measures, where necessary, to ensure that the use of multiple-vote share structures does not lead to violation of EU rules on the environment and on human rights.”

- **Other optional safeguards**

Include in Article 5(2) the optional safeguards, instead of putting those in a recital, as it is in the Council mandate. Lines 52 to 54 of the EP mandate would be included in the proposal.

The optional safeguard of the EP mandate in line 55 would be erased due to the problems it might generate for promoting long-termism in companies, so it would not be included in the articles nor in the recitals.

Line 55 of the EP mandate – ~~"(d) a requirement that enhanced voting rights attached to multiple vote shares do not apply in matters relating to executive remuneration and dividend policy or to the approval of related party transactions"~~.

Transparency – article 6

- Annual information - article 6(1) (line 57)

The PCY would include in the package this obligation for companies in the first year and, after that, only if there are modifications of the multiple-vote share structure. If there are no changes, there would be no obligation for companies to publish any information on an annual basis.

Proposed wording:

Line 57 of the Council mandate – *"Member States shall ensure that companies with multiple-vote share structure whose shares are to be traded on an SME growth market **or any other multilateral trading facility** after relying on the right referred to in Article 4 make publicly available, in the EU Growth ~~issuance document~~ **prospectus** referred to in Article 15a of Regulation (EU) 2017/1129 of the European Parliament and of the Council or in the admission document referred to in Article 33(3), point (c), of Directive (EU) 2014/65/EU and, **where relevant, in the company's annual financial report, when required by European Union law or national law**, detailed information on all of the following:"*

This indicative wording would be accompanied by changes in recital 13.

Proposed wording:

Line 22 of the Council mandate – *"(13) [...] **Member States should also require companies admitted to trading on an SME growth market**, relying on the right created by this Directive to adopt a multiple-vote share structure, to publish information concerning their share structure at the moment of the admission to trading, **as well as periodically – when modifications of the multiple-vote share structure occur – in the annual financial report**. The publication of such financial reports should be done in line with the frequency established under the relevant EU or national law. Member States may also require companies admitted to trading on an MTF, relying on the right created by this Directive to adopt a multiple-vote share structure, to publish information concerning their share structure in a relevant document **where the publication of such document is required by national law**. Such information should mention whether there are any limitations on the holding of securities, including whether any transfer of securities requires the approval either of the company, or of other holders of securities. It should*

also mention whether there are any restrictions on voting rights, including limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby the financial rights attached to shares are separated from the holding of shares. [...]"

- **Identity of shareholders – article 6(1)(e) (line 62) (Identical to option 2)**

In line 62 of the EP mandate, there are references to the identity of shareholders. The PCY would keep the Council wording.

Proposed wording (no changes):

Line 62 of the Council mandate – "(e) the identity, if known to the company, of shareholders holding multiple-vote shares representing more than 5% of voting rights of all shares in the company, and of natural persons of legal entities entitled to exercise voting rights on behalf of such shareholders, where applicable."

- **Markers and investor awareness – article 6(2a) and (2b) (lines 63a and 63b)**

In lines 63a and 63b, the EP mandate includes two new provisions that aim at reinforcing transparency and that are not included in the Council mandate (markers and the obligation to promote investors understanding and awareness). For the sake of compromise, the PCY could accept the provision on the marker (in exchange of a narrower scope of the proposal).

The PCY would, however, suggest a more proportionate approach (than that suggested by the EP) that would allow for more time for developing the most appropriate way of marking of companies, considering the established market standards and well-functioning practices. The PCY would thus propose to give a mandate to the European Securities and Markets Authorities to develop standards in level 2, in close collaboration with national competent authorities. The PCY would thus propose the following amendments:

Proposed wording:

*Line 63a of the EP mandate – Art. 6, "2a. **Member States shall ensure that the shares of companies with multiple-vote share structures admitted to trading on an SME growth market or any other MTF after relying on the right referred to in Article 4 are clearly identified as such**, ~~the shares of which are traded or are to be traded on a regulated market, an SME growth market, or any other MTF, shall have a stock name that ends with the marker 'WVR' (weighted voting rights) in order to clearly indicate to the public that their shareholder structure is different from that of traditional companies. These companies shall inform the relevant SME growth market or MTF about the existence of such shares.~~*

ESMA shall develop regulatory technical standards to specify how companies with multiple-vote share structures shall identify their shares. In developing these regulatory technical standards, ESMA shall take into consideration the established market standards and well-functioning practices for identifying companies with multiple-vote share structures.

ESMA shall submit those draft regulatory technical standards to the Commission by [12 months of the application date of the Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010."

Line 63b of the EP mandate – "~~2b. National competent authorities, regulated markets, SME growth markets and MTFs, shall promote investor understanding and awareness concerning the WVR marker and the impact on voting rights associated with investing in companies with multiple vote share structures.~~"

This indicative wording would be accompanied by changes in recital 13.

Proposed wording:

*Line 22 of the Council mandate – "(13) The disclosure of accurate and comprehensive information about companies is the basis for investor confidence and is necessary for informed investment decision-making. Such informed investment decision-making is needed for both investor protection and market efficiency. Member States should therefore require companies **with multiple-vote share structures admitted to trading on an SME growth market or any other MTF in accordance with this Directive to be clearly identified by providing this information to the relevant trading venue. To ensure a better comparability of the information available to investors, ESMA should develop regulatory technical standards on how companies should identify shares with multiple voting rights. [...]**"*

A solution could be elaborated in an Interinstitutional Technical Meeting for the difference between companies with a marker admitted to trading pursuant to this Directive and other companies that were admitted to trading before the Directive started to apply to which the provision would not apply.

Transposition – article 8 (line 70) (Identical to option 2)

In line 70, the PCY would keep the Council wording. Thus, the transposition period would be, in any case, 2 years after the entry into force of the Directive.

II. SECOND PACKAGE SOLUTION: THE EP COMPROMISE PROPOSAL – MAXIMUM EXTENSION OF THE SCOPE

II.1. Approach.

Context. The EP compromise proposal as put forward at the second political Trilogue on MVSS, sets a scope that covers a wide variety of markets (regulated markets, SME growth markets and any other multilateral trading facility), and which imposes only one mandatory safeguard: a maximum voting ratio (of up to 1 to 12). All remaining safeguards would be considered as optional.

In contrast, the Council's approach, in line with the Commission proposal, is articulated on the basis of a scope covering only companies applying for admission of their shares to trading on an SME growth market (a subset of multilateral trading facilities). This difference has a logical impact on the safeguards (originally intended to be limited in scope) and on the validity of the impact assessment that underpins the proposal.

Solution proposed. The PCY would like to understand to which extent the compromise proposal, as set out by the EP, could be acceptable to Member States. Under the EP's compromise proposal, the scope would not only cover SME growth markets, but also any other multilateral trading facility and, very importantly, regulated markets. The EP is prepared to make concessions on the safeguards, by imposing a single mandatory safeguard of a maximum voting ratio up to 1:12. This option would thus be a variation of option 2 set out in the Spanish Presidency's November CWP note, however with a more restrictive safeguard (i.e. mandatory maximum voting ratio up to 1:12).

For the sake of clarity, we reiterate the **implications** of this proposal:

- Risks:
 - (1) much broadened scope of the proposal (i.e. including regulated markets), in addition to being disconnected from the problem identified and the objectives of the proposal, would imply higher uncertainty and higher risk of unforeseen consequences in those Member States with no experience with these structures;
 - (2) the extension of the scope to regulated markets and the need for the appropriate safeguards have not been properly impact-assessed;
 - (3) the safeguards initially designed in the proposal with respect to SME growth markets may not be adequate to protect the interests of shareholders who do not hold enhanced voting rights in regulated markets, and even less so if watered down, ultimately leading to lower demand from those investors;
 - (4) considerable weakening of the harmonisation of the regime and its possible impacts in terms of the level playing field.

- Advantages:
 - (1) flexibility for the Member States to accommodate these new structures.

II.2. Details.

Scope – article 1

In line 29, the scope would be adapted to a full extension, aligned with the EP wording proposal.

Proposed wording:

Line 29 of the EP mandate – *"This Directive lays down common rules on multiple-vote share structures in companies that seek the admission to trading of their shares on a regulated market, an SME growth market, or any other multilateral trading facility, ~~in one or more Member States~~ and that do not have shares already admitted to trading on any trading venue."*

Adoption and modification of MVSS – article 4 (compromise of technical nature)

The PCY considers that there is room for a middle ground with the EP mandate (see line 43a of the EP text) on this aspect. In this sense, the safeguard established by the Council in line 46 could be combined with Article 4 (adoption of multiple-vote share structure).

Proposed wording: identical as in the previous package (option I).

Safeguards – article 5

- Maximum voting ratio – article 5(1) (a) (line 46)

In line 46 of the European Parliament mandate, the EP sets a maximum voting ratio (1/2 to 1/12) and limits the maximum percentage of the outstanding share capital that multiple-vote shares can represent. During the second political Trilogue on MVSS, the EP proposed to keep only one mandatory safeguard, namely a compulsory maximum voting ratio of up 1 to 12, whereby the quantum is negotiable as a measure for convergence.

Proposed wording:

Line 46 of the EP mandate – *"(a) introduce a maximum voting ratio ranging from one-to-two to one-to-twelve ~~and a limit on the maximum percentage of the outstanding share capital that the total amount of multiple vote shares can represent.~~"*

- Cumulative vs non-cumulative condition – safeguard 5.1.b (lines 48 and following).

The Council's mandate imposes a restriction on the design of the MVSS. Member States must either set a maximum voting ratio or a restriction for (most of the) qualified majority decisions by the general meeting. These two alternative conditions ("*at least one of the following*" reference) are included in lines 48 to 50b of the Council mandate. Due to the EP compromise proposal to keep the maximum voting ratio as the only mandatory safeguard, this would mean that the restriction for (most of the) qualified majority decisions by the general meeting is left to the discretion of Member States: lines 50 to 50b of the Council would become optional (moving it in Article 5(2) with other optional safeguards). However, the maximum voting ratio (including a quantum of up 1 to 12) would now become a requirement for all Member States who would no longer be able to choose between a maximum voting ratio and a safeguard with a double majority voting modality, as it was the case in the Council compromise text.

- Sustainability safeguard – article 5(1) (ba) (line 50a)

In line 50a of the EP mandate, the EP establishes a new safeguard to exclude the use of enhanced voting rights attached to multiple-vote shares at general meetings of shareholders during the votes on resolutions tabled by shareholders in accordance with Article 6(1) of Directive 2007/36/EC. During an Interinstitutional Technical Meeting, the EP proposed a new wording – dropping the shareholders Resolution reference, with the aim of giving full flexibility to Member States on how to act in the spirit of the directive, while ensuring that multiple-vote share structures do not override EU rules on human rights and the environment. Pursuant to the EP compromise proposal as put forward at the second political Trilogue on MVSS, the sustainability safeguard would become optional, placing it in Article 5(2). The final wording of this approach would be subject to further fine-tuning.

Tentative proposed wording:

Article 5 (2), point (d): "measures, where necessary, to ensure that the use of multiple vote share structures does not lead to violation of EU rules on the environment and on human rights."

- Other optional safeguards

The EP mandate includes the optional safeguards in Article 5(2), instead of putting those in a recital as it is in the Council mandate. Lines 52 to 55 of the EP mandate would be included in the proposal. The PCY assumes that some of them could be open for discussion and could be deleted (e.g. line 55 of the EP mandate).

Transparency – article 6

At the second political Trilogue, provisions on transparency (including the markers and investor awareness) were not discussed. The PCY assumes that these provisions are still in the EP's compromise proposal but open for discussion.

- **Annual information – article 6(1) (line 57)**

The PCY would include in the package the option of having this obligation as mandatory for companies in the first year and, after that, only if there are modifications of the multiple-vote share structure. If there are no changes, there would be no obligation for companies to publish any information on an annual basis.

Proposed wording:

Line 57 of the Council mandate – *"Member States shall ensure that companies with multiple-vote share structure whose shares are to be traded on a regulated market, an SME growth market, or any other multilateral trading facility after relying on the right referred to in Article 4 make publicly available, in the prospectus referred to in Article 6 of Regulation (EU) 2017/1129 of the European Parliament and of the Council or in the EU Growth issuance document prospectus referred to in Article 15a of that regulation Regulation (EU) 2017/1129 of the European Parliament and of the Council or in the admission document referred to in irrelevant article of Directive 2004/109/EC or Article 33(3), point (c), of Directive (EU) 2014/65/EU and, where relevant, in the company's annual financial report referred to in Article 78(2), point (g), of Commission Delegated Regulation (EU) 2017/5652, or in any other document, when publication of such a document is required by national law, detailed information on all of the following:"*

This indicative wording would be accompanied by changes in recital 13.

Proposed wording:

Line 22 of the Council mandate – *"(13) The disclosure of accurate and comprehensive information about companies is the basis for investor confidence and is necessary for informed investment decision-making. Such informed investment decision-making is needed for both investor protection and market efficiency. Member States should therefore require companies relying on the right created by this Directive to adopt a multiple-vote share structure, to publish information concerning their share structure at the moment of the admission to trading. In the case of such companies admitted to trading on SME growth markets or regulated markets, Member States should also require publication of this information in the annual*

financial report provided for under Union law when modifications of the multiple-vote share structure occur. In the case of such companies admitted to trading on other MTFs, Member States could require publication of information concerning the companies' share structure in a relevant document where the publication of such documents is required by national law. Such information should mention whether there are any limitations on the holding of securities, including whether any transfer of securities requires the approval either of the company, or of other holders of securities. It should also mention whether there are any restrictions on voting rights, including limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby the financial rights attached to shares are separated from the holding of shares. [...]"

- Identity of shareholders – article 6(1)(e) (line 62)

In line 62 of the EP mandate, there are references to the identity of shareholders. The PCY would keep the Council wording.

Proposed wording (no changes):

Line 62 of the Council mandate – *"(e) the identity, if known to the company, of shareholders holding multiple-vote shares representing more than 5% of voting rights of all shares in the company, and of natural persons of legal entities entitled to exercise voting rights on behalf of such shareholders, where applicable."*

- Markers and investor awareness – article 6(2a) and (2b) (lines 63a and 63b)

In lines 63a and 63b, the EP mandate includes two new provisions that aim at reinforcing transparency and that are not included in the Council mandate. Considering the concerns expressed by Member States, and since they were not mentioned in the EP's compromise proposal, the PCY could defend the deletion of both elements from the final proposal:

Proposed wording:

Line 63a of the EP mandate – ~~"2a. Companies with multiple-vote share structures, the shares of which are traded or are to be traded on a regulated market, an SME growth market, or any other MTF, shall have a stock name that ends with the marker 'WVR' (weighted voting rights) in order to clearly indicate to the public that their shareholder structure is different from that of traditional companies."~~

Line 63b of the EP mandate – ~~"2b. National competent authorities, regulated markets, SME growth markets and MTFs, shall promote investor understanding and awareness concerning the WVR marker and the impact on voting rights associated with investing in companies with multiple vote share structures."~~

Transposition – article 8 (line 70)

In line 70, the PCY would keep the Council wording. Thus, the transposition period would be, in any case, 2 years after the entry into force of the Directive.

OVERALL PACKAGE QUESTIONS

A change of mandate would be necessary to move forward in any of the packages proposed by the PCY. To this extent:

Q1. Is a limited extension of scope to MTFs with the mandatory safeguards as set out in the Council compromise text, and as proposed in option I, acceptable?

Q2. Is a broad extension of the scope to all regulated markets with one mandatory safeguard, namely a maximum voting ratio of up to 1:12, acceptable (as presented in option II)?

Q3 – Do you consider acceptable both packages proposed by the PCY? In case you have a strong preference for one of them, which one would you prefer?

Q4 – Do you consider necessary any further adaptation of the elements contained in either of the two packages? If so, which ones and which option?