The European proposal to open up multiple-vote share structures to listing companies: a simplification in *trompe l'oeil*

The European Commission (EC) has chosen to include within its Listing Act package, dated December 7, 2022, a proposal for a Directive dedicated to the use of multiple-vote share structures (MVSSs) by companies seeking the admission to trading of their shares on an SME growth market (SME GM)[1]. This endeavour underlines both the perceived practical importance of MVSSs for potential candidates to listing and its political importance for the Commission itself, given its long-standing inclination towards the "one share - one vote principle", which it even considered at one point imposing on all European companies listed in the EU, before changing its mind in the absence of a clear demonstration of the benefits of such generalized application. More pressing pragmatic considerations are now leading the EC to propose requiring Member States to offer companies that are candidates to listing on a SME GM the possibility of using shares with multiple voting rights, so as to enable their promoters to hold, retain or even strengthen their control despite the opening of the company's share capital to the public[2]. The aim is to incentivise growth and innovative companies to list on EU capital markets, which are facing attrition and severe competition, including regulatory competition, from their largest global rivals. In recent years, the use of MVSSs has indeed increased in countries that did not prohibit them, such as the USA, where they have become particularly popular in the tech sector, leading to their authorization on competing Asian or British markets.

The pseudo mandatory "one share - one vote principle", which is in fact an exception under ordinary company law, is thus being attacked in its final frontier: that of listed companies. The EC proposal is, however, cautious in two respects. Firstly, it limits the scope of the reform to companies applying for admission to an SME GM. Secondly, it provides safeguards for the use of MVSSs, either at the time of their adoption or during their lifetime. For the EC, which sees MVSSs from the outset in terms of "*fair and non-discriminatory treatment of the company's shareholders*" rather than in terms of the company's interest itself, these safeguards must necessarily include: on the one hand, the adoption of the MVSS by a qualified majority at the shareholders' meeting, as well as, where several classes of shares exist, the separate approval of their holders; on the other hand, a quantitative limit to the voting disparity, which can either take the form of a maximum voting ratio accompanied by a maximum percentage of the capital represented by multiple-voting shares, or a restriction on the types of decisions that can give rise to the exercise of multiple voting rights. As can be seen, the deliberate choice has been made to harmonize the rules at European level as little as possible, for reasons of flexibility and efficiency. It is simply added that Member States may adopt additional safeguards in the interests of shareholders and the company, and in particular: prohibiting the transfer of voting rights to third parties or their survival on the death, incapacity or retirement of the beneficiary; extinguishing multiple voting rights after a certain period of time or setting a time limit linked to the occurrence of a particular event; or prohibiting the use of multiple voting rights to block the adoption of a decision by the shareholders' meeting aimed at preventing, reducing or eliminating the negative impact of the company's operations on human rights and the environment.

The terms of this initial balance are in the process of being substantially redefined within the European Parliament. If the path opened up by the European Parliament's Committee on Legal Affairs for the Committee on Economic and Monetary Affairs, in a draft report dated June 14, 2023[3], were to be followed, significant changes would ensue, adding to the shortcomings of the Commission's proposal and leading one to question the very usefulness of such a reform.

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[1] Comm. UE, prop. dir., 7 Dec. 2022, of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market, COM (2022) 761 final, 2022/0406 (COD).

[2] A. Pietrancosta, « Propositions françaises et européennes pour ouvrir le vote multiple aux sociétés entrant en bourse », BJS janv. 2023, n° BJS201q7.

[3] See Committee on Economic and Monetary Affairs Draft Report on the proposal for a directive of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market (COM(2022)0761 – C9-0416/2022 – 2022/0406(COD)), 14 June 2023; *adde*, Draft Opinion of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market (COM(2022)0761 – C9 0416/2022 – 2022/0406(COD)).

The draft report envisaged that the scope of the directive will no longer be restricted to SME GMs. It will extend to regulated markets. On the face of it, this extension is to be welcomed. In any case, it is understandable, since some Member States do not have SME GMs. For them, the reform would have been trivial. As for the Member States that already authorise MVSSs on their regulated markets, a limitation to SME GMs would have led to the paradoxical result of creating regulatory constraints for these growth markets that do not find application on larger markets. This would have contradicted the spirit of the principle of regulatory proportionality that should drive the reform and lead to regulatory differentiation, when justified, favouring SMEs.

This scope extension has, however, a negative impact on the content of the proposed reform. Overall, it leads to stricter conditions for using MVSSs, including for SME GMs. In particular, the stricter conditions are achieved by imposing a fixed ratio of MVSSs which "*can only range between a one to two ratio and a one to five ratio*", which is admittedly a rather curious way of defining a maximum ratio of multiple voting. Similarly, a fixed limit of 10 years would be imposed on the lifespan of MVSSs. Furthermore, some of the additional safeguards that had been provided on an optional basis by the Commission would become mandatory. This is the case for those relating to the adoption of certain collective decisions by a qualified majority "*of the share capital represented at the meeting or of the number of shares represented at the meeting*", or to ratification by separate votes "*within each class of shares the rights of which are affected*". The "*requirement to ensure that the enhanced voting rights cannot be used to block the adoption of decisions that aim to prevent, reduce or eliminate adverse impacts related to the operations of the company concerned on human rights or the environment*" would also become mandatory, which is hardly reassuring, given the singularity of such an obligation in the international context and the high risk of litigation that such a vaguely defined substantive condition entails. Let us also mention an obligation specific to companies listed on SME GMs, that of carrying a stock name that ends with the marker "WVR" for "Weighted Voting Rights" "*in order to clearly notify the public that their shareholder structure is different from traditional stocks. National competent authorities and SME growth markets shall promote investor understanding and awareness concerning the WVR-marker and the impact on voting rights associated with investing into companies with multiple vote-share structures*".

This rigidification, dominated by a one-size-fits-all approach, apart from the backwards-looking exception constituted by the nominative marking of companies listed on SME GMs, seems ill-advised. Admittedly, this is only a Directive, and a certain level of differentiation will be possible at Member State level. The Directive would nonetheless impose a set of minimum legal requirements, which would mean that differentiation could operate upwards, by adding legal constraints for companies listed on regulated markets, rather than downwards, by providing relief for companies listed on SME GMs.

What's more, the European proposal would lead Member States that already allow MVSSs for companies listed on regulated markets or SME GMs to tighten their conditions of use. This would be quite paradoxical for a Directive aimed to alleviate listing regularity burdens and costs. While the text was designed to introduce a new freedom in Member States which currently prohibit the use of MVSSs, it would end up prescribing new constraints in many Member States which already use them, often successfully. From being simplifying and liberating, the Directive would simply become a text of harmonization of further constraints, imposing conditions that are often without equivalent in relation to what already exists, as in the case of the ban on negative social and environmental impacts.

Given the current evolution to open up the remaining Member States, notably France and Germany, to MVSSs under conditions adapted to local situations and the types of markets considered, doubts increase regarding the very appropriateness of the European proposal, and its real added value in terms of European listing attractiveness, besides the ones on the legitimacy of this EU intrusion in national corporate governance[4]. If its prime goal is to make European markets more attractive, rather than to reduce intra-European regulatory arbitrage, the proposal deserves to be reconsidered because of the effects it induces and its drawbacks in relation to the bottom-up opening-up process currently under way.

In reality, the authors of the Directive seem to be caught in a dilemma. Either the Directive simply introduces a new freedom in prohibitive Member States, leaving it up to them to set the conditions for

[4] See J. L. Hansen, A Harmonising Step Too Far – A Comment on the Proposal for a Directive on Multiple Voting Rights in SME, Nordisk Tidsskrift for Selskabsret nr. 1/2023.

using MVSSs, which would be the text's primary useful effect in terms of listing attractiveness in the EU, and is trivial in terms of added value given the existing situation and ongoing national developments; or, the Directive is intended above all to set minimum imperative protections in MVSSs companies, alongside the amendments proposed by the European Parliament, and the Directive appears to be an element of rigidity and constraint within the Union, far from the objective announced by the promotors of the reform and from entrepreneurs' expectations. The main merit of the Directive proposal would then have been its mere existence, inasmuch as the most reluctant Member States may have seen it as a further or even determining factor in the conviction of the inevitability of authorising a mechanism which, in just a few years, has become an essential component of modern markets the world over. It would thus have exhausted its useful effect before it was even born...