

MODERN COMPANY LAW
For a Competitive Economy
Company General Meetings
and
Shareholder Communication

A Consultation Document from
The Company Law Review Steering Group

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October 1999

Chapter		Page
	Executive Summary	v
1	Introduction and Background	1
2	The Overall Approach	8
3	The European Dimension	21
4	The Comparative Dimension	24
5	Selected Key Issues:	
	5.1 The Scope of Company Law	33
	5.2 The Needs of Small and Closely-held Companies	56
	5.3 Company Formation	70
	5.4 Capital Maintenance	81
	5.5 Regulation and Boundaries of the Law	92
	5.6 International Issues	96
	5.7 Information and Communications Technology	107
6	High Level Reporting and Accounting Issues	115
7	The Law Commissions' Project: Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties	126
8	Legislative Options and Future Machinery for Reform	134
9	The Way Forward	140
10	Summary of Questions for Consultation	148
Annex A -	Membership of Company Law Review Groups and Others Assisting or Participating in the Review	159
Annex B -	Alphabetical List of Respondents to 'Modern Company Law for a Competitive Economy'	166
Annex C -	Summary of Implications for British Company Law of EC Company Law Directives and European Convention on Human Rights	175
Annex D -	The Company Population and Small Companies: Some Key Facts	182
Annex E -	Company Law and Small and Closely-held Firms – Some Models	185
Annex F -	Company Law and Related Matters: Summary of Regulatory System	190

Introduction

1. This is one of three Consultation Documents being published by the Company Law Review Steering Group in October 1999. The other two documents concern company formation and capital maintenance (URN 99/1145) and the company law rules applying to overseas companies (URN 99/1146).
2. This Consultation Document addresses the subject of annual general meetings (AGMs).
3. This is rightly a subject which is of wide public interest; and it raises questions which are of great importance for the running of companies. AGMs are often described as the key mechanism whereby shareholders hold the managers of companies to account. They are the focus for conveying much information to shareholders, and they provide the forum for the direct questioning of the company's management. In addition AGMs normally provide the mechanism for the taking of certain formal decisions, for example the election of directors.
4. In principle at least, then, AGMs are the key mechanism for promoting transparency and accountability in the management of company affairs. But in practice there is wide agreement that they do not usually achieve these objectives very satisfactorily. We therefore believe that it is important to take a fundamental look at the way in which the present law operates, and that we should not shrink from considering radical options. There are two approaches to this task. One is to abandon the requirement on public companies to hold an AGM, and for the law to provide other means of achieving its objectives; the other is to maintain the requirement to hold an AGM and to seek incremental improvements in the law. These are not mutually exclusive. This Consultation Document considers the issues in some detail; and we would welcome comments from all parties with an interest in the subject.
5. The AGM is of course only one element, albeit an important one, in the legal framework for corporate governance. Others include the role and duties of the directors, and the scope of the requirements on companies to report to their members and to the wider public. We shall be issuing consultation papers on these topics later in the Review.

6. As with other Consultation Documents issued by the Review, this Consultation Document represents the views of the Steering Group of the Company Law Review¹ though it derives from the work of a working group chaired by Richard Sykes QC. The members of the Group are listed in Annex A. It does not represent the views of any particular individual or group that has participated in the Review, though we warmly acknowledge those contributions. Nor does the document represent Government policy. The plan remains that the Government will issue a White Paper in 2001 to outline its proposals on the basis of the outcome of the Review.

7. Some months have elapsed since our earlier Consultation Document, and we therefore also give in this document a brief account of work in hand since February. Since this account will be of interest to more general readers, we reach it at an early stage – see paragraphs 9-12 below.

8. We would welcome comments on the issues raised in this Document. We have included a number of specific questions in order to help consultees to structure their responses. But these are not intended to be the only issues on which we are seeking responses; we would welcome all suggestions for improvements in the law relating to AGMs. There is much detail contained in this document and we are keen to allow sufficient time for consultation, in particular in representative organisations which require time to consult their membership fully. But the wider timetable means that we would welcome comments by 7 January 2000 if at all possible.

Responses should be in writing and should be sent to:

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¹: The membership of the Steering Group is given at page 159 of the February 1999 Consultation Document ‘The Strategic Framework’. Professor Paul Davies of the London School of Economics and Political Science and Martin Scicluna of Deloitte and Touche have subsequently joined the Group.

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In accordance with the code of practice on open government, comments made on this Document may be made publicly available unless consultees specifically request otherwise. Additional copies of this Document may be obtained by telephoning 0870 1502 500; the Document is also available from the Review pages on the Department's Internet site (<http://www.dti.gov.uk/cld/review.htm>).

The Review: Progress Report

9. This section gives a brief report on the progress of the Review since the beginning of the year, when our first Consultation Document was finalised for publication.

Responses to the February Consultation Document

10. Our earlier Consultation Document – Modern Company Law for a Competitive Economy: The Strategic Framework – was published in late February 1999. We invited comments on a wide range of issues by the end of June. Responses have been received from 136 individuals or organisations, ranging from interested individuals, often with a specialist background in Company Law, to large representative organisations.

11. These responses represent a very large volume of material, and the substantial task of analysing it in detail still continues. However comments on specific issues have already been fed through to Working Groups as appropriate: and they have proved very valuable. As with the Department's earlier Consultation Document, a summary of responses will be published as soon as possible over the Autumn. These responses themselves are available from the Department's library.

Working Groups

12. New Working Groups have been set up along the lines envisaged in Chapter 9 of our February Consultation Document. They are working within the framework of the February Consultation Document and under the guidance of the Steering Group. Our current expectation is that we will be publishing a further major Consultation Document in February or March of next year.

Acknowledgements

13. We remain immensely grateful to all of those who are participating in the Review, whether through participation in working groups, through responses to Consultation Documents, or in other ways. We have been greatly struck by the enthusiastic willingness of such a wide range of contributors; the Review depends very heavily on this. We are also very grateful for the strong continuing support of the Government; Ministers have stressed their continuing commitment to the Review, and their determination to see it through to implementation.

Company General Meetings

14. It was clear from the responses to the first Consultation Document on the Company Law Review published in March 1998 that current law and practice on annual general meetings (AGMs) is a matter of widespread concern. The purpose of this Consultation Document is to examine a) whether improvements in law and practice could better enable the meetings to serve their intended purposes for companies without imposing undue burdens on company boards or others concerned, and b) whether companies, including plcs, could achieve those purposes as well, or better, by means other than the AGM. It also examines the scope for improvement in shareholder communication outside the general meeting. The rapid development of communication technology and its applications has great potential for improving the preparation and conduct of company general meetings and more generally for communication between companies and their shareholders. Many companies are already taking advantage of this. It is important that the law should not inhibit such developments but facilitate and encourage them. We have borne this very much in mind in the proposals which follow.

15. The paper is addressed mainly to the situation of larger and particularly listed companies, and the proposals in it are provisional, in the sense that they may be overtaken to some extent by work in the Review on other aspects of company law. In particular, we are considering whether annual general meetings have any place in the company law applying to small private companies. But we would welcome views at this stage, on the assumption, unless the contrary is stated, that other relevant aspects of company law remain unchanged.

The Holding of General Meetings

Statutory Provisions

16. The Companies Act 1985 (CA1985) recognises two types of company general meeting – the AGM and the Extraordinary General Meeting (EGM). Every company must hold an AGM each year (CA1985, section 366). But a private company may elect, by unanimous agreement, to dispense with holding an AGM (CA1985, section 366A). The company's Articles normally recognise the power of the directors to call general meetings of both types (see for example Table A, 1985 version, article 37). In addition, the directors are obliged to call an EGM if enough

members call upon them to do so (CA1985, section 368). In the normal course of events, the AGM is the only formal link between the two key governance bodies of the company, the members in general meeting and the directors.

The Theory

17. There are no statutory requirements as to the agenda of an AGM, but the General Meeting of the company's members provides the members with the opportunity to debate amongst themselves, with the benefit of information in the company's annual report and accounts, and to take decisions on those matters (normally few in number) which the law, or the company's own constitution, reserve for decision by the membership; to hear answers to questions put to directors of the company; and to hold the directors, whose duty is to operate the business in the interests of the members, accountable for their stewardship. Obvious analogies are the accountability of elected politicians to their electorate, or of the officers of a club to the members.

The Practice

18. A general meeting of shareholders can be an effective mechanism for quasi democratic control of the directors if on the one hand most of the votes are held by members other than the directors or those under their influence; and if on the other hand all or most of the members are able and willing to participate in the meeting. Unfortunately, these conditions do not obtain in companies at either end of the size spectrum. At one extreme, there are a large number of small, mainly owner managed companies whose shares are held wholly or mainly by the directors and those actively engaged in the company, or their families. Such companies are run for the most part informally, and without reference to company law unless something goes wrong. A formal general meeting of members serves little purpose where the directors and the members are largely the same people, and the extent of compliance by such companies with the requirement to hold an AGM is conjectural. The introduction in 1989 of the right of private companies to elect by unanimous resolution to dispense with the AGM was a recognition of this situation. The right of private companies to elect to dispense with the AGM will be reviewed separately in the context of company law as it applies to small business.

19. For public companies, at least those whose shares are listed on a stock exchange, the general meeting fails for quite different reasons to provide the reality of democratic accountability and control. There are many thousands – sometimes hundreds of thousands or even millions – of individual shareholders of such companies; they live in all parts of the UK, and many live abroad. It is quite impracticable for more than a small minority of them to attend a general meeting on a working weekday at a single location in the UK.

20. Moreover, 70-80% of the shares in listed companies are registered in the names not of individuals but of financial institutions. It is unusual for representatives of these institutions to attend any company general meetings. They exercise their membership rights in a different way. Typically, a large listed company will publish preliminary results within a few weeks of the end of the financial year, followed up to three months later by the publication of the full statutory accounts which are then laid before the AGM shortly thereafter. It is the preliminary results rather than the full statutory accounts which are the main influence on the share price. In the interval between the publication of preliminary results and full accounts, the company will typically hold a considerable number of meetings either one to one with individual institutions or with analysts representing institutions. These discussions are, we are assured, conducted in scrupulous observance of the constraints of the insider dealing legislation; but often searching questions are asked of the directors and a substantial amount of information is conveyed about the company's past performance and future plans and prospects – far more than the individual shareholder will glean from the annual report and accounts. Well before the AGM, the institutions are able to take an informed view on the matters to be decided; they will then lodge their proxy forms with the company, so that in the vast majority of cases the outcome of the meeting is determined in advance. The AGM is not the debating, information exchanging and decision taking body which it purports to be. Individual shareholders have neither the participation rights nor the equality of information which the theory arguably implies.

21. Recently, proceedings at the AGMs of some leading companies have been dominated by representatives of pressure groups exercising their rights as shareholders to draw attention to wider social or environmental concerns. We understand that some shareholders indeed acquire a few shares for this specific purpose. It is entirely reasonable that the directors should face

challenge on the wider implications of the company's activities and policies; but in some cases the objectives of the groups concerned have seemed to be disruption rather than enlightenment and self-advertisement rather than genuine monitoring of the company's operations; and their activities have reduced the value of the AGM for the "genuine" private shareholder.

22. For a large public company, the direct costs of arranging an AGM, including in some cases the costs of security arrangements to ensure that the business is transacted without disruption, are considerable. Even more significant is the opportunity cost of the very substantial amount of directors' and senior management time needed to prepare for an unpredictable debate on any aspect of the company's business. There would be justification for this if the AGM provided a genuine forum of accountability. But in most cases it does not.

The Policy Response

23. There are two ways of responding to the ineffectiveness of the AGM in fulfilling its role in the governance of public companies. The first is to extend to plcs a right to dispense with the AGM; the second is to improve the legislative provisions relating to the AGM to enable it better to fulfil its role. The two are not mutually exclusive.

Enabling Public Companies to Dispense with the AGM

24. The rationale for enabling plcs to dispense with the holding of an AGM would be that the AGM is in many cases ineffective in fulfilling the functions assigned to it by theory (see paragraph 17) and companies should have the option of replacing it with something less cumbersome to achieve the indispensable governance functions of the institution. Those functions would however remain important, and it would be necessary for the law to ensure that they were fulfilled no less – and preferably more – effectively in those plcs which decided to dispense with the AGM. It would be necessary for this purpose for the law to ensure:

- a) that all shareholders had timely access to whatever information on performance and prospects it was decided to require the company to disclose;

- b) that the shareholders were able both to decide on matters put to them for decision by the directors, and themselves to put forward matters for decision.

and perhaps; and
- c) that the shareholders had the opportunity to debate this information amongst themselves, and to question the directors and hold them to account.

(Item (c) is more dubious, given that the reality of the position is that such debates do not make any difference in practice in the vast majority of cases. It might be replaced by a requirement that any private meetings with substantial shareholders to explain the interim announcement or the final results should be recorded and the record made available to shareholders.)

25. To fulfil these functions without an AGM, it would be necessary for the law to make separate provision for the accountability of directors to shareholders, and for decisions taken by shareholders. Thus debate between the members and questions to the directors could take place at a series of meetings in different locations (if appropriate); and voting could take place by post or electronically, without a meeting. But if it is thought essential to preserve shareholder participation at a level of effectiveness no lower than that provided by the AGM, and that the availability of the information which the company is required to publish each year is necessary if shareholders are to participate in an informed way, detailed rules would be needed. The law would have to provide a carefully modulated sequence of events – despatch of report and accounts – period for “live” meetings and circulation of meeting records (if any) – opportunity for formulation of shareholder resolutions – circulation of resolutions – opening of voting – closing of voting. The spread of electronic communication has reduced the time all this would take. But there would need to be minimum periods between each stage to enable shareholder input to be considered and effective, and there would also need to be an overall time limit if decisions were not to be taken on information even more out of date than now. The resulting legislation would be quite complex, and the process cumbersome and probably more expensive.

26. It would also be necessary for the law to set out the procedure by which a plc would dispense with the AGM. It would be impracticable to require unanimity among the members of a

widely held public company for a decision to dispense with the AGM. But to require a special resolution (75% majority) would often enable the board of a listed plc to secure enough support from the institutions to dispense with the AGM regardless of the views of individual shareholders. A possible compromise might be to require the support of holders of 90% of the votes (ie not just of those actually voting) at an annual or extraordinary general meeting of the company, by analogy with the holders of 10% of the votes required to requisition an EGM (see below). A subsequent resolution to reinstate the AGM might then be deemed to succeed if supported by holders of more than 10% of the votes.

27. Public companies are required by the Second EU Company Law Directive (the Second Directive) to take a number of decisions relating to share capital in general meeting. These include increase of share capital; reduction of share capital; purchase of own shares; action in response to serious loss of capital; disapplication of pre-emption rights. The provisions of CA1985 implementing these for plcs could not simply be repealed; but a plc which had elected to dispense with AGMs could call an EGM whenever such a decision arose. Nor does the Directive necessarily require a physical meeting of members as opposed to a collective decision making process (see below).

Question 1 Do you think that the right to dispense with the AGM should be extended to public companies?

Question 2 If so, do you think that it would be necessary for the law to prescribe procedures and a timetable to ensure that the purposes of information, debate, accountability and decision taking now served by the AGM are satisfactorily met by other means?

Question 3 Should it be possible for a company to dispense with the AGM only by unanimity, or with the support of holders of 90% of the votes, or by some other majority?

Question 4 Should the requirement to hold an AGM be restored if 10%, or some other minority proportion, of holders of votes so wish?

Improving the Present Law Relating to the AGM

28. Consultees are invited to consider the following possible improvements on the alternative assumptions that the right to dispense with the AGM is, or is not, extended to plcs.

What May Constitute a Meeting

29. The Companies Act does not define what may count as a meeting, but the great majority of AGMs of listed UK companies take place at a specified time, in a single location in the UK, with voting in the course of the meeting. Companies have on occasion accommodated some shareholders in an overflow room with two way audio-visual communication with the “main” meeting room, and it is understood that the law accepts this as a single meeting for the purposes of section 366. Provided that there is two way real time communication between all locations, there seems no reason why a “meeting” held at a number of locations, including overseas locations, should not be recognised by the law as a company general meeting. Rapid advances in communications technology are providing a wide range of modes of “real time” communication between geographically separated locations, and the extent to which the law will, without further assistance, recognise these as “meetings” is unclear. (It should be noted in this and the following paragraph that the law will provide a minimum standard applicable to all plcs; regulatory bodies may wish to set more restrictive requirements.)

Question 5 **Do you think that a company should be permitted to hold a general meeting at an unlimited number of locations, provided that real time, two way communication is available between all participants?**

Question 6 **If so, should audio-visual communication be required, or should audio communication suffice?**

Question 7 **Should the law be sufficiently flexible to recognise any form of multilateral real time communication as a “meeting”?**

Question 8 **If so, is statutory provision needed to ensure this flexibility?**

Question 9 **Should a decision to hold an AGM by some form of remote communication require shareholder approval?**

Question 10 **(a) If so, should this be by ordinary or special resolution?**

(b) How might provision for a quorum for a dispersed meeting be formulated?

Question 11 **Would you answer questions 5-10 differently for public and private companies?**

30. It would be possible to go one stage further and envisage an interactive “virtual meeting” held in no location; the directors’ presentations would be posted on an electronic company bulletin board accessible to shareholders, and the shareholders’ interventions and the directors’ responses would also be posted on the bulletin board. Such a “meeting” would probably have to remain open for several days. Such a procedure could potentially offer even wider shareholder access, but at the cost of the discipline on the directors of face to face real time contact with shareholders. It is suggested that this option should be open to plcs with unanimous shareholder agreement, as an alternative to dispensing with the AGM altogether, but there may be a case for allowing this approach with a lesser majority requirement.

Question 12 **Do you think that a company should be permitted to hold a “virtual” general meeting, substituting interactive communication through an electronic bulletin board for face to face contact?**

Question 13 **If so, should this require unanimous agreement of the members or should some lesser requirement be imposed?**

Question 14 **Would you answer questions 12 and 13 differently for public and private companies?**

Timing of the AGM

31. CA1985, section 366(2) requires companies to hold an AGM in every calendar year,

except that the first may be held at any time within 18 months of incorporation; and section 366(3) requires that each AGM must be held not more than 15 months after the previous one.

32. If it is accepted that a main purpose of an AGM is to require an account of stewardship by directors to shareholders, it would be more logical to relate the timing of the AGM to the availability of the annual accounts and directors' report. It is therefore suggested that companies should be required to hold their AGM (including the first AGM after incorporation) within the period allowed for the laying and delivering of accounts and reports (v. CA1985, section 244). (This period is currently 7 months for a public company and 10 for a private company. These time lags will be examined separately as part of the work of the Review on the accounting and reporting requirements in the legislation.) In the case of a newly formed company, the effect of the change proposed would be to put back the latest permitted date of the first AGM from 18 to 21 or 22 months after incorporation.

Question 15 Do you agree that the present statutory requirements on the timing of the AGM (CA1985, section 366(2) and (3)) should be replaced, for both private and public companies, by a requirement to hold the AGM within the period allowed for the laying of the annual report and accounts?

Question 16 If so, should there be an additional requirement for a newly formed company to hold its first AGM within 12 months of incorporation, regardless of the absence of statutory accounts?

The AGM Agenda

33. There are currently no statutory requirements as to the business to be transacted at the AGM as such. However, CA 1985 section 241 requires the directors to lay before the company in general meeting copies of the annual accounts, the directors' report, and the auditors' report on the accounts. In addition, section 385 requires the company, at the general meeting at which the accounts are laid, to appoint auditors for the period until the next annual accounts are laid; and section 390A requires the company in general meeting to fix the remuneration of the auditors or determine the manner in which the remuneration will be fixed.

34. It is common practice for each of these requirements to be met at the AGM. In addition, the Articles commonly provide for the AGM to re-elect retiring directors and to elect new directors, including the confirmation of directors appointed to casual vacancies since the previous AGM (see Table A 1985, articles 73ff). Three year rotation is also covered in the codes on corporate governance (Combined Code, paragraph A6).

35. It is suggested that the law should be clarified, in line with almost universal practice, by obliging companies to transact the following business at the AGM:

- have laid before them the annual accounts;
- have laid before them the directors' report;
- have laid before them the auditors' report;
- appoint auditors for the coming year;
- re-elect directors retiring and seeking re-election in accordance with any annual requirement in the articles;
- elect new directors to fill vacancies; and
- confirm by election the appointment of any director appointed (other than by general meeting) since the previous AGM to fill a casual vacancy.

Question 17 Do you think that the items of recurring business referred to in paragraph 35 should be required by statute to be included in the agenda for the AGM of both private and public companies? (The DTI in its consultative document 'Directors' Remuneration' published in July 1999 (URN 99/923) has invited views on a range of proposals for requiring quoted companies to put a resolution on remuneration to the AGM each year. We assume that any resulting decision will be implemented in advance of wider company law reform.)

36. The requirement that the remuneration of the auditors must be fixed in general meeting, or in such manner as the company may in general meeting determine, is usually met in the latter

manner, by delegation. There is a case for removing the requirement from the statute altogether, and leaving the manner of fixing the auditors' remuneration to the company's constitution.

Question 18 Do you think that it is necessary to retain provision in the statute relating to the fixing of auditors' remuneration?

Question 19 If so, should the fixing of the remuneration, or the determination of the manner in which it is to be fixed, be an obligatory item on the AGM agenda?

37. In addition to these recurring items, there are a number of points on which companies are required by statute to take decisions in general meeting (not necessarily the AGM) but which may not arise every year. These include:

- directors' authority to issue shares (section 80);
- directors' authority to issue shares without pre-emption (section 95);
- alteration of share capital (section 121);
- reduction of capital (section 135);
- authority to purchase own shares (section 165); and
- approval of certain long term directors' contracts (section 319).

In the first, second, fourth and fifth cases, the requirement for decision in general meeting derives from the Second Directive. The first two cases are in practice recurrent because although the authorities in question have maximum duration of 5 years they are normally renewed annually. The sixth should be assumed to remain as a requirement, pending consideration of directors' remuneration. It is suggested that these requirements for decision in general meeting should remain, but without specifying the AGM.

Question 20 Do you agree that the statute should continue to require the items of business listed in paragraph 37 to be transacted in general meeting by public companies, but without specifying the AGM??

38. If these suggestions are accepted, the agenda for the AGM would thus comprise:

- recurring items required by the statute or the Articles to be decided by the AGM;
- non-recurring items (if any) required by the statute or the Articles to be decided in general meeting;
- any other resolution proposed by the directors; and
- resolutions proposed by the shareholder and accepted for consideration by the directors (see below).

Question 21 Do you think that any other items, or categories of item, should be prescribed for inclusion on the AGM agenda?

Right to Attend General Meetings

39. It has been suggested, as a means of combating disruption from pressure groups (see paragraph 21 above), that the legislation might confirm a company's right to restrict the right of some members of the company, or some of a class of members, to attend a general meeting, by reference to the number, value or percentage of their shares in the company. Possible thresholds for the right to attend might be 1% of the shares or a holding of £500 market value. We see serious difficulties in this idea: it would be seen as "anti-democratic" and aimed at stifling legitimate criticism of companies, and it would be difficult to pick a threshold high enough to discourage pressure groups which did not also deprive significant numbers of "genuine" members of one of the main membership rights.

2: Private companies will be considered separately.

Question 22 Do you agree that the statute should not be amended to permit either private or public companies to restrict attendance of members or their representatives at general meetings by reference to the size of their shareholding?

Notice of General Meetings

Notice Period

40. The present requirements are for notice in writing of 21 (calendar) days for AGMs and for meetings at which a special resolution is to be considered. The notice required for other meetings is 14 days, except for unlimited companies where it is 7 days. The report of the Committee on Corporate Governance (the Hampel Committee) recommended as a matter of good practice that listed companies should give at least 20 working days' notice of their AGM, to enable institutional shareholders to consult their clients (report, paragraph 5.24). It has also been drawn to our attention that a longer notice period may help institutional shareholders who hold shares through custodians to communicate voting instructions to the custodian and ensure that these are acted on. This could help to increase the proportion of shares voted from the present disappointing levels. However, against that, the introduction of electronic communication should make it easier to conduct the necessary communications within the present notice period.

Question 23 Do you think that the minimum notice period for the AGM should be changed from the present 21 calendar days to 20 working days, or in any other way?

Question 24 If so, should the change be restricted to listed companies?

Content of Meeting Notice

41. CA1985, section 366(1) requires that the notice of an AGM shall specify the meeting as the AGM. That apart, there are no statutory requirements for the content of a meeting notice.

Table A 1985, article 38, provides that a meeting notice shall specify the time and place of the

meeting and the general nature of the business to be transacted. And at Common Law sufficient notice is required of the nature of the business to enable a member to decide whether to attend.

It seems desirable that the notice should be required to also include:

- the text of resolutions proposed by directors and shareholders. (This is already the case with extraordinary and special resolutions. But these are often detailed and expressed in technical language difficult for the layman to understand); and
- a explanation which appears sufficient to the proposers to explain the motivation of any proposed resolution. (This would include relevant biographical details in the case or resolutions to elect or re-elect directors. This point is covered in the Combined Code (A.6.2).)

Question 25 Do you think that the minimum information about proposed resolutions on the AGM agenda, to be given in the meeting notice, should be prescribed?

Question 26 Should the minimum information about proposed resolutions in the AGM agenda include the text of the resolution and a brief explanation of its motivation, including relevant biographical details of a director proposed for election or re-election?

Question 27 Should any other information be prescribed for inclusion in the AGM agenda?

Question 28 Should prescription be by statute or as a matter of best practice, eg by inclusion in the Combined Code?

Question 29 If it is to be by statute, what should be the sanction for failure to comply?

Question 30 Would you answer questions 25-29 differently for public and private companies?

Conduct of General Meetings

42. Matters such as the quorum for a meeting, the arrangements for a substitute chairman where one is needed, and the right to propose the adjournment are currently left to the Articles. It has been suggested that to confine the right to propose the adjournment to the chairman could be useful to block one tactic of disruptive elements at the AGM. It may well be open to companies now to include such a provision in their Articles.

Question 31 **Should the statute confirm the right of a private or public company, by its Articles, to give the chairman of the general meeting the sole right to propose the adjournment?**

Voting at the AGM

43. In its recent report of its Committee of Inquiry into Vote Execution, the National Association of Pension Funds (NAPF) found that levels of voting at AGMs of major plcs remained at around 40%; acceptance by institutions of voting as a fiduciary responsibility, together with closer co-ordination between institutions and custodians and the introduction of electronic voting could improve voting levels; but the legal framework relating to voting at general meetings was also an inhibiting factor.

44. In most respects, the procedure for voting at general meetings is provided for in the company's Articles. Table A 1985, articles 46 and 54 provide that voting shall be by show of hands (one vote for each shareholder actually present or represented in the case of a corporate shareholder, but not proxies unless the articles so provide) unless a poll is demanded (one share, one vote) before or after the declaration of the result. Many companies follow this. But it is open to a company to provide that all votes shall be by poll, and some do. CA1985 section 373 sets out the rights of members to demand a poll. The only questions on which the Articles can exclude the right to demand a poll are the election of the chairman and the adjournment of the meeting (section 373(1)(a)). A demand for a poll cannot be made ineffective if it is made by at least 5 members with the right to vote or by members representing at least 10% of the total voting rights (section 373(1)(b)). It is commonly provided in Articles that a poll (other than on

the election of the chairman or on the adjournment) may be fixed by the chairman to take place up to 30 days after the poll is demanded, and the meeting is not closed until the poll is taken (Table A 1985, article 49).

45. Voting by show of hands has the merit of enabling uncontroversial resolutions to be disposed of quickly, and the right of the chairman on the one hand and a relatively small number of members on the other to demand a poll is a safeguard against a decision being taken against the wish of holders of a majority of the shares. But given the unrepresentative nature of the attendance at AGMs of large companies, voting by show of hands seems anomalous – particularly so if Table A applies, and proxies have no votes (see articles 54 and 58). The case for retaining voting by a show of hands is weakest for listed companies.

Question 32 Do you think that the law should require decisions on all business at the AGM of a listed company to be taken by poll, one share one vote, thus abolishing voting by show of hands?

46. A possible way both of rationalising the voting procedure and adding substance to the meeting itself might be to defer voting until after the meeting – beginning at the end of the meeting and ending some time later. (An interval of two weeks might be appropriate.) Shareholders attending the meeting could reflect before voting; those unable to attend would not lodge proxies before the meeting but would vote themselves afterwards. Boards with close and harmonious relations with major shareholders would, as now, be confident of support in the vote; but in some cases boards would not go into the meeting knowing that they already had the votes to achieve their desired outcome. This could give the meeting a more real “democratic” significance, leaving open the possibility, at least, that the course of the debate might influence the outcome. In particular, institutions could assess the directors’ performance at the meeting, and any media or public reaction, before casting their vote. Votes might be cast either at the place(s) of the meeting at the conclusion of the business, or by post or, if authorised by the constitution, and agreed by the members, by telephone or electronically. (It would however be necessary to provide for voting at the meeting on procedural matters.) Voting by proxy would still be permitted, but would in practice be replaced by postal or electronic voting after the meeting.

Question 33 Do you see advantage in the suggestion that, in the case of listed companies, voting should commence at the end of the AGM and be concluded at a later date specified at the AGM?

Question 34 If so, do you think that this should be required by statute or be prescribed as good practice?

Question 35 How long a period after the AGM should be allowed for voting?

47. One particular problem with deferred voting is that of amendments. It is certainly an unsatisfactory feature of current procedure that meetings can be delayed for long periods while a poll is taken on an amendment. On the other hand, to invite shareholders to vote, after a meeting, on a resolution to amend the original motion and then on a conditional basis, on both the amended and the unamended resolution may be to invite confusion. The solution may be to provide that no amendment shall be considered unless notice of the intention to propose it has been given to the company a reasonable period before the meeting with the support of, say, 10% of the share capital. The proposed amendment could then be discussed at the meeting and the law could provide for the voting to take place in relation to two alternative resolutions – amended and unamended. It might also be necessary to permit the chairman of the meeting to put forward minor amendments, such as those necessary to correct errors and to conform the resolution to changed circumstance.

Question 36 Do you think that amendments can be adequately accommodated in a deferred voting system?

48. At present, there need be no way of distinguishing between a failure to vote on a resolution and a considered abstention. It has been suggested that the inclusion on the ballot paper for company resolutions of abstention as a third option would provide shareholders, and particularly institutions, with a means of demonstrating their disquiet with a proposal without having to face up to the implication for the value of their investment if it were defeated.

Question 37 Do you think that ballot papers for company resolutions should include an option to register an abstention?

Question 38 **If so, should this be a statutory obligation or a matter of good practice?**

Shareholder Resolutions

49. Section 376 provides that the company must circulate a resolution proposed by shareholders representing at least 5% of the voting rights or by at least 100 shareholders with shares on which at least £100 on average has been paid up. Circulation is at the shareholders' expense. Following the DTI consultation on the subject, Ministers approved the following proposed modifications. Shareholder resolutions would have to be circulated by the directors free of charge, if they were:

- a) Received by a date specified by the directors as reasonably necessary to enable them to be included in the annual report mailing.
- b) Signed by members representing at least 5% of voting rights (as now) or by at least 100 members with an average holding of a market value of at least £500.

Companies could refuse to circulate resolutions repetitious of others to be considered at the same meeting or which had been defeated within the previous five years.

Question 39 **Do you agree with the proposals outlined in paragraph 49 to make it easier for shareholder resolutions to be put at AGMs?**

Question 40 **Should directors be allowed to reject shareholder resolutions on other grounds – eg that they are vexatious, defamatory, offensive, or trivial?**

Question 41 **Would you answer questions 39 and 40 differently for public and private companies?**

Rights of Proxies and Corporate Representatives

50. CA 1985 section 372 provides that a proxy may vote on a poll and may speak at a meeting of a private company; but he may not speak at a meeting of a public company, nor vote on a show of hands at either a public or a private company meeting, unless permitted to do so by the Articles. It also provides that, unless otherwise provided in the Articles, each member of a private company may appoint only one proxy to attend and vote on his behalf. Following the DTI consultation on the subject, Ministers have approved the following proposed modifications. Section 372 would be amended:

- a) to require proxies to be permitted to speak at meetings of public as well as of private companies, and to vote on a show of hands at either; and
- b) to require all companies to permit a member to appoint a proxy for each beneficial holding at a given meeting, thus ensuring that where a nominee or trustee member has beneficial holders who wish to vote in different ways, their wishes can be accommodated.

(It should be noted a) that pressure groups could take advantage of these relaxations – see paragraph 21 above; and b) that if the suggestion is adopted that voting should take place after the meeting (see paragraph 46 above), the giving or proxies would be likely to fall into disuse.)

Question 42 Do you support the proposals outlined in paragraph 50 for relaxing present statutory restrictions on the appointment of proxies and their right to participate in general meetings of both private and public companies?

Extraordinary and Special Resolutions

51. An extraordinary resolution is a resolution which must be passed by a 75% majority at a meeting of which notice is given specifying the resolution as an extraordinary resolution, and a special resolution is a resolution which must be passed by a 75% majority at a meeting of which at least 21 days' notice is given specifying the resolution as a special resolution (CA1985 section 378). Extraordinary resolutions are required in the following cases:

- for a variation of class rights in certain cases (section 125(2));
- under the Insolvency Act, in connection with various aspects of winding up (eg voluntary winding up by reason of inability to meet liabilities – section 84(1)(c)); and
- where the Articles so require and the Act does not require a special or elective resolution.

52. It is desirable to preserve a category of resolutions requiring an enhanced majority for certain very important decisions, and this is in any case necessary to comply with requirements of the Second Directive (on withdrawal of pre-emption rights and reduction of capital). In the case of capital reduction (Article 30 of the Directive) there is also a requirement that the meeting notice should state the purpose of the resolution. We doubt however whether it is necessary to preserve the extraordinary resolution as a separate category, given that the only difference is that it may be passed at an EGM with 14 days' notice, and that the notice required by a special resolution may be reduced with the agreement of holders of 95% of the voting rights. The Jenkins Committee recommended the abolition of extraordinary resolutions in 1962 (Cmnd 1749, paragraph 461).

Question 43 Do you agree with the proposal that, for both private and public companies, the special resolution should be retained but that the extraordinary resolution should be dropped as a separate category, and requirements for an extraordinary resolution replaced by requirements for a special resolution?

EGMs

53. An extraordinary general meeting (EGM) is defined as any general meeting which is not called as an AGM (Table A 1985, article 36). An EGM may be called either:

- a) by the directors on their own initiative (Table A 1985); or
- b) by the directors on a requisition by members holding at least 10% of voting rights (section 368).

It is suggested that the above proposals for AGMs should also apply to EGMs with the following variations.

Timing

54. An EGM is typically called to conduct specific business which will not wait for the next AGM. There are therefore no rules about when an EGM may be held. It is suggested that this should remain the position.

Notice Period

55. At present, the statutory minimum notice period for an EGM is 7 (calendar) days for an unlimited company and 14 days for a company of any other type. However, if it is proposed to pass a special resolution, the minimum notice period is 21 days. Table A also includes a 21 day notice period for a resolution to appoint a director.

56. If it is decided to move to a minimum notice period of 20 working days for AGMs, it would be logical to do the same for EGMs at which it is proposed to pass a special resolution. In that event, a minimum notice period for other EGMs might be 10 working days (5 for an unlimited company).

Question 44 Do you think that the minimum notice period for an EGM should be changed to 10 working days for a limited company and 5 working days for an unlimited company (except where it was proposed to pass a special resolution in which case the minimum notice period for an AGM would apply)?

Question 45 If so, should the change be restricted to listed companies?

Voting

57. It is for consideration whether, if voting after the meeting is introduced for AGMs, this should also extend to EGMs. The argument of improved accountability applies with equal force

to EGMs; but the urgency of the business at many EGMs may require decisions on the spot.

Question 46 Do you think that, if voting after the meeting is prescribed for AGMs of listed companies, it should also be prescribed for EGMs?

Question 47 If so, what minimum period for registering votes should be prescribed, if any?

Shareholder Resolutions

58. It is suggested that the right of shareholders to have their resolutions circulated should not extend to EGMs, apart of course from the case of an EGM requisitioned by shareholders, where it should extend only to the objects stated in the requisition.

Question 48 Do you agree that the right of shareholders to have their resolutions circulated at AGMs should not extend to EGMs of private or public companies (except where the EGM has been requisitioned by the shareholders, in which case only those resolutions relevant to the objects of the requisition would be allowed)?

Right of Members to Requisition the Directors to Call an EGM

59. Under CA1985 section 368 if members holding at least 10% of the voting rights requisition the directors to call an EGM with stated objects, the directors must do so. If the directors fail to do so within 21 days, the requisitionists may do so themselves and recover reasonable expenses from the company. There are safeguards to prevent the directors from calling the meeting for a distant date in the future. It is suggested that the substance of these provisions should be retained.

Question 49 Do you agree that the right of members to requisition an EGM should be retained?

Question 50 If so, is the present threshold of 10% of voting rights appropriate?

Question 51 **Would you like to see any other changes in the provisions of section 368?**

Electronic Transmission of Documents

60. The Department has already issued for consultation proposals that a bill to promote electronic commerce should include provisions which would enable companies, where the shareholder agreed, a) to transmit to him by electronic means information required by the Companies Act 1985 or b) to place such information on a website or electronic forum, notifying him that access was available. Such provisions would cover:

- annual accounts;
- directors' report;
- notices of meetings; and
- proxy forms.

The consultation letter also proposes a provision enabling a shareholder, if he wishes, to return to the company an appointment of proxy instrument by electronic means, as an alternative to a hard copy instrument, where the company decides to permit this. The Department is now considering the response to these proposals. However, if voting takes place after the AGM, or if public companies are permitted to dispense with the AGM altogether, it would seem appropriate that provision for electronic transmission should extend to the voting itself. Even without these changes, some companies may wish to offer electronic voting as an option.

Question 52 **Should enabling provisions for electronic transmission be extended to cover electronic voting by members of companies?**

Improved Corporate Communication With All Shareholders

61. It has already been noted (paragraph 20 above) that institutional holders of shares of listed plcs benefit from fuller information about the company's performance and prospects than do individual shareholders. The Hampel Committee were concerned about this. In paragraph 5.24 of their report, the Committee said:

“ We also consider that, as far as is practicable, private individuals should have access to the same information from companies as institutional shareholders. In time, as it becomes possible to communicate with shareholders through electronic media, companies will be able to make their presentations to institutional investors available to a wider audience more readily. For the time being, companies who value links with private shareholders cultivate them by, for example, arranging briefings for private client brokers and regional shareholder seminars. We commend such initiatives.”

62. We consider that the time is now ripe to develop these ideas into more concrete proposals. For example, listed plcs with a widely dispersed shareholding might hold a series of meetings in different locations, open to all shareholders, in the period between the publication of the annual report and accounts and the commencement of voting on the AGM resolutions. Only the last meeting, at the conclusion of which voting began, would be the statutory AGM; but the agenda for the meetings could be the same, and the separation of the voting procedure from the AGM would in practice give almost equal rights to those attending any of the meetings.

63. Electronic communication has developed rapidly even over the last year or two, and many companies are taking advantage of this to communicate with their shareholders through company websites. It is now feasible for companies to supplement the shareholder communications required by statute by placing on such websites much of the information now available only to institutions and analysts, thus reducing the present disparity of information, at least for those individual shareholders able to receive electronic communications.

Question 53 Do you agree that, for listed companies, improvements in shareholder communication outside the AGM should be encouraged, particularly through additional shareholder meetings and the use of company websites?

Question 54 Do you agree that improvements should be sought through the development of best practice rather than through new statutory provisions for the purpose?

Question 55 If rules should take a form other than statutory provision, how should they be promulgated?

A Power to Delegate the Making of Rules Relating to Company General Meetings

64. It may be that answers to some of the above questions will be different for different categories of company, eg private and public companies; listed and unlisted companies; companies in particular sectors. One option would be to give the Secretary of State a general power to delegate the making of rules relating to company general meetings to a regulatory body. This might enable rules to be tailored more closely to the requirements of particular classes of company or particular sectors, and for the rules to be changed more quickly and conveniently in response to changing circumstances. The bodies to whom such a power might be delegated might include eg the Financial Services Authority (FSA), the Financial Reporting Council (FRC) or the London Stock Exchange.

Question 56 Do you think that it would be helpful for the Secretary of State to have a power to delegate to another regulatory body the function of making rules relating to company general meetings and applicable to a particular category of companies regulated by that body?

Conclusion

65. The above suggestions are not intended as an exhaustive list of possible improvements in the law and practice relating to company general meetings. We would welcome any other suggestions for making general meetings more effective or for achieving their objectives by other means.

Question 57 Do you have any proposals of your own for improving the company general meeting, or any equivalent arrangements, as a vehicle for taking decisions on resolutions, for informing the members of their company's performance and prospects, and for enabling them to hold the directors to account?

Question 58 If so, do your proposals apply to private companies, public companies or both?

Summary of Questions for

Consultation

1. Do you think that the right to dispense with the AGM should be extended to public companies?
2. If so, do you think that it would be necessary for the law to prescribe procedures and a timetable to ensure that the purposes of information, debate, accountability and decision taking now served by the AGM are satisfactorily met by other means?
3. Should it be possible for a company to dispense with the AGM only by unanimity, or with the support of holders of 90% of the votes, or by some other majority?
4. Should the requirement to hold an AGM be restored if 10%, or some other minority proportion, of holders of votes so wish?
5. Do you think that a company should be permitted to hold a general meeting at an unlimited number of locations, provided that real time, two way communication is available between all participants?
6. If so, should audio-visual communication be required, or should audio communication suffice?
7. Should the law be sufficiently flexible to recognise any form of multilateral real time communication as a “meeting”?
8. If so, is statutory provision needed to ensure this flexibility?
9. Should a decision to hold an AGM by some form of remote communication require shareholder approval?
10. (a) If so, should this be by ordinary or special resolution?

(b) How might provision for a quorum for a dispersed meeting be formulated?
11. Would you answer questions 5-10 differently for public and private companies?

12. Do you think that a company should be permitted to hold a “virtual” general meeting, substituting interactive communication through an electronic bulletin board for face to face contact?
13. If so, should this require unanimous agreement of the members or should some lesser requirement be imposed?
14. Would you answer questions 12 and 13 differently for public and private companies?
15. Do you agree that the present statutory requirements on the timing of the AGM (CA1985, section 366(2) and (3)) should be replaced, for both private and public companies, by a requirement to hold the AGM within the period allowed for the laying of the annual report and accounts?
16. If so, should there be an additional requirement for a newly formed company to hold its first AGM within 12 months of incorporation, regardless of the absence of statutory accounts?
17. Do you think that the items of recurring business referred to in paragraph 35 should be required by statute to be included in the agenda for the AGM of both private and public companies?
18. Do you think that it is necessary to retain provision in the statute relating to the fixing of auditors’ remuneration?
19. If so, should the fixing of the remuneration, or the determination of the manner in which it is to be fixed, be an obligatory item on the AGM agenda?
20. Do you agree that the statute should continue to require the items of business listed in paragraph 37 to be transacted in general meeting by public companies but without specifying the AGM?
21. Do you think that any other items, or categories of item, should be prescribed for inclusion on the AGM agenda?

22. Do you agree that the statute should not be amended to permit either private or public companies to restrict attendance of members or their representatives at general meetings by reference to the size of their shareholding?
23. Do you think that the minimum notice period for the AGM should be changed from the present 21 calendar days to 20 working days, or in any other way?
24. If so, should the change be restricted to listed companies?
25. Do you think that the minimum information about proposed resolutions on the AGM agenda, to be given in the meeting notice, should be prescribed?
26. Should the minimum information about proposed resolutions on the AGM agenda include the text of the resolution and a brief explanation of its motivation, including relevant biographical details of a director proposed for election or re-election?
27. Should any other information be prescribed for inclusion in the AGM agenda?
28. Should prescription be by statute or as a matter of best practice, eg by inclusion in the Combined Code?
29. If it is to be by statute, what should be the sanction for failure to comply?
30. Would you answer questions 25-29 differently for public and private companies?
31. Should the statute confirm the right of a private or public company, by its Articles, to give the chairman of the general meeting the sole right to propose the adjournment?
32. Do you think that the law should require decisions on all business at the AGM of a listed company to be taken by poll, one share one vote, thus abolishing voting by show of hands?
33. Do you see advantage in the suggestion that, in the case of listed companies, voting should commence at the end of the AGM and be concluded at a later date specified at the AGM?

34. If so, do you think that this should be required by statute or be prescribed as good practice?
35. How long a period after the AGM should be allowed for voting?
36. Do you think that amendments can be adequately accommodated in a deferred voting system?
37. Do you think that ballot papers for company resolutions should include an option to register an abstention?
38. If so, should this be a statutory obligation or a matter of good practice?
39. Do you agree with the proposals outlined in paragraph 49 to make it easier for shareholder resolutions to be put at AGMs?
40. Should directors be allowed to reject shareholder resolutions on other grounds – eg that they are vexatious, defamatory, offensive, or trivial
41. Would you answer questions 39 and 40 differently for public and private companies?
42. Do you support the proposals outlined in paragraph 50 for relaxing present statutory restrictions on the appointment of proxies and their right to participate in general meetings of both private and public companies?
43. Do you agree with the proposal that, for both private and public companies, the special resolution should be retained but that the extraordinary resolution should be dropped as a separate category, and requirements for an extraordinary resolution replaced by requirements for a special resolution?
44. Do you think that the minimum notice period for an EGM should be changed to 10 working days for a limited company and 5 working days for an unlimited company (except where it was proposed to pass a special resolution in which case the minimum notice period for an AGM would apply)?

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55. If rules should take a form other than statutory provision, how should they be promulgated?
56. Do you think that it would be helpful for the Secretary of State to have a power to delegate to another regulatory body the function of making rules relating to company general meetings and applicable to a particular category of companies regulated by that body?

57. Do you have any proposals of your own for improving the company general meeting, or any equivalent arrangements, as a vehicle for taking decisions on resolutions, for informing the members of their company's performance and prospects, and for enabling them to hold the directors to account?
58. If so, do your proposals apply to private companies, public companies or both?

Working Group F – Corporate Governance: Shareholders

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Oliver Barnes – Travers Smith Braithwaite

Charlotte Black – Brewin Dolphin Bell Lawrie Ltd

Gavin Downs – Lloyds TSB Registrars

Judith Hanratty – BP Amoco plc

Guy Jubb – Standard Life Investments Ltd

Professor John Kay – London Economics*

Simon Laffin – Safeway plc

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