# Clauses in relation to the right to vote in shareholders' agreements

In our previous "MNKS booklets" (which now become the "PwC Legal booklets") dedicated to shareholders' agreements[1], we briefly described the main clauses designed to restrict the transferability of shares of a company, ensure the maintenance of the structure of its share capital and facilitate the withdrawal of certain of its shareholders in certain circumstances.

We also recalled that, in addition to these clauses relating to the company's capital, there was another fundamental category of clauses present in almost all shareholders' agreements: clauses relating to the exercise of power within the company, which are themselves divided schematically into two subcategories, namely:

- on the one hand, clauses tending to personalize the functioning of the organs in the company; and
- on the other hand, clauses tending to control the exercise by certain shareholders of their voting rights or their influence over the company.

This fifth PwC Legal booklet dedicated to shareholders' agreements will only focus on this last subcategory of clauses, which directly or indirectly affect the exercise by the shareholders of their political rights in a company governed by Luxembourg law. As always, it will only deal with these clauses in public limited liability companies and private limited liability companies.

The main clauses relating to voting rights under Luxembourg law are voting commitments[2], voting power limitation clauses, irrevocable voting mandate clauses, double or plural voting clauses and voting rights transfer clauses.

**Voting commitments clauses** are clauses by which a shareholder of a company undertakes to vote in a specific manner or also, according to some authors, to abstain from voting. Until the entry into force of the law of 10 August 2016 reforming the law of 10 August 1915 on commercial companies (together the "**LCC**"), no legal provision directly established the validity of such clauses. The validity of such clauses was therefore discussed in a relatively long and lively way in doctrine, before being progressively confirmed by case law under the condition that these voting commitments (a) do not totally and permanently eliminate the right of the shareholder to participate in social deliberations, (b) are not contrary to the corporate interest and (c) are free from any element of fraud.

Today theoretically these debates no longer exist, since the above mentioned law of 10 August 2016 now expressly recognises that "*the exercise of voting rights may be subject to agreements between* shareholders[3]". However, the freedom to conclude such voting commitments has not become absolute. Indeed, voting commitments (a) which are contrary to the provisions of the LCC or to the corporate interest, (b) by which a shareholder undertakes to vote in accordance with the instructions given by the company, by a subsidiary or by one of the organs of these companies or (c) by which a shareholder commits himself to approve proposals from the organs of the company or the subsidiaries, remain void and lead to the invalidity of the taken decisions unless they have had no impact on the result of the vote that has taken place.

It seems that the conditions of duration, scope of the object of the voting commitment and compliance of the object at any time with the corporate interest, which previously prevailed for the validity of voting commitments, have been abandoned (although it is perhaps still a little too early to dare to state this without reservation). For example, a practitioner who does not concludes a fixed-term voting

[1] This term naturally refers to any agreement concluded between "shareholders" or "partners" of a company.
[2] Also referred to in doctrine as "*voting pacts*" or "*voting agreements*".
[3] Articles 450-2 and 710-20 of the LCC.

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commitment but an indefinite commitment will at least keep in mind that any indefinite commitment can in principle always be terminated by giving reasonable notice...

**Voting power limitation clauses** are clauses by which one or more shareholders of a company undertake to limit the number of votes they have at the general meeting. They generally tend to "*make decision-making more democratic by balancing the importance of capital and reducing the censorial aspect of the vote"*.[4,5] In some cases they can also be construed as a defense mechanism against hostile takeover bids.[6]

Perfectly valid in public limited liability companies governed by Belgian law[7] subject to certain conditions[8], the validity of the clauses limiting the voting power[9] seems much more uncertain (not to say totally excluded) in the Grand Duchy of Luxembourg. Indeed, although neither the legislator nor case law have, to our knowledge, expressly taken a decision on the validity of such clauses, the doctrine currently seems to consider them almost unanimously as unlawful because of their conflict with section 450-1 (5) of the LCC. The doctrine contrary to these clauses can also, since the discussions concerning the bill that led to the last reform of the LCC, rely on the parliamentary proceedings of the bill 5730, which had expressly considered introducing a possibility of limiting the right to vote in companies governed by Luxembourg law, before this possibility was finally withdrawn following a government amendment that considered the introduction of a limitation on voting power (even optional) inappropriate.

However, some may find this governmental opinion on the voting power limitation clauses somewhat surprising since, at the same time, the law of 10 August 2016 expressly allowed, both in public limited liability companies and in private limited liability companies, extremely broad waivers of voting rights...

**Irrevocable voting mandate clauses** are, as their name indicates, clauses by which a shareholder gives an irrevocable mandate to another shareholder or, where applicable, to a third party to exercise all or part of his voting rights. The lawfulness of such clauses is discussed at length in doctrine. Mainly with regard to article 2004 of the Civil Code, which provides in particular that "*the principal may revoke his power of attorney at any time […]* ". However, today the majority of the doctrine seems to consider that such clauses are valid, on the grounds that article 2004 of the Civil Code is not of public order (except in certain specific cases). Paradoxically, while asserting the validity of these clauses, part of the same doctrine points out however, that their only effect is to impose an obligation of liability on the principal in the event of revocation. In other words, as one author summarizes it, "*even if it is irrevocable, a voting mandate can always be revoked*". The jurist will certainly understand the subtle difference that makes some authors[10] say that "*irrevocability is a reality [...] because it has a price*". But what about the shareholder seeking a pragmatic and effective solution to enforce the agreements entered into by his co-contractors under a shareholder agreement?

Luxembourg case law, albeit limited, also seems rather favorable to recognize the lawfulness of irrevocable mandates granted by one shareholder to another shareholder or to a third party.[11] To maximize the chances of having their effects recognized, the practitioner will be cautious to ensure that they are limited in time and/or in the decisions concerned, as everyone seems to at least agree on the fact that a mandate of unlimited duration would be void. It will also consider, as far as possible, presenting its irrevocable mandate clause as a mandate of common interest.

**Plural voting clauses** are clauses that confer more than one vote to the shareholder who holds one share, generally with the general objective of ensuring the continuity of the management or direction of the concerned company. In essence, they lead to a derogation from the principle "*one share - one vote*"

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[4] Yves De Cordt, « Le Droit de vote », in Le Statut des Actionnaires (SA, SPRL, SC) – Questions spéciales, CUP, vol. 89, Bruxelles, Larcier, 2006, page 27.
[5] By succeeding, if necessary to replace the principle "*one share one vote*" by the principle "*one shareholder one vote*".
[6] By capping shareholders' voting rights to ensure control of the historical shareholders.
[7] Article 544 of the Belgian company code provides that the articles of association can "limitate the number of votes that each shareholder has at the general meetings, provided that that limitation is imposed on all shareholders regardless of the number of shares for which they vote".
[8] Such as their insertion in the company's articles of association, their application to all shareholders and their application to all securities conferring voting rights.
[9] That the Luxembourgish doctrine treating the subject generally classifies in "*capping clauses*" and "*adjustment clauses*".
[10] P. SANTER et L. GLODEN, L'irrévocabilité du mandat : Mythe ou réalité, in Le Bicentenaire du Code civil, p. 412.
[11] See in this sense the references cited by : P. SANTER et L. GLODEN, L'irrévocabilité du mandat : Mythe ou réalité, in Le Bicentenaire du Code civil, p. 394 et seq.

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foreseen in article 450-1 of the LCC in the case of public limited liability companies and article 710-19 of the LCC in the case of private limited liability companies. Taking into account the existence of this principle - considered to be a matter of public order - plural voting clauses are unanimously judged to be unlawful under Luxembourg law. This is a pity, in a context of competition of company law, when we know that the reform of the Belgian company code should from 2019 expressly allow these clauses in unlisted public limited liability companies and private limited liability companies. But let us recall at least, that fortunately the majority of the doctrine seems to agree that if such clauses are not valid when they concern shares or corporate units, they are *a priori* valid when they concern beneficiary shares.

**Double voting clauses** have the more specific objective of trying to ensure a stable shareholding structure for a company, by conferring a double voting right on the shares held by certain shareholders being for a long time in the company. These clauses are intended to encourage long-term investment. Similar to plural voting clauses, these clauses lead to an obvious derogation from the principle "*one share - one vote*". However, the bill 5730 had proposed to introduce the express possibility to foresee double voting rights by the articles of association or by an extraordinary general meeting of a company for fully paid-up shares for which proof of registration in registered form for at least two years in the name of the same shareholder had been provided. Unfortunately, this proposal was not adopted in the end, as the Council of State (*Conseil d'Etat*) opposed it on the grounds that such a double voting right would conflict with a general principle of company law according to which, in companies with share capital, voting rights are attached to the share and not to the person of the shareholder. This objection is certainly respectable but clearly does not seem to have been raised in Belgium, which should also expressly confirm the validity of these clauses under certain conditions as from 2019 (if its reform bill of the company code is adopted).

Finally, the **voting rights transfer clauses** tend to allow shareholders to transfer their voting rights independently of the title. The validity of these clauses is controversial. Part of the doctrine considers that such clauses would be unlawful on the ground essentially that the right to vote would be a prerogative of public order attached to the status of the shareholder and therefore a non-transferable prerogative. Authors who share this view argue that the right to vote is an adjunct to the social right and that it guarantees the shareholder the compensation for the risk he takes as a shareholder. They consider that the non-transferability is justified by the protection of the shareholder, who in the event of a transfer would lose the guarantee of the protection of his interests.

Another part of the doctrine considers *a contrario* that these clauses would be valid. According to this doctrine, there is no text prohibiting the transfer of the voting right, so that it would be like the other rights attached to the share a right specific to the shareholder who could freely dispose of it. This part of the doctrine can base its position and support its thesis on the latest reform of the LCC. Indeed, with the reform of the LCC in 2016, the legislator has largely weakened the essential and sacred nature of the right to vote. In particular, by authorising non-voting shares without the need to attach preferential financial rights, the suspension by the management body of the voting rights of certain defaulting shareholders or the waiver by shareholders of all or part of their voting rights.

Unfortunately, however, neither the legislator nor case law have yet finalized the debate on the validity of this type of clause.


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