

Finance Council 2021 - Proposed Constitutional Amendments

Introduction

This paper provides background detail and explanation in relation to the various constitutional amendments to be proposed at April 2021 Finance Council. It deals, first, with a Governance Committee proposal in relation to the preparation of the September 2021 voting register in light of the downturn in chess activity in the last year; secondly, following a consultation process with members of Council, with a proposal of the Board that ECF-rated online games should give rise to voting rights at Council; and thirdly with a proposal generated by the Governance Committee to reflect the consultation it was asked to undertake with members of Council in relation to directors' terms in office.

Voting register

If the voting register to be prepared in September 2021, for use at general meetings in the twelve month period from October 2021, were to be prepared in accordance with the existing provisions of the articles of association it would lead to a voting register where leagues, congresses and other organisations which ordinarily derive votes from the submission of games for rating having substantially fewer votes than would ordinarily be the case; this would reflect the almost complete cessation of over-the-board ("OTB") chess as a result of Covid-19. Correspondingly, members of Council whose voting rights do not depend on the numbers of games submitted for rating – Direct Members' Representatives, present and past officers etc – would be disproportionately over-represented in comparison with normal times.

So as to redress the effect of Covid-19, it is proposed that the articles of association be amended such that the September 2021 register be prepared on the basis that each member of Council will be entitled to votes equal to the highest of:

- (a) the votes it would have if no amendment were made to the articles of association;
- (b) the votes it has in the September 2020 voting register;
- (c) the votes it has in the September 2019 voting register.

The reason for the use of the September 2019 voting register is that the September 2020 register was itself distorted by the impact of Covid-19 on the level of chess activity from mid-March 2020 through to June 2020.

As the proposal constitutes an amendment to the articles of association, a special resolution is needed. This requires 75% or more of votes cast to be in favour if the resolution is to be passed. The Governance Committee is firmly of the view that the proposal should be supported as, without it, the September 2021 voting register would not properly reflect a customary distribution of votes at Council.

Directors' terms in office

Background

The issue of how many consecutive terms a Director should be able to serve in the same post arose in August 2020 after the opening of the period for nominations for elections at the 2020 AGM. This was followed by considerable discussion between Directors, the Chair of Council and the Chair of the Governance Committee as to how many consecutive terms should be permitted. In the absence of any agreement as to what constitutional changes (if any) were needed, a consensus was reached that the Governance Committee in conjunction with the Chair of Council would consult with Members of Council and table a formal proposal at Finance Council in 2021.

This process was put on hold pending consideration by Council at the 2020 AGM of a resolution proposed by the Northern Counties Chess Union to prevent a Director from standing for re-election to a post after being in that post for two consecutive terms. The resolution fell well short of the necessary 75% majority. The undertaking of the proposed consultation with Council members and the proposed resolution to Finance Council are the continuation of the original process.

Background - the Pearce Report

Before the implementation of constitutional reform in 2016 every Director was required to stand for election/re-election at every AGM and there was no limit on the number of terms a Director could serve. The recommendations of the report produced in 2015 by the Independent Constitutional and Governance Review Commission (the "Pearce Report") included recommendations that "Directors should serve for an initial period of three years but may serve for a further period of 3 years" and that "to help continuity and stability, Directors' three year terms should be phased in so that, as far as possible, each AGM should have only 3 or 4 elections or re-elections". So, the Pearce Report appears to contemplate a phasing-in period followed by two terms of three years each.

Background - the current position

In working out what proposals would best amend the then existing constitutional provisions, the Pearce implementation committee was faced with having to balance the contradictory requirements of, on the one hand, the need for renewal, and, on the other, not prematurely forcing the departure from office of the most suitable candidate.

This led to constitutional reform with Article 58 obliging the Directors to maintain a rota with a three year cycle for each board position, Article 59 providing "At each Annual General Meeting held in or after 2017 Directors shall retire in accordance with the Board Rota and article 60 providing "Any Director who retires at an Annual General Meeting pursuant to Article 59 shall be eligible for re-election at such Annual General Meeting". The amendments to the Directors and Officers Responsibilities Regulations (the "Regulations") included the insertion of a rota (with each post being given an initial term of one year, two years or three years to ensure an even spread of elections each year) and of the

following wording: “Subsequent terms shall be 3 years for all posts”. And then in the following paragraph: “It is in the interest of board renewal that no individual should serve continuously in the same post for more than two terms commencing from the 2016 elections. There is therefore a strong presumption that service in the same post will be limited to not more than 2 terms thereafter, subject to availability of alternative candidates acceptable to Council”.

Background – the current position – points to note

It should be noted in relation to the current position that the Articles of Association take priority over the Regulations as a matter of law; Article 86(2) confirms this by expressly stating that “no Bye-Law or Regulation shall be inconsistent with, or shall affect or repeal anything contained in, the Memorandum or Articles of Association of the Company”. So, in circumstances where a Director has, since 2016, served two terms in the same post and there is an alternative candidate acceptable to Council – these being the circumstances where the strong presumption in the Regulations would suggest a Director should not serve a further term – the legal position is that the Director can stand for a further term or terms; Article 60 takes priority. The strong presumption in the Regulations might be regarded as having a function of being a reminder of the importance of board renewal, but it does not operate as a legal constraint. There is currently no binding limit on how many terms may be served.

It should also be noted in relation to the current position that, although a normal term of office will last three years, there are circumstances in which it will be shorter. The first example of such circumstances arises because the 2016 changes gave some of the Directors an initial term of one year or two years rather than three years (see above). This will cease to be relevant after the 2021 AGM. The second example, and this will remain relevant after 2021, arises when a Director leaves office in the first two years of the cycle of three years applicable to a post. The replacement Director is then required to be elected at the next Annual General Meeting and will then be due to stand for election again one or two years later (a “Stub Period”) rather than three years later.

A final point to note in relation to the presumption in the Regulations is that when it refers to a limit of no more than two terms there is ambiguity as to whether that means two terms of three years or whether it means two terms of whatever length (a term of one or two years followed by a term of three years).

Background – a wider perspective

The question of whether and, if so, to what extent a limit should be put on how long a Director is permitted to remain in office revolves around balancing the desirability of encouraging board renewal as against the risk of not being permitted to retain able incumbents. Obviously, this is not an issue unique to the ECF and, unsurprisingly, a wide range of different approaches is adopted by other bodies. To take two examples close to home, the English Bridge Union has a limit of two terms of three years each, whereas the British Go Association has no limits. Looking slightly wider afield, rules applicable to London listed companies with a premium listing provide no limits on the length of service of

executive directors but provide that a non-executive director ceases to be capable of being regarded as independent after serving for nine years.

It is difficult to draw any conclusions, whether firm or otherwise, from the practice of other bodies and it probably makes most sense to pay attention to factors particularly relevant to the ECF. These would include the ECF lacking the kind of permanent substance that would be provided by a larger number of employees and so perhaps having a greater need to avoid change than might otherwise be the case; whether in practice there have been lengthy periods in office and, if so, whether they have been damaging or beneficial; whether there is an advantage in seeking to maximise the numbers of candidates for posts.

Proposals

The consultation undertaken by the Governance Committee with members of Council accepted the view of the Governance Committee that any reform should not dismantle the rota (referred to above) which was introduced in accordance with the Pearce Report and is designed to ensure an even spread of elections over a cycle of three years; its introduction has been beneficial in terms of board stability and continuity. The consultation process also indicated a consensus that any prohibition on standing for office should only apply to standing for re-election to the same post, not standing for a different post.

As regards the key issue of limiting tenure of office, the very strong consensus of the consultation was that if limits are to be introduced then an incumbent should be allowed to serve two or three full three year terms before being precluded from standing for election. However, there was some support last year for a stricter limit and so, for the sake of completeness, a stricter option will also be put to Council.

Accordingly, the three alternative resolutions being put to Council are:

- a resolution that a director cannot stand for re-election to a post at an AGM having just occupied that post (or a substantially similar post) for a period longer than one three year term – so this would preclude standing where a director has just completed a single three year term which was immediately preceded by a period shorter than three years, whether a Stub Period (explained above) or a period where appointed by the Board to fill a casual vacancy
- a resolution that a director cannot stand for re-election to a post at an AGM having just occupied that post (or a substantially similar post) for a period of two consecutive three year terms or longer
- a resolution that a director cannot stand for re-election to a post at an AGM having just occupied that post (or a substantially similar post) for a period of three consecutive three year terms or longer

In all three cases, if no replacement were elected at the relevant AGM the board could re-appoint the relevant director to serve until the next AGM under its power to fill a casual vacancy, but the director could not stand for election for the post until the third AGM after the one at which the prohibition started to apply.

The three resolutions will be voted on simultaneously by card vote and it is open to members of Council to vote for all resolutions; against all resolutions; for one or two resolutions but against one or two of the others; or abstain in respect in respect of one or more resolutions. If more than one of the resolutions is passed by the requisite majority of 75% or more of votes cast (they are all special resolutions) then the resolution that shall come into force is the one with the highest percentage majority in favour. If resolutions are passed with an identical percentage majority in favour then the Chair of Council shall exercise a casting vote. The Chair of Council has indicated that, in his capacity of Chair of Council, he will not be voting on these resolutions other than if called upon to exercise a casting vote.

If none of the resolutions are passed, it will remain the case that there is no binding limit on how many terms a director may serve, whether in a specified post or more generally.

Votes for online games

Over the past year there has been a surge in online chess activity and a very significant amount of formal online chess is taking place, both rated and unrated. It is likely that high levels of online activity will continue even after any return to OTB chess. It is thought appropriate that the voting entitlements of members of Council should reflect not only OTB activity but also online activity.

Currently a member of Council generates one vote for every 1,000 game units ("Qualifying Games") submitted for rating, with each rated game played giving rise to two entries (one for each player) and a standardplay entry constituting one game unit and a rapidplay game constituting half a game unit. The proposal retains this for OTB games but provides that, in addition, online standardplay games will generate two entries of half a game unit each and online rapidplay games two entries of a quarter of a game unit each. There will also be a new category of blitz, with each OTB blitz game (as and when rated OTB blitz is introduced) generating two entries of a sixth of a game unit each and each online blitz game two entries of a twelfth of a game unit each. So, an online rated game will be "worth" half as much as the corresponding OTB rated game, as a step in the direction of constitutionally reflecting online activity.

To give a rough idea of the effect that implementation of the proposal might have, in the year ended 30th June 2020 there were 160,654 standardplay game units and 114,528 rapidplay game half units, so a total of 217,918 game units for the year, but this figure would probably have been between 20% and 25% higher but for the effect of Covid-19. At current levels of online activity, there would be approximately 60,000 or so online game units in a year. In February, a pretty typical month, there were 5,074 online standardplay half games (worth half a game unit each), 9,146 rapidplay half games (worth a quarter of a game unit each) and 4,164 blitz half games (worth a twelfth of a game unit each) which gives a total for the month of 5,170 online game units. (It should be remembered that not all rated games are allocated for voting purposes, but this applies to both OTB and online games.)

The proposal also caps the number of online game units generating votes in any year at 50% of the number of OTB game units generating votes. So, if in a year the number of allocated OTB game units is 300,000 and the number of allocated online game units is 200,000, the cap will apply such as to reduce 200,000 to 150,000, with each online game unit only having three-quarters of the value that it would have had but for the cap. By way of exception, the cap for the 2021 voting register will – because of the impact on Covid-19 on OTB activity – be based on the number of OTB game units in the 2019 voting register (the latest year not affected by Covid-19).

This proposal will also be by way of special resolution, so requiring a majority of 75% of votes cast in order to be passed.