

COMMISSION CONSULTATION ON FOSTERING AN APPROPRIATE REGIME FOR SHAREHOLDERS' RIGHTS

PRELIMINARY UNICE RESPONSE

I. GENERAL COMMENTS

UNICE considers that European law should set out general principles concerning shareholders' rights and decision-making, including minority protection.

However it should be left to EU Member States to implement the general principles in the light of the different types of companies (listed, open and closed companies) – which normally raise different agency cost problems – and ownership structures.

Regarding the *use of modern information technology*, UNICE is supportive of the use of modern information technology and communication technology in the area of company disclosure. Modern technology communication should be encouraged but should not be made compulsory. The right solution, however, would probably be to leave regulation of the matter to the by-laws of the companies or to self-regulatory bodies, such as national Corporate Governance Commissions.

UNICE believes that, on the subject of *communications between company and shareholders and between shareholders* a distinction should be made between the regulation of communication between company and shareholders, which needs the provision of guiding principles at primary legislation level, and the question of communication between shareholders outside the general meeting, which is a matter that should be dealt with through self-regulation

As regards *voting in absentia*, UNICE judges that shareholders of listed companies should be given the opportunity to exercise their voting rights without physically attending the meeting and that listed companies should offer their shareholders a facility for proxy voting. Once again, UNICE supports an enabling philosophy for this matter. Companies should be encouraged to do so in electronic form but should not be compelled.

The complexity of the issues dealt with in this consultation has led UNICE to submit preliminary comments and we reserve the right to voice additional comments at a later stage in light of further consideration.

II. SPECIFIC COMMENTS

SCOPE - LISTED COMPANIES (ISSUE 4)

Do interested parties agree that the scope of the forthcoming proposal on shareholders' rights should be restricted to companies whose shares are admitted to trading ('listed companies'), and that Member States could be invited to extend these facilities to non-listed companies?

UNICE agrees that the scope should be limited to listed companies.

The situation of non-listed companies is substantially different from that of listed companies. Notably, the size of non-listed companies tends to be much smaller and the impact of such requirements from a cost point of view could prove to be disproportionate regarding the objectives that such requirements would seek to achieve (the shareholder situation is different in non-listed companies). In this context we do not believe it is appropriate that Member States have the option to extend these obligations to non-listed companies.

ENTITLEMENT TO CONTROL THE VOTING RIGHTS (ISSUE 5)

UNICE could support the adoption of a directive that sets up a framework to identify the person entitled to vote at the GM.

We clearly support the objectives stated in the consultation paper: a) to create legal certainty over who controls the voting rights and b) to attribute the entitlement to control the voting rights as closely as possible to the person or entity holding the economic interest in the shares. A majority of UNICE members consider that the forthcoming proposal for a directive should set up a framework to identify the person entitled to control the voting rights as the last natural or legal person holding a securities account in the chain of intermediaries and who is not a securities intermediary within the European securities holding systems, nor a custodian. The ultimate investor should be allowed to exercise the entitlement to control the voting rights. The ultimate investor should, in all cases be offered the possibility, either to provide the financial intermediary with voting instructions or to be given power of attorney by the same financial intermediary. Nevertheless, given the complexity of this issue, UNICE reserves the right to reconsider this matter in light of the results of the consultation or other considerations.

With a view to avoiding conflicting legislation, it should be borne in mind that, depending on the legislation in place, the disclosure by the intermediaries of their client names/number of shares, etc., may conflict with banking secrecy. Too high costs can be prohibitive for an efficient system. Obviously, the goal should be to limit the costs as much as possible, thereby using modern technology. In any case, we believe the costs should not be borne by the issuing companies.

UNICE agrees that securities intermediaries should be required to certify to the issuing companies who the ultimate investor entitled to control the voting rights is and for how many shares. An authentication trail throughout the chain of securities intermediaries is required. The securities intermediary closest to the issuer will formally certify the entitlement to control the voting rights. Where such a system can be organised contractually, this solution should be preferred as opposed to legislation

5.2. Stock Lending

Do interested parties consider that the practice of securities lending create problems for the exercise of voting rights, in particular in a cross-border context that should be tackled at EU level? Should such provisions essentially aim at enhancing transparency and protecting the interests of long-term investors?

The practice of securities lending is essentially a matter of private agreement between the borrower and the lender and should not be part of a proposal at EU level.

5.3 Depositary Receipts

Do interested parties consider that there are problems associated with the holding of depositary rights that should be addressed in the forthcoming proposal for a directive? If so should it allow holders of depositary receipts to be recognised as holding the rights attached to the underlying shares and that any specific exclusion from voting rights should be removed?

We are not aware of any serious problems associated with the holding of depositary rights that should be addressed in the forthcoming proposal for a directive. In any case, it is our considered opinion that the rights of the depositary receipt holder is a matter of private agreement.

PRE-ANNUAL GENERAL MEETING STAGE (ISSUE 6)

Issue 6.1 Questions related to Communication of information relevant to GMs

Do interested parties consider that the forthcoming proposal should contain provisions regarding the disclosure of GM notice and materials and some standards for the dissemination of such information?

What should these standards be? Should it also require issuers to maintain a specific section on their website where they would have to publish all General Meeting- related information? Should issuers websites or such GM dedicated sections of their websites contain also a description of shareholders' and investors' rights in relation to voting (voting by proxy or in absentia) and with regard to the GM (right to ask questions or table resolutions)?

Do interested parties consider that the forthcoming proposal for a directive should deal with the way information is 'pushed' by the issuer to the ultimate investor? If so, which of the two approaches (chain or direct) is preferable? Should the possibility be given to the ultimate investor to opt out of such identification system?

Although we agree that the use of electronic means should be encouraged, provided that it is not made mandatory, at the same time traditional methods should be retained and made freely available.

In any case, the forthcoming proposal should, in principle, not contain provisions regarding the disclosure of GM notice and materials or any standards for the dissemination of this information because these matters are already dealt with in the Transparency Directive.

There is no benefit for companies or for investors in having two different legal regimes and additional costs for the same kind of information (see Art. 13 of the Transparency Directive or Art. 17 in the consolidated final version of the Transparency Directive).

Issue 6.2 Questions related to Admission to / Participation in GM – Share blocking

Do interested parties consider that share blocking requirements represent a barrier to the exercise of voting rights, especially for cross-border investors?

Do interested parties agree that the forthcoming proposal should require the abolition of share blocking requirements and propose an alternative system to determine which shareholders are entitled to participate and vote at the GM?

We consider that irrevocable share blocking requirements may represent a barrier to exercise of voting rights.

We are in favour of abolishing irrevocable share blocking requirements. One alternative system could be to replace them by a record date system. Nevertheless, it should be borne in mind that such an alternative system could necessitate harmonization at EU level of the transfer of ownership date. Should this harmonization not be implemented, the record date system could not be made compulsory, since some Member States apply a verification period system which can take place without blocking the disposal of shares. We consider it

essential that a “record date”, if not the date of the GM itself, is a date as close as possible to the GM. In case of a record date well ahead of the GM there is an inherent risk that the shareholders’ rights and in particular the right to vote are not exercised by the true shareholders.

Nevertheless, given the complexity of this issue, UNICE reserves the right to reconsider this matter in light of the results of the consultation or other considerations.

SHAREHOLDERS’ RIGHTS IN RELATION TO THE GM (ISSUE 7)

Issue 7.1 Questions related to Participation in the GM via electronic means

Do interested parties consider that Member States should be prevented from imposing requirements on companies regarding the venue of the GM that would act as a barrier to the development of electronic means of participation? Should additional criteria be defined at EU level to enable shareholders participation in the GM by electronic means?

UNICE would encourage principles to facilitate the use of electronic means to participate in, ask questions and vote at the GM, provided that it is not made mandatory. At the same time, traditional methods should be retained and made freely available. However, it would imply development costs, and the lack of legal certainty concerning the consequences of such participation/failure of the system is a major issue to be carefully examined.

We believe that it should be left to the discretion of companies to allow for participation in the GM via electronic means. Therefore, Member States should neither impose barriers on such new forms of participation in the GM nor should the forthcoming proposal for a directive promote or even prescribe participation via electronic means. In this context, we do not believe that additional criteria should be defined at EU level to enable shareholder participation in the GM by electronic means.

Issue 7.3 Questions related to right to add proposals to the agenda /to table resolutions

Do interested parties consider that the forthcoming proposal for directive should define certain criteria concerning the maximum shareholding threshold for the tabling of resolutions and placing items on the GM agenda and the timing to file these ahead of the GM? If so, what should these minimum criteria be?

A majority of UNICE members consider that minimum standards (minimum shareholding thresholds, deadlines) could be set at EU level to address this issue. The provision for a deadline to exercise the right should be carefully evaluated and should not turn into an excessive burden in the organisation of the GM.

Issue 7.4 Questions related to voting in absentia (voting by correspondence / proxy voting)

UNICE supports the use of proxy voting, and would encourage measures to facilitate the way that proxies are appointed, provided that the company does not bear the entire administrative burden. The investor should also be asked to take the necessary steps to vote in absentia or by proxy.

POST-GM INFORMATION (ISSUE 8)

Issue 8.1 Questions related to dissemination of GM results and minutes

Do interested parties consider that companies should be obliged to disseminate the results of votes and minutes of the GM to all shareholders and/or to post these on their website within a certain period following the meeting?

UNICE agrees that companies should disseminate the results of votes and minutes of the GM to all shareholders at their request and/or to post these on their website within a certain period following the meeting. The forthcoming proposal for a directive should only contain a few principles on the dissemination of post-GM information.

Issue 8.2 Confirmation of vote execution

Do interested parties consider that the non-confirmation of vote execution hinders significantly the exercise of their voting rights? If so, do they consider the forthcoming proposal should address the issue by defining obligations on issuers and securities intermediaries to provide and pass automatic confirmation of vote execution along the chain from the issuer to the ultimate investor?

We believe that responsibility for confirmation that investors' voting instructions have been received and duly executed should not lie with issuing companies. Primary responsibility should be with the shareholder and his representatives.

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