

SECOND COMMISSION CONSULTATION ON FOSTERING AN APPROPRIATE REGIME FOR SHAREHOLDERS' RIGHTS

UNICE RESPONSE

INTRODUCTION

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

In our response to the first Commission consultation conducted by the European Commission in 2004, we highlighted our agreement and concerns regarding the directions indicated in the consultation document.

We are pleased that the Commission has issued the second consultation document which suggests certain minimum standards and requests feedback from interested parties. We consider that the approach taken by the Commission for certain minimum standards is reasonable although others require clarification or should be disregarded.

SPECIFIC COMMENTS

1. SCOPE

Do you agree with the proposed scope for any future measure at EU level, if any, establishing minimum standards for shareholders' rights? If not, please give your reasons.

Any potential measure at EU level establishing minimum standards for shareholders' rights should apply solely to companies formed under the laws of a Member State and whose securities are admitted to trading on a regulated market in one or more Member States within the meaning of Council Directive 2004/39/EC.

UCITS (of the corporate type) falling within the scope of Art. 1(2) of Directive 85/611/EEC, and equivalent funds, should be excluded from the scope of any such measure.

UNICE agrees that private companies and UCITS (of the corporate type) falling within the scope of Art 1(2) of Directive 85/611/EEC, and equivalent funds should be excluded. However, we also consider it may be appropriate to limit the scope to companies with equity securities admitted to trading rather than to all types of securities.

2. THE “ULTIMATE INVESTOR” OR “ULTIMATE ACCOUNTHOLDER”

1. Do you consider, contrary to the views expressed above, that granting ‘ultimate investors’ at EU level a legal enforceable right to direct how votes attached to shares credited to their accounts are cast, is a pre-requisite to facilitating cross-border voting?

2. If so, do you agree with the following proposal, based on the works of UNIDROIT: “the legal or natural person that holds a securities account for its own account shall have the right to determine how votes attached to shares credited to its securities account are to be cast”? Please give your reasons.

UNICE considers that it is important to be able to identify the person entitled to exercise voting rights attached to shares.

We clearly support the objective to create legal certainty over whom controls the voting rights.

In the event that the Commission decides to pursue this issue at, it may be appropriate to foresee that the right of the “ultimate investor” to determine how votes are to be cast does not prevent the exercise of the voting rights by an intermediary providing that the latter is in a position to identify the ultimate investor and justify the voting instructions it received.

3. STOCK LENDING AND DEPOSITARY RIGHTS

3.1. Stock lending

Do you agree with the following minimum standard? If you do not agree or agree only partially, please give your reasons.

1. Agreements providing for the temporary transfer for consideration of shares shall contain provisions informing the relevant parties to the agreement of the effect of the agreement with regard to the voting rights attaching to the transferred shares.

2. Where an intermediary enters into such an agreement in relation to shares which the intermediary holds on behalf of another person, or which are held in a securities account in the name of another person, the intermediary shall, prior to entering into the agreement, duly inform that person or its representatives of its intention to enter into such an agreement and the effects of the agreement with regard to the voting rights attaching to the relevant shares.

UNICE agrees with the minimum standards as outlined by the Commission.

Nevertheless, it would be appropriate to be more specific on the effect of non compliance with these information obligations: the stock lending must not be declared null and void in the absence of such compliance as well as the vote would not be contested. Otherwise, this would lead to an unacceptable high a degree of legal uncertainty.

Furthermore, the stock lending business has to a certain degree become a mass business. In that context, it is important that parties have a degree of flexibility and the minimum standard should not lead to an increase in the administrative barriers to this kind of business: For example, it should be possible for an intermediary to provide a general pre-information (of his intention to enter into such an agreement) in respect of all the shares he holds on behalf of another person. A requirement to inform a person ahead of each single agreement then intermediary intends to enter into would be too strict.

3.2. Depositary receipts

Do you agree with the following minimum standard? If not, please give your reasons.

Holders of depositary receipts shall alone have the right to determine how the voting rights attached to underlying shares represented by depositary receipts are exercised.

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. Nevertheless, if the Commission decides to pursue this issue, the proposal could benefit from clarification. Indeed, holders of depositary receipts should be able to carry the votes which are attached to the underlying shares. In addition they should be able, by private agreement, to give the right to exercise the voting right to the depositary. In this way the depositary that exercises the voting right with the issuer will be presumed to have done so in compliance with the agreement with the holder of depositary receipts. If there is a breach of the agreement, the depositary would be held liable but the vote would not be contested.

4. PRE GENERAL MEETING COMMUNICATIONS

▪ Notice periods for convening a General Meeting

Do you agree with the following minimum standards? If not, please give your reasons

1. Annual General Meetings of listed companies shall be convened on a first call with no less than 21 business days notice.

2. Other Shareholders' Meetings shall be convened on a first call with no less than 10 business days notice.

In principle we would prefer if the Commission do not intervene in this area. In the event that the Commission decides to intervene, we recommend that the Commission specifies "30 calendar days" instead of "21 business days" as the number of business days varies between Member States. Furthermore, the Commission should clarify that this period is applicable to informing people of the date of the next meeting and not the date when the final agenda has to be communicated.

While some companies agree with having different dates for annual general meetings and "other shareholders' meetings", we also consider that companies should be able to choose the same deadlines for conveying the annual general meetings and "other shareholders' meetings", i.e. 30 calendar days. It is our understanding that the reference to "no less" would allow this. If so, we agree.

The Commission should also clarify what is meant by "first call". This could indicate that there would necessarily be a "second call". This should not be imposed. The convening of the meeting should be possible via one communication to shareholders.

▪ Content of the notice

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons.

Any notice convening a General Meeting shall at least:

- indicate precisely the place, time and agenda of the meeting and give a clear and precise description of participation and voting procedures and requirements for voting at the General Meeting. Alternatively, it may indicate where such information may be obtained.

- indicate where the full, unabridged text of the resolutions and the documents intended to be submitted to the General Meeting may be obtained.

UNICE can agree with the minimum standard as proposed providing that alternative according to which the issuer can indicate where such information may be obtained is maintained. The standard must not leave room for interpretation which would lead to a requirement for the issuer to provide information on applicable law.

▪ **Information relevant to the General Meeting**

Do you agree with the following minimum standard with regard to the time at which GM-related documents should be made available? If not, please give your reasons.

The full text of the resolutions and documents related to the agenda items and intended to be submitted to the General Meeting shall be made available at the latest 15 business days before any Annual General Meeting, and at latest 10 business days before any other General Meeting.

The deadlines provided do not appear realistic. Indeed, if it is proposed under the first proposal of this section 4, the notice period is 30 calendar days or 21 business days, by imposing the deadline for making information available within 21 calendar days or three weeks, this leaves only 7 calendar days or 5 business days draft and file documents relating to the agenda and eventually to communicate the final agenda where shareholders have tabled other resolutions.

Fundamentally, it is not appropriate for a Directive to impose such periods because indirectly this determines the time period for shareholders to propose agenda points.

▪ **Dissemination and language of the meeting notice and materials**

Do you agree with the following minimum standard? If not, please give your reason.

Any notice convening a General Meeting and any document intended to be submitted to the General Meeting shall be made available in a language customary in the sphere of international finance, unless the General Meeting decides to the contrary.

UNICE disagrees with the minimum standard. It is unreasonable for a European Directive to impose a “language customary in the sphere of international finance”. We prefer for the language of the Member State where the issuer is incorporated to prevail with the possibility for the company to choose to use the “language customary in the sphere of international finance”.

▪ **Specific section of the issuer’s website dedicated to the General Meeting**

Do you agree with the following minimum standards? If not, please give your reasons.

1. Member States shall ensure that issuers post on their websites the information relevant to General Meetings at the same time as such notices are published and/or sent to the issuers’ shareholders.

2. Such information shall include at least: the notice of the meeting, the full text of the resolutions intended to be submitted to the General Meeting and other documents relevant to the General Meeting, a precise description of the means given to shareholders to participate in the General Meeting and cast their vote and the forms to be used to vote by correspondence and/or by proxy.

UNICE in principle agrees with the minimum standard proposed by the Commission. However, it must respect the possibility foreseen under section 4 “content of the notice” which allows for an alternative according to which the issuer can indicate where such information may be obtained. Such an alternative must also be allowed for the issuer’s website.

Furthermore we believe that the terms “other documents” are too vague and should be abandoned.

5. ADMISSION TO THE GENERAL MEETING – SHARE BLOCKING

Do you agree with the following minimum standards? Please give your reasons.

1. Provisions making the right to vote in a General Meeting conditional, or allowing the right to vote to be made conditional, on the immobilisation of the corresponding shares for any period prior to the Meeting shall be abolished.

2. The right to vote at the General Meeting of a listed company shall be made conditional upon qualifying as a shareholder of that listed company on a given date prior to the relevant General Meeting.

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”, is a date as close as possible to the GM. This exact date is fundamental to the acceptability of a record date system and should not be left to “implementing measures” as mentioned in the Commission’s consultation document. 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.

6. SHAREHOLDERS RIGHTS IN RELATION TO THE GENERAL MEETING

6.1. Electronic participation in General Meetings

Do you agree with the following minimum standard? If not, please give your reasons.

Member States shall remove existing requirements, and shall not impose new requirements, that act or would act as a barrier to the development of the participation of shareholders to the general meeting via electronic means.

UNICE appreciates the Commission’s intention to adopt an enabling approach to electronic participation in General Meetings. Nevertheless, we question the formulation of the minimum standard. Indeed, given the rapid evolution of “electronic means” and the ways of securing such “means” it is possible that cryptology develops and is increased to secure communications. Because of the general wording of the proposed minimum standard, this may be wrongfully considered as a barrier.

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.

6.2. Right to ask questions

Do you agree with the following minimum standard? If not, please give your reasons.

Shareholders shall have the right to ask questions at least in writing ahead of the General Meeting and obtain responses to their questions. Responses to shareholders questions in General Meetings shall be made available to all shareholders.

The above principles are without prejudice to the measures which Member States may take, or allow issuers to take, to ensure the good order of General Meetings and the protection of confidentiality and strategic interests of issuers.

The minimum standard as proposed by the Commission is not satisfactory and leaves too much room for abuse.

An obligation to answer all questions shareholders send ahead of the General Meeting could prove unmanageable for companies (possibly reaching thousands in numbers!). The minimum standard does not specify that questions have to be in relation with the agenda of the meeting.

For example, the company should be entitled to select the questions to be answered according to objective criteria such as materiality of the question and the pertaining of the question to the agenda. Similarly, questions should be answered only in the meeting and not on a selective basis and the company should be entitled to define limitations to the right to ask questions before the GM (i.e.: limit the number of questions to two per shareholder).

Furthermore, the right to send questions to the companies which have to be made available on the companies' website could be used by shareholders to force the company to place untrue, misleading or insulting texts on its website. The publication of questions and answers given in the General Meeting would require verbatim minutes and increase costs considerably. This minimum standard would also not enhance the participation of shareholders.

Lastly, if there were to be an initiative at European level on this issue then companies should be able to specify the deadline for submitting questions in advance of the meeting. For example, a deadline of five days before the meeting would be reasonable in order to allow time for the issuer to prepare an answer.

UNICE would like to make clear that European companies are happy to respond to shareholders' questions and to answer shareholder letters as a matter of best practice but they are concerned that a legal right to ask questions with a corresponding obligation to answer questions could be easily abused.

6.3 Rights to add items to the agenda and table resolutions

Do you agree with the following minimum standard? If not, please give your reasons.

1. Shareholders, acting individually or collectively, shall have the right to add items on the agenda of General Meetings and table resolutions at General Meetings. Such rights may be subject to the condition precedent that the relevant shareholder or shareholders hold a minimum stake in the share capital of the issuer.

2. Such minimum stake shall not exceed 5% of the share capital of the issuer or a value of € 10 million, whichever is the lower.

3. Such rights must be exercised sufficiently in advance of the date of the General Meeting, to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of the General Meeting.

A majority of UNICE members consider that minimum standards could be set at EU level to address this issue.

In any case an appropriate standard at EU level should not go further than the principle according to which shareholders, acting individually or collectively, shall have the right to add items on the agenda of General Meetings and table resolutions at General Meetings. Such rights may be subject to the condition that the relevant shareholder or shareholders hold a minimum stake in the share capital of the issuer.

Indeed, any rule specifying the *minimum* standard should be decided by the single Member State.

We question the reference to a value of € 10 million. Indeed, such a criteria will cause difficulties given the variations to which such a value is subject between the day of the request, sending the draft resolution and the date of the General Meeting. Furthermore the relevance and importance of such a threshold will vary greatly depending on the size of the company (large or small).

6.4. Voting

▪ Voting by correspondence

Do you agree with the following minimum standard? Please give your reasons.

1. Member States shall ensure that shareholders of listed companies have the possibility to vote by correspondence.

2. Member States shall remove existing requirements, and shall not impose new requirements, on companies which hinder or prohibit voting by electronic means at General Meetings.

UNICE is not opposed to the minimum standard as suggested by the Commission provided that electronic means are not made mandatory.

▪ Proxy voting

Do you agree with any, each, all, or the following minimum standards? Please give your reasons in each case. In particular, where you believe that certain constraints should be maintained, please justify your opinion.

1. Every shareholder shall have the right to appoint any other natural or legal person as a proxy to attend any General Meeting on his behalf.

2. No constraint or limitations shall be imposed other than provisions relating to the legal capacity of the person. In particular, there shall be no limitations on the persons who can be appointed as proxies and on the number of proxies any such person may hold.

3. Shareholders shall not be prevented from appointing their representatives by electronic means.

4. Persons appointed as proxies shall enjoy the same rights to speak and ask question in General Meetings as those to which the shareholders they represent are entitled.

5. Issuers shall not themselves collect proxies in advance of General Meetings but shall entrust independent third parties with such collection.

6. All votes cast on each resolution submitted to a General Meeting shall be taken into account, irrespective of the means by which the votes are cast.

Do interested parties consider that it would be appropriate to set up an EU proxy form that would have to be accepted by all issuers in all Member States while not excluding the use of other formats allowed for under Member States' laws?

1. UNICE agrees that shareholder should have the right to appoint another natural or legal person a proxy to attend a General Meeting on his behalf.

2. We consider that there should not be too many formal requirements. Nevertheless, there is a need for certain limitations, notably on the number of proxies in order to avoid abuse and hindering the proper functioning of the General Meeting.

3. "Appointing by electronic means" is too vague as it would allow appointing a representative by a simple e-mail which in our view is too informal. The appointment of a proxy by a shareholder should be made in a form that allows the company to verify easily the validity of the presented proxy.

4. UNICE agrees (see above 1.)

5. UNICE does not agree with this minimum standard which prevents issuers from collecting proxies in advance of the General Meeting and would oblige the issuer to entrust a third party to carry out such collection. We see no reason for prohibiting collecting proxies by the company itself. It should be at the discretion of the

shareholders whether they consider it as appropriate or not to empower the company in relation of the rights attached to their shares.

6. UNICE agrees, provided votes are validly cast.

Regarding a possible EU proxy form, this should be left up to market players to decide rather than an EU Directive.

7. POSITION OF INTERMEDIARIES IN THE CROSS-BORDER VOTING PROCESS

▪ Definition of intermediary

Do you agree with the following definition? Please give your reasons.

A legal or natural person who, as part of a regular activity, maintains securities accounts for the account of other legal or natural persons shall be considered as an intermediary. An intermediary may also maintain securities accounts for its own account.

The majority of UNICE members agree with the definition suggested by the Commission

▪ Registration as nominees

Do you agree with the following minimum standards? If not, please give your reasons.

Whenever an intermediary is registered as a shareholder in respect of shares which he/she/it actually holds for the account of another legal or natural person, a mention should be added in the relevant companies' shareholders registers that such intermediary hold the shares for the account of another person.

UNICE agrees that companies should be allowed to request that such mention is made in the shareholder register. However, it should not be mandatory but rather should be a matter for the individual company as it could be very expensive for companies to keep such information and they may not have the necessary IT systems in place.

UNICE therefore agrees with the minimum standard as suggested by the European Commission as an option which should not be prevented by the Member States.

▪ Being granted a power of attorney

Do you agree with the following minimum standard? If not, please give your reasons.

Where an intermediary is a shareholder in relation to shares which the intermediary holds for the account of another legal or natural person, that other legal or natural person shall have the right to be given a power of attorney by the intermediary to attend the General Meeting and act at the General Meeting as if he/she/it were a shareholder.

UNICE agrees with the minimum standard suggested by the Commission.

▪ Voting upon instructions

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons

1. Member States shall allow intermediaries to hold shares on behalf of their clients in collective or individual accounts.

2. Intermediaries shall have the right to cast votes upon their clients express instructions.

3. Where intermediaries hold on behalf of their clients shares in collective accounts, they shall be able to cast split votes.

UNICE agrees with the three minimum standards suggested by the Commission.

8. COMMUNICATIONS FOLLOWING THE GENERAL MEETING

▪ Dissemination of voting results

Do you agree with the following minimum standard? If not, please give your reasons.

1. Within a reasonable period of time which shall not exceed one month following the General Meeting, the issuer shall make available to all shareholders information on the results of the votes on each resolution tabled at the General Meeting.

2. Such information, which shall include for each resolution, the number of voters, the number of voted shares, the percentages and numbers of votes in favour and against of each resolution and the percentages and numbers of abstentions, shall be posted on the issuer's website.

UNICE agrees with the suggested minimum standards providing there is not a requirement to provide individual information. It should be possible to meet the minimum standard by publishing the information on the issuer's website or by reference to a third party website. Furthermore, it may be appropriate to allow for maximum period during which companies are obliged to publish the required information on their website (e.g. two years).

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