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POSITION PAPER

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COMMISSION PROPOSAL FOR A DIRECTIVE ON SHAREHOLDERS' RIGHTS[1]

UNICE has contributed actively to both consultations which preceded the proposal by the European Commission of a Directive on shareholders' rights on 5 January 2006[2]. UNICE fully appreciates the Commission's intention to "*facilitate the cross-border exercise of shareholders' rights in listed companies, through the introduction of minimum standards".*

Whilst we consider that the Commission has generally adopted a reasonable approach, we nonetheless believe that certain provisions of the proposal would benefit from clarification and certain modifications, taking into account the business reality of relations between issuers and shareholders.

Article 2 c ii – Definitions: Shareholder

The definition of 'shareholder' under this Article is too broad since not everybody whose name is entered in the share register instead of the real shareholder can be regarded as a shareholder but rather a registered person who may be regarded as shareholder vis-à-vis the issuer only.

Article 5 – General Meeting Notice

The Commission proposal imposes a minimum of "30 calendar days" as a notice period for convening a general meeting and indicates which information must be communicated with the notice.

First of all, as the proposal does not specify which type of general meeting is subject to this "30 calendar days" deadline, it would appear that the Commission intends that not only annual general meetings (AGMs) should be subject to this deadline, but also other shareholder meetings or extraordinary general meetings. (EGMs).

We regret that the proposal does not foresee the possibility to convene EGMs at shorter notice than 30 calendar days even though, in the second consultation document, the Commission did recognise that "*a balance must be struck with the need*

[1] COM (2005) 685, Commission proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC, 5.1.2006

[2] See UNICE's Preliminary response to "*Commission consultation on fostering an appropriate regime for shareholders' rights*", 24.12.2004 and UNICE response to "*Second Commission consultation on fostering an appropriate regime for shareholders' rights*", 28.7.2005, both available at www.unice.org

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for companies to have the ability to react swiftly to events. Such ability would be hindered by overly long notice periods".

If companies are required to have EGM notice periods identical to AGM notice periods, it will make EU companies less reactive to market needs. Indeed, a company may need to convene an EGM rapidly in situations such as, for example, auction processes where a vendor is seeking early completion of a deal, need to decide rapidly on raising capital, etc.
If ultimately the EU institutions do not envisage differentiating between AGMs and EGMs, UNICE considers that a "30 calendar days" period is possible for informing shareholders that the meeting is to be held. However, for the notice convening the meeting as is understood under Article 5 of the proposal, a "14 calendar days" period should be adopted.

Secondly there is a need to ensure that there will not be an automatic breach of the requirement to post "documents intended to be submitted to the general meeting for approval may be obtained" (Article 5.2(d)), if certain documents are not posted on the internet site within the 30 calendar day deadline. This is particularly true for the annual accounts since companies are bound to make available to the public before the shareholders' meeting also the relevant auditors' report which can be issued only after the directors' approval of the same accounts. This can also occur with reference to extraordinary transactions such as, for example, a capital increase carried out by means of contributions in kind for which a special report of an expert is required.

The Commission should also clarify what is meant by "*first call*" (Article 5.1). This could indicate that there would necessarily be a "second call". This should not be imposed. It should be possible to convene the meeting via one communication to shareholders as is currently the case in many Member States.

Article 6 – Right to add items to the agenda of the general meetings and to table draft resolutions

The Commission proposal provides the principle that shareholders have the right to add items on the agenda of general meetings (GMs) and table draft resolutions at the GM. The proposal nevertheless includes thresholds reserving this right to shareholders representing a minimum proportion or number of shares. It is also provided that such additions or draft resolutions should be tabled sufficiently in advance of the GM (leaving Member States determine what would be deemed "sufficiently in advance").

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 GMs and table resolutions at GMs.

Any rule specifying the minimum standard should be decided by Member States. For instance certain Member States' legislation foresees that items may not be added on matters which the shareholders meeting is required by law to resolve on proposals put forward by the directors or on the basis of a plan or report they have prepared.

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

Article 8 – Participation in General Meeting by electronic means

This article prevents Member States from prohibiting participation in GM by electronic means.

It should be clarified that the Directive leaves the issuer the right to decide if electronic means are used. UNICE appreciates the Commission's intention of adopting an "enabling" approach to electronic participation in General Meetings. UNICE would encourage principles to facilitate the use of electronic means to participate in, the GM, provided that it is not made mandatory.

Article 9 – Right to ask questions

This provision provides the right for shareholders to ask questions oral "and/or" in written or electronic form ahead of the GM. It also imposes the obligation on issuers to answer the questions subject to measures taken (either by Member States or by issuers when allowed to take such measures by the Member State) to ensure the "good order of the general meeting" and "protection of confidentiality of business interests". The issuer can refer to FAQs available on its website if the answer is provided there. Responses to questions should be made available on the issuer's website.

Article 9.1 refers to oral questions "and/or" written or electronic form of questions. This wording could lead to having the same questions available in both formats. We believe this is of no added value and it should be replaced by "or".

Reference to "FAQs" pre-determines the format of information an issuer may be able to refer to. A reference to its website should be sufficient.

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 related to 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 the company should be entitled to define limitations on the right to ask questions before the GM (e.g. 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.

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. In addition, there should be an obligation for shareholders to prove their capacity.

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 easily be abused which is contrary to the interest of shareholders and issuers alike.

Article 12 – Voting in absentia

This article obliges companies to provide for postal voting and, proceeding in the same spirit as in Article 8 (see above), obliges Member States to prohibit requirements and constraints which hinder voting by electronic means.

Regarding postal voting, our opinion is that there should be no obligation for issuers to offer their shareholders the possibility to vote by post. Issuers should remain free to offer not only electronic voting facilities but also postal voting, if they want.

Regarding electronic voting, we consider that the wording of Article 12.2 of the current proposal could be interpreted as bestowing a right on shareholders to demand from issuers voting by electronic means. This should be clarified that the Directive leaves the issuer the right to decide if electronic means are most suited to its needs. As is the case in Article 8, Member States should not prohibit voting by electronic means and remove constraints and requirements that could act as a barrier to electronic voting.

Article 14 - Counting of votes

UNICE opposes the introduction at EU level of an obligation for issuers to count all votes on all resolutions.

A normal procedure in some Member States is that the chairman asks the shareholder representing the largest number of shares for his or her vote, then asks the shareholder representing the second largest number of shares, etc., until a sufficient number of yes votes has been cast to obtain the required majority. This can be a rational and effective way of conducting a general meeting.

The Directive should not prohibit such procedures. For shareholders who need assurance that their votes have actually been taken into account, it is sufficient that they are granted the right to demand that their votes are recorded in the minutes of the general meeting.

Article 15 - Post-General meeting information

UNICE opposes the introduction of an obligation to have a vote on each resolution tabled at the general meeting. Such an obligation would lead to more administrative work, longer general meetings and also higher costs for issuers, especially if the obligation in Article 14 to count all votes remains.

Therefore, we propose that Article 15 is changed: the issuers should be obliged to publish the outcome of each resolution, and only in those cases where there has actually been a vote, should the issuer be obliged to publish the results.

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