Introduction

BUSINESSEUROPE has always been actively engaged in debates on Company Law and Corporate Governance at EU level. We have always stressed that any action at EU level on these fields should be based on facts, empirical evidence, and on an objective and unbiased opinion.

In this context, BUSINESSEUROPE is closely following the debate on proportionality between ownership and control and is currently concerned about the discussions on this topic being held at EU level. BUSINESSEUROPE fears in particular that one system ("one share - one vote") will be favoured vis-à-vis others.

The Commission issued a tender in April 2006 entitled "Proportionality between ownership and control in EU listed companies: external study", in order to analyse the relevant regulatory framework at member-state level, and to evaluate whether deviations from the proportionality principle have an impact on EU investors. It is of primary importance that the assessment conducted by the Commission takes into consideration two basic premises: the principle of freedom of contract and the fact that alleged superiority of "one share - one vote" has not been proved to date.

Freedom of contract must serve as the basis for free capital markets

It is essential that capital markets rest on the principle of freedom of contract, safeguarding free markets and competition. The institutional framework differs significantly across the member states and companies must be able to offer investors different share structures. Currently a number of well known companies rely on dual-class voting shares.

Having the possibility of offering holders of equity different share structures can satisfy investors with different preferences. Small investors may not want to exert active ownership, being interested in pure cash flow rights, whereas others such as families, foundations or institutional investors may be interested in control rights as well.


2 The Commission appointed the Institutional Shareholder Service (ISS) to conduct the report together with the ECGI and Shearman and Sterling LLP.
Moreover, share systems such as dual-class voting shares may help to encourage committed owners to influence the company in the long-term interests of the company’s stakeholders.

Thus, imposing "one share - one vote" at EU level may not be in the interests of investors or issuers of securities.

The freedom of contract principle goes hand in hand with transparency. BUSINESSEUROPE considers that as long as there is full transparency no single share structure should be imposed on EU-listed companies.

The issue is not limited to large listed companies, since it is vital that European SMEs have an opportunity to grow and obtain capital. If SME entrepreneurs do not have the possibility to continue controlling the firm in line with their vision, there is reason to believe that entrepreneurs will no longer invest in their companies.

Imposing one particular share system may therefore reduce the willingness of entrepreneurs in SMEs to seek capital through a listing on European stock exchanges. Even large listed companies may consider withdrawing from stock exchanges if they are no longer allowed to retain their current share structure. It should be noted that such an initiative would be at odds with the current need to develop and open financial markets.

Moreover, the Commission, like BUSINESSEUROPE, has always stressed the importance of free competition. This position must also include competition between different national ownership structures, where investors have the possibility of comparing their effectiveness and performance. In today’s global competition it is also important not to limit the scope of European financial markets and companies to issue financial instruments as compared with the rest of the world. Such limitations would damage the competitiveness of European companies.

We would also like to stress that the OECD Principles of Corporate Governance (2004) leave companies the possibility of choosing the share system that best satisfies their interests, recognising that many countries and jurisdictions permit companies to issue shares with different rights: “the optimal capital structure of the firm is best decided by the management and the board, subject to the approval of the shareholders. Some companies issue preferred (or preference) shares which have a preference in respect of receipt of the profits of the firm but which normally have no voting rights. Companies may also issue participation certificates or shares without voting rights, which would presumably trade at different prices than shares with voting rights. All of these structures may be effective in distributing risk and reward in ways that are thought to be in the best interests of the company and to cost-efficient financing”.

PROPORTIONALITY BETWEEN OWNERSHIP AND CONTROL - FREEDOM OF CONTRACT AND TRANSPARENCY MUST PREVAIL, 17 APRIL 2007
The burden of proof has not been established for the alleged superiority of "one share - one vote"

To date, no particular share system has proved superior, either theoretically or empirically. Proponents of "one share - one vote" have not been able to establish the burden of proof. Specifically, the empirical results covering different countries show different results, indicating that the issue is country-specific. The factors crucial to decisions on investments are risk and reward. The prices of financial instruments will to a large extent be based on the combination between these two elements.

Following the principle of subsidiarity the issue of companies’ shares should be settled at member-state level.

Conclusion

BUSINESSEUROPE considers that in some countries "one share - one vote" serves well, whereas this system may not be optimal in some other countries which rely on other ownership structures. Moreover, it is essential that competition among member states for offering the best legal environment – including in relation to the design of companies' share structures – is encouraged.

The key point is that investors should have the freedom to decide for themselves. BUSINESSEUROPE stresses that, currently, no solid evidence that the "one share - one vote" system is superior to other types exists and therefore, the EU should abstain from recommending it as superior to other models.

BUSINESSEUROPE considers full transparency a key issue: if companies believe that changing their share structure may increase the value of the company, they should be allowed to do so, provided that shareholders approve it in line with the principle of freedom of contract.

It is essential that a company’s share structure is not restricted by mandating one particular share system. Instead the owners should have the freedom and flexibility to agree on any type of share system that best suits the needs of the company and its owners - something which varies substantially across the Union.

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