BUSINESSEUROPE

POSITION PAPER

30 July 2007

RESPONSE TO THE THIRD COMMISSION CONSULTATION ON SHAREHOLDERS' RIGHTS: FOSTERING AN APPROPRIATE REGIME FOR SHAREHOLDERS' RIGHTS (MARKT/30.04.2007)

SUMMARY

BUSINESSEUROPE has actively participated in the debate on shareholders' rights since its inception and is pleased that important aspects of our request have been taken on board in the Commission's Directive on this topic which is key for European companies.

Although BUSINESSEUROPE considers that some of the points made by the Commission in the current consultation may produce a significant improvement in market transparency, we would like to stress that the better regulation principles should be kept in mind during this exercise in order not to increase bureaucracy and to impose additional burdens that may prove disproportionate to European companies.

BUSINESSEUROPE does not see any need for a recommendation on translation nor is it aware of any serious problems associated with the holding of depositary receipts that should be addressed in a Recommendation.

Although we consider stock lending a matter of private agreement between the lender and the borrower, we believe that the introduction of more transparency may be important so that the issuer can acknowledge the existence of these agreements, considering that they may affect voting rights and may interfere with the good functioning of the General Meeting. Regarding the duties of intermediaries, BUSINESSEUROPE considers that this issue should be addressed at EU level and supports the Commission's proposed statements although with some caveats. BUSINESSEUROPE also believes that action at EU level regarding investor disclosure as well as regarding management companies of investment schemes would be convenient.

Finally, BUSINESSEUROPE considers that the Commission should examine the impact of the Hague Securities Convention in depth, notably its effects on shareholders' rights, since its adoption may collide with the EC Directives due to the different approach on the law applicable for indirectly held securities.

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

BUSINESSEUROPE

POSITION PAPER

30 July 2007

RESPONSE TO THE THIRD COMMISSION CONSULTATION ON SHAREHOLDERS' RIGHTS: FOSTERING AN APPROPRIATE REGIME FOR SHAREHOLDERS' RIGHTS (MARKT/30.04.2007)

INTRODUCTION

BUSINESSEUROPE actively participated in both consultations which preceded the proposal by the European Commission of a directive on shareholders' rights[1] and was pleased to see that important aspects of our request[2] have been taken into consideration in the Commission's Directive on this topic which is key for European companies.

BUSINESSEUROPE considers of primary importance the Commission's intention to "*facilitate the cross-border exercise of shareholders' rights in listed companies, through the introduction of minimum standards"* and believes that the directive represents an improvement in this regard. Regarding the recommendation, we would like to restate the principles that we consider should serve as reference criteria for intervention or non-intervention in the areas of company law and corporate governance, and that should also be taken into consideration in the current debate so the legal environment in which companies act is not disrupted:

- principle of subsidiarity;
- a principles-based and market-driven approach;
- transparency and disclosure;
- global orientation;
- market competition;
- and should take into consideration the Commission's better regulation agenda.

Moreover, we would like to stress that excessive regulatory burdens may ultimately restrict the freedom of companies to do business, thereby holding them back from realising their potential. This is detrimental to business, shareholders and more generally for growth and jobs in the EU.

[1] See BUSINESSEUROPE's preliminary response to "*Commission consultation on fostering an appropriate regime for shareholders' rights*", 24.12.2004 and BUSINESSEUROPE response to "*Second Commission consultation on fostering an appropriate regime for shareholders' rights*", 28 July 2005, both available at www.businesseurope.org.

[2] See BUSINESSEUROPE's position paper on the Commission Proposal for a Directive on Shareholders' Rights, 20 June 2006.

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

BUSINESSEUROPE

BUSINESSEUROPE RESPONSE TO SPECIFIC QUESTIONS

LANGUAGE OF MEETING DOCUMENTS

Question 1:

Q 1.1.: Do you think there is a need for action in that area?

Q 1.2.: If your answer is yes, do you think a recommendation along the following lines would go into the right direction?

"1. Companies should make available to their shareholders the convocation for a general meeting, the meeting agenda and the documents to be submitted to the general meeting at least also in a language customary in the sphere of international finance, unless the General Meeting decides to the contrary.

2. Point 1 should not apply to companies

- *that fulfil at least two of the criteria established by Article 11 of the Fourth Company law Directive on annual accounts (not exceeding a balance sheet total of EUR 3 650 000, a net turnover of EUR 7 300 000 and an average number of employees during the financial year of 50), or*
- *that neither have a wide foreign shareholder base (on average under 10% of the subscribed capital) nor are actively seeking foreign investment.*

For these companies, the obligation referred to in point 1 should only apply where this is requested by shareholders representing at least 1/3 of the subscribed capital."

BUSINESSEUROPE's response:

Major listed companies already issue the main documents in *a language customary in the sphere of international finance* and publish them on their official website on a voluntary basis. We believe that it is also in the interests of listed companies to translate documents of significant importance when their shareholders have other nationalities than that of the company. Besides, if a company's securities are traded in several Member States, there are already translation obligations according to Article 20 Transparency Directive (Directive 2004/109/EC).

From a better regulation point of view, and at a time when the Commission wants to simplify Company Law rules, thereby reducing red tape, it should not impose more bureaucracy. This requirement will prove burdensome by imposing an additional obligation on companies. In practice, translations would be very costly and time consuming. Also, the legal checking of the translated documents will prove onerous. In some Member States, due to very protective stock company rules, there would be the risk of additional rescission rights.

Therefore, BUSINESSEUROPE does not see any need for action in this area.

However, if any measure were to be adopted, it should be limited to the main listed companies, mainly due to, as above-mentioned, the burdensome and disproportionate

costs of translation that it would impose on them. It should definitely consider each company's ownership structure and the translation costs to which it would be subject.

Moreover:

- Paragraph 1 should read: "Companies should make available to their shareholders the convocation for a general meeting, the meeting agenda and, at the discretion of the management, the documents to be submitted to the general meeting at least also in a language customary in the sphere of international finance, only if the previous General Meeting so decides.";

- The notion of "actively seeking foreign investment" as in paragraph 2 should be clearer and a higher percentage should be considered for the foreign shareholder base. We consider that an average of under 10% is too low;

- It should clearly state that the request by the shareholders should be made well in advance before the General Meeting to allow the company to translate the relevant documents, giving the company with a reasonable period to organise the translation. This period should be coordinated with the minimum period to convene the General Meeting as stated at Article 5 of the Directive on shareholders' rights;

- It should mention that in case of different language versions, the text drafted in the original language should prevail and (if at all) be legally binding;

- Last but not least, it should be stated that in the event that the shareholders do exercise their rights to add an item to the agenda, the same rules will apply to the documents that require a resolution of the General Meeting and that are drafted and deposited by the shareholders. In this case the costs of the translation will be borne by the active shareholders.

However, as mentioned above, BUSINESSEUROPE is of the firm belief that there is no need for a recommendation on translation.

III. DEPOSITARY RECEIPTS (DRS)

Question 2: Do you think a recommendation along the following lines would go into the right direction?

"The depositary agreement should provide that the depositary is not allowed to vote on the shares without instructions given by the depositary receipt holder, unless the latter has given the depositary explicitly such discretion."

BUSINESSEUROPE's response:

BUSINESSEUROPE is not aware of any serious problems associated with the holding of depositary receipts that should be addressed in a Recommendation. We consider that rights of the depositary receipt holder are a matter for private agreement between the holder and the depositary and that this topic should be left to the market to decide.

There is already a movement in this direction as mentioned in the consultation document. This market-driven approach should continue without the interference of any EU action.

IV. STOCK LENDING

Question 3:

***Q 3.1:* Do you believe that stock lending needs to be addressed at EU level? Please give your reasons.**

***Q 3.2:* If your answer is yes, would you support recommendations along the following lines?**

"1. Stock lending agreements should contain provisions informing the relevant parties of the effect of the agreement with regard to the voting rights attaching to the transferred shares.

2. Member States should ensure that shares can only be lent by financial intermediaries where the investor has explicitly agreed to his shares being used for stock lending in the framework agreement with his financial intermediary.

3. Borrowed shares should not be voted, except where the voting rights are exercised on instructions from the lender.

4. Stock lending agreements should provide that borrowers have to return equivalent shares to those borrowed promptly upon the lender's request."

BUSINESSEUROPE's response:

BUSINESSEUROPE believes that stock lending is a matter of private agreement between the lender and the borrower. Stock lending is used in many different contexts and in many different markets. Sometimes such arrangements are used temporarily to transfer the rights attached to the securities while in other instances the securities merely serve as collateral in a regular business loan agreement. But it seems necessary:

- to introduce more transparency into stock lending, as the current lack of transparency in quite a number of countries is to the detriment of all market players including issuers. Consequently, to impose disclosure for stock lending agreements, is important so the issuer can acknowledge the existence of these agreements considering that they may affect voting rights and may interfere with the good functioning of the General Meeting;
- to provide that borrowed shares should not be voted except where the voting rights are exercised on instructions from the lender to avoid distorted votes;

- to clarify the effects of the agreement on the exercise of voting rights: the Commission might want to consider stating explicitly that non-compliance with the provisions of the agreement concerning the information obligation has no effect on the validity of the exercised voting rights towards the issuer.

V. CHAIN OF INTERMEDIARIES

1. DUTIES OF INTERMEDIARIES

Question 4:

***Q 4.1:* Do you consider that the duties of intermediaries in the voting process need addressing?**

***Q 4.2:* If your answer is yes, would you consider recommendations along the following lines as adequate?**

"1. Member States should ensure that before entering into relevant agreements, intermediaries explain to clients whether, and if so how, they will be able to give instructions about the exercise of voting rights.

2. Where a client is entitled to give instructions about the exercise of the voting right, Member States should ensure that financial intermediaries that are part of the chain of intermediaries between that client and the issuer either cast votes attached to shares in accordance with the clients' voting instructions or transfer the voting instructions to another intermediary higher up in the chain.

3. Financial intermediaries should keep a record of the instructions and provide confirmation that they have been carried out or passed on for a period of at least one year.

4. Member States should ensure that fees charged by intermediaries for the services referred to above do not exceed substantially the actual costs incurred by that intermediary.

5. Member States should ensure that intermediaries take the necessary measures to have the client's name registered in the register of companies which have issued registered shares. This obligation should not apply where the client objects to his name being registered.

6. "Client" within the meaning of this provision is the natural or legal person on whose behalf another natural or legal person holds shares in the course of a business."

BUSINESSEUROPE's response:

Intermediaries play a key role in the processes around General Meetings. Issuers and shareholders rely on them to get the notice to convene the meeting swiftly through the

issuer to the shareholder and to make sure that information regarding the identity of the shareholder and, where applicable, his voting instructions reach the issuer in a timely manner. BUSINESSEUROPE therefore considers that this issue should be addressed at EU level and supports the above-mentioned statements although with some caveats.

In cross-border situations, where financial intermediaries are involved, the exercise of shareholders' rights relies to a great extent on the efficiency of the chain of intermediaries. Investors are frequently unable to exercise voting rights without the cooperation of every intermediary in the chain between the company and himself. As the shareholder base of EU issuers often consists to a considerable extent of foreign investors, the problem cannot be solved at national level.

We consider that the right to vote enables shareholders to influence change and to take an active role in key decisions. It is therefore essential that clients are fully aware of the fact that they themselves – and not intermediaries – are the owners of the right and of all possibilities to exercise it. Moreover, in order to enable investors to cast votes, it is important that intermediaries pass on the voting instructions from the investor to the company along the chain of intermediaries. The intermediary should only be able to cast a vote if it is designated as a proxy by his client. Thus, the entitlement to control the voting right should rest with the person having the genuine economic interest in the shares.

Although we support point 3, regarding the record of the instructions and the confirmation that should be provided by financial intermediaries, we believe that it should be explicitly mentioned that the confirmation has to be provided by the intermediary as it is not the issuer's duty to monitor in detail how every intermediary has cast his votes, nor can he be expected to bear the responsibility or liability for the accuracy of such information.

Point 4 would lead to considerable administrative burdens and significant costs for intermediaries as well as supervisory authorities. Therefore, a better solution is that intermediaries should be obliged to use the least expensive and most efficient channels for providing their services. Moreover, it could seem an unjustified restriction of contractual freedom between the parties.

We support point 5 as we consider that one of the benefits of registered shares is that they allow for a direct contact between the stock corporation and its shareholders. However, the last part may jeopardize the effectiveness of this provision. While legislators are able to find appropriate solutions at national level they have no means to make sure that foreign investors – who often form a considerable part if not the majority of the shareholder base – are not registered. Inasmuch, the proposed provision is welcome.

In addition, the European Commission should examine the means to monitor that intermediaries fulfil their duties and whether disclosure requirements and consequences for non-compliance should be imposed as a matter of EU law, in order to ensure equal treatment of all investors.

In the current wording of the shareholder's right to object to his registration, there is a risk that an intermediary could try to release himself from his duty to register the client by clauses in the General Terms and Conditions. To avoid such an abuse, the word "expressly" should be inserted before "objects to his name being registered".

Although we consider useful the definition of client (point 6), the current wording gives the wrong impression as if the recommendation only concerned intermediaries who hold shares in the name and/or "for the account" (which is missing in the current version) of somebody else. Nevertheless all intermediaries keeping securities accounts or intervening otherwise in the processes must be covered. This also includes clients of intermediaries that are intermediaries themselves, in which case they are not shareholders.

Moreover, the Recommendation should also encourage Member States to remove all legal obstacles that intermediaries could be confronted to in complying with the said disclosure obligation, such as provisions in place in the area of privacy or data protection. It should also provide that, in general, if there is a breach of the agreement, the intermediaries would be held liable but the vote would not be contested.

2. DISCLOSURE OF INVESTORS

Question 5: Would you agree that the transparency directive, once implemented, will give a breakdown of voting rights and that further action at EU level would be premature?

BUSINESSEUROPE's response:

BUSINESSEUROPE believes that action at EU level regarding investor disclosure would be convenient. This would facilitate the identification of shareholders at any time, especially in the case of investors from abroad who are not registered in the share register but for whom intermediaries are registered instead. Securities intermediaries should be required to certify to the issuing company, at its request, who the ultimate investor entitled to control the voting rights is and how many shares he holds. This would enable issuers to ensure that only the right persons vote at general meetings and would help avoid double voting, which is of primary importance for companies, as well as improving the dialogue between the issuer and the shareholders in general.

In France (Articles L-228-2 and L228-3 of the French Code of Commerce) and in the United Kingdom such regulation is already in place. In the latter, section 793 of the Companies Act 2006 allows a public company to investigate who has an interest in its shares. Where a person fails to give the company the required information in response, the company can apply for a court order imposing restrictions on the shares in question. A similar provision at European level would at the same time offer an alternative to special rules for hedge funds as is currently discussed at EU and G8 level.

The scope and the object of the transparency directive (Directive 2004/109/EC) are different and are not sufficient as they only allow the identification of significant shareholders. This directive provides only that the issuer has to be informed when the shareholders exceed a fixed threshold; thus, this provision is not sufficient to ensure that the company knows all its shareholders. Moreover, intermediaries should not only have the duty to disclose this identity in the course of the processes around general meetings, but should also cooperate in disclosing the identity of the shareholder at any time upon request of the issuer.

Also, under Article 9 of the transparency directive, Member States shall ensure that shareholders notify the relevant issuers of their proportion of voting rights once it reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. This is a step towards more transparency. It would, however, give this obligation the necessary effectiveness if the Commission recommended at European level a certain degree of sanction attached to non-compliance with this rule. A recommendation in this sense could read as follows: "Member States shall ensure that shareholders not complying with notification obligations under Article 9 Transparency Directive forfeit their voting rights for a minimum period of six months commencing with the delayed notification."

VI. MANAGEMENT COMPANIES OF INVESTMENT SCHEMES

Question 6: Do you think there is a need for a recommendation along the following lines?

"1. Management companies, the regular business of which is the management of collective investment schemes, shall be deemed to be 'clients' for the purposes of the draft recommendations set out in section V.1.
2. Member States should ensure that management companies referred to in point 1 shall be permitted to cast votes attaching to some of the shares differently from votes attaching to the other shares."

BUSINESSEUROPE's response:

Yes. BUSINESSEUROPE supports inclusion of the above-mentioned statements in a recommendation.

VII. OTHER SUGGESTIONS

BUSINESSEUROPE believes that the Commission should examine in depth the impact that the adoption of the **Hague Securities Convention** in the EU would have, notably on shareholders' rights. It determines the applicable law to the legal nature and effects of a credit of securities to an account held through an intermediary.

The Convention and the EC Directives[3] take a different approach on the law applicable for indirectly held securities. Community legislation is based on a "location of the account" formula: the Convention is based on the law expressed in the relevant account agreement. These two approaches are incompatible and, consequently, the Directives will have to be changed.

[3] Directive on settlement finality in payment and securities settlement systems (98/26/EC), the Directive on the reorganisation and winding up of credit institutions (2001/24/EC), and the Directive on financial collateral arrangements (2004/47/EC).

The Hague Convention would allow European accounts to be ruled by non-European laws. This will pose many problems for European companies, in particular since such a free choice could modify the way voting rights have to be exercised. In reality, the "free choice" is of a more theoretical nature: it would enable a small number of global players to enforce their preferred law worldwide.

———