Director Notes
The European Series

Investor Engagement in Europe in the Wake of the Shareholder Rights Directive Implementation

by Marco Scalera

The Shareholder Rights Directive, which pursues the fostering of dialogue between the board of directors and investors, is being implemented across member states of the European Union. In the current economic and legal environment, directors of European listed companies need to engage shareholders effectively to ensure their support of business strategies aimed at recovery and medium-term growth.

Shareholder communication with the board of directors is no longer merely a matter of public disclosure. It is gaining vital importance in corporate governance practices across European jurisdictions, as investors demand an increasing say in entrepreneurial decisions and business affairs.

Most shareholders are institutional investors. Eighty-six percent of shares in European listed companies are held by investors that are not individuals or households and 37 percent of such shares are held by foreign investors.[1] The financial crisis has led these entities to the forefront of shareholder unrest, where they are generally calling for greater corporate democracy. In practice, shareholders have been demanding increasing information and engagement on issues such as:

- director independence and qualifications;
- executive compensation;
- director duties;
- oversight systems and responsibilities;
- corporate risk management;
- strategic oversight; and
- board and committee structure and performance.

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In response to this increasing pressure, directors should consider developing a successful shareholder engagement strategy that reaches beyond general meetings. At a minimum, directors should consider the following issues:

- organizing sessions with shareholders;
- choosing the right shareholder representatives to invite to such sessions;
- choosing which directors and other executives should participate in such sessions; and
- predetermining the subjects to be discussed, in light of shareholders' concerns as well as considerations involving the protection of confidentiality and business interests of companies.

As the Shareholder Rights Directive of 2007[2] (SRD) is implemented across European jurisdictions, directors should be aware that shareholders are being provided with sharper tools to monitor management and increase their involvement in corporate affairs.

This report briefly outlines major governance issues that, in light of the new legal and economic environment, the boards of European public companies should consider when evaluating the most effective and efficient approach to engage shareholders, especially in connection with their general meetings. The report focuses on recent developments in Belgium, France, Germany, Italy, the Netherlands, and the United Kingdom.

The Shareholder Rights Directive

The SRD was passed on July 11, 2007, long before the onset of the financial crisis, by the Parliament and Council of the European Union. It was due to be implemented into national legislation by member states by August 3, 2009; however, among the jurisdictions considered, to date only Germany, the United Kingdom, and Italy have done so.[3] In the Netherlands, France, and Belgium, legislative measures implementing the SRD are currently being discussed and are expected to enter into force during 2010.

The SRD pursues two aims: enhancing shareholders' rights in listed companies and tackling hindrances to cross-border voting. Among other things, the SRD enables greater shareholder access to relevant business information and the exercise of voting rights by proxy.[4]

The rationale for legislation enhancing shareholder engagement can be found in the empirical evidence that, in recent decades, the countries most protective of investor interests enjoyed the highest rates of capital market growth.[5]

Engagement tools Under the SRD, shareholders should be provided with the legal instruments to engage proactively with corporate executives and directors. These tools include:

- timely and widespread access to information regarding the general meeting;
- the right to put items on the agenda;
- the right to table draft resolutions; and
- the right to ask questions (and expect answers) on agenda items.

The sections below elaborate on each of these developments.

Access to Information Regarding the General Meeting

The SRD enhances corporate/investor engagement by ensuring that shareholders are able to cast informed votes at the general meeting, having had sufficient time to consider all relevant documents and information. This is achieved through a set of rules based on three elements:

1. the term for issuance of the convocation of a general meeting (time);
2. the means for dissemination of such convocation (access); and
3. the content of such convocation (content).

The first element: **Time** As a general rule, under Article 5(1) of the SRD the convocation of a general meeting shall be issued no later than 21 days before the day of the meeting.[6]

This term aims at providing shareholders with sufficient time to acquire and process relevant information regarding the items on the meeting agenda and undertake such internal consultations as may be necessary for the exercise of voting rights. With regard to groups of companies, the term should be sufficient to allow for parents or other affiliates to evaluate the voting decision. Similarly, the term should provide institutional investors with sufficient time for

implementing voting decisions and strategies as well as ensuring successful proxy solicitation procedures.

Overall, compliance with the 21-day minimum notice requirement should not entail major amendments to the existing legislations of the European jurisdictions covered by this report. In fact:

- In Germany, the general rule applicable prior to the implementation of the SRD required listed companies to issue the convocation at least 30 days prior to the general meeting.[7]
- In France, as a general rule, a meeting notice (*avis de réunion*) must be published at least 35 days prior to the meeting, while the convocation (*avis de convocation*) follows the meeting notice and is issued 15 days prior to the general meeting.
- In the United Kingdom, national legislation has been amended to implement the SRD and now requires traded companies[8] to issue the convocation at least 21 days before the day of the meeting.[9]
- In Italy, the general rule applicable after the implementation of the SRD provides for a 30-day term.[10] The term is shortened to 21 days when the general meeting is called to pass resolutions on losses affecting the share capital or the appointment of liquidators, and is extended to 40 days if the general meeting is called to appoint directors and/or statutory auditors.
- In the Netherlands–where the legislation currently provides for a 15-day term–the proposed new legislation implementing the SRD provides for a term of 42 days prior to the date of the general meeting.
- In Belgium–where the legislation currently provides for a 24-day term–the proposed new legislation implementing the SRD provides for a term of 30 days prior to the date of the general meeting.

A general exception to the 21-day minimum requirement is carved out under Article 5(1), first subparagraph, of the SRD, pursuant to which member states may provide that—in companies where all shareholders are allowed to vote by electronic means—the general meeting of shareholders may decide that the convocation of a meeting other than the annual general meeting shall be issued no later than 14 days before the day of the meeting.[11] Such exception has generally not been welcomed favorably by the member states considered by this report and, at the moment, has been envisaged only in the United Kingdom.[12]

Time: Implications

The implementation of the 21-day minimum term requirement for the issuance of the convocation of a general meeting should not entail major changes in corporate practice across the European jurisdictions considered. In particular, the new rules should not significantly affect the timing for convocation of the board called to discuss and resolve upon the convocation of the general meeting. With the exception of the United Kingdom, the term for issuance of convocations tends to be greater than the minimum provided by the SRD, which may indicate the will to foster greater informed participation at general meetings. In practice, in most jurisdictions the 21-day term appears to be the minimum term possible to ensure successful implementation of proxy solicitation and voting procedures.

The second element: Access The second element of the reform regards the means of dissemination of the meeting convocation. Even though today, following the implementation of the transparency directive (2004/109/EC), companies can legally avail themselves of a number of technological vehicles, including the internet, to ensure widespread cross-border outreach, national newspapers remain a preferred means of dissemination in the jurisdictions considered.

Under Article 5(2) of the SRD, companies are required to issue the convocation in a manner ensuring fast access on a non-discriminatory basis and to use such media as may reasonably be relied upon for effective dissemination of information to the public throughout Europe. Furthermore, to discourage forms of protectionism, member states may not impose on companies an obligation to use only communication service providers established on national territory.[13]

As in the case of minimum convocation terms, the legislation of the European jurisdictions considered was generally in line with the SRD, even before its implementation. In particular:

- In the United Kingdom, no amendments were needed to implement the SRD. The convocation may be sent by mail, by electronic means, or posted on the investor relations website. In the latter case, the convocation must remain available until the conclusion of the relevant general meeting.

- In Germany, no major changes were needed to implement the SRD. The convocation must be published in the *Electronic Federal Gazette* and then forwarded to such media as may be relied upon for dissemination of information to the public throughout the European Union.[14]
- In Italy, legislation adopted in summer 2009 has established the fundamental obligation that companies must disseminate a meeting's convocation by publishing it in national newspapers. However, the legislative amendments enacted to implement the SRD provide dissemination through the company's website and demand that CONSOB (the Italian financial market authority) establish additional means of dissemination.
- In France, no major changes appear necessary to implement the SRD, since a general meeting notice is published in the *Bulletin des Annonces Légales Obligatoires* and on the company's website, and the convocation is published in the *Bulletin des Annonces Légales Obligatoires* and in financial newspapers as well as on the company's website.
- In the Netherlands, as a general rule, the convocation is issued by way of an announcement in a national newspaper.[15] The proposed new legislation provides that the convocation must be made available on the company's website.
- In Belgium, the convocation is published in the Belgian Official Gazette (*Moniteur Belge/Belgisch Staatsblad*), in at least one Belgian newspaper and in media that may be reasonably relied upon for the effective dissemination of information to the public in the European Union. The proposed new legislation provides that the convocation be published in the company's website and in those media, ensuring accessibility in a non-discriminatory manner throughout the European Union.

Access: Fostering Cross-Border Participation

The rules regarding the dissemination of the convocation partly overlap with existing national rules adopted to implement the transparency directive. Such rules – which are in force or coming into force in European jurisdictions – envisage a widespread system of disclosure based on the dissemination, filing, and storage of relevant information. The general trend appears to be in favor of the use of electronic communication and the internet, although it remains unclear what effect this will have on shareholder engagement, aside from fostering cross-border participation.

The third element: Content The third element of the reform ensures efficient and effective shareholder engagement by focusing on the actual information to be provided to shareholders.

On one hand, shareholders must be provided with meaningful information that is necessary to decide whether they want to attend the meeting and how to cast their votes. On the other, shareholders should not be overwhelmed by the amount of information they receive, as this may undermine the ultimate objective of the reform and become an additional cause for shareholder apathy.

Under Article 5(3) of the SRD, the convocation shall at least:

- indicate precisely when and where the general meeting is to take place and the proposed agenda;
- contain a clear and precise description of the necessary procedures to participate and cast votes in the general meeting;[16]
- state the record date and explain that only those who are shareholders on that date shall have the right to participate and vote in the general meeting;
- indicate where and how the full, unabridged text of the documents and draft resolutions submitted to the meeting may be obtained; and
- indicate the website address where certain other information shall be made available (see below).

Under Article 5(4) of the SRD, for a continuous period of at least 21 days prior to and including the date of the general meeting, companies shall make available to their shareholders on their website:

- the convocation of the general meeting;
- the total number of shares and voting rights as of the date of the meeting;
- the documents to be submitted to the general meeting;
- the draft resolutions or, where no resolution is proposed, a comment from the company's competent body;[17] and
- the forms to be used to vote by proxy, unless such forms are sent directly to each shareholder.

As for the implementation of the rules in the European jurisdictions examined by this report, the countries that have already implemented the SRD generally comply with the new requirements. The same appears to be the case for the proposed implementing measures that are currently being discussed in the other major jurisdictions examined. In particular:

- The United Kingdom[18] and Germany have implemented the SRD;[19]
- In Italy, the legislative amendments enacted to implement the SRD provide that certain documents–corresponding to those listed under Article 5(4) of the SRD–must be made available on the company's website on the same day the convocation is issued.
- The French legal system, as currently in force, generally complies with Article 5(3) of the SRD.[20] As for Article 5(4) of the SRD, the AMF (the French financial market authority) mandates listed companies to make available on their website the meeting convocation. However, the term by which such documents need to be made available is 15 days instead of 21 days. By the same 15-day term a list of shareholders and the documents to be submitted to the general meeting also need to be made available.[21]
- In the Netherlands, existing legislation only provides that the agenda and related documentation be made available at the company's registered office. The proposed new legislation provides that certain documents–generally corresponding to those listed under Article 5(4) of the SRD–must be made available on the company's website at least 42 days prior to the day of the general meeting.
- In Belgium, according to existing legislation, the convocation needs to state the date, time, and place of the meeting, agenda, and draft resolutions as well as information on the total number of shares and votes in the company and the right to participate in the meeting. Pursuant to corporate governance "comply or explain" rules, directors are required to provide appropriate explanations on the agenda items and proposed resolutions, while publication on the company's website is only required for certain documents.

Content: Lowering Information Costs

Although national legislations considered by this report already seem to be in line with the spirit of the SRD – if not, pending implementation, with its rules – it is probable that the new rules will stimulate foreign investors and cross-border voting and engagement. Uniformity regarding information to be provided before the general meeting should lower information costs for institutional and foreign investors. Overall, the rules impose that documentation be available as of the convocation, which will require that, in general, such documentation be prepared prior to the board meeting calling the shareholders meeting.

Right to Put Items on the Agenda and to Table Draft Resolutions

The rights to put items on the agenda and to table draft resolutions have traditionally been recognized across the major European jurisdictions. However, the actual exercise of these rights has often been subject to limitations, reducing their impact on corporate practice. Moreover, the limitations have differed among European jurisdictions, often hampering the participation and engagement of foreign investors. For these reasons, the SRD is aimed at establishing uniform rules on thresholds and deadlines regarding the exercise of these rights.

Following the full implementation of the SRD, shareholders of European public companies will be better positioned to participate in corporate affairs, both at the preliminary proposal stage and during the actual decision-making process. The practical impact of the directive, therefore, is to confirm the need for boards to pursue an effective shareholder engagement strategy. This strategy should apply not only in connection with general meetings, but also before and independent of such meetings, so as to successfully interpret shareholder needs and objectives.

Under Article 6 of the SRD, as a general rule, member states shall ensure that shareholders, whether acting individually or collectively, have the right to put items on the general meeting agenda, provided that any such item is accompanied by an explanation or a draft resolution. Similarly, shareholders should be granted the right to table draft resolutions for items included or to be included in the agenda.

Member states may provide that the right to put items on the agenda may be exercised only in writing and in relation to the annual general meeting. However, if a member state chooses to do so, the SRD requires that shareholders, whether acting individually or collectively, be recognized as having the right to call a special meeting whose agenda includes items indicated by those shareholders.

As mentioned, the right to put items on the agenda and the right to table draft resolutions are well-established rights across the European Union. Nonetheless, the implementation of the SRD is producing important consequences on existing legislation as, under Article 6(2)(3)(4), the exercise of such rights is subject to strict deadlines as well as specific rules on minimum stake requirements. In particular, the above-mentioned rules establish that:

- if the rights are only available to shareholders holding a minimum stake in the company, the minimum stake shall not exceed five percent of the share capital;
- member states shall set a deadline, with reference to a specified number of days when the right to put items on the agenda and the right to table draft resolutions are before the date of the general meeting or convocation, for the exercise of such rights; and
- member states shall ensure that, where the agenda of a general meeting is amended as a consequence of the exercise of the right to put items on the agenda and the right to table draft resolutions, the company shall make available a revised agenda of the meeting before the record date or–if no record date applies–sufficiently in advance of the date of the general meeting, so as to enable shareholders to appoint a proxy or, where applicable, vote by correspondence.

In the major European jurisdictions, the fundamental rights to put items on the agenda and to table draft resolutions are currently regulated as follows:

- In Germany, after the implementation of the SRD:
  - the right to put items on the agenda shall only be exercised in writing, by shareholders holding either five percent of the share capital or shares representing EUR 500,000 of the share capital. The right is not limited to the annual general meeting, and each item must be accompanied by an explanation or draft resolution;
  - the right to table draft resolutions is not subject to a minimum stake requirement; and
  - the request to put a new item on the agenda must reach the company 30 days prior to the date of the meeting, while the right to table draft resolutions is not subject to deadlines. However, if the draft resolutions reach the company after 14 days before the meeting, the company is exempted from making them available on its website.
- In the United Kingdom, after implementation of the SRD:
  - the right to put items on the agenda with respect to a traded company and the right to table draft resolutions with respect to a public company are available only in connection with annual general meetings and only to (i) shareholders representing at least five percent of the total voting rights of all shareholders with the right to vote at the meeting, and (ii) at least 100 shareholders who have the right to vote at the meeting and hold shares in the company for which they have paid an average sum, per shareholder, of at least £100;[22]
  - the agenda may not include vexatious or defamatory matters. Similarly, draft resolutions may not be tabled if they are defamatory or vexatious; and
  - for both rights the deadline is the later of (i) six weeks before the annual general meeting to which the request relates, or (ii) the time at which the notice of the meeting is issued.
- In Italy, after implementation of the SRD:
  - the right to put items on the agenda may be exercised in writing by shareholders holding, whether individually or collectively, at least 2.5 percent of the share capital;

- the right to put items on the agenda cannot be exercised for items in relation to which, under Italian law, shareholders may be called to resolve on draft resolutions submitted or drafted only by directors;
- as a general rule, the right to put items on the agenda may be exercised within 10 days from the convocation of the meeting. This term is shortened to five days when the convocation term is 21 days pursuant to applicable laws and in case of takeover bids; and
- shareholders are required to accompany any item put on the agenda with a report on that item; the request to put items on the agenda, together with the report prepared by the requesting shareholder and an additional report that directors are allowed (but not mandated) to draft, is published–in the same manner required by Italian law for the convocation–at least fifteen days before the meeting (seven days in the case of takeover bids).

The legislative amendments implementing the SRD in Italy have not changed the rules governing the right to table draft resolutions, which may be exercised by any shareholder. This right may not be exercised for items in relation to which, under Italian law, shareholders may be called to resolve on draft resolutions submitted or drafted only by directors.

- In France, according to the legislation currently in force:
  - the right to put items on the agenda and the right to table draft resolutions may be exercised by shareholders holding five percent of the share capital, if the share capital is lower than or equal to EUR 750,000. If the share capital is greater than EUR 750,000, the minimum stake required is calculated by dividing the share capital in fractions and summing up the figures calculated on these fractions as follows: four percent for the fraction of the share capital up to EUR 750,000, 2.5 percent for the fraction of the share capital between EUR 750,000 and EUR 7,500,000, one percent for the fraction of the share capital between EUR 7,500,000 and EUR 15,000,000, and 0.5 percent for the fraction of the share capital greater than EUR 15,000,000;[23]
  - proposed resolutions must be sent by registered mail or via electronic means of communication and must include an explanation; and
  - the right to put items on the agenda and the right to table draft resolutions may be exercised between the date of the meeting notice and the 25th day before the meeting.[24]
- In the Netherlands, current legislation provides that:
  - the agenda of the general meeting must also contain the items requested in writing by shareholders who, whether individually or collectively, hold at least one percent of the share capital or hold shares representing a value of at least EUR 50 million,[25] unless it would be detrimental to an important interest of the company; and
  - the request to put an item on the agenda must be received by the company no later than 60 days before the date of the meeting.[26]
- The proposed new legislation implementing the SRD in the Netherlands provides that:
  - the agenda of the general meeting must also contain the proposal for resolutions requested in writing by shareholders which, whether individually or collectively, hold at least one percent of the share capital or hold shares representing a value of at least EUR 50 million;[27]
  - the request must state the relevant reasons; and
  - the request may not be rejected by the company on the basis of an "important interest."[28]
- In Belgium, current legislation provides that:
  - the right to put items on the agenda may be exercised only by shareholders representing at least 20 percent of the share capital, unless the articles of association grant the right to shareholders owing a lower percentage;
  - the request to put an item on the agenda is not subject to deadlines but, if received by the company when the convocation has already been published (or is being published), the company may also decide not to amend the agenda and call another meeting on the item which was not included in the agenda; and
  - the right to table draft resolutions may be exercised during the general meeting only and the modified draft resolutions must remain within the scope of the agenda.

Agenda Rights: Incentives to Shareholder Engagement

The right to put items on the agenda and the right to table draft resolutions were generally recognized across the jurisdictions considered before the implementation of the SRD. The SRD provides greater uniformity in regulating such rights, which may act as a catalyst to their exercise, especially by foreign investors. In practice, the exercise of such rights may impose additional procedural complexities and costs if, for example, it is necessary to revise an agenda and prepare relevant documentation. This may render shareholder engagement prior to general meetings more useful.

- The proposed new legislation implementing the SRD in Belgium provides that:
  - the rights to put items on the agenda and table draft resolutions is available to shareholders representing at least three percent of the share capital; and
  - the relevant request must be in writing (or sent by electronic means) and received by the company not later than 22 days prior to the date of the general meeting.

The Right to Ask Questions on Agenda Items

Allowing questions at the general meeting is probably the most direct form of shareholder engagement. Following the implementation of the SRD, on one hand, shareholders are expressly allowed—if not encouraged—to directly engage the board of directors in connection with general meetings, while on the other, directors are generally under an obligation to successfully and exhaustively answer questions from shareholders.

Under Article 9(1) of the SRD, every shareholder shall have the right to ask questions related to items on the agenda of the general meeting, and the company is under an obligation to answer these questions.

Pursuant to Article 9(2) of the SRD, the right to ask questions and the obligation to answer them may be subject to limitations that member states may envisage—or allow companies to envisage—with a view to ensuring:

- the identification of shareholders;
- the good order of general meetings and their preparation; and
- the protection of the confidentiality and business interests of companies.

Furthermore, member states may allow companies to provide a sole answer to the same types of questions or indicate that the answer to a certain question is deemed to be already available on the investor relations pages of the company's website, in a dedicated Q&A section.

Question and answer rights are currently regulated as follows in the major European jurisdictions:

- Under German law, whose compliance with the SRD on this specific matter did not require any amendments:
  - every shareholder participating in the meeting, regardless of the amount of his/her holding and right to vote, is entitled to request information on agenda items;
  - the request shall be made orally at the meeting, without the need for any advance notice or explanation;
  - the request may involve any matter that, on the basis of publicly available information, a reasonable shareholder would consider as essential for the purpose of making a voting decision;
  - the right to request information can be subject to a time limit to be determined by the chairman of the meeting, provided that the articles of incorporation or the rules of procedure of the general meeting so provide;
  - directors are allowed to reject information requests in the following cases:
    - disclosure may prejudice the company and one or more of its affiliated companies;
    - information relates to tax valuations or individual tax amounts;
    - information relates to the difference between book values and market values of company assets, unless annual financial statements are to be approved at the meeting;

A Look at the United States: Emerging Engagement Practices

In the United States, issues of shareholder engagement have taken center stage in the corporate governance debate of the last few years. Under pressure from shareholders and proxy voting advisory groups, a number of U.S. public companies have publicized proactive forms of investor outreach.

Confirming its reputation for being at the forefront of best practice developments,[a] Pfizer announced in 2007 the new practice of inviting representatives from investors (owning, in aggregate, approximately 35 percent of Pfizer's shares) to meet regularly with the company's board of directors. Pfizer already had used a number of other mechanisms to foster dialogue with all shareholders, including participating in investor conferences and instituting board sessions for reviewing letters and e-mails from investors.[b] Although the "approach may not be for all boards," governance experts Ira M. Millstein, E. Norman Veasey, Harvey J. Goldschmid, and Holly J. Gregory released a joint statement in which they predicted that other companies would follow Pfizer's example.[c]

In fact, in 2008 and 2009, the success encountered by the new Pfizer policy persuaded other companies that they should experiment with similar forms of direct engagement. Directors of Bristol-Myers Squibb also met with large investors. The board at McDonald's Corp. brought in a panel of outside experts for a half-day discussion on an issue raised by shareholders. Home Depot held a town meeting with shareholder activists and other vocal critics of the company's practices. And Occidental Petroleum arranged a series of road shows to illustrate its corporate governance developments.[d]

a Matteo Tonello, *Corporate Governance Handbook: Legal Standards and Board Practices*, The Conference Board, Research Report 1450, 2009, p. 51.

b "Pfizer Board of Directors to Initiate Face-to-Face Meetings with Company's Institutional Investors on Corporate Governance Policies and Practices," Press Release, 28 June 2007.

c "Meetings between Directors and Institutional Investors on Governance Matters Are a Constructive Step," Memorandum, Weil, Gotshal & Manges LLP, 29 June 2007.

d For an overview of these and other recent cases following Pfizer's example, see Stephen Deane, *Board-Shareholder Dialogue: Why They're Talking*, Issue Report, RiskMetrics Group, February 2009.

  - information relates to the company's accounting and valuation methods, as far as the disclosure of the methods in the notes to annual financial statements suffices to provide a true and fair view on the company assets, financial situation, and profitability, unless annual financial statements are to be approved at the meeting;
  - the board of executive directors (*Vorstand*) would commit a criminal offence by disclosing the information;
  - the company is exempted from disclosure with regard to accounting and valuation methods, set-offs in the annual financial statements, etc.;[29] and
  - relevant information has been made available on the company's website for no fewer than seven consecutive days prior to the commencement of the meeting.

- In the United Kingdom, following implementation of the SRD:
  - traded companies are required to answer questions at the general meeting if the questions are asked by a shareholder attending the meeting and relate to the business being dealt with at the meeting;[30]
  - questions need not be answered if:
    - to do so would interfere unduly with the preparation of the meeting or would involve the disclosure of confidential information;
    - the answer has already been given on the company's website in a question and answer format; and
    - it is undesirable, based on the interests of the company or the good order of the meeting, that the question be answered.

- In Italy, the legislative amendments passed to implement the SRD provide that:
  - shareholders may ask questions relating to items on the agenda at or before a general meeting;
  - questions are to be answered prior to or at the first general meeting held after the company receives them;
  - single answers to questions having the same content are allowed; and

- the company is not under an obligation to answer questions when the information requested is available on its website in a Q&A format.

- In France, according to the legislation currently in force:
  - all shareholders may ask questions irrespective of share capital held; and
  - questions may be asked after the date on which the relevant documents are made available to investors.

- In the Netherlands, current legislation[31] provides that:
  - companies must provide shareholders with the information they request during the general meeting, unless it would be detrimental to an important interest of the company (for example, if providing the information could adversely affect the company's competitive position).

- In Belgium, current legislation provides that:
  - questions asked by shareholders relating to the board reports or the agenda must be answered, unless the answer would inflict significant damage on the company, its shareholders, or employees;
  - the proposed new legislation adds that: (i) questions can be asked in writing prior to the meeting; (ii) global answers can be given to questions on the same subject; (iii) questions must be received by the company not later than six days prior to the date of the meeting; and (iv) answers may not be given if the shareholder raising the question did not comply with admission formalities.

Questions on Agenda Items: Developing Q&A Sections

The right to ask questions – and to have them answered – may lead to time-consuming complexities if shareholders have no option but to pursue this activity at general meetings. To forestall this scenario, directors might do well to envisage a relevant section on the company's website providing questions and answers in connection with all issues and concerns of possible interest to shareholders.

Final Remarks

The financial crisis has led shareholders to seek increasing engagement on fundamental corporate issues and concerns. Although modeled according to the core standards already in place in the European jurisdictions considered, the rules contained in the SRD provide for greater uniformity. As such, they aim at lowering information costs and encouraging cross-border activism. Moreover, as shareholders—institutional investors in particular—demand greater and more effective involvement in corporate affairs, even the minor changes that may result from the implementation of the SRD can have significant effects on shareholder participation. Engaging shareholders effectively and satisfying their growing information needs is thus becoming an essential role of directors of companies listed in Europe.

In particular, the directors of companies that hold participations in other companies will have the opportunity to develop practices on the basis of their experience in playing both sides of the fence: as directors in relationship to the shareholders of their companies and as shareholders in relationship to the directors of participating companies. This will also make it possible for directors to work as catalysts of communication and best practices among their peers in participating companies.

Endnotes

1 Federation of European Securities Exchanges, *Share Ownership Structure in Europe*, December 2008. For a detailed recognition of the growing presence of institutional investors in the stock ledger of public companies around the globe, see the data discussed in Matteo Tonello and Stephan Rabimov, *The 2009 Institutional Investment Report: Trends in Asset Allocation and Portfolio Distribution*, The Conference Board, Research Report 1455, 2009.

2 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, available at http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm.

3 The SRD was implemented in 2009 in Germany by the *Gesetz zur Umsetzung der Aktionrsrechterichtlinie* and in the United Kingdom by the Companies (Shareholders' Rights) Regulations 2009 (SI 2009/1632). In Italy the SRD was implemented by Legislative Decree No. 27 on 27 January 2010.

4 Considerando No. 1 and No. 5 of the SRD and Communication to the Council and the European Parliament of 21 May 2003, entitled "Modernising Company Law and Enhancing Corporate Governance in the European Union–A Plan to Move Forward."

5 See, notably, Rafael LaPorta, Florencio Lopez de-Silanes, Andrei Shleifer and Robert W. Vishny, "Legal Determinants of External Finance," *Journal of Finance*, Vol. 52, Issue 3, 1997, pp. 1131-50. More recently, see John Armour, Simon Deakin, Prabirjit Sarkar, Mathias Siems and Ajit Singh, "Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origin Hypothesis," ECGI Law Working Paper No. 108/2008, available at http://ssrn.com/abstract=1094355.

6 Exceptions apply in circumstances where the company is facing a takeover bid. See Article 9(4), which refers to general meetings called to resolve on defensive measures, and Article 11(4), which refers to general meetings called by the offeror that reached 75 percent of the share capital for the removal/appointment of directors or the amendment of the articles of association.

7 The term is extended to 36 days when the articles of association require shareholders to sign up in advance for attendance at the general meeting.

8 *I.e.*, those companies with their shares admitted to trading on a regulated market.

9 Prior to implementation of the SRD, private companies could call general meetings on 14 days' notice, and public companies could call general meetings on 14 days' notice but were required to give 21 days' notice if the meeting was an annual general meeting (AGM). This continues to apply to non-traded companies and traded companies who have 'opted-in' in the process described in Section 971 of the Companies Act 2006. Subsequent to the implementation of the SRD, section 307A of the Companies Act 2006 now provides that if three conditions are satisfied, traded companies' general meetings can still be called on 14 days' notice. The conditions are: (i) that the meeting should not be an AGM; (ii) that members can appoint a proxy by means of a website; and (iii) that a special resolution permitting 14 days as a notice period for meetings is adopted either at the AGM immediately preceding the meeting in question or at a general meeting that takes place after the AGM immediately preceding the meeting in question.

10 The legislation in force prior to the implementation of the SRD provided for a 15-day term.

11 According to Article 5(1), first subparagraph, of the SRD, a majority of "*not less than two thirds of the votes attaching to the shares or the subscribed capital represented*" must adopt the relevant resolution, and the decision is valid "*for a duration not later than the next annual general meeting*."

12 See footnote 9.

13 These rules do not apply to companies that are able to identify names and addresses of their shareholders and are mandated to send the convocation to each shareholder.

14 The articles of association may provide additional channels of dissemination, including electronic media. Unless prohibited by the articles of association, companies that have issued only registered shares and therefore know the identity of their shareholders are allowed to issue the convocation by registered mail and are exempted from forwarding the convocation for dissemination throughout the European Union.

15 The convocation notice may also be distributed by mail (in case the company has only registered shareholders and the company's articles of association provide for this option) or via electronic means (in case the registered shareholder(s) has agreed to be notified by electronic means and the articles of association do not provide otherwise) and be made available on the company's website (in case the company's articles of association provide for this option), on which the convocation must remain available until the start of the general meeting.

16 This shall include information on (a) the right to put items on the agenda and the right to table draft resolutions as well as to ask questions; (b) procedures for voting by proxy; and (c) procedures, if any, for casting votes by correspondence or electronic means.

17 Draft resolutions tabled by shareholders also need to be published on the company's website as soon as practicable after the company has received them.

18 In order to give effect to the SRD, new provisions have been put into section 311 and a new section 311A inserted in the Companies Act 2009. Prior to the SRD, Section 311 required notices of meetings to contain the time, date, and place of the meeting in question, as well as a statement of the nature of the business to be dealt with at the meeting. The new s.311 (3) (which applies to traded companies and is stated to be subject to any provisions on the matters contained within the company's articles) adds the requirements in Article 5(3) of the SRD that notices must contain a description of procedures for participating and voting in the meeting, and indicate the website address at which this information can be found. Provisions relating to the circulation of documents and shareholder records can be found in English law prior to the SRD. Section 311A (which applies to traded companies) incorporates the requirements of Article 5(4).

19 As far as publication on the company's website is concerned, under German law, information equivalent to that required under Article 5(4) of the SRD must be made available on the company's website only "after" the publication of the convocation in the *Electronic Federal Gazette*. There may thus be no legal certainty that, in practical terms, the information will actually be available on the website for a 21-day period.

Endnotes continued

20 It is not mandatory to indicate the date and place of the meeting and the record date in the meeting notice. However, such information is generally included.

21 The forms to be used for proxy voting are not required to be made available on the company's website but, in practice, they are generally available electronically through a dedicated website. In addition, the AMF recommends that information necessary to prepare for the meeting be made available on a website: the recommendation is generally followed.

22 Section 338A of the Companies Act 2006, inserted to effect implementation of the SRD, gives members of a traded company the rights to include other matters to be deal with at an AGM. Section 338, which pre-dates the implementation of the SRD, gives members of a public company the right to require circulation of resolutions for AGMs.

23 By way of example: if the share capital is equal to EUR 600,000 (lower than EUR 750,000), the minimum stake is five percent of that amount (i.e., EUR 30,000); if the share capital is equal to EUR 1,000,000 (greater that EUR 750,000), the threshold becomes EUR 36,250: four percent for the fraction up to EUR 750,000 (EUR 30,000), plus 2.5 percent for the fraction between EUR 750,000 and EUR 1,000,000 (EUR 6,250).

24 If the meeting notice has been issued more than 45 days before the meeting, the rights can be exercised within 20 days from the date of the meeting notice; for companies with registered shares only, the rights can be exercised at least 25 days before the meeting.

25 Lower thresholds may be provided by the articles of association.

26 A shorter term may be provided by the articles of association.

27 The opportunity to increase the threshold from one percent to three percent is currently being discussed.

28 However, as a general principle under Dutch law, the request may always be rejected if not "reasonable and fair."

29 These rules apply only to financial services institutions.

30 In order to give effect to these provisions of the SRD, Section 319A has been inserted into the Companies Act 2006.

31 The national government considers the current legislation to be compatible with the SRD and has not proposed any amendments in this respect.

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