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Brussels to the Point

e-Newsletter



Brussels to the Point December

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Shareholders' Rights Directive finally implemented in Belgium

By Elke Janssens & Anne Tilleux

*Shareholder participation in corporate life is a prerequisite for good corporate governance. It is thus essential to strengthen shareholder protection, including by setting minimum standards for the exercise of certain rights by shareholders at general meetings. This is the objective of 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 (the "**Shareholders' Rights Directive**"), the implementing legislation for which should have been adopted by 3 August 2009. This directive has finally been implemented in Belgium. A bill was indeed adopted by the House of Representatives on 22 November 2010, and the Senate had five days to decide whether to examine the bill. Since the Senate did not exercise this right, an act should be adopted and published shortly (the "**Act**").*

The purpose of the Act is to strengthen certain rights of shareholders and eliminate the main obstacles to cross-border voting. In order to do so, minimum standards are adopted, including with respect to (i) the calling of general meetings of shareholders, (ii) the right to add items to the agenda of a general meeting, (iii) rules on access to general meetings and the record date system, (iv) participation in general meetings by electronic means, (v) the right to ask questions, (vi) voting by proxy, and (vii) voting by correspondence. These new rules are briefly discussed below.

Most of the new rules apply only to companies whose shares are admitted to trading on a regulated market (so-called "traded public companies"), but certain provisions also apply to private and non-traded public companies.

Convening formalities

The Act introduces new rules to call a general meeting of shareholders of a public limited company (SA/NV) (amended Article 533 and new Article 533bis of the Company Code).

The new rules on convening formalities apply only to traded public companies. For non-traded and private companies, the formalities remain unchanged: the notice must be published in the *Belgian State Gazette* and in a national newspaper at least 15 days before the scheduled date of the meeting, except in the case of an ordinary general meeting (namely, the annual general meeting) held at the place and time and on the date indicated in the company's articles of association, the agenda for which is limited to an examination of the annual accounts, the management report and the auditor's report and the

discharge (from liability) of the directors and auditor, in which case publication in only the *Belgian State Gazette* 15 days before the meeting is sufficient.

New time limits - For traded public companies, the notice must currently be published in the *Belgian State Gazette* and in a national newspaper at least 24 days before the date of the general meeting or the record date.

The Act extends this period to thirty days before the date of the general meeting. The notice period is extended by six days in order to give shareholders more time to take note of the agenda and prepare to exercise their rights at the meeting. If a second meeting is called because the required quorum was not met at the first meeting and the date of the second meeting was mentioned in the notice of the first meeting, the second notice need only be published seventeen days before the date of the meeting.

Effective dissemination by other media - The Act requires that the notice of a general meeting of a traded public company be published not only in the *Belgian State Gazette* and in a national newspaper but also disseminated to the public using such media as may be reasonably relied upon to ensure the efficient spread of the information in the European Economic Area in a fast and non-discriminating manner.

Content of the notice - The Act (new Article 533bis of the Company Code) requires that the notice of a general meeting of shareholders of a traded public company contain, in addition to the agenda, the proposed resolutions and the date, time and place of the meeting, clear and precise information on:

- the formalities the shareholders must fulfil in order to be admitted to the general meeting and exercise their voting rights;
- the right of shareholders to add items to the agenda and propose resolutions;
- the procedure to vote by proxy, including by means of a specific form, and the conditions at which the company is prepared to accept notifications of the appointment of a proxy by electronic means;
- the procedure to participate in the general meeting by electronic means and vote by correspondence;
- the record date and an indication that only shareholders on the record date shall have the right to participate in and vote at the general meeting;
- the address where certain documents (e.g., annual accounts and draft resolutions) can be obtained and the formalities to obtain copies of these documents; and
- the address of the website where the information required by law, such as the proxy form, the documents that must be presented to shareholders prior to the meeting, etc. has been made available.

Right to add items to the agenda of the general meeting and to table draft resolutions

In addition to the board of directors and the statutory auditor, shareholders holding at least 20% of a traded public company's share capital have the right to call a general meeting (Art. 532 Company Code). Only shareholders entitled to call a general meeting have the right to add items to the agenda and propose draft resolutions. Therefore, unless the company's articles of association provide otherwise, currently only shareholders representing 20% or more of the share capital have the right to add items to the agenda of the general meeting and table draft resolutions.

The Shareholders' Rights Directive provides that all shareholders of a traded public company should have the right to add items to the agenda of the general meeting and propose draft resolutions, regardless of whether they also have the right to call a general meeting. The Directive further states that if this right is subject to the holding of a minimum stake in the company, this stake should not exceed 5% of the share capital.

The Act inserts a new provision in the Company Code (new Article 533ter) pursuant to which one or more shareholders holding at least 3% of the capital of a traded public company have the right to add items to the agenda of the general meeting and table draft resolutions. This right applies regardless of the type of general meeting (ordinary, special or extraordinary), but not to second meetings called because the required quorum was not met at the first meeting.

Various formalities must be fulfilled in order to exercise this right. The shareholders must of course prove that at the time of their request they hold the requisite 3% of the capital. Further, the request must be made in writing and reach the company no later than the twenty-second day before the date scheduled for the general meeting. The company must ensure publication of the new agenda and/or the new draft resolutions at least fifteen days before the meeting in the *Belgian State Gazette* and a national newspaper and ensure their dissemination by other relevant media. At the same time, all relevant information must be made publicly available on the company's website.

Mandatory record date system

The Shareholders' Rights Directive states that the rights of a shareholder to participate in a general meeting and to vote in respect of any of his or her shares should not be made subject to the deposit of the shares with, their transfer to or registration in the name of another natural or legal person before the general meeting.

The Act therefore amends the Company Code (Article 536) to provide that the rights of a shareholder of a traded public company to participate in a general meeting and to vote in respect of his or her shares shall be determined with respect to the shares held by that shareholder on a specified date prior to the general meeting (the record date), *i.e.*, the fourteenth day prior to the meeting at 24.00 hours (CET), regardless of whether the shareholder still owns the shares on the date of the general meeting itself.

An optional record date system has been in existence in Belgium for some time, but is applicable only if the traded public company's articles of association so provide, and a limited number of companies have decided to use it. The record date system is now generally applicable and mandatory for all traded public companies.

This means that the shareholders of a traded public company can participate in and vote at a general meeting only if (i) their registered shares are mentioned in the company's shareholders' register on the date of the general meeting, (ii) any dematerialized shares are booked by the record date on the account of a licensed account holder or settlement institution, and (iii) any bearer shares have been deposited by the record date with a financial institution.

The shareholders must also inform the company whether they intend to participate in the general meeting (in person or by proxy) at least six days before the meeting. The purpose of this rule is to allow the company to verify the identity of its shareholders.

Participation in the general meeting by electronic means

The Act provides that the articles of association of a company, regardless of whether its shares are admitted to trading on a regulated market, may allow shareholders to participate in general meetings by electronic means (such as real-time transmission of the meeting) without the need to appoint a proxy holder who is physically present at the meeting (new Article 538*bis* Company Code).

This possibility is also available to other types of companies, *i.e.*, private limited companies (new Article 270*bis*), cooperative companies (new Article 382*bis*), and partnerships limited by shares (Article 657). It is also possible to extend this possibility to the general meeting of bondholders (new Articles 571*bis* and 295*bis*).

Companies are free to indicate in their articles of association the procedure and conditions to exercise the right to participate in general meetings by electronic means. The requirements and constraints must be limited to those necessary to ensure the identification of shareholders and the security of the electronic communication.

However, the fact that shareholders are allowed to participate in a general meeting by electronic means does not mean that a physical meeting need not be held. The members of the presiding committee, the directors and the statutory auditor must all attend in person.

The Act contains a number of provisions that must be complied with in order to validate the presumption that shareholders who participate electronically are physically present at the place where the general meeting is held. This presumption is important for the purpose of calculating the required quorum and majority.

Another important requirement is that the company must be able to verify the capacity and identity of shareholders participating in a general meeting by electronic means. Further, the company must ensure that shareholders who participate electronically can take note "directly, simultaneously and uninterrupted" of the discussions and are able to vote. The company's articles of association can moreover give shareholders who participate by electronic means the right to participate in the deliberations and to ask questions.

Finally, the Act specifies that technical problems or other incidents that prevent or disrupt electronic participation by shareholders must be mentioned in the minutes of the general meeting.

Right to ask questions

Pursuant to Article 540 of the Company Code, every shareholder has the right to ask questions related to items on the agenda of the general meeting. The company shall answer the questions put to it by shareholders. The Act slightly amends this provision to allow the shareholders of a public limited company (SA/NV) to ask questions in writing as from the date of publication of the notice of the meeting, regardless of whether the company's shares are admitted to trading on a regulated market. The company's articles of association must indicate the time period within which such questions must be submitted in writing to the company. For traded public companies, the questions must reach the company no later than six days before the general meeting.

Voting by proxy

The Act contains new rules on voting by proxy (amended Article 547 and new Article 547*bis* Company Code).

A proxy is defined as "the power granted by a shareholder to a natural or legal person to exercise some or all of that shareholder's rights in the shareholder's name at the general meeting".

The Act specifies that the proxy holder shall have the same rights to speak, ask questions and vote at the general meeting as those to which the represented shareholder would be entitled. A proxy can be appointed for one or more meetings or for all meetings during a specified period of time.

For traded public companies, the Act provides that a shareholder can appoint only one proxy holder for any given general meeting. However, if the shareholder's shares are held in more than one securities account, the shareholder can appoint a separate proxy holder for each account in relation to any given general meeting. The Act also contains various rules on who may act as a proxy holder, how the proxy must be notified to the company, and conflicts of interests between shareholders and proxy holders.

Voting by correspondence or by electronic means

The Act replaces Article 550 of the Company Code to meet the requirement of the Shareholders' Rights Directive that companies must offer their shareholders the possibility to vote by correspondence or by electronic means before a general meeting.

The Act lists the minimum items of information that must be included on the form used to vote by correspondence. The articles of association must specify the conditions and formalities pursuant to which shareholders may vote by correspondence or by electronic means, including information on how the identity of shareholders can be guaranteed and controlled. The articles of association must also indicate the time period within which votes must be submitted to the company. For traded public companies, the voting form (when voting by correspondence) must be submitted no later than the sixth day before the general meeting. Electronic votes must be submitted no later than the day before the date of the general meeting.

Entry into force

Once the Act is adopted, it will enter into force on the tenth day following its publication in the *Belgian State Gazette*. Companies formed before the entry into force of the Act will however have until 1 January 2012 to amend their articles of association so as to bring them into line with the mandatory provisions of the Act.

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