



JONES DAY
COMMENTARY

PROPOSED AMENDMENTS TO COMPANIES ACT 2006 TO IMPLEMENT THE SHAREHOLDER RIGHTS DIRECTIVE

The Department for Business Enterprise & Regulatory Reform (“BERR”) has recently published a consultation document setting out draft regulations (the “Regulations”) to amend the Companies Act 2006 (“CA 2006”) in order to implement the directive (adopted by the EU Commission on 11 July 2007) on the exercise of certain rights of shareholders in listed companies (the “Directive”).

The Directive seeks to improve corporate governance in Europe by facilitating the exercise of voting rights and enhancing access to information on a pan-European basis. Procedures for voting at shareholder meetings differ widely across EU Member States and are particularly complex where shares of a company incorporated in one Member State are held by investors in another. The Directive seeks to remedy this by overcoming the obstacles that cross-border investors face when participating in shareholder meetings, and thus ultimately seeks to improve the conditions for cross-border investment.

The UK already has in place a well-developed framework for shareholder rights, which has recently been enhanced by the CA 2006. As such, the UK has already implemented a large portion of the legislation covered by the Directive. There are, however, some provisions in the Directive, such as the requirement (i) for a reduction in the percentage shareholding required to requisition meetings and (ii) that shareholders must be able to vote directly by correspondence without appointing a proxy, which will require changes or additions to current UK legislation.

BERR is also taking this opportunity to correct certain anomalies that have come to light since the implementation of the provisions of the CA 2006 relating to shareholder meetings. Although most of the proposed changes to be made by the Regulations affect only EU companies traded on a regulated market in the UK (referred to as “traded companies”)¹, the changes proposed to resolve these anomalies in the CA 2006 will apply more generally.

¹ Note, therefore, that the definition of “traded companies” does not include companies whose share capital is admitted to trading on AIM.

PROPOSED CHANGES APPLICABLE TO TRADED COMPANIES

Notice of General Meetings

Under the Directive and proposed Regulations, the minimum notice period for general meetings of traded companies is generally 21 days². However, this minimum notice period may be reduced to 14 days, if the following two conditions are met:

- (i) The traded company must offer “the facility for shareholders to vote by electronic means accessible to all shareholders”.

The Government has asked for views on whether and, if so, how it should define “electronic means accessible to all shareholders” as it is unclear what this phrase means in terms of accessibility and the circumstances when accessibility is required. It may mean that companies must offer the facility for members to vote electronically at all times (for example, via the company’s web site); or alternatively that any method available to vote electronically (for example, the voting mechanism provided by CREST) is acceptable and that shareholders should use such facilities.

- (ii) A resolution to reduce the notice period to not less than 14 days must have been passed either unanimously on a show of hands or on a poll by a two-thirds majority of those voting.

The Government has asked for views on whether resolutions to permit traded companies to hold a general meeting on 14 days’ notice should be passed on the basis of a two-thirds majority or whether it should be 75 percent as for special resolutions.

In any event, traded companies wishing to benefit from the ability to hold a general meeting on 14 days’ notice will need to include an appropriate resolution in their regular AGM business and (depending on the outcome of the consultation process) may need to adopt new voting procedures. Traded companies seeking to take advantage of the shorter notice period may also need to amend their articles of association to allow them to do so.

Contents of notice of general meetings and publication of information in advance

Notices of general meetings will need to include additional boilerplate information (for example, relating to voting procedures and proxy forms). Traded companies will also need to publish information on a web site in advance of a general meeting detailing the matters set out in the notice of meeting and providing details of the shares which carry rights to vote and the total voting rights exercisable. This information must be available on the web site from the date that the notice is given to the conclusion of the relevant meeting.

Questions at meetings

General meetings are the main forum in which shareholders can exercise their right to ask questions. The Directive establishes rights for the asking and answering of questions at traded company meetings. At present, in the UK, the orderly conduct of the meeting is the responsibility of the chairman, operating in accordance with the company’s memorandum and articles of association and common law. The Government’s view (on which it has invited comments) is that current UK legislation needs to be supplemented in order to create an express obligation on the company to answer shareholder questions at general meetings, although this will be subject to certain conditions.

The Regulations make it clear that an answer need not be given if:

- (i) to do so would interfere unduly with the preparation for the meeting or involve the disclosure of confidential information; or
- (ii) an answer has already been given on a web site (in the form of an answer to a question); or
- (iii) it appears to the chairman of the meeting that it is “undesirable in the interests of good order of the meeting” that the question be answered.

Members’ power to require circulation of resolutions for AGM

Currently, a UK public company is required to circulate resolutions in advance of AGMs upon being requested to do so by either (i) members holding more than 5 percent

² Currently, pursuant to the CA 2006, a general meeting of a public company (other than an AGM) must be convened on at least 14 clear days’ notice.

of the total voting rights or (ii) at least 100 members holding voting shares with a paid-up value of at least £100. The request must be received by the company not later than six weeks before the relevant meeting or, if later, the time the notice of meeting is given. The Regulations extend these provisions to all traded companies and, in respect of traded companies only, shorten this deadline to not later than 14 days before the meeting to which the request relates. The Regulations propose that a traded company bear the expenses of circulating the resolution (for other companies, this is the case only for a resolution received before the end of the financial year preceding the AGM in question).

Members' power to include other matters in business dealt with at AGM

The Regulations also incorporate a new right for either (i) members holding more than 5 percent of the total voting rights or (ii) at least 100 members holding voting shares with a paid-up value of at least £100 to require a traded company to include "other matters"³ on the agenda for an AGM. The Regulations require this request to be received by the company at least 14 days before the meeting, with the company then obliged to circulate a revised agenda to members at least one week before the meeting.

Web site publication of poll results

A traded company is required to publish the results of any poll on its web site, and will be required to include additional boilerplate information when it does so. The results of any poll will need to be published within 15 days of the meeting (rather than as soon as reasonably practicable, as is currently the case under CA 2006).

Share dealings before meetings: shareblocking

The Directive seeks to abolish "shareblocking", a practice which requires shareholders wishing to vote at general meetings to deposit their shares shortly before a meeting with a designated depository. Once deposited, the shares to be voted at the meeting typically cannot be sold until the meeting has taken place and the shares are returned to the shareholders. This practice represents a major obstacle to voting for institutional investors in particular.

Although shareblocking does not take place in the UK, it is not specifically prohibited by current UK legislation, and the

Regulations therefore provide that any provision in a traded company's articles of association is void to the extent that it restricts a member's right to transfer shares during the 48 hours before the meeting (if that right would not otherwise be restricted) or restricts a member's right to vote unless its shares had previously been dealt with in a specified way.

A traded company will be required to determine the right to vote by reference to the register of members either (a) 48 hours before the time for the holding of the meeting if the traded company is unable to do so on the day of the meeting or (b) not earlier than 48 hours before the time for the holding of the meeting if the traded company is able to do so on the day of the meeting.

Disapplication of saving provision for casting votes

Although the practice of providing the chairman with a casting vote at company meetings was abolished by the CA 2006, companies formed before 1 October 2007 are permitted to continue (or revert to) provisions in their articles giving the chairman a casting vote. This saving provision will no longer apply to traded companies as the Directive requires the equal treatment of all shareholders.

PROPOSED CHANGES GENERALLY APPLICABLE

Voting

The Regulations clarify certain issues relating to the CA 2006 governing the ability of shareholders, proxies and others to cast votes for different shares in different ways.

Section 285 of the CA 2006 will be amended to confirm that a proxy appointed by two or more members who wish to vote in different ways will be able to exercise one vote for and one vote against the relevant resolution on a show of hands.

Representation of corporations at meetings

One of the unintended consequences of the CA 2006 is the interpretation that where multiple representatives are appointed by corporate nominees to represent different beneficial owners wishing to vote in different ways, the representatives may not do so unless they are formally appointed as proxies.

³ This refers to any matter other than a proposed resolution.

Section 323 currently provides that a corporate shareholder can appoint more than one individual as a non-proxy representative, but that if they seek to exercise voting rights in different ways, they will be treated as abstaining from the vote. This section has been interpreted to mean that those who provide nominee shareholding services can no longer appoint representatives to attend and vote at general meetings other than by appointing them as proxies (unlike the appointment of corporate representatives, proxies must generally be appointed at least 48 hours before the meeting).

The Regulations will amend Section 323 of the CA 2006 to clarify that multiple corporate representatives appointed by a member may vote in different ways in respect of different blocks of shares.

Members' power to require directors to call general meetings

The minimum threshold required for members to requisition a general meeting will be reduced to 5 percent (the current threshold is 10 percent in most cases). The Regulations reduce this threshold for all companies in order to maintain consistency and, in doing so, go further than the Directive requires.

Advance voting on a poll

Under current UK legislation, shareholders are able to appoint proxies electronically and by post, but the Directive requires that members be able to vote directly in that way without appointing a proxy. The Regulations will therefore enable shareholders to vote in advance by correspondence (which could be electronic or by post) without appointing a proxy if permitted by the articles of association. As currently drafted, the Regulations would also permit shareholders to demand a poll in advance by correspondence, although the Government is seeking views on whether this is desirable.

NEXT STEPS

The formal consultation period in relation to the draft Regulations will end on 30 January 2009. The Directive must be implemented by 3 August 2009, and it is currently proposed that the implementing Regulations will come into force on that date.

Please visit <http://www.berr.gov.uk/files/file48662.pdf> for a link to the consultation document.

LAWYER CONTACTS

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