SHAREHOLDERS' RIGHT TO REQUEST THE CONVENING OF A GENERAL MEETING

In France, the board of directors or the directorate of a French *société anonyme* (public limited company) is in principle the competent body to convene a shareholders' meeting. Failing this, the shareholders may request in court the appointment of an *ad hoc* representative for the purpose of convening a shareholders' meeting provided that a certain number of conditions are met and in particular that this measure must meet the corporate interest of the company and not the sole interest of the applicants. This solution has been recalled very recently by a decision of the Paris court of appeal in the context of the battle over the control of the French listed multimedia conglomerate Lagardère.

1. The board of directors (in the traditional model and in the one-tier model) or the directorate (in the two-tier model) of a French *société anonyme* (public limited company) is in principle the competent body to convene a general meeting of shareholders.

However, French commercial code (article L. 225-103) provides that shareholders may request in court the appointment of an *ad hoc* representative for the purpose of convening a shareholders' meeting:

"*I.- The general meeting is convened by the board of directors or the directorate. II. Failing this, the general meeting may also be convened: (…)*

2° By an ad hoc representative, appointed by a court, at the request either of any interested party in case of emergency, or of one or more shareholders holding at least 5% of the share capital, or of an association of shareholders meeting the conditions set forth in Article L. 225-120; (...)".

Such subsidiary competence means that a request for the general meeting to be convened by an *ad hoc* representative may only be made in the event of the board or the directorate has first failed to act. In no event may the shareholders themselves call the shareholders' meeting.

In practice, the judicial request to convene the meeting will have to follow a formal notice to the board of directors or the directorate which has remained unsuccessful.

2. The requirements for the appointment of the *ad hoc* representative vary depending on who is requesting the meeting.

Shareholders owning at least 5%. One or more shareholders holding at least 5% of the share capital may request the appointment by a court of an *ad hoc* representative for the purpose of convening a general meeting.

The 5% holding threshold shall be assessed on the date of the document initiating the proceedings.

An association of shareholders. In companies listed on a regulated market (*e.g.* Euronext Paris), a shareholders' association may also request the appointment of an *ad hoc* representative.

A shareholders' association is made up of shareholders who have been registered under the nominative form for at least two years and who collectively hold a certain percentage of the voting rights. The required fraction is 5% of the voting rights but this fraction is reduced to 1% of the voting rights for market capitalization above 15 million euros.

Any interested party in case of emergency. Any interested party - including a shareholder who does not meet the above mentioned required capital holding - may also request the appointment by the court of an *ad hoc* representative to convene the shareholders' meeting.

The applicant must be able to justify an emergency situation. The notion of urgency is assessed with respect to the company, and not with respect to the applicant. In practice, the qualification of an emergency situation implies the demonstration of an imminent danger for the company.

3. Regardless of who makes the request to convene the general meeting, the admissibility of such a request, though not limited to specific agenda items, is subject to its conformity with the corporate interest of the company.

Indeed, French case law also requires the judge to verify that the request is made for legitimate purposes in accordance with the corporate interest of the company and not only for the satisfaction of purposes that are specific to its author.

4. While case law on this topic was rather few and old, the current battle over the French multimedia conglomerate Lagardère SCA (a listed limited partnership by shares with general partners and limited partners, the latter having the right to convene a general meeting under the same conditions as the shareholders of a public limited company) between, on one side, media giant Vivendi and its ally, the investment fund Amber Capital, and, on the other, Mr. Arnaud Lagardère, supported by Mr. Bernard Arnault, has put back this question in the spotlights.

In this matter, Lagardère rejected calls by Vivendi and Amber Capital, who are its two biggest limited partners, to hold a general meeting to replace four of the nine members of Lagardère's board. The two limited partners then turned to the Paris commercial court to appoint an *ad hoc* representative responsible for convening it.

On October 14, 2020, the commercial court in fact dismissed all their requests, considering *inter alia* that they had not "*demonstrated with the requisite evidence that they are pursuing a goal other than that of their own interests*".

Following an appeal on such decision initiated by Vivendi and Amber Capital, the Paris court of appeal, on December 17, 2020, has confirmed such commercial court decision.

In particular, the court of appeal held that the own interests of Vivendi and Amber Capital of being represented to the board as soon as possible did not meet here the corporate interest of Lagardère since there was no evidence of an obvious failure of the board to comply with its obligations nor that the latter, as currently composed, would not be in a position to fulfil its missions up to the next annual general meeting of the company planned few months later (where shareholders holding a minimum percentage of the share capital are entitled to request that items or draft resolutions be added to the agenda of the meeting).

While any change in the share capital, even a significant one, is not intended to result in a systematic and immediate change in the composition of the board, it is conceivable that, beyond a failure of the governing bodies of a company, where for instance a company would consider taking in a short-term irremediable measures (*e.g.* disposal of significant assets) impacting the whole entity, there would be here a convergence of the own interest of a given shareholder and the corporate interest of the company opening the way for a convening of a shareholders' meeting by an *ad hoc* representative appointed in court.

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OVERVIEW OF WHAT IS BEING DONE IN OTHER EUROPEAN JURISDICTIONS

GERMANY

Shareholders of a *German Aktiengesellschaft* (stock corporation) may, subject to certain conditions, request the management board (*Vorstand*) to convene a shareholders' meeting; shareholders do not have the right to do so themselves or by means of a representative. If the management board does not comply with the request, the shareholders may file an application with the competent court to grant them authority to convene the shareholders' meeting. The request to convene a shareholder's meeting is not limited to specific agenda items and it does not have to be in the best interest of the company. However, the right to request the convention of a shareholders' meeting is subject to the shareholders' general fiduciary duty and may not be exercised in an abusive way.

ITALY

Shareholders of Italian *società per azioni* (joint stock companies) representing at least 5% of the company's share capital (if listed) or 10% (if not listed) - or the lower percentage possibly provided by the by-laws - may request the company's administrative to convene a general meeting of the shareholders. In case of unjustified refusal to convene the meeting by the administrative body, or by the controlling body, the requesting shareholders may apply to the court which may take the relevant provisions. Indeed, according to the prevailing case law, the company's corporate bodies are under a binding obligation to call the general meeting of the shareholders upon request by the latter, except when such request covers issues in which the proposal of the administrative body is required by the law (such as for example mergers and demergers) or the shareholders' request is illegitimate, illegal, impossible or not motivated at all.

PORTUGAL

Shareholders of a Portuguese public limited company holding at least 5% of the share capital may request the chairperson of the board of the general meeting to convene the general meeting. This percentage is of 2% in case of listed companies. Should the chairperson of the general meeting fail to convene the general meeting within 15 days from its request, then the shareholders may request to the court the judicial convening of the general meeting. The request to convene a shareholders' meeting is not limited to specific agenda items but that the requested items fall within the competence of the general meeting and that the need for a meeting is justified. Additionally, the right to request the convening of a shareholders' meeting is subject to the shareholders' general fiduciary duties and may not be exercised in an abusive way.

SPAIN

Shareholders of a Spanish listed company holding at least 3% of the share capital may request to the Board of Directors the convening of the general meeting. Should the Board of Directors not convene the general meeting to be held within two months from its request, then the shareholders may request to the Mercantile Register or Mercantile Court of the registered address of the company to convene the general meeting. Spanish Companies Act does not provide for any restriction on the matters to be included in the agenda of the general meeting. However, case law has clarified that the request for such a meeting shall not be abusive.

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