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Reference:

Houben Robby, Straetmans Gert.- Shareholder rights and responsibilities in the context of corporate social responsibility
European business law review - ISSN 0959-6941 - 27(2016), p. 615-637
To cite this reference: <http://hdl.handle.net/10067/1345510151162165141>

Shareholder Rights and Responsibilities in the Context of Corporate Social Responsibility¹

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Abstract

In this article the authors reflect in more detail on shareholder rights and responsibilities, highlighting two recent developments that could give rise to further debate, namely: shareholder's activist conduct in the general meetings of systemic enterprises and shareholder responsibility as to voting without having an economic interest in the company in which the votes are casted ("empty voting"). Empty voting is problematic in that it allows parties to vote who do not or to a small extent bear the ultimate risk of a company. In doing so, it blurs the traditional ratio along the lines of which the shareholders are the ultimate risk bearers in a company and best placed to assess what is in the interest of the company. More in general, shareholder activism may have negative consequences for the target company, for example when activism leads to a higher risk profile of the target company. Rather than curtailing the shareholder rights, the authors plea for greater shareholder involvement in the decision-making of a (systemic) company as a counterbalance against aggressive activists.

I. Introduction

In the aftermath of the financial crisis, shareholder rights and responsibilities are topical issues. The responsibility of shareholders is somewhat a new concept, which differs from shareholders' liability. Liability of shareholders is traditionally understood as the shareholders' obligation to the company's debts (to the amount of their respective contributions). Shareholder responsibility, however, is a wider concept, which encompasses certain obligations towards other shareholders, the company and society as a whole. In this respect, shareholder responsibility rests at the heart of corporate social responsibility.

In this article we reflect in more detail on shareholder rights and responsibilities³. First, we elaborate on the relevant interests as to a company: shareholders' interest, the company's interest and public interest. Second, we examine the rights attached to the capacity of shareholder, more in particular the types of shareholder rights, types of shareholders, the general meeting as the forum to exercise shareholder rights and the recent innovations in view of enhancing shareholder rights. Third, our focus shifts towards shareholder responsibility,

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² The opinions expressed in this article are personal to the authors.

³ The analysis relates to public limited companies; private limited companies will not be discussed. The starting point will be Belgian corporate law and Belgian public limited companies (*naamloze vennootschap / société anonyme*, "NV/SA"). Regulatory issues will not be addressed. Given the nature of the topics and arguments covered, the analysis taken from the Belgian legal context will also be relevant to other jurisdictions. The aim of the analysis is to stimulate further debate. Therefore only very occasionally functional comparisons with other jurisdictions, mostly UK and US will be made.

highlighting two recent developments that could give rise to further debate, namely: shareholder's activist conduct in the general meetings of systemic enterprises and shareholder responsibility as to voting without having an economic interest in the company in which the votes are casted ("empty voting").

The latter topics are of particular interest, as they confront current (Belgian) company law with interesting new challenges, that will be further elaborated in this article. First, the modern trend of shareholder activism stands in sharp contrast with the traditional "rational apathy" that characterised the average shareholder in a large (listed) company. Activism may have negative consequences for the target company, for example when activism leads to a higher risk profile of the target company. Recently authoritative legal doctrine rightly criticised the conduct of some shareholders in the general meeting of systemic companies, especially financial institutions. Rather than curtailing the shareholder rights, we plea for greater shareholder involvement in the decision-making of a (systemic) company as a counterbalance against aggressive activists (who could potentially dominate the general meeting with a relatively small percentage of the shares). Secondly, it is possible that the (activist) shareholder acts on the basis of a risk-free participation in the company. This relatively new, but already widespread phenomenon is known as empty voting. Empty voting is problematic in that it allows parties to vote who do not or to a small extent bear the ultimate risk of a company. In doing so, it blurs the traditional ratio along the lines of which the shareholders are the ultimate risk bearers in a company and best placed to assess what is in the interest of the company.

II. Shareholders' Interest, Company's Interest and Public Interest

Shareholders' interest, the company's interest and public interest, although interrelated, are also concepts that stand on their own.

A shareholder's interest as a rule is a self-centred interest⁴: shareholders seek to generate profit for themselves from a participation in a company.

As regards the interest of the company various views have been expressed by Belgian scholars⁵. In a broad interpretation the company's interest is conceived as the composite of various specific interests which relate to the company, including the interests of employees,

⁴ Walter Van Gerven, *Van de generale naar Fortis*, in *Huldeboek voor Mr. Jos Van Goethem*, 64 (Antwerp/Oxford/Portland, Intersentia, 2009).

⁵ On this concept as to Belgian law, see Sven Bogaerts, *Het verbod op financiële steunverlening en het vennootschapsbelang: schapen in wolvenvacht?* 4 TRV, 245-251 (2008); Christoph Michiels, *Private equity: vennootschapsrechtelijke aandachtspunten*, in *Actuele problemen van vennootschaps, financieel en fiscaal recht*, 273-332 (Antwerp, Intersentia, 2007); David Napolitano, *Ondernemingsfinanciering door kredietinstellingen – vennootschapsrechtelijke aandachtspunten: het specialiteitsbeginsel en het vennootschapsbelang* 13 *Rechtskundig Weekblad*, 420-423 (1999-2000); Alain François, *Het vennootschapsbelang in het Belgisch Vennootschapsrecht* (Antwerp, Intersentia, 1999); Koen Geens, *Het toegestaan kapitaal als afweermecanisme tegen overvallen: het wettig belang van de bieder (CERUS) en het vennootschapsbelang van de doelwitvennootschap (GMB)*, TRV 133-142 (1988).

creditors, clients and other relevant stakeholders. In a more narrow view corporate interest primarily refers to the collective interest of the shareholders to realise profit. However, the distinction between both views should not be overestimated nowadays⁶. In both views the interests of future shareholders are taken into account. Moreover, the interests of other stakeholders can indirectly impact the collective interest of the shareholders to realise profit, allowing the gap between the broad and narrow view to decrease.

Recently, the Belgian Court of Cassation was asked to judge on the scope of the concept of corporate interest. In its judgment of 28 November 2013, the Court of Cassation stated that the company's interest is determined by the collective profit interests of all current and future shareholders⁷. In its annual report, the Court of Cassation further clarified that the concept of corporate interest is a dynamic one which also encompasses the continuity of the undertaking and, hence, must be interpreted future-oriented taking into account the company's future viability⁸. Bearing this additional guideline in mind, it is our view that the Court of Cassation had no intention to narrow down the company's interest to the interests of the shareholders solely. Rather, the Court's clarification supports the view that the company's interest is composed of various specific interests which relate to the company. Thereto the Court used the reference to future shareholders in the judgment. In view of the Court's own interpretation in its annual report a clearer reference to the various interests relating to the company would have been preferable.

Public interest can be defined as the essential interests of a state or a community as a whole, or taken from a private law angle as the principles on which the economic and moral order of society is based⁹.

Very often a shareholder's interest, the company's interest and public interest will be aligned. For instance when a company performs well, the interests of the shareholders (increase in share value) and society as a whole (job creation, stimulation of economy, etc.) are generally met.

In contrast, it also occurs that a shareholder's interest, the company's interest and public interest are not aligned. For example in case of short selling with a view to deteriorating company value solely to create value for the seller of shares frictions occur between the

⁶ Sven Bogaerts, *Het verbod op financiële steunverlening en het vennootschapsbelang: schapen in wolvenvacht?* 4 TRV, 245-251 (2008); Christoph Michiels, *Private equity: vennootschapsrechtelijke aandachtspunten*, in *Actuele problemen van vennootschaps, financieel en fiscaal recht*, 273-332 (Antwerp, Intersentia, 2007); David Napolitano, *Ondernemingsfinanciering door kredietinstellingen – vennootschapsrechtelijke aandachtspunten: het specialiteitsbeginsel en het vennootschapsbelang* 13 Rechtskundig Weekblad, 420-423 (1999-2000); Alain François, *Het vennootschapsbelang in het Belgisch Vennootschapsrecht*, 733-756 (Antwerp, Intersentia, 1999).

⁷ Court of Cassation 28 November 2013, 3 TRV, 286-288 (2014) and 1 *Revue pratique des sociétés*, 41 ff. (2014) (annotation Golier).

⁸ The annual report can be accessed via http://justitie.belgium.be/nl/binaries/cass2013nl_tcm265-244613.pdf, p. 34.

⁹ See *Cour de cassation 6 December 1956*, *Revue critique de jurisprudence belge*, 156 (1960) (annotation Baeteman); *Cour de cassation 9 December 1948*, I *Pasicrisie belge*, 699 (1948) and *Revue critique de jurisprudence belge*, 251 (1954), (annotation De Harven).

“shareholder”¹⁰ interest and the company interest¹¹. In other instances public interest can justify decisions relating to a company which are perhaps less optimal from a pure shareholder’s point of view. This can in particular be the case in systemic companies¹².

III. Shareholder Rights

1. Types of Rights

Through his or her shares a shareholder has certain rights to a company. These rights can be divided into two categories: equity rights and membership rights¹³. Examples of the first category are the dividend right and the right to share in the liquidation balance. Examples of the latter category are the voting right, the right to ask questions, to appoint and dismiss directors, to supervise the board, to convene a general meeting when a certain threshold is met (in Belgium: 20% of share capital), to audit the company if no auditor is appointed (Article 166 Belgian Companies Code, hereinafter: “BCC”), etc.

2. Types of Shareholders: Shareholder Activism vs. Traditional Shareholder Concept

A relatively recent trend as to types of shareholders is the emergence of shareholder activism, which involves shareholders actively intervening in the policy of a company by using their voting rights in that company, whether or not as a mere means of exerting pressure on the management of a company¹⁴. Such intervention can range from the imposition of rules associated with corporate governance to the complete restructuring and reform of the risk profile of the company. Shareholder activism can be associated – but not necessarily is associated – with an aggressive attitude towards the management of the company, to accept and implement the activists’ proposals¹⁵.

The modern trend of shareholder activism stands in sharp contrast with the traditional “rational apathy” that characterised the average shareholder in a large (listed) company¹⁶. An important cause for this trend is the emergence in the 1990s of hedge funds and private equity

¹⁰ Of course, when someone shorts a stock, he ceases to be shareholder.

¹¹ See *infra* Section IV.2.C.

¹² See *infra* Section IV.1.

¹³ In this article we focus only on the membership rights attached to shares, especially the membership rights that can be exercised in the general meeting of a company.

¹⁴ Eddy Wymeersch, *Shareholders in Action*, Working Paper Financial Law institute (2007). See as to the economic aspects: European Parliament, *The Economic Consequences of Large Shareholder Activism*, PE 416.245 (IP/A/ECON/2008-32), (2009).

¹⁵ Georges Ugeux, *Private equity, hedge funds, activisme et démocratie*, in *Synthèses de droit bancaire et financier – Liber amicorum André Bruyneel*, 640-642 (Brussels, Bruylant, 2008); Marcel Kahan and Edward B. Rock, *Hedge Fund Activism in the Enforcement of Bondholder Rights*, 100/2008 ECGI - Law Working Paper, 1 (2008); Marcel Kahan and Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 76/2006 ECGI - Law Working Paper, 4-15 (2006).

¹⁶ On this e.g. Hilde Laga and Floris Parrein, *Corporate Governance in a European Perspective* (abstract), in *The European Company Law Action Plan 2003 revisited*, 13 (2009); Paul Davies, *Gower and Davies’ Principles of Modern Company Law*, 337-339 (London, Sweet & Maxwell, 2003).

funds. In general, these funds are defined as funds that invest in (listed) companies of which they are of the opinion that the shares are undervalued for various reasons¹⁷. The objective is to identify and put a stop to the causes of the underperformance of the shares in order to increase shareholder value and to ultimately exit the company¹⁸. Although hedge funds and private equity funds are similar, they are distinguished¹⁹. It is often perceived that hedge funds are involved in listed companies, mainly invest in options and generally handle a short-term strategy, whereas private equity funds in principle only envisage private companies, invest in shares and handle a middle-term strategy. However, this distinction between hedge funds and private equity funds must be nuanced, as recent research shows that hedge funds are often not as focused on the short-term than one might think²⁰. Moreover, they are often not as aggressive as frequently portrayed in the media²¹.

Further, it should be noted that shareholder activism is not limited to financial investors. It could very well be that industrial shareholders assume an activist role in a company, as was for example the case recently at the general meeting of Nyrstar, a Belgian listed company²².

Shareholder activism can have a positive impact on the target company²³. A striking example is the implementation or improvement of corporate governance rules. The activist expects that such implementation or improvement of corporate governance rules will result in better and more efficient performance of the (management of the) company and will hence increase shareholder value²⁴. Therefore, shareholder activism is often associated with the implementation of corporate governance rules in the target company.

¹⁷ On the characteristics and objectives of hedge funds: Alon Brav, Wei Jiang, Frank Partnoy, Randall Thomas, *The Returns to Hedge Fund Activism*, 098/2008 ECGI - Law Working Paper (available at <http://ssrn.com/abstract=1111778>), 29 ff. (2008).

¹⁸ Eddy Wymeersch, *Shareholders in Action*, Working Paper Financial Law institute, 5-7 (2007); William W. Bratton, *Hedge funds and Governance Targets*, 80/2007 ECGI - Law Working Paper (available at <http://ssrn.com/abstract=928689>), 16 (2006); also see Bob Wearing and Yuval Millo, *Activist Investors in UK Quoted Companies and the Implications for Corporate Governance*, ICAEW, 27 ff. (2011).

¹⁹ Georges Ugeux, *Private equity, hedge funds, activisme et démocratie*, in *Synthèses de droit bancaire et financier – Liber amicorum André Bruyneel*, 639-640 (Brussels, Bruylant, 2008); Eddy Wymeersch, *Shareholders in Action*, Working Paper Financial Law institute, 7 (2007); William W. Bratton, *Hedge Funds and Governance Targets*, 80/2007 ECGI - Law Working Paper (available at <http://ssrn.com/abstract=928689>), 8-9 (2006). See on private equity funds: Ronald Masulis and Randall Thomas, *Does Private Equity Create Wealth?* 76 *University of Chicago Law Review*, 219-260 (2009); from a Belgian point of view: Christoph Michiels, *Private equity: vennootschapsrechtelijke aandachtspunten*, in *Actuele problemen van vennootschaps-, financieel en fiscaal recht*, 273-277 (Antwerp, Intersentia, 2007).

²⁰ Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence* 7 *Virginia Law & Business Review* (2013).

²¹ Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence* 7 *Virginia Law & Business Review* (2013).

²² On this e.g. Sarah Kent and Alex Macdonald, *Taftigura Pushes for Nyrstar Board Seats*, *Wall Street Journal* (27 April 2015).

²³ Recent research shows that institutional investors, who did not engage in activist investment styles, were supportive of activists as they felt that they too gained from the research conducted by activists and from the impact they had on companies: Bob Wearing and Yuval Millo, *Activist Investors in UK Quoted Companies and the Implications for Corporate Governance*, 27 (ICAEW, 2011).

²⁴ William W. Bratton, *Hedge Funds and Governance Targets*, 80/2007 ECGI - Law Working Paper, 22-23 (2006).

Activism may, however, also have negative consequences for the target company²⁵, for example when activism leads to a higher risk profile of the target company²⁶. It is conceivable that such higher risk profile could adversely affect the target company and could eventually result in insolvency²⁷ (although this is probably unlikely, given that implementing a higher risk profile normally is an informed decision of the majority within the competent body). Moreover, as to certain hedge funds, speculating on the insolvency of the target company through imposing a higher risk profile could even be intentional, for example in the context of short-selling²⁸. This could not only be detrimental to the target company, but also to the other shareholders. Indeed, unlike the hedge fund, the remaining shareholders will probably not have hedged their insolvency risk²⁹.

3. Membership Rights Exercised at the General Meeting

The obvious place for a(n)(activist) shareholder to exercise his or her membership rights in a company is the general meeting, which according to Belgian law is the body which is, in addition to the board of directors, responsible for decision-making in the company and for the supervision of the board.

As to Belgian law the general meeting traditionally is conceived as the supreme body in the company to which all other corporate bodies are subordinate³⁰. The main argument to support this view is that within the limits of the law and the articles of association, the general meeting is in principle not accountable for its decisions, although justifications may be useful to situate decisions within the framework of the company's interest³¹.

The qualification according to Belgian law of the general meeting as the supreme body in a company can be misleading. Indeed, the general meeting only has the powers expressly

²⁵ And the other shareholders in that company: Marcel Kahan and Edward B. Rock, *Hedge fund Activism in the Enforcement of Bondholder Rights*, 100/2008 ECGI - Law Working Paper, 38-41 (2008); Marcel Kahan and Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 76/2006 ECGI - Law Working Paper, 37-54 (2006).

²⁶ For an overview of the outcome for target companies in the United States: William W. Bratton, *Hedge Funds and Governance Targets*, 80/2007 ECGI - Law Working Paper (available at <http://ssrn.com/abstract=928689>), 16-23 (2006) (*sale, unbundling, cash payout*).

²⁷ See the criticism cited by Eddy Wymeersch, *Shareholders in Action*, Working Paper Financial Law institute, 9-11 (2007).

²⁸ Marcel Kahan and Edward B. Rock, *Hedge Fund Activism in the Enforcement of Bondholder Rights*, 100/2008 ECGI - Law Working Paper, 40 (2008).

²⁹ To anticipate this, authoritative Belgian legal doctrine proposed a scheme wherein an activist who uses his voting power to reform the risk profile and the structure of the target company, should be obliged to launch a takeover bid on all shares which are not yet in its possession Eddy Wymeersch, *Shareholders in Action*, Working Paper Financial Law institute, 11 (2007). This should lead to making activists more responsible, since they would be obliged to take up the full risk of the modified risk profile of the company.

³⁰ Frank Hellemans, *De algemene vergadering*, 110 (Kalmthout, Biblo, 2001).

³¹ Walter Van Gerven, *Van de generale naar Fortis*, in *Huldeboek voor Mr. Jos Van Goethem*, 64-65 (Antwerp/Oxford/Portland, Intersentia, 2009); Frank Hellemans, *De algemene vergadering*, 110 (Kalmthout, Biblo, 2001).

assigned to it by law, whereas the board of directors has residual and full power³². The board therefore has considerably more (substantive) powers than the general meeting. Hence, quantitatively and as regards policy issues, the board is in fact the main body of the company.

The qualification of the general meeting as “supreme body” is, however, not completely inaccurate. Qualitatively the general meeting has very important powers, such as approving the annual accounts, the allocation of profit (BCC Article 554), appointment and dismissal of directors, modification of the articles of association, modification of the rights attached to securities in the company, etc.³³.

Especially with regard to larger (listed) limited liability companies the concept of the general meeting is subject to criticism, mainly because the general meeting in those companies is characterised by a large absenteeism of shareholders. Furthermore, the majority of the shareholders is in practice passive and often only interested in the dividends as well as focused on the short(er) term³⁴. Consequently, in its capacity of “watchdog” towards the board, the general meeting does not perform very well³⁵. Moreover, given that the shareholders who do show up for the general meeting often have an extension in the board, *de facto* all power lies with the board³⁶. Another extreme is the listed company of which (nearly) all shares are publicly traded (and that, hence, is characterised by a great deal of free float). In such companies, a minority shareholder holding a relatively limited stake could have a majority at the general meeting. Consequently, significant power lies with this minority shareholder, as the board will be very much aware that when it disregards to a great extent the specific interests of that shareholder, the latter could very well propose to the general meeting

³² It is possible to assign more powers to the general meeting than provided by the law (BCC Article 522§1). It is important to note that such an assignment cannot be invoked against third parties, even when it is included in the articles of association. Nevertheless, such an assignment can be of great practical importance. An example is the famous Belgian Fortis case. In its articles of association Fortis referred to its Corporate Governance Statement, which stated that an important transfer of assets was subject to an approval of the general meeting (the Belgian Companies Code on the contrary assigns the transfer of assets to the board). The Belgian court ruled that the board should have respected this clause (which in fact it had not), so that the decisions made in conflict with this clause had to be suspended (Brussels (18th Ch.) 12 December 2008, *Bank- en financieel recht* (2008), *Journal des tribunaux*, 62 (2009), TRV, 67 (2009), *Revue pratique des sociétés*, 432 (2009), *Revue de jurisprudence de Liège, Mons et Bruxelles*, 388 (2009) (annotation Bruls); see *Comm. Brux. (ref.)* 18 November 2008, *Bank- en financieel recht*, 387 (2008).

³³ Jacques Malherbe, Yves De Cordt et al., *Précis de droit des sociétés*, 667 (Brussels, Bruylant, 2011); Frank Hellemans, *De algemene vergadering*, 112 (Kalmthout, Biblo, 2001). These powers are slightly different in English law. Some are allocated to the board, generally.

³⁴ European Commission, *Green Paper: The EU Corporate Governance Framework*, COM(2011) 164 final, 3 (2011).

³⁵ Jacques Malherbe, Yves De Cordt et al., *Précis de droit des sociétés*, 666 (Brussels, Bruylant, 2011); Christoph Van Der Elst, *Algemene vergadering van aandeelhouders: revitaliseerbaar?*, in *Van Alle Markten – Liber Amicorum Eddy Wymeersch*, 977-996 (Antwerp/Oxford, Intersentia, 2008); Jan Ronse, *Algemeen deel van het vennootschapsrecht*, 337 (Leuven, Acco, 1975). Also the European Commission points to this problem: European Commission, *Green Paper: The EU Corporate Governance Framework*, COM(2011) 164 final, 3 (2011).

³⁶ The larger shareholders in listed companies often only represent a relatively small percentage of all shareholders. Given the high absenteeism, they nevertheless have the effective voting power in the general meeting. Indeed, in principle the general meeting can decide with a simple majority of the shareholders present. No quorum requirements apply.

(that he *de facto* controls) to dismiss the whole board and elect its own candidates. In Belgian practice this is, however, an exception to the rule (as in Belgium most listed companies have a reference shareholder). Therefore, it will not be further elaborated.

The lack of broad (active) shareholder involvement can be a significant problem. For instance the lack of shareholder interest in holding management accountable may contribute to poor management accountability and may entail excessive risk taking³⁷. More in general, the lack of broad (active) shareholder involvement in decision making contributes to broadening the gap between ownership and control, potentially resulting in a decline of trust in the stock market and driving investors away from the capital markets in search of safer investments³⁸.

4. Enhancing Shareholders' Rights

In the context of the established large absenteeism of shareholders at general meetings, relatively recent legislative initiatives aim at enhancing shareholders' rights and improving shareholder involvement as to decision making in the general meeting³⁹.

At EU level the relevant instrument in this respect is Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies ("SRD")⁴⁰. The aim of the SRD is to enhance shareholders' rights in listed companies, *inter alia* through removing obstacles which deter shareholders from voting, such as making the exercise of voting rights subject to the blocking of the shares during a certain period before the general meeting, and through ensuring that shareholders have sufficient time to consider the documents concerned and to determine how they will vote. The idea is that effective shareholder control is a prerequisite to sound corporate governance and should therefore be facilitated and encouraged (Preamble (3) with the SRD).

³⁷ The European Commission has expressed its explicit concerns on this, focusing on financial institutions: European Commission, *Green Paper: The EU Corporate Governance Framework*, COM(2011) 164 final, 11 (2011).

³⁸ The gap between ownership and control is increased by the fact that numerous intermediaries intervene in the voting process, such as proxy advisors, credit-rating agencies, share custodians and voting agents, who without having a stake in the company affected by their activities, effectively pull the strings of corporate governance: Pavlos E. Masouros, *Is the EU taking shareholder Rights Seriously?: An Essay on the Impotence of Shareholdership in Corporate Europe*, 7 *European Company Law*, 195-203 (2010). Also see on how to revitalise the general meeting e.g. Christoph Van Der Elst, *Revisiting Shareholder Activism at AGMs: Voting Determinants of Large and Small Shareholders*, 311/2011 ECGI - Finance Working Paper, (2011).

³⁹ Also see in this respect the recent innovations as to the electronic general meeting (BCC Article 538*bis*) and electronic voting (BCC Article 550§1), which will not be further discussed in this article.

⁴⁰ Please note that, when compared to financial (services) legislation, corporate law has not changed that much since the financial crisis of 2008. However, inspired by the lessons learned in the aftermath of the financial crisis, the European Parliament and the Council of the EU have recently launched a proposal to amend the SRD (see the *Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement* (COM/2014/0213 final - 2014/0121 (COD) (hereinafter referred to as the "Proposal"). The overarching objective of this Proposal is *inter alia* to contribute to the long-term sustainability of EU companies, to create an attractive environment for shareholders and to enhance cross-border voting by improving the efficiency of the equity investment chain in order to contribute to growth, jobs creation and EU competitiveness. We will not further elaborate on this Proposal in this article.

In Belgium the SRD was implemented through the Law of 20 December 2010,⁴¹ which came into force on 1st January 2012. Below, we touch upon some selected topics regarding the Belgian implementation of the SRD: 1) the mandatory record date and reporting obligations in this respect, 2) the right to put items on the agenda and table draft resolutions and 3) the right to ask questions.

A. Mandatory record date: reporting obligations

As from January 1st 2012 the right of a shareholder to participate and vote in the general meeting of a listed company is subject to the registration of his or her shares on the fourteenth day prior to the general meeting at midnight (the record date), regardless of the number of shares he or she holds on the date of the general meeting (BCC Article 536§2).

Moreover, the shareholder has to report to the company (or to the person appointed for that purpose by the company) that he or she intends to participate in the general meeting, no later than the sixth day prior to the general meeting. In this respect the shareholder will receive a certificate stating the number of shares of which he or she has indicated to participate in the general meeting.

The participating shareholders, as well as the number of shares they hold on the record date and of which they have indicated to participate in the general meeting, will be registered in a register designated by the board.

These new rules deserve two comments. First, the new rules introduce into Belgian law the mandatory record date (as opposed to the previous optional regime). The objective is to promote the mobilisation of shares. An adverse consequence, however, is the possibility for a person to vote in a general meeting with shares he or she no longer holds on the date of that meeting. This raises some fundamental questions to challenge (Belgian) company law⁴². Indeed, (Belgian) company law takes the assumption that shareholders who vote in a general meeting have an interest to vote in such a manner as to avoid a negative effect on the value of their shares. This assumption is no longer valid when a “shareholder” can vote in a general meeting, without holding “his” or “her” shares on the date of the general meeting. Indeed, in such event, the “shareholder” not necessarily has an incentive to vote in accordance with the assumption, as he or she no longer bears any risk in the company on the date of the general meeting. Perhaps, he or she could even have an incentive to vote in favour of “value-

⁴¹ O.G. 18 April 2011. On this e.g. Thierry Tilquin and Valerie Simonart, *De algemene vergaderingen: Wet betreffende de uitoefening van bepaalde rechten van aandeelhouders van genoteerde vennootschappen* (Brussels, Larcier, 2011).

⁴² Also see the discussion on empty voting further *infra* Section IV.2. In this respect, it can already be noted that not only the rules on the record date can lead to empty voting. Indeed, there exist already some other contractual mechanisms which can give rise to empty voting, e.g. puts and calls, equity swaps, etc. From this point of view the record date system as a facilitating factor for empty voting should not be exaggerated: also see Jaap Winter, *Level Playing Fields Forever*, in *De nieuwe macht van de kapitaalverschaffer*, 137 (Deventer, Kluwer, 2007).

destroying” resolutions, e.g. in the context of short selling. as will be further elaborated hereinafter.

Secondly, it is remarkable that the new rules, which aim to enhance shareholders’ rights and shareholder participation in the general meeting, in fact could form an impediment to such enhanced participation due to the formalism introduced by the new reform. Indeed, the (administrative) failure of a shareholder to register his or her shares on the record date or to timely report his or her participation in the general meeting as a rule could have the adverse effect that the concerned shareholder will not be entitled to validly exercise his voting rights in the general meeting. However, this potential negative effect of the new formalism introduced into Belgian law must not be overestimated. The new rules overall serve the purpose of better compliance with regard to registration through providing uniform registration rules for all EU listed companies, and hence, have in general the positive effect of contributing to enhance shareholder participation in general meetings. The sanction in a specific event of non-compliance is, indeed, severe, but it can be argued that this is not a specific consequence of the new rules, yet rather results from a specific shareholder’s non-compliance with formalities that are sufficiently disclosed to him. Non-compliance is more the responsibility of the non-compliant shareholder, than it is attributable to the strictness of the rules which have to strike a delicate balance between compliance and participation.

Nevertheless, *de lege ferenda* a less severe sanction than the obligatory non-participation of the non-compliant shareholders could be contemplated. For instance, the company could be granted the right to waive non-compliance at the general meeting. This would allow shareholders who show up at the general meeting to effectively participate in the general meeting, whilst they have not complied with the registration formalities. The right to waive non-compliance with the registration formalities could be construed as an exclusive right of the company to be exercised discretionally. Another line of thought could be to allow non-compliant shareholders to regularise their non-compliance within a certain term. This seems, however, a less optimal solution. First, it is not sure whether shareholders that initially are non-compliant will actually take the effort to comply with formalities when they are granted an additional term. Secondly, and along the same lines, it seems that the implementation of an additional procedure (regularization term, possibly invitation by the company to regularise) would be too time-consuming and costly in view of the (limited) possible merits.

B. The right to put items on the agenda and to table draft resolutions

An important change in the context of the preparation of the general meeting of a listed company is that as from 1st January 2012 one or more shareholders who together hold at least 3% of the capital can put items on the agenda of the general meeting and can also table draft resolutions for items included or to be included in the agenda (BCC Article 533^{ter})⁴³. A

⁴³ The easily accessible right to put items on the agenda and to table draft resolutions is to be distinguished from the right of shareholders who hold 20% of the share capital to convene a general meeting – and the correlating

request to put items on the agenda or table draft resolutions shall be in writing - including by e-mail. Furthermore, it is required that the company has received the written request no later than the 22nd day prior to the general meeting. The revised agenda should be made available by the company no later than the 15th day before the general meeting.

The relatively low threshold of 3% (as opposed to the proposed 5% in the SRD)⁴⁴ is inspired by the idea that a higher threshold would lead to erosion of the right to put items on the agenda and to table draft resolutions in the event of dispersed ownership. This might be correct, but one could also wonder whether such an easily accessible right to put items on the agenda and table draft resolutions is justified in any event, e.g. when stable long - or middle - term shareholders are faced with minority shareholders inspired by short-term (self-interested) perspective or political motives.

A striking example of the serious implications a low threshold could have is the *Dutch TCI* case. In the Netherlands a threshold of 1% applies (Article 2:114a Dutch Civil Code). In 2007 this allowed The Children's Investment Fund ("TCI"), which held just over 1% of the capital of ABN AMRO, to table resolutions on the agenda of the general meeting of ABN AMRO aimed at forcing the bank to spinoff non-core assets and to block acquisitions in the short term. Allegedly, this was inspired by the (sole) interest of TCI to produce shareholder value. Ultimately, after a bidding war with Barclays, ABN AMRO was sold to the banking consortium Royal Bank of Scotland, Fortis and Banco Santander and its businesses divided between the consortium members.

C. The right to ask questions

Shareholders possess the right to ask questions. This right encompasses the right to question the directors and auditors of the company during the general meeting, respectively about the board report and the agenda and the auditor report (BCC Article 540). According to Belgian law, this right is general and consequently not limited to listed companies.

As from January 1st 2012 the right to ask questions can be exercised both orally, during the general meeting, and in writing (electronic), prior to the general meeting. As regards written questions it is required that the articles of association of the company state a deadline for submission. As to listed companies a statutory deadline applies: questions in writing should be received by the company at the latest on the sixth day before the meeting.

The directors – and, as the case may be, the auditor(s) – are required to answer the shareholders' questions during the general meeting, provided that the answer is not harmful to

right to put items on the agenda. Both schemes currently exist side by side. Compare with the UK, where a threshold of 5% suffices to require directors to call a general meeting (Section 303 Companies Act 2006).

⁴⁴ In the UK the threshold is also set at 5%. The right to put items on the agenda is however also available to at least 100 shareholders holding shares with voting rights with an average paid up value of at least £100 (ss. 338-340, 2006 Companies Act).

the business interests (e.g. ongoing negotiations) of the company, nor compromises statutory or contractual confidentiality undertakings of the company, its directors or the auditor(s) (e.g. non-disclosure agreements)⁴⁵. In their assessment of whether or not to answer a question, the board and the auditor(s) should adequately reflect upon whether answering would be contrary to the company's interest or not. If the answer is yes, the board / auditor(s) should refuse to answer. Furthermore, it is acceptable that the board is not required to answer in the event wherein the right to ask questions is abused, e.g. when the right to ask questions is used only for competitive purposes or to prepare a public takeover bid or in the event of repetitive asking of the same question (even if slightly rephrased).

It is clear, that the balance between informing shareholders (through answering) and observing discretion (through refusing to answer) is not always easy to strike and, hence, requires thorough reflection on a case-by-case basis by the board and the auditor(s) prior to disclosing corporate information at the request of a shareholder. Such adequate balancing and weighing is essential for it might entail in the end director's liability. . When e.g. the board would decide not to answer a question submitted by a shareholder, although answering would be required, this can result in directors' liability and potentially the invalidity of the resolution on the agenda item concerned. Conversely, when the board would decide to answer the question, whereas an answer should have been refused, the same reasoning applies. Be that as it may, the board will have to pick out of two options: to answer the question or to refuse to answer it, and must do so on the basis of the aforementioned exceptions.

In Belgium the decision of the board whether or not to answer a shareholder's question is taken collegially, which means by a majority of the board members following a debate amongst them. In practice the board should ask the chairman of the general meeting for a short recess to allow the board to deliberate on whether to answer a question when it is not entirely clear from the outset whether answering or refusing to answer is the appropriate option.

The aforementioned balancing exercise becomes even more difficult when answering a question could result in disclosing inside information⁴⁶. In Belgium, the particular difficulties that directors encounter in this respect, is generally acknowledged by the Belgian Financial Services and Markets Authority ("FSMA"). It thereto issued some specific practical guidelines in its Circular on obligations of issuers listed on a regulated market (last updated

⁴⁵ When various questions have the same content, the directors and auditors are allowed to reply with a single overall answer.

⁴⁶ We recall that, as a rule, inside information should be disclosed immediately to the market, unless the specific conditions for a delay of such disclosure are met. In general these conditions are: (1) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant; (2) delay of disclosure is not likely to mislead the public; (3) the issuer or emission allowance market participant is able to ensure the confidentiality of that information. Specific rules apply to credit institutions and financial institutions (see in this regard the new European rules set out in Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, O.J. 2014, L. 173/1–61.

22 April 2014) (the “Circular”)⁴⁷. This Circular sets out in great detail the specific situations that are to be classified as inside information (e.g. profit warnings) and be disclosed immediately, and also in what circumstances the immediate disclosure of inside information can be delayed (e.g. ongoing negotiations). It is highly recommendable for the board members to familiarise with the relevant sections of the Circular prior to the general meeting, as it can greatly help them in taking the adequate decisions when assessing to answer (or not to answer) a particular question (or to assess the extent to which they should answer a question). It also provides them with the necessary information on how to disclose inside information, provided the answer includes such information⁴⁸.

IV. Shareholder Responsibility

Shareholders do not only have rights; they also carry responsibilities. An important example thereof is the obligation to use voting power in the interest of the company, under penalty of votes becoming null and void on the basis of abuse of voting rights⁴⁹.

As indicated above, hereinafter we discuss two topical issues relating to shareholder responsibility: a) the conduct of shareholders in the general meeting of systemic companies, and b) empty voting. It must be recalled that the purpose of this contribution is not to focus on the technicalities, but rather to highlight some relevant aspects which are still open for discussion.

1. Shareholder Conduct in the General Meeting of Systemic Companies

In order to usefully discuss the topic of shareholder conduct in the general meeting of systemic companies, it is important to outline the concept of the systemic company first.

A. Systemic companies

Some (private) companies have outgrown their traditional roles as mere players in the economic market. Events of the past ten years have clearly demonstrated that several of these companies have become very large, obtained great power and, simultaneously, started to carry great responsibility. Some (multinational) companies have indeed become so big and influential that they became part of the core structures of (global) society, even up to the point that their activities became vital for the well-functioning of the social order. Some private companies even fulfil – and sometimes control – the primary needs of a state. As such, they

⁴⁷ Of course, the ESMA guidelines on insider trading (available at ESMA’s website), that largely inspired the Belgian Circular, are guiding principles in this respect as well.

⁴⁸ In this respect the Circular more specifically states that the FSMA should be notified as soon as inside information is disclosed during the general meeting. Subsequently, the FSMA - in consultation with the listed company - can decide to request the market authority to suspend the listing of the company concerned pending the publication of a press release. The suspension enables the company to draft a press release. Once published, suspension of listing will be lifted, as a rule 30 minutes after publication.

⁴⁹ See *infra* Section IV.1.B. and Section IV.2.D.

could be called “systemic” companies.

Of course, the great power gathered by these companies and the core responsibilities with which they have been bestowed create new and great challenges for states, and the international community in general. Numerous examples illustrate how important these companies are (e.g. companies that (almost) control the entire energy supply of a state; domestic airline companies that are often of great economic importance to a state), and also make clear that their activities and even existence may lead to serious problems.

Given their importance, it is *inter alia* imperative that such companies do not fail, for any bankruptcy will surely have a considerable impact on the employment rate in that state, and on its economic well-being in general. In this respect mention must of course also be made of financial institutions⁵⁰. The failure of one of such institutions has a massive impact on the liquidity and solvency of other financial institutions, both domestically and abroad, and it can even affect the entire global economic system. The international crisis that was triggered by the collapse of Lehman Brothers is most telling in this respect, for as a consequence, major banks worldwide faced great difficulties and had to struggle to survive.

The concept of “systemic companies” as such is not entirely new. Many state enterprises, such as public utility companies and railways, have long provided basic services without which society would not have been able to function properly. It has thus long been accepted that states must ensure the continuity of these entities⁵¹. However, in contrast to these public entities, the examples given above concern (semi) private companies that take care of basic needs, and therefore warrant specific treatment. This is a pressing issue: many public tasks and functions are in the process of being privatised, and the ever-growing importance of certain non-state enterprises for the functioning of social order cannot be denied⁵².

B. Shareholder responsibility: conduct during the general meeting of systemic companies

Recently authoritative legal doctrine criticised the conduct of some shareholders in the general meeting of systemic companies, especially financial institutions. It is considered not to be acceptable that an admittedly important group of stakeholders – the (activist) shareholders, whether or not acting through their lawyers – have the final say about a company which affects the prosperity of many and/or a whole community. More and multiple stakeholders should be involved as to decision making in these companies⁵³.

⁵⁰ Important systemic financial institutions are of course subject to specific financial legislation. As already indicated above, specific financial legislation will not be dealt with in this article.

⁵¹ On this matter: Bruno Peeters, *De continuïteit van het overheidsondernemen. Een begrippenanalyse en een kritiek op de uitvoeringsimmuniteit*, 331-350 (Antwerp, Maklu, 1989).

⁵² Also see Eddy Wymeersch, *Aandeelhouders in de crisis*, Working Paper Series, 2 (2009).

⁵³ Walter Van Gerven, *Van de generale naar Fortis*, in *Huldeboek voor Mr. Jos Van Goethem*, 63-75 (Antwerp/Oxford/Portland, Intersentia, 2009).

How this could be realised in practice is a difficult question to answer. The following suggestions must therefore be seen within the realm of stimulating an open debate on these relevant issues. It could be envisaged, for example, to enhance the powers of the independent directors (who represent all shareholders and, hence, not only specific (activist) shareholders) within the company, e.g. enhance their ability to intervene during the debate at the general meeting and in the same vein perhaps even allow them to request the board to adjourn the general meeting whenever they deem it fit in the best interests of the company and all shareholders (and thus not only a specific (activist) shareholder)⁵⁴. In extraordinary circumstances, it could even be contemplated to allow other stakeholders than those that are normally entitled to participate in the general meeting, to take part in the general meeting, with extraordinary (voting) power. In this respect, it could also be considered to allow the government to intervene in a general meeting when public interest is at stake, subject to judicial supervision (prior to or after the meeting, depending on the urgency of the matter). Of course, such governmental intervention must be a means of last resort, subject to unequivocal (yet sufficiently flexible) statutory conditions⁵⁵. Further, it must be limited to companies that are systemic, and thus not stretched-out to non-systemic companies.

Along the very same lines, Van Gerven already suggested to implement legislation allowing to set aside the normal statutory or contractual rules (e.g. the rules set out in the articles of association) when systemic companies find themselves in crisis situations, *i.e.* in the event of force-majeure, to the extent only that the normal application of aforementioned rules would be unacceptable given the circumstances and taking into account the standards of reasonableness and fairness⁵⁶.

The above criticism is relevant. In the context of systemic companies all the interests which

⁵⁴ Please note that Belgian law, as to date, grants the board the right to adjourn a general meeting only with respect to the resolution on the financial statements and related items (e.g. discharge), but not related to any other resolution.

⁵⁵ Of course, when further developing these rules due regard should be given to the numerous and restrictive golden shares case law as established by the Court of Justice of the European Union (the only case wherein a construction constituting a golden share was allowed by the court was a case relating to the protection of public security in the gas industry in Belgium: CJEU 4 June 2002, Case C-503/99 (Commission v. Belgium)). See on this case law e.g.: Thomas Papadopoulos, *Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion after Commission v. Greece*, 1 *European Company and Financial Law Review*, 1-18 (2015); Jaron van Bekkum, Joost Kloosterman and Jaap Winter, *Golden Shares and European Company Law: the Implications of Volkswagen*, 5 *European Company Law*, 6-12 (2008); Jaron van Bekkum, *Golden Shares: a New Approach*, 7 *European Company Law*, 13-19 (2010); Gert-Jan Vossestein, *Volkswagen: the State of Affairs of Golden Shares, General Company Law and European Free Movement of Capital*, 5 *European Company and Financial Law Review* 115-133 (2008); Wolf-Georg Ringe, *Domestic Company law and free movement of capital: nothing escapes the European Court*, 2 *Cambridge Law Journal*, 378-409 (2010).

⁵⁶ Walter Van Gerven, *Van de generale naar Fortis*, in *Huldeboek voor Mr. Jos Van Goethem*, 74-75 (Antwerp/Oxford/Portland, Intersentia, 2009). Perhaps, the recent legislative innovations in Europe relating to crisis measures for banks, as included in the Capital Requirements Directive IV (Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, O.J. 2013 L. 176/338–436) and in Belgium, in the Banking Act of 25 April 2014, could be inspiring in this respect (Act of 25 April 2014 on the statute and supervision of credit institutions, *Belgian Official Gazette* 7 May 2014).

we have identified above⁵⁷ necessarily come into play together and hence interfere. This can give rise to difficult balancing exercises. The result could very well be that public interest justifies action or behaviour which is not necessarily in line with the shareholders' or a certain shareholder's interest. Therefore, in those circumstances it is justifiable that voting rights should be exercised also taking into account the public interest⁵⁸. Technically, this could be constructed through the obligation of the shareholders to exercise their voting rights in accordance with good faith,⁵⁹ which is reflected in the prohibition to abuse voting rights⁶⁰. The concept of good faith relates to the behavioural requirements of reasonableness and fairness⁶¹. Therefore, this concept has a normative importance, given that a code of conduct can be derived from it.

Also, it should be clear that the general meeting of a (systemic) company is not a forum for shareholders to express their frustrations towards the board⁶². It is, however, a forum for informed and well thought-out decision-making in the company and for supervision of the board⁶³. Hence, as regards potential issues, subject to the circumstances permitting,⁶⁴ it would be much more preferable to establish a constructive informal dialogue with the board prior to the general meeting, of course within the limits of the equality of shareholders, than to use the general meeting as (first) means of pressure on the board.

The board could take a more pro-active role in this respect, of course, to the extent that the board is able to identify potential issues prior to the general meeting. The following events could have a signalling effect to the board that potential issues might occur at the general meeting. A clear signal is that of a shareholder who submits critical written questions he wants to see discussed at the general meeting or who indicates that he will ask questions orally at the general meeting. In that case it is conceivable that the board contacts that shareholder already before the general meeting to address the questions raised by him or her on an informal basis, so as to avoid lengthy discussions at the general meeting itself. A similar signal is that of the shareholder who invites the board to include additional agenda items and

⁵⁷ See *supra* Section II.

⁵⁸ For the definition of 'public interest', also see *supra* Section II.

⁵⁹ Of course, as to financial institutions there would/could also be a regulatory side to it: the financial supervisor would/could supervise the risk profile of the company and prior approval by the financial supervisor could be required.

⁶⁰ See *infra* Section IV.2.D.

⁶¹ Walter Van Gerven, *Verbintenissenrecht*, 96 (Leuven, Acco, 2006).

⁶² Somewhat troubling in this respect are also the examples wherein a shareholder (ab)uses the general meeting of (systemic) companies as a forum to highlight political issues, whereas the (only) suitable forum to do this is the political arena. An example is Tesco (UK company), where campaigners put resolutions to highlight animal welfare issues (see e.g. Urme Khan, *Hugh Fearnley-Whittingstall calls on Tesco Shareholders to Protest over Cheap Chickens*, Telegraph 23 May 2013 (accessible via <http://www.telegraph.co.uk/news/celebritynews/2014112/Hugh-Fearnley-Whittingstall-calls-on-Tesco-shareholders-to-protest-over-cheap-chickens.html>)). Another example is News Corp (US company): a member of parliament acquired some shares in the company purely to be able to attend the general meeting and speak at the meeting with a view to influencing other shareholders against management (see e.g. Matthew West, *UK MP Buys News Corp Shares to Speak at Meeting*, CNBC 20 October 2011 (accessible via <http://www.cnbc.com/id/>)).

⁶³ See *supra* Section III.3.

⁶⁴ E.g. in crisis situations circumstances will not always allow a constructive dialogue to be set up.

proposed resolutions in the agenda of the general meeting. If the board disagrees with the new agenda items and proposed resolutions, it can establish contact with the shareholder concerned and convince him to withdraw the request. A similar reasoning applies in the event of a (significant) shareholder indicating that he or she would vote against a certain resolution proposed by the board. Then; the board could reach out to that shareholder and try to convince him or her to adjust his or her suggested voting behaviour.

An implicit signal further can be that of a shareholder who registers for a general meeting with a significant proportion of the shares in the company, whereas that shareholder had not registered for general meetings before, or, with significantly less shares, in circumstances where it is likely that one of the agenda items could affect the shareholder's position.

Of course, absent any indications to the contrary, it will not be possible for the board to predict the shareholders' or a specific shareholder's precise intents, and consequently to start up a dialogue with these shareholders beforehand will be impossible. It must therefore be submitted that ultimately the ball will always be in the shareholder's court. The board can evidently attempt to set up a dialogue, but when a shareholder is unwilling to engage in a constructive dialogue, there is not much left to the board to defuse a potential issue prior to the general meeting.

For the avoidance of doubt, we stress that the above opinion is not a plea to curtail shareholder rights. Curtailing shareholder rights is not the appropriate means to address the issue of shareholder conduct in the general meeting of systemic companies. Quite on the contrary, enhancing shareholder rights and improving shareholder participation in general meetings can only be encouraged. Greater shareholder involvement could indeed form a counterbalance against aggressive activists (who could potentially dominate the general meeting with a relatively small percentage of the shares) and would more generally lead to a greater legitimacy of the decisions of the general meeting⁶⁵. Therefore, in our view, the emphasis of legislators should be on designing effective legislative incentives to enhance responsible shareholders' participation in general meetings rather than relying too much on formalistic rules which could have adverse effects on shareholder participation, as also elaborated above⁶⁶.

2. Empty Voting

A. Introduction

One of the most important rights of a shareholder is his or her voting right in the general

⁶⁵ It should, on the other hand, be noted that the enhancement of shareholder rights and improvement of shareholder participation in general meetings might also lead to further abuse by other types of shareholder activists, albeit that it can also be argued that in the event of enhanced shareholder participation (whatever the nature thereof may be) the activist shareholders will almost automatically form a counterbalance with respect to each other. We will not elaborate on this further.

⁶⁶ Also see our suggestions *de lege ferenda* in section III, 4, *A in fine* above.

meeting. In this context it is possible that the (activist) shareholder acts on the basis of a risk-free participation in the company. Hence he or she exercises his or her voting rights, without bearing a (significant) economic risk in the company. Possibly, it is even in his or her interest that the risk manifests itself. This relatively new, but already widespread phenomenon, is known as empty voting⁶⁷.

B. Organisation of empty voting

Empty voting can be organised in various manners. First, this can be done through stock lending⁶⁸. It is conceivable that an (activist) shareholder borrows shares in the target company before the (record date of a) general meeting of that company in order to exercise the related voting rights during the general meeting⁶⁹. After the general meeting, and possibly even immediately after the record date, the borrower provides similar shares back to the lender. The shareholder's risk during the loan agreement in principle is hedged by an equity swap⁷⁰.

Second, empty voting can also be constructed through a purchase of shares accompanied by put and/or call options that can be exercised at a price which is at least equal to the initial purchase price of the shares⁷¹. The same risk-reducing effect can be achieved through entering into an equity swap⁷². Both constructions allow one to cast votes without taking up any risk in

⁶⁷ Henry T. C. Hu and Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions* 156 *University of Pennsylvania Law Review*, 625-739 (2008); Henry T.C Hu and Bernard Black, *Debt, Equity, and Hybrid Decoupling: Governance and Systemic Risk Implications*, 207/2008 ECGI - Finance Working Paper Series, (2008); Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications and Reforms* 61 *The Business Lawyer*, 1011-1070 (2006); Henry T. C. Hu and Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership* 79 *Southern California Law Review*, 811-908 (2006); Henry T. C. Hu and Bernard Black, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, 56/2006 ECGI - Law Working Paper (2006); see also extensively on this topic Carl Clottens, *Proportionaliteit van stemrecht en risico in kapitaalvennootschappen*, 394-467 (Antwerp, Biblo, 2012) and Evelien Hellebuyck, *Hedge funds*, 284-360, (Antwerp, Intersentia, 2014).

⁶⁸ European Commission, *Fostering an appropriate regime for shareholders' rights*, 6 (2007); Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications and Reforms* 61 *The Business Lawyer*, 1015 (2006). See on securities lending: Christian Gavaldà and Jean Stoufflet, *Droit Bancaire*, 512-513 (Paris, Litec, 2005); Joanna Benjamin, *Interests in Securities*, 140-146 (Oxford, University Press, 2000).

⁶⁹ As to the ability of the borrower of shares to exercise voting rights: Frank Hellemans, *De algemene vergadering*, 464 (Kalmthout, Biblo, 2001).

⁷⁰ The period of risk can be very short taking into account the rules on the record date, which, as indicated, apply to listed companies (see also Henry T. C. Hu and Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions* 156 *University of Pennsylvania Law Review*, 641 (2008); Hu and Black(a), 2006, p. 1027-1029). An equity swap is defined by ISDA as "[...] a derivative contract where payments are linked to the change in value of an underlying equity, basket of equities or index. The equity return payer pays to the equity return receiver any increase in the value of the underlying plus any dividends received. The equity return receiver pays the equity return payer any decrease in the value of the underlying plus funding cost." (see <http://www.isda.org>) On equity swaps e.g. see Gilles Nejman, *Les contrats de produits dérivés*, 18 (Brussels, Larcier, 1999).

⁷¹ Henry T. C. Hu and Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions* 156 *University of Pennsylvania Law Review* 640 (2008); Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications and Reforms* 61 *The Business Lawyer*, 1026 (2006).

⁷² Henry T. C. Hu and Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and*

the company.

C. Problematic nature of empty voting

The emergence of empty voting is problematic. Indeed, *de lege lata* the *ratio* of the shareholders' right to cast votes is that they, as the ultimate risk bearers in a company, are in the best position to assess what is in the interest of the company. From an economic point of view, however, not the shareholders are the ultimate risk bearers in the company, but the creditors and – in the context of this article – the counterparty to the put and/or call or equity swap. Therefore the traditional *ratio* blurs, given that voting is open to parties who do not or to a limited extent bear that ultimate risk, whereas the parties who do bear the ultimate risk cannot vote⁷³. It is conceivable that the former category could in fact tend to extract value from the company at the expense of the latter category⁷⁴ and the other shareholders, rather than having the company's interest in mind⁷⁵. This places (Belgian) company law for some interesting new challenges, especially related to the search for a balance between the various interests concerned, i.e. the company's interest, the interests of all shareholders, the interest of a particular shareholder and even public interest in the event of systemic companies. How this balance must be struck in the new corporate landscape, should be the subject of further research. At first glance, however, it seems that the company's interest (broader defined than the shareholders' interests) should always remain the focal point, without disregarding, however, a shareholder's legitimate interest to seek profit from his or her participation – and that, as the case may be, both aforementioned interests may be adjusted by public interest⁷⁶.

D. Sanctions: abuse of voting rights

Belgian law has no specific sanctions for empty voting⁷⁷. The general prohibition of the abuse of voting rights can, however, serve as a useful legal basis in this respect (BCC Article 64, 3°)⁷⁸.

Abuse of voting rights is at hand when a shareholder uses his voting rights contrary to good

Extensions 156 University of Pennsylvania Law Review, 640 (2008); Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications and Reforms* 61 The Business Lawyer, 1026 (2006).

⁷³ Jaap Winter, *Level Playing Fields Forever*, in *De nieuwe macht van de kapitaalverschaffer*, 138 (Deventer, Kluwer, 2007); Nederlandse Monitoring Commissie Corporate Governance Code, *Advies over de verhouding tussen vennootschap en aandeelhouders en over het toepassingsbereik van de code*, 17-19 (2007) Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications and Reforms* 61 The Business Lawyer, 1011-1070 (2006); Carl Clottens, *Proportionaliteit van stemrecht en risico in kapitaalvennootschappen*, 402-406 (Antwerp, Biblo, 2012).

⁷⁴ The hypothesis is that no prior contractual arrangements have been made as to voting instructions.

⁷⁵ Also see as regards the issue of the proportionality between capital and control: European Commission, *Fostering an appropriate regime for shareholders' rights*, 14 (2007).

⁷⁶ For the definition of 'public interest', also see *supra* Section II.

⁷⁷ Lientje Van Den Steen, *De effectenrekening*, 684 (Antwerp, Intersentia, 2009); Robby Houben, *Het risicovrij aandeelhouderschap in een NV: vragen vanuit het verbod op leonijns beding en empty voting* 37 Rechtskundig Weekblad, 1551-1554 (2008-2009).

⁷⁸ This provision prohibits "abuse of power" at shareholder level, including the abuse of voting rights.

faith, whereby he or she has an interest that is not in a reasonable proportion to the harm caused to the company and/or the other shareholders⁷⁹. When a shareholder exercises his or her voting rights contrary to the company's interest, this often constitutes abuse of voting rights, regardless of whether he or she is a minority or a majority shareholder⁸⁰.

Pursuant to BCC Article 64, 3°, the decisions of a general meeting which are achieved through the abuse of voting rights can be declared null and void. More specifically, it is possible to obtain the invalidity of the underlying individual votes. As a result, the decision taken on the basis of these votes will normally also be null and void⁸¹. Hence, if a (minority) shareholder through an improper use of his or her voting right achieves a decision in the general meeting which obviously comes into conflict with the company's and/or the other shareholders' interest, the decision itself will also be void⁸².

The latter is conceivable as regards empty voting⁸³. Suppose that an activist shareholder uses his or her voting rights to perniciously influence a major policy decision, without bearing any economic risk. It is quite possible that such an attitude is inspired by a self-interest that is manifestly in contrast with the interests of the company and other shareholders. In that event, the abuse of voting rights can provide a good basis to annul the votes casted by the activist shareholder and/or the decision of the general meeting. If the annulment of the votes and/or the decision is not sufficient to compensate for the damages caused, an additional compensation can be claimed⁸⁴.

E. De lege ferenda

De lege ferenda specific (international) rules on empty voting could be considered. In other

⁷⁹ See on the abuse of voting rights: Jan Ronse and Koen Geens, *Misbruik van minderheidspositie*, in *Gebruikt dese mynen arbeit tot uwen besten, Verspreide geschriften Jan Ronse*, 629-652 (Kalmthout, Biblo, 2009); Pascale Hainaut-Hamende and Gilberte Raucq, *Les sociétés anonymes*, 645 (Brussels, Larcier, 2005); François De Bauw, *Les assemblées générales dans les sociétés anonymes*, 321 (Brussels, Bruylant, 1996); Xavier Dieux, *Nouvelles observations sur l'abus de majorité ou de minorité dans les personnes morales fonctionnant selon le principe majoritaire*, Tijdschrift voor Belgisch Burgerlijk Recht, 8-22 (1998); Jan Ronse and Koen Geens, *Misbruik van minderheidspositie*, in *Van vennootschappelijk belang – Liber amicorum Prof. Mr. J.J.M. Maeijer*, 227-249 (Zwolle, Tjeenk Willink, 1988); Lucien Simont, *Réflexions sur l'abus de minorité*, in *Liber amicorum Jan Ronse*, 307-334 (Story-Scientia, 1986); Greta Suetens-Bourgeois, *De verhouding meerderheid-minderheid in de naamloze vennootschap*, 302 ff. (Leuven, 1969). Also see the abundant Belgian case-law on the abuse of voting rights referred to by these authors.

⁸⁰ Philippe Ernst, *Belangenconflicten in naamloze vennootschappen*, 606-607 and 625-626 (Antwerp, Intersentia, 1997); Bernard Tilleman, *De geldigheid van besluiten van de algemene vergadering*, 63 (Kalmthout, Biblo, 1994).

⁸¹ Jan Ronse and Koen Geens, *Misbruik van minderheidspositie*, in *Van vennootschappelijk belang – Liber amicorum Prof. Mr. J.J.M. Maeijer*, 248 (Zwolle, Tjeenk Willink, 1988); Frank Hellemans, *De algemene vergadering*, 465 (Kalmthout, Biblo, 2001); Luc Van Caneghem, *Nietigheid van besluiten van een algemene vergadering op gronden van gemeen recht*, Rechtskundig Weekblad, 1480-1483 (1998-1999); Jan Ronse and Koen Geens, *Misbruik van minderheidspositie*, in *Van vennootschappelijk belang – Liber amicorum Prof. Mr. J.J.M. Maeijer*, 227-249 (Zwolle, Tjeenk Willink, 1988).

⁸² Jan Ronse and Koen Geens, *Misbruik van minderheidspositie*, in *Van vennootschappelijk belang – Liber amicorum Prof. Mr. J.J.M. Maeijer*, 227-249 (Zwolle, Tjeenk Willink, 1988).

⁸³ The hypothesis is that no prior contractual arrangements have been made as to voting instructions.

⁸⁴ Bernard Tilleman, *De geldigheid van besluiten van de algemene vergadering*, 71 (Kalmthout, Biblo, 1994).

countries and at an international level, some initiatives already exist, that will be highlighted hereinafter.

As to securities lending, the European Commission recommends that borrowers cannot vote with borrowed shares, save for when the voting rights are exercised in accordance with the instructions of the lender⁸⁵. This recommendation can be approved, since the use of voting rights through the instructions of the lender is associated with the economic risk in the company.

In the United States some authors plead for a functional restriction on voting rights that includes all forms of empty voting: voting rights of a shareholder should be limited or prohibited if he or she has an interest in a decrease in the value of the shares of the target company⁸⁶.

In France, the *Autorité des Marchés Financiers* (AMF) proposes to suspend the voting rights attached to securities that are held temporarily⁸⁷.

In Belgian legal doctrine, the possibility of a prohibition of transactions that are undertaken for the sole purpose of obtaining voting rights separate from the underlying cash-flow rights has been raised⁸⁸. The introduction of a conflict of interest scheme at shareholder level is another line of thought⁸⁹. Such a scheme would imply that a shareholder who has a financial interest that conflicts with a decision or transaction that lies within the competence of the general meeting should, at least, have a duty to disclose that conflict of interest.

⁸⁵ European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies*, SEC(2007) 1705, 4 (2007) (although respondents were generally opposed to the suggestion that borrowers of stock should only vote if they obtain voting instructions from the lenders of the stock). Also see International Corporate Governance Network, *Letter to the Securities and Exchange Commission regarding panel on Securities Lending and Investor Protection Concerns* (2009) (accessible via <https://www.icgn.org/component/k2/item/996-letter-to-the-securities-and-exchange-commission-regarding-panel-on-securities-lending-and-investor-protection-concerns>).

⁸⁶ Henry T. C. Hu and Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions* 156 *University of Pennsylvania Law Review*, 625-739 (2008); Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications and Reforms* 61 *The Business Lawyer*, 1057-1062 (2006); also see Carl Clottens, *Proportionaliteit van stemrecht en risico in kapitaalvennootschappen*, 426-427 (Antwerp, Biblo, 2012).

⁸⁷ Autorité des marchés financiers, *Rapport sur les opérations de prêt emprunt de titres en période d'assemblée générale d'actionnaires*, available at http://www.amf-france.org/documents/general/8162_1.pdf, 14 (2008).

⁸⁸ Koen Geens and Carl Clottens, *One Share One Vote: Fairness, Efficiency and EU Harmonisation Revisited*, in *The European Company Law Action Plan Revisited*, 175 (Leuven, University Press, 2010).

⁸⁹ Herman Braeckmans and Robby Houben, *Afwenteling van aandeelhoudersrisico*, in *Over grenzen – Liber amicorum Herman Cousy*, 1313-1323 (Antwerp, Intersentia, 2011); Carl Clottens, *Proportionaliteit van stemrecht en risico in kapitaalvennootschappen*, 448-449 (Antwerp, Biblo, 2012); compare Evelien Hellebuyck, *Hedge funds*, (Antwerp, Intersentia, 2014). Please note in this respect that the Proposal aims at improving the engagement of institutional investors and asset managers. Therefore, they will be required to develop a policy on shareholder engagement, which should contribute to managing actual or potential conflicts of interests with regard to shareholder engagement, and that will be disclosed to the public. Also, the institutional investors and asset managers will (*inter alia*) have to disclose how they will exercise their voting rights (see draft article 3f as included in the Proposal).

V. Concluding Remarks

Shareholders possess certain rights in a company. One of the most important rights is the right to cast votes in the general meeting and hence to co-determine the policy and future of the company. Depending on the type of shareholder (activist *vs.* passive shareholder) voting rights are used effectively and/or with a various intensity, *inter alia* as a means of exerting pressure on the board of directors.

However, shareholders also carry responsibilities. Shareholder responsibility is embedded in a context of interests, which are not necessarily aligned: a shareholder's interest, shareholders' interest, company's interest and public interest. Especially as to systemic companies it is arguable that public interest should prevail if and when decision making in the company not only affects the company and its shareholders, but also society as a whole. In this respect recent developments such as empty voting and shareholders' activism are placing new challenges on company law and the debate on corporate social responsibility. Two of these challenges formed for purposes of further discussion the subject of this article: shareholder conduct during the general meeting of a systemic company and empty voting. We hope that the elements raised in this article contribute to the academic debate concerning the challenges ahead.