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Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders

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An appropriate division of power between the board of directors and shareholders of the company is quintessential for the success of the company. However, for a long period of time the monitoring powers of the shareholders were limited. Recently, both the European and the national member states' legislators refined corporate law and allocated more (monitoring) powers in the hands of the (general meeting of) shareholders. This paper addresses in a comparative perspective the powers of the general meeting in five countries. First, the power of the shareholders that is provided through the European company law directives is briefly described. Next the "national" powers of (1) ordinary general meetings and (2) extra-ordinary meetings are addressed and compared. Third, the law in action is used to analyse the developments of shareholder rights and shareholder activism and to discuss whether the law and regulations provide in the appropriate shareholders rights.

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1. INTRODUCTION

Shareholder monitoring and shareholder activism is at the heart of the corporate governance debate. It is considered as a fundamental component balancing the powers of the board and of the shareholders. The issue is not very new. Ever since corporate law was developed, questions were raised as to how to divide the power between boards and shareholders, quintessential for the corporation that exists in part to facilitate delegated decision-making.[1]

Shareholders generally occupy a central position in company law all over Europe. Investors put money at risk in a venture and use the corporate form to legally structure the business. As consideration for their investment, the investors receive shares, which make them shareholders. These shares provide the shareholder a bundle of shareholder rights. Shareholders will make use of these rights to protect their investment. Easterbrook and Fischel note:

> Shareholders are the residual claimants to the firm's income. Creditors have fixed claims, and employees generally negotiate compensation schedules in advance of performance. The gains and losses from abnormally good or bad performance are the lot of shareholders, whose claims stand last in line. As the residual claimants, shareholders have the appropriate incentives (collective choice problems notwithstanding) to make discretionary decisions…The shareholders receive most of the marginal gains and incur most of the marginal costs. They therefore have the right incentives to exercise discretion. And although the collective choice problem prevents dispersed shareholders from making the decisions day by day, managers' knowledge that they are being monitored by those who have the right incentives, and the further knowledge that the claims could be aggregated and votes exercised at any time, leads

[1] R. Kraakman *et al., Anatomy of Corporate Law*, Oxford University Press, Oxford 2009, 72.

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> managers to act in shareholders' interests in order to advance their own careers and to avoid being ousted.[2]

This theory still stands today notwithstanding some scholars have criticized its incompleteness. Black provides an overview of the interests of other corporate constituents, explaining why these constituents have no voting rights.[3]

For a long period of time the shareholders – acting together in the general meeting of shareholders – were considered the supreme and final decision makers of the company. The shareholders controlled all powers which were not vested in other bodies of the company. The shareholders were – and still are today – presented at the top of the diagram representing the company.[4] Shareholders are seen as "owners" of the company. However shareholders own the shares, not the company. When shareholders become numerous and the ownership of the shares is constantly changing, the allocation of all powers in the hands of shareholders and general meeting becomes inefficient. Today the residual powers shifted to the board of directors and the general meeting of shareholders can only vote on the issues that the law or the articles of association are willing to allocate to the decision making power of the general meeting. As long as corporate issues cannot or are not subject to a vote, the right to vote is of limited value.

The shareholders' meeting is not deprived of all powers. In most countries the (general meeting of) shareholders are in charge of the election of the board of directors, a number of other recurrent corporate items and the "fundamental decisions" of the corporation. In one textbook it sounds: "In any case, however, it is the general meeting that decides on fundamental matters, such as the alteration of the articles, including the objects of the company, the transformation of the company into another legal person and its winding up."[5]

The objective of this paper is to comparatively examine the role of the general meeting of shareholders and relate this role to the attendance and voting turnout of shareholders and identify the drivers for shareholder attendance. That is, we examine whether the AGM can play the role it is given in the new corporate governance framework.

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[2] F. Easterbrook and D. Fischel, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge 1996, 67-68.

[3] Black refers to the wide distribution of the residual interests, the costs and nature of the residuals claimant. Other distributions of formal control rights will be less efficient (B. Black, *Corporate Law and Residual Claimants*, working paper, http://escholarship.org/uc/item/5746q7pj#page-1, last visited 1 December, 2011).

[4] Until 1973 the Belgian Companies Act stated explicitly that the general meeting had all the residual powers which were not vested in the board of directors.

[5] A. Dorresteijn *et al., European Corporate Law*, Kluwer Law International, Alphen aan de Rijn 2009, 193.

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2. THE POWERS OF THE GENERAL MEETING OF SHAREHOLDERS

2.1.THE EUROPEAN HARMONISATION EFFORTS

In many corporate law textbooks the position of the general meeting is addressed in a strictly formal way. In a large comparative research project on the efficiency of voting systems, Eckbo, Paone and Urheim started the analysis of the general meeting with the time and power to convene the meeting, the notification date, the techniques to provide the notice, and the content of the notice and the agenda. The paper continued with the right to put items on the agenda, the distribution of information, the criteria for participating and voting at the general meeting, how shareholder can vote at the general meeting. Finally the work ends with the quorum and majority requirements, the functioning of the meeting and the distribution of information after the general meeting.[6] The analysis does not come as a surprise in light of the legal developments of shareholder rights for which the European Shareholder's Directive 2007/36/EC serves as an illustration.[7] The directive aims "to allow shareholders effectively to make use of their rights throughout the Community"[8]. The Directive requires that companies provide in a timely manner information on the time and the place of the meeting, that shareholders have a right to put items on the agenda, that shareholders do not have to deposit their shares prior to the meeting, that shareholders have a right to ask questions and vote by proxy and that companies disclose the voting results. How major the step forwards towards more shareholder democracy was, the shareholder directive does not empower shareholders with more control rights.

The agenda items upon which the shareholders are empowered to vote are not identical in the different countries. To assess the monitoring behavior of shareholders it is necessary to study which items the general meeting of shareholders are according to the law subject to a vote,

[6] B. Eckbo, G. Paone, R. Urheim, *Efficiency of Share-Voting Systems – Report on Italy*, Tuck School of Business Working Paper No. 2009-64, July 2009, 183 p. ; B. Eckbo, G. Paone and R. Urheim, *Efficiency of Share-Voting Systems – Report on Sweden*, Tuck School of Business Working Paper No. 2010-79, August 2010, 226 p.

[7] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *PBL* nr. 184, 14 July 2007, p. 17.

[8] Considerans 14 of the Directive 2007/36/EC.

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when these matters come up to a vote, how these matters come up to a vote and how the topics are approved or rejected. We address the first two questions.

First it is necessary to identify the rights of the general meeting of shareholders. The European harmonization efforts of company law failed to focus on the internal organization of the company. In the nineteen seventies the European Commission started a debate to harmonize the internal structure of the company through the proposal of the fifth company law directive. It was considered that the two-tier system was superior but the Commission recognized that one-tier systems provide characteristics that in certain situations can be tolerated. The proposals were modified during the discussions over the next years but finally, as it became obvious that both systems had their merits and shortcomings, the European Commission withdraw its proposal.[9] Many of the discussion topics had been picked up in other developments like corporate governance and freedom to (re)incorporate. As a result the harmonization efforts vis-à-vis the position and power of the general meeting of shareholders ended with the provision of mandatory approval rights of a limited number of reorganizations of the company.

Table 1 provides an overview of the rights of the general meeting of shareholders in the different company law directives. It is of importance to note that the field of application of the directives can differ. The second, third and sixth company law directive as well as Directive 2005/56/EC is applicable to all public limited liability companies while the takeover directive, the transparency directive and the shareholder rights directive is only applicable to companies which have their shares traded on a regulated market and in Directive 2006/43/EC the articles differ from one another in the field of application.

The second company law directive which emphasizes the protection of creditors of the company via the minimum capital rule and the maintenance of capital provides in the intervention of the general meeting when the capital is modified. First, when the company acquires assets of the founders of the company outside the normal course of business shortly after incorporation, the acquisition must be submitted for the approval of the general meeting[10]. The rule was promulgated to avoid founders to first establish the company and subsequently circumvent the procedures for considerations in kind. In 2006, the requirement

[9] The developments regarding the proposal of the fifth but also of all other directives are recently and orderly provided in A. Dorresteijn *et al., European Corporate Law*, Kluwer Law International, Alphen aan de Rijn, 2009, 39-93.
[10] Article 11.

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was further softened when transferable securities are contributed as consideration. The protection of capital is further strengthened via the intervention of the general meeting of shareholders when the company decides to undertake any kind of the reduction in the subscribed capital[11], as well as for distributions to shareholders through the acquisition of its own shares[12]. Both can be used as tunneling techniques that the European Commission wanted to prohibit.

Next, the position of the incumbent shareholders can be significantly influenced if the company issues new shares[13]. Incumbent shareholders will have to vote on the decision to increase the capital or to empower another company organ to take the decision to increase the capital. The general meeting will also have to decide if the preemptive rights of the incumbent shareholders can be waived. The European Commission considered these shareholder rights as very important and requires the general meeting of shareholders to take these decisions with a majority of not less than two thirds of the votes attached to the securities or the subscribed capital. The supermajority rule can be waived when at least half of the subscribed capital is represented. It is obvious that this procedure makes calls for capital in the European Union more complicated.

The second company law directive also requires the approval of the general meeting to wind up the company in case of serious losses or to decide whether any other measure should be taken in place thereof[14].

The election of the auditor is a current item of the agenda of the general meeting in all European countries in this study in line with article 37 of Directive 2006/43/EC. However, this directive allows countries to provide in alternative systems if this system does not impair the auditor's independence from the executive members of the board or management board. Next, it should be noted that although the shareholders elect the auditor, it is the board that governs or monitors the selection procedure. Finally, the right to dismiss the auditor is not explicitly granted to the general meeting of shareholders. The Directive only requires that the dismissal is based on proper grounds and excludes the divergence of opinions on accounting treatments or audit procedures as proper grounds.

[11] Article 30.
[12] Article 19.
[13] Article 25.
[14] Article 17

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Mergers and divisions of companies require the *fiat* of the general meeting of shareholders. The regulatory requirements can be found in the third directive for (national) mergers, in the sixth directive for divisions and in Directive 2005/56/EC for international mergers. As for the capital requirements, the European Commission provided for specific majorities approving these types of restructuring. In many countries several types of mergers and acquisitions are distinguished and the involvement of shareholders is also required in case all the assets of the company are transferred.[15]

The European Union empowered the general meeting of shareholders to frustrate a takeover bid. If the board of directors considers the bid to be inappropriate it requires prior authority of the general meeting of shareholders before taking any action resulting in the frustration of the bid. However, in order to pass the takeover directive the European Commission compromised that the Member States can authorize the board of directors not to apply the condition that the general meeting must approve the defensive mechanism. The opting out of the Member States had to be combined with an opting-in system for the individual companies.

The transparency directive protects the investors' community by regulating the information that companies listed on a regulated market must disclose. The use of electronic means to distribute information is allowed if it is approved by the general meeting. The transparency directive also refers to the general meeting in case of the amendment of the articles of association. Article 19 of the Directive states:

> Where an issuer proposes to amend its instrument of incorporation or statutes, it shall communicate the draft amendment to the competent authority of the home Member State and to the regulated market to which its securities have been admitted to trading. Such communication shall be effected without delay, but at the latest on the date of calling the general meeting which is to vote on, or be informed of, the amendment.

It considers that the changes of the statutes requires at least the general meeting of shareholders to be informed about all amendments, but more in general, that the general meeting is to vote on any amendments. The vagueness of the article suggests that many other issues regarding corporate life and the position of the general meeting of shareholders have

[15] See for example in the German Umwandlungsgesetz and the Dutch Book 2:107a. In the latter case the transfer of the company or the transfer of "as good as" the whole company requires shareholder approval.

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not been harmonized at the European level. We will discuss next how national corporate law empowers the shareholders of listed entities.

Table 1: Rights of the general meeting of shareholders according to the European company law related directives.

Directive	article	power of general meeting
second company law directive	article 11	approve acquisition of non-cash assets from founders
second company law directive	article 17	decide winding up in case of serious loss
second company law directive*	article 19	acquire own shares (exception for serious and imminent harm)
second company law directive	article 25 (1)	decide an increase of capital
second company law directive	article 25 (2)	authorize other body to decide on capital increase
second company law directive	article 25 (3)	waive pre-emption rights
second company law directive	article 30	decide on reduction in the subscribed capital
third company law directive (codified in directive 2011/35/EC)	article 6-7	decide on merger
directive 2005/56/EC	article 6	decide on cross-border merger
sixth company law directive	article 4-5	decide on division
directive 2006/43/EC	article 37	appointing auditor
take over directive	article 9	empower board to frustrate a bid (but MS can waive)
transparency directive	article 17-18	techniques of conveying information
transparency directive	Article 19	Indirectly: change of instrument of incorporation or statute

* as amended by directive 2006/68/EC

2.2.THE POSITION OF THE GENERAL MEETING OF SHAREHOLDERS IN NATIONAL MEMBER STATES

The general meeting of shareholders (AGM) serves as a corporate body to obtain the consent of the shareholders for decisions that do not lie within the managerial discretion of the board of directors. Aforementioned we briefly discussed which issues the European Union considers as outside the discretion of the board of directors. For the remainder, it is up to the national legislators to consider these issues which should be inside and outside this discretion. We studied the national company legislation of five European member states and identified the powers of the general meeting of shareholders. Table 2 indicates the powers of the general meeting of shareholders according to the Companies Code of Belgium, the Code de Commerce for France, Book 2 Civil Code for the Netherlands, the German Aktiengesetz and

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the Companies Act of 2006 for the UK. We identified and classified other powers than the "European" powers referred to in table 1. We have separated the issues we considered as current items (table 2) and non-current items (table 3). This classification is somewhat arbitrary as some current items are only scheduled for approval by the AGM biennial, triennial or multiannual while some non-current items are *de facto* scheduled annually. The division is based on the legal requirement that the general meeting recurrently have to approve the item or not. As an example, we can refer to the French case of approving contracts between board members and the election of auditors. The latter decision is recurrent but the articles of association of the company can provide for a term of up to six years. The former item only requires a decision of the AGM if a contract between the board member and the company is entered into, but in practice almost all AGMs of large listed entities must approve some of this kind of contracts every year.

A first look at table two already illustrates that common agenda items are rare. The approval of the annual financial statements serves as a good example. In Belgium and France the general meeting must approve the financial statements. In the UK the accounts and reports are approved by the board and signed by a director after which both the accounts and reports are "laid before" the general meeting[16]. The German management board must submit the accounts and the report to the supervisory board that reviews both the accounts and the report. This procedure results in the "adoption" of the accounts[17]. The management and the supervisory board are allowed to take the decision that the "adoption" of the accounts is left to the AGM[18]. The Dutch board must sign the accounts while it is the power of the AGM to "adopt" the accounts[19]. The report is only provided to the shareholders. The French AGM has to "receive" the report of the board and to "deliberate and decide on all questions that relate" to both the accounts and the consolidated accounts[20]. The latter accounts are separately voted. In Belgium, the shareholders have to "hear" the annual report and "to treat" the accounts. The AGM must approve the accounts[21].

Some countries empowered the general meeting to decide on the allocation of the profit and the dividend. France has the most extensive provisions with respect to the procedure of the

[16] Section 414 and 437 UK Companies Act 2006.
[17] Section 171-172 UK Companies Act.
[18] Section 173 UK Companies Act.
[19] Book 2:101 Dutch Civil Code.
[20] Article L225-100 French Commercial Code.
[21] Article 554 Belgian Companies Code.

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approval of the financial statements. After the accounts have been approved the French AGM has to approve the allocation of income and the dividend. The general meeting has the power to decide to fully or partially distribute the dividend in shares[22].

In some countries the approval of the accounts is accompanied with the decision of the general meeting to discharge the directors.[23] The decision to discharge the directors limits claims against the directors for breach of duty which is disclosed in the annual accounts and report. According to article 554 of the Belgian Companies Act, the general meeting of shareholders must vote on the discharge of the directors and the auditor. While discharging the directors can be found in other countries, like Germany and the Netherlands, where the general meeting of shareholders discharges both the members of the management board and the members of the supervisory board[24], discharging the auditor seems to be a unique power of the Belgian general meeting. In the UK it is neither provided in the Companies Act to discharge the directors, nor is it practiced. A decision of the UK AGM to discharge the directors would even be void[25]. However, the UK provides for a case-based but broader (non-current) exception. The general meeting of shareholders can ratify the behavior of a director which would give rise to liability for negligence, default, breach of duty or breach of trust in relation to the company unless there are additional legal requirements.[26] The French commercial code does not provide for the discharge of the directors, nor is it practiced. Contrary to section 239 CA 2006, the French Civil Code states in article 1843-5 that no decision of the general meeting can prevent a claim against the director for any kind of breach of duty.

As we referred to the non-current UK item of ratification of director's misbehavior we must make note of the Belgian and German law empowering the general meeting of shareholders to start a claim against (supervisory) board members.[27] French law provides this power to individual shareholders or groups of shareholders and explicitly denies the general meeting of

[22] Article L232-18 French Commercial Code.
[23] For a detailed comparative overview see S. Cools, "Europe's Ius Commune on Director Revocability", *European Company and Financial Law Review* 2/2011, 199-234.
[24] Section 11 the German Aktiengesetz. In the Netherlands the law only provides that the adoption of the accounts cannot be qualified as a discharge of the directors or the supervisory board members. As a consequence Dutch companies provide in a separate agenda item to discharge the directors and supervisory board.
[25] Section 232 UK Companies Act.
[26] Section 239 UK Companies Act.
[27] Section 147 German Aktiengesetz; including the auditors in Belgium (article 561 Belgian Companies Act).

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shareholders the power to intervene.[28] In the Netherlands, claims against directors are organized according to the rules applicable for conflicts of interest.[29] Where appropriate, and unless the articles of association do not provide for an alternative procedure, the supervisory board represents the company.[30] However, the general meeting of shareholders has always a right to elect another person to represent the company.

The election and dismissal of directors is considered to be one of the most important duties of the general meeting of shareholders. However the right of the general meeting to elect and revoke board members has been curbed in a number of ways.[31] First, many countries have a mandatory or optional two-tier board system. If a two tier system is adopted, the division of powers between the general meeting of shareholders and the supervisory board is more complex. In Germany, the supervisory board has as most important legal duties the appointment, supervision, and removal of members of the management board. The general meeting of shareholders elects the supervisory board but, in companies with more than 2,000 workers, half of the supervisory board members are labor representatives appointed by representatives of the employees, in accordance with the codeterminations laws. In companies with 500 to 2,000 employees, one third of the board members are employee representatives. In France[32] and the Netherlands, the supervisory board is elected by the general meeting[33], but in case the Dutch company is a "structuur-NV"[34], the power of the general meeting to elect the members is significantly restrained[35]. The supervisory board selects its own members and the employees' council must provide an opinion. The general meeting of shareholders only has a recommendation right with respect to the nomination of members. Even this recommendation right is limited, as one third of the members on the election list must be recommended by the employees' council. Next, the general meeting appoints the proposed candidates. In case the majority of the meeting votes against the election and this majority also represent at least 1/3 of the company's capital, a new meeting can be called. In case the candidate is neither appointed nor rejected with the required

[28] See article L 225-253 French Commercial Code
[29] G. Van Solinge and M.P. Nieuwe Weme, *Rechtspersonenrecht – Deel II De naamloze en besloten vennootschap*, Kluwer, Deventer 2009, nr. 446, 551.
[30] Book 2:146 Dutch Civil Code.
[31] This is also the case in the US. For an overview of the election procedure in the US see M. Ventoruzzo, "Empowering Shareholders in Directors' Elections: A Revolution in the Making", *European Company and Financial Law Review* 2/2011,105-144.
[32] And the company has opted for a two tier board.
[33] Article L 225-59 French Commercial Code.
[34] It is a specific regime for large companies. These companies must mandatory adopt a two tier board structure.
[35] Book 2:162 Dutch Civil Code.

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majority, the supervisory board may itself appoint the member.[36] The election right of the Dutch general meeting can be further restrained by the articles of association. The French supervisory board of listed entities must be composed of one or more representatives of the employees in case the employees hold more than 3 per cent of the capital[37]. Also the articles of association can provide for a right for employees to have one or more representatives elected. The number of employees' representatives must not exceed four or one third of the number of other members[38].

The supervisory board elects the members of the board of directors of a German "Aktiengesellschaft", a Dutch "structuur-NV", as well as the French members of the executive committee. In a two-tier board structure of a Dutch non "structuur-NV" the general meeting retains the power to elect both the management board and the supervisory board. The articles of association can restrict the freedom to elect the members and allow in specific nomination rules (binding nominations). However, it is possible for the general meeting to overrule this limitation via a supermajority vote.

In most countries the general meeting of shareholders elects the board members of the one-tier board. However binding nominations are common in the Netherlands.[39] Similarly it is not uncommon to provide in nomination rights for large shareholders in the articles of association of Belgian companies. However the election right of the shareholder might not be too much scooped. In the UK the articles can provide in detailed appointment processes according to the Companies Act, but provision B.7.1. of the Combined Code requires that directors of FTSE 350 companies must be subject to annual election by shareholders and all other directors should be subject to election by shareholders at the first annual general meeting after their appointment. The Companies Act provides individual votes for directors of public companies[40]. The articles of association of French boards can provide the right for employees to elect up to five directors but not more than 1/3 of the total number of other board members[41].

[36] Book 2: 158 Dutch Civil Code.
[37] Article L 225-71 French Commercial Code.
[38] Article L 225-79 French Commercial Code.
[39] B. Santen and F. Kloosterman, "Bad governance of goede bescherming? – Benoeming van bestuurders en commissarissen in de niet-structuur-beursvennootschap", *Tijdschrift voor Ondernemingsbestuur* 2/2007, 49-56.
[40] Section 160 Companies Act.
[41] Article L 225-27 French Commercial Code.

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The general meeting of shareholders is free to remove directors from office. This is the case in the UK, the Netherlands, Belgium and France. Section 168 and 169 of the UK Companies Act requires a special notice of a resolution and provides the right for directors to be heard, while the French and the Belgian Supreme Court consider the right to dismiss directors as a right of public order.[42] The requirement to provide in a special notice and hearing protects the interests of the directors but limits the power of the general meeting which hardly can make use of its right to dismiss the director pending the meeting. Under Belgian law, the general meeting does not have to provide any reason for its decision to dismiss the director, nor does the company have to pay any damages. In France the revocation of a director must not even be announced in the agenda but can be decided pending the meeting[43]. For removing Dutch board members, the articles of association may provide for supermajority requirements not exceeding two thirds of the represented votes and half of the capital[44].

In two-tier boards the right to dismiss the board is more regulated. In the Dutch "structuur-NV" the supervisory board dismisses the management board but the general meeting of shareholders has the right to be heard.[45] The German general meeting can even issue a vote of no-confidence which the supervisory board can use to revoke the management board member. In the Netherlands, a similar procedure exists for the members of the supervisory board. The general meeting has the right to issue a vote of no-confidence on the supervisory board members supported by more than half of the votes at a meeting of shareholders where more than 1/3 of the capital is represented[46]. It results in the automatic revocation of all supervisory board members. In that case, the management board must summarize the Enterprise court to provide in one or more supervisory board members[47]. In France, the supervisory board elects the members of the management board. However, the general meeting of shareholders is empowered to dismiss the members of the management board[48].

Related to the right to "hire and fire" the members of the board of directors is the right to determine the remuneration of the board. When the company has a one-tier board the general meeting of shareholders sets the board fee. The law can explicitly empower the general

[42] Cass. 13 April 1989, *Tijdschrift voor Belgisch Handelsrecht* 1989, 878; *Tijdschrift voor Rechtspersoon en Vennootschap* 1989, 321, nt. Wyckaert and Bouckaert.
[43] Article L 225-105 French Commercial Code.
[44] Book 2:134 Dutch 2 Civil Code.
[45] Article 162 Book 2 Dutch Civil Code.
[46] Book 2:161a Dutch Civil Code.
[47] Section 84 par. 3 German Aktiengesetz.
[48] Article L 225-61 French Commercial Code.

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meeting of shareholders to provide in an appropriate remuneration, like in France or implicitly, like in Belgium. In two tier boards, the remuneration of the supervisory board is generally set by the general meeting of shareholders, while the supervisory board sets the remuneration of the members of the management board. This is the case in Germany where according to section 113 Aktiengesetz, the general meeting determines the remuneration of the supervisory board, unless it is set in the articles of association. The supervisory board determines the aggregate remuneration of a member of the management board. Both the supervisory board and the general meeting must take care that a "reasonable relationship" exists between both the duties of the board members and the condition of the company.

In most countries, the role of the shareholders in the determination of the remuneration of the board members is strengthened. Although these items can be considered as non-current, since remuneration policies or severance payments are not issues that always need a yearly shareholder approval, we decided to discuss these issues together with the election and remuneration of the board. In the UK and Belgium, the general meeting of shareholders must approve the remuneration report[49]. The report must contain information of both the remuneration policy as well as the total fee that the members of the board of directors receive. When the report is voted down, the remuneration of the directors must not be repaid but the company has to consider another remuneration policy. On top of this voting right, both the Belgian and the UK's general meetings have an additional voting right. The UK general meeting must approve director's service contracts of more than two years[50], whereas the Belgian meeting must approve severance pay packages of more than 12 months of executive board members, members of the management board and officers in charge of the day-to-day management.[51]

In the Netherlands only the remuneration policy requires a shareholder vote. The German general meeting of listed entities can be empowered to vote on the remuneration system of the members of the management board. The vote is not binding and the members of the supervisory board must guarantee the appropriate remuneration of the management board. The French Commercial Code has a different approach regarding director's remuneration. It assimilates the decision of the remuneration package to a conflict of interest between the

[49] Hence, it must be considered as a current agenda item.
[50] Section 188 UK Companies Act.
[51] Article 554 Belgian Companies Act.

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company and its board member and requires a similar procedure. We will discuss this decision as a non-current agenda item next.

Specific rules have been issued with respect to incentivising board members and senior executives with shares and share options. In 2010, Belgium introduced a complicated remuneration system related to the variable remuneration of executive directors and senior executives and the granting of shares and share options, which must be deferred for at least three years. Fifty per cent of the variable remuneration of executive directors and senior executives must be deferred for two to three years.[52] However, the general meeting of shareholders is granted the right to deviate from both the requirement for deferred variable remuneration and the deferred vesting of shares and share options.[53] The articles of association can also depart from the legal requirements, and altering the articles of association requires the general meeting's consent.[54]

For sake of completeness, we add that only Belgian law explicitly empowers the general meeting of shareholders to determine the remuneration of the auditor.

[52] Article 520ter Belgian Companies Act

[53] For an analysis of this system see H. De Wulf, C. Van der Elst, S. Vermeesch, Radicalisering van corporate governance-regelgeving: remuneratie en transparantie na de wet van 6 april 2010, *Tijdschrift voor Belgisch Handelsrecht* 10/2010, 909-963.

[54] The difference between the two alternatives is twofold. First, deviations that the general meeting approves are only valid for one program while the articles of association can be applied for each program. Second, the modification of the articles of association requires the intervention of a notary, a specific quorum and a supermajority approval.

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Table 2: Overview of current powers of the general meeting in five European countries

	Belgium	**France**	**Germany**	**The Netherlands**		**UK**
				one tier	*two tier*	
current items						
approve annual financial statements	x	x	(x***)	(x)	(x)	(x)
approve consolidated financial statements		x	(x***)			
approve the allocation of income		x	x			
approve the dividend		x	x	x	x*	
elect and revoke board of directors	x	x		x		x
Provide in vote of no confidence in member management board			x			
elect and revoke management board						
elect and revoke supervisory board		x	x	x**	x	
determine compensation of directors	x	x		x	x*	x
determine compensation of supervisory board		x	x		x	
determine compensation of auditor(s)	x					
approval of the remuneration report	x					x
approve remuneration policy of the board				x	x	
Approval of the remuneration system of the members of the management board (optional)			x			
approve large severance pay for board members or senior executives	x					
Share and share price related incentive scheme	x			x	x	(LSE)
approve service contract of more than two years with director						x
discharge the liability of directors (related to the disclosed information)	x		x	x	x	
ratify conduct by a director amounting to			x			x

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negligence, default, breach of duty (or waive a claim)						
start a claim against directors (in name and on behalf of the company)	x		x	(x)	(x)	x
discharge the liability of supervisory board			x		x	
discharge the liability of auditors	x					
TOTAL OF ITEMS	10	8	12	9	10	8

Source: own research based on the analysis of the Belgian Companies Act, the French Commercial Code, the German Aktiengesetz and Handelsgesetzbuch, the Dutch Civil Code (Book 2) and the UK Companies Code 2006 and LSE listing requirements;
*: delegation of power is possible; ** removal requires supermajority; ***: only if required by boards or supervisory board did not approve the accounts

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Table 3 provides a summary of the non-current decision rights of the general meeting of shareholders in five Western European countries. First, in some countries the general meeting is provided with specific rights regarding transactions between corporate incumbents and the company. Since 2007, the UK Companies Act requires the general meeting's approval for substantial property transactions with directors. "Substantial" transactions are transactions of assets with a value of either 100.000£ or 10% of the company's balance sheet and more than 5.000£.[55] Similarly, the UK general meeting must approve a (quasi-)loan to a director as well as any kind of guarantee or a provision of security in connection with a loan to a director. Other countries have introduced different mechanisms to address these conflicts of interests between a director and the company. In Germany, loans can be provided to both the members of the management board and the supervisory board with the approval of the supervisory board.[56] The member of the board of a Belgian company that directly or indirectly has a patrimonial interest related to a decision or transaction of the company should disclose this interest to the other directors, and in listed entities, abstain from the discussions and decision-taking process. The external auditor must report on the transaction.[57] The general meeting of shareholders is not involved. The French approach related to loans, guarantees or provision of security to a director is straightforward. Any contract of this kind is null and void. All other "conventions" which includes all contracts between a director[58] and a company must be submitted to the approval of the general meeting so shareholders. In the Netherlands, there are no specific provisions regarding the allotment of loans to directors. Where appropriate, and unless the articles of association do not provide in an alternative procedure, the supervisory board represents the company in case a board member has a conflict of interest.[59] However, the general meeting of shareholders has always a right to elect another person to represent the company.

Next to the right to approve transactions with directors, there are some non-current decisions that are considered of general importance and require shareholder approval in all countries. Next to the amendments of the articles of association, the conversion of the company and the liquidation of the company need shareholder approval. In most countries there are specific quorum and majority rights applicable to take these types of decisions.

[55] Section 190-191 UK Companies Act 2006.
[56] Section 89 and 115 German Aktiengesetz.
[57] Article 523 Belgian Companies Code.
[58] As well as the large shareholders of the company, the senior officers of the company and the controlling company (Article 225-38 French Commercial Code).
[59] Book 2:146 Dutch Civil Code.

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Other powers of the general meeting of shareholders are more country specific. If a company enters into an enterprise agreement, the German general meeting must approve the agreement with a majority vote of not less than 75 per cent of the represented share capital. In the Netherlands, the general meeting of shareholders must also approve similar agreements, like important joint ventures and the acquisition or disposal of a participation in the capital of the company with a consideration of more than 1/3 of the value of the balance sheet.[60] Companies listed on the London Stock Exchange must ensure that shareholders can vote on all major transactions. Transactions are categorised in classes according to their size related to the assets, profits and capital of the company.[61] Transactions that pass the threshold of 25 per cent must be accompanied with an explanatory circular to its shareholders and require prior approval in a general meeting.

Other powers of the general meetings in different countries are: (i) for Germany, the approval of transactions for which the supervisory board is withholding its consent whilst required according to the articles of association; the appointment of auditors for examining matters of formation or management; conferring the management board to prepare any matter for which the general meeting is empowered; and the squeeze-out of minority shareholders upon a request of the majority shareholder; (ii) for France, the issuance of bonds is since 1994 the responsibility of the board of directors, but the articles of association can reserve this power to the general meeting of shareholders; (iii) for the Netherlands, the authorisation of the board to file for bankruptcy and the delegation of power to set the record date, (iv) for Belgium, the granting of rights to third parties that can influence the company's capital or originating debt depending on the launch of a takeover bid[62]; and (v) for the UK, the granting of political donations of more than 5.000£.

[60] Book 2:107a Dutch Civil Code.
[61] See annex 1 to listing requirement 10 of the London Stock Exchange.
[62] In particular different kinds of change of control clauses in loan agreements will require Belgian listed entities to acquire shareholder approval at the general meeting of shareholders.

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Table 3: overview of "non-current" powers of general meetings in five Western-European countries

	Belgium	France	Germany	The Netherlands		UK
non current items				*one tier*	*two tier*	
approve substantial property transaction with director or relative						x
approve loans, quasi loans with director						x
approve contracts with board members and large shareholders*		x				
Elect representative in case of conflict of interest between board member and company				x	x	
Entering or changing enterprise agreements			x			
Squeeze-out minority shareholder upon request large holder			x			
Issuing bonds		(x)				
amendments to the company's bylaws**	x	x	x	x	x	x
liquidation of the company	x	x	x	x	x	x
Approve transaction for which articles require supervisory board approval and the latter withheld consent			x			
Appointment of auditors for examining matters of formation or management			x			
Delegation setting record date				x	x	
approve (larger) political donations						x
granting third parties rights that influences the company's capital or originating debt dependent on take over bid	x					
conversion of the company	x	x	x	x	x	x
Require board preparation of any matter the shareholder meeting is empowered to.			x			
important joint ventures				x	x	
file for bankruptcy				x	x	
acquire or dispose of a participation in the capital with a value of more than 1/3 of assets/ important transactions***				x	x	(LSE)

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TOTAL OF ITEMS	4	5	8	8	8	7

Source: own research based on the analysis of the Belgian Companies Act, the French Commercial Code, the German Aktiengesetz and Handelsgesetzbuch, the Dutch Civil Code (Book 2) and the UK Companies Code 2006 and LSE listing requirements.
* owning more than 10%; **: includes many items like subdivide or consolidate share capital; ***: see listing requirements

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3. THE GENERAL MEETING OF SHAREHOLDERS IN ACTION

The aforementioned comparison illustrates that the general meetings of shareholders in Western European countries have many common items on their agenda but also many different items. Overall we identified – other than the "European" empowerment of the general meeting of shareholders - between fourteen agenda topics for which the French general meeting can take a decision up to twenty one items that German meetings can address. In an accompanying study, we collected the agenda, the minutes and the polls of the general meeting 2010 of more than 150 blue chip companies in the five countries of which we studied the role and decision taking of the general meetings.[63] Article 5 and 14 of the European Directive 2007/36/EC require the (timely) disclosure of the convocation with the agenda and minutes with the voting results and the proportion of the capital represented by the votes. The Directive had to be transposed by August 2009 but some Member States failed to timely transpose the Directive. As a consequence, not all companies disclosed all this information on their websites. Table 4 summarizes the findings. The individual agendas of the meetings provide the number of items the general meeting had to approve or to reject (column three Table 4). On average, the general meetings have to approve approximately 17 items. In the Netherlands the total number of items is significantly smaller; in France, the total number is significantly larger. In Germany one meeting had to approve not less than fifty items, while the maximum number of items was only twenty three in the Netherlands. Even the smallest number can be found in the Netherlands: five items. In the UK, each meeting had to approve at least eleven items.

In order to better compare the agendas of the meetings and to account for the formal legal differences between the countries, we individually studied the agendas to assess the different agenda items. It is e.g. common that companies (re)elect more than one director or, like in France, authorize the chief executive officer to execute the decisions of the meeting[64]. In the fourth column, the (re)election of directors has been counted as one agenda item and the authorization has been excluded as agenda item. We have seen that French companies have to

[63] Van der Elst, Christoph, *Revisiting Shareholder Activism at AGMs: Voting Determinants of Large and Small Shareholders* (July 16, 2011). ECGI - Finance Working Paper No. 311/2011; Tilburg Law School Research Paper No. 019/2011. Available at SSRN: http://ssrn.com/abstract=1886865.

[64] In other countries the approval of an agenda item implicitly includes the authorization to execute the decision. From a more theoretical point of view the separation of the decision and the authorization to execute this decision has the advantage that it allows the meeting to choose the most reliable corporate officer. However as the agenda is set by the board of directors and the board provides the name of the officer, it risks that this officer is voted down and the execution is blocked. All French meetings approved almost unanimously the authorization of the corporate officer.

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vote on the accounts, the consolidated accounts, the allocation of the income and the dividend, while only the accounts are laid before the meeting – and *de facto* voted – in the UK. We counted the approval of the accounts as one agenda item in the third column. French meetings have to elect a college of external auditors (and deputy members) which are counted as one item in the third column. These modifications reduce the list of resolutions for which an average general meeting has to vote considerably, but the relative ratio remains the same: the Dutch meeting has the least work, the French meeting the most.

Board member (re)elections are omnipresent. Column five of Table 4 presents the results of the average number of directors that each meeting had to (re)elect. In two-tier board structures, the election of supervisory board members is concentrated in specific years and only a limited number of members need to be (re)elected in the other years. In the UK, it is common that all or a large number of directors stand up for (re)election. The average number of director elections is the highest in the UK. However, it was during a French general meeting that twenty directors stood up for (re)election.

Column six of Table 4 provides the relative number of meetings that had to approve special resolutions or was combined with an extra-ordinary meeting. In those cases column seven of Table 4 shows the average extra items the meeting need to approve. Extra-ordinary or special resolutions require in Belgium and France a separate general meeting for which a specific quorum and majorities are applicable. In the UK and Germany these decisions must be considered as 'special' resolutions for which a 75 per cent majority is required. The Netherlands is more flexible; only some decisions require a supermajority approval at Dutch AGMs if less than half of the capital is represented. All German and UK companies combine regular items with special resolutions. It is also common in France to combine the general meeting with an extra-ordinary meeting or to combine regular with special resolutions in the Netherlands. Less Belgian companies organize extraordinary meetings, but when these companies combine the meetings, they list more special resolutions. One company had a list of eighteen extra-ordinary agenda items. Also French companies list a significant number of agenda items for which the extraordinary meeting must take a decision. Again, the shareholders of Dutch companies are those that only need to take a limited number of decisions.

The last column of table 4 provides the average number of total voting rights that were present or represented. The minutes of the meeting either disclose the relative attendance of

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shares either the absolute number of voted shares (for, against and withheld). In the latter case this number is compared with the total number of issued shares with voting rights. The latter information is either disclosed in the minutes of the meeting either in the annual report of the company. The average and median voting turnout at general meetings is 60 per cent. The voting turnout of 80 per cent of the meetings is above the threshold of 50 per cent and more than half of the meetings have an attendance of more than 60 per cent. A closer look at the voting turnouts in the different countries illustrate that the attendance is higher in the UK, with an average of approximately 67 per cent, and lower in France, with 62 per cent. In Belgium, the average remains beneath the threshold of 50 per cent. Especially Belgian companies experience low voting turnouts. Four of the five lowest attendance outcomes are from Belgian meetings.

Table 4: Summary of the role and duties of general meetings

2010	nr. of companies	Total number of resolutions	"different real" resolutions	board members to be elected	combined meeting or special resolutions	number of special resolutions	average attendance
Belgium (BEL-20)	17	16,06	12,17	4,06	53%	8,56	49,10%
France (CAC-40)	37	20,16	13,27	5,32	89%	6,15	61,70%
Germany (DAX 30)	29	16,76	11,03	1,48	100%	5,41	55,50%
The Netherlands (AEX-25)	19	11,53	9,84	2,47	79%	3,47	51,30%
UK (Footsie 100)	51	16,67	11,61	6,02	100%	4,27	66,70%
All companies	153	16,82	11,75	4,33	90%	5,16	59,50%

Source: own research based on the hand collected agendas, minutes of the general meetings and results of polls 2010 through the websites of the companies

It seems that all the different items that are on the agenda of general meetings do not directly change the behavior of shareholders to attend the general meetings. With more special resolutions to be voted Belgian meetings experience low voting turnouts.[65] However, the attendance of shareholders is only one technique to measure shareholder involvement that can help to support legislators in their development of an appropriate model for the division of power between the general meeting of shareholders and the board of directors.

[65] The results are not different for companies that combined the extraordinary meeting and the general meeting of shareholders and the companies that did not combine both meetings.

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We also collected the voting results of the most common items on the agenda of the meetings: the approval of the accounts, the discharge of the board, the remuneration of board members, and the election of board members. For comparability reasons the approval rates were calculated as the ratio of the votes for to the total votes including the votes withheld.[66] The results of the approval rates can be found in table 5. All accounts were approved with a supermajority rate of more than 99 per cent in all countries. Board members received their discharge with more than 97 per cent of the attending votes. The remuneration of the board and in particular the remuneration report or remuneration system received slightly higher disapproval rates. In the UK on average 10 per cent of the attending shareholders voted against the report. All directors were (re)elected with more than 92 per cent of the votes, with the exception of the French board members, of which some experienced somewhat more opposition. Considering all items on the agenda of the general meetings, the lowest approval rates were above 80 per cent in four countries and still almost 75 per cent in France. Often, the items that received the most opposition are the approval (of granting the right of the board of directors of) issuing new shares without the use of the preemptive rights.

It results from this part of the analysis that, whatever the kind of items that the general meeting has to approve, the opposition of shareholder remains very modest and agenda items are seldom voted down.

Table 5: Average approval rates of common agenda items (2010)

	accounts	Discharge board	discharge superv. board	remuneration	remuneration report/system	lowest election	lowest overall
Belgium	99,12%	98,12%		98,40%		96,49%	93,25%
France	99,34%			93,67%		86,65%	73,88%
Germany	99,92%	97,89%	97,30%		93,34%	92,29%	84,80%
The Netherlands	99,30%	99,07%	98,26%	97,09%		97,85%	84,42%
UK	99,19%				90,83%	94,42%	85,67%
all companies	99,36%	98,24%	97,65%	95,66%	91,69%	92,97%	83,33%

Source: own research based on the hand collected agendas, minutes of the general meetings and results of polls 2010 through the websites of the companies.

[66] In the UK the approval rate is calculated as the ratio of the votes for to the votes for and against with the exclusion of the votes withheld while companies in other countries generally include the votes withheld in the denominator.

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Third, we address one specific meeting's agenda item which experienced a recent legislative change in two countries. In Germany, the "Gesetz zur Angemessenheit der Vorstandsvergütung" (VorstAG) of 31 July 2009[67] provided the general meeting with a right to vote on the system of remuneration of the board members. In Belgium, the "Wet tot versterking van het deugdelijk bestuur bij de genoteerde vennootschappen"[68] of 6 April 2010 requires the general meeting of shareholders to vote on the remuneration report with information on the remuneration policy and remuneration of the board and senior executive officers. In accordance with the German law, a large majority of the DAX-30 companies required the general meeting of shareholders to vote on the adequacy of the remuneration of the management board in 2010. Some Belgian companies provided their general meeting with a similar right of voting for the remuneration report during the general meeting of 2011, although the Belgian law only requires companies to put this item on the agenda of the general meeting from 2012 onwards.

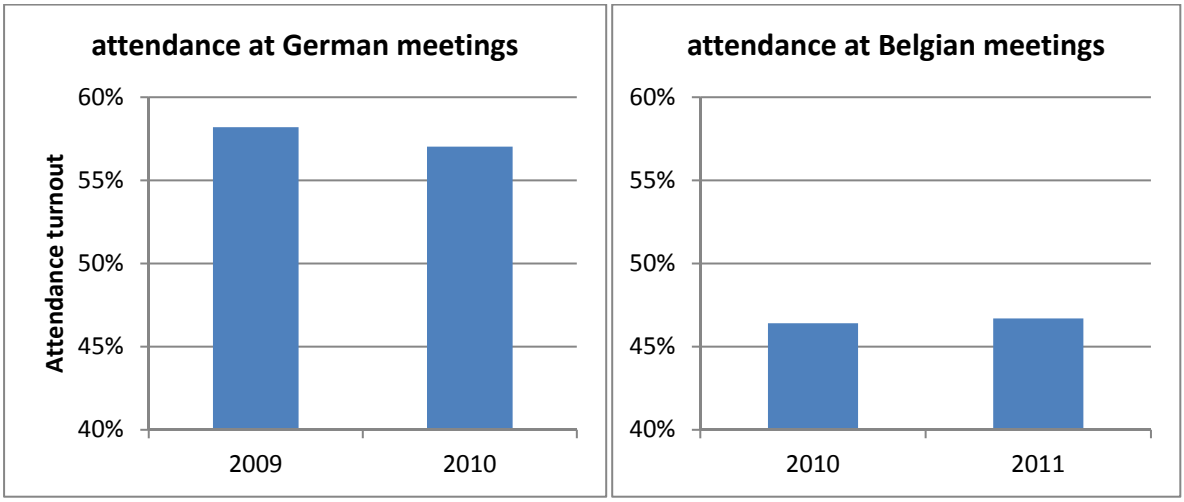
Comparing the effects of these legal developments, we collected the attendance rate of shareholders at the general meeting that had to take a decision on the remuneration report/system and compared the results with the attendance rate of the shareholders at the general meeting of the previous year. For Germany, the attendance at the 2009 meeting is compared with the attendance at the 2010 meeting. For Belgium, the years of the analysis are 2010 and 2011. The results of the analysis can be found in figure 1. At the 26 DAX-30 companies that approved the remuneration system in 2010, the average attendance was 57,0 per cent. It dropped from 58,2 per cent in 2009. Although the difference and decrease between 2009 and 2010 is not statistically significant, 17 of the 26 companies experienced a decrease in the attendance at the meeting where the remuneration system was approved. For Belgium meetings the results are similar. At 11 meetings where the remuneration report was placed on the agenda, only 4 of the companies experienced an increase in the attendance of shareholders at the 2011 general meeting. Overall, the attendance at these 11 meetings increased from 46,1 per cent to 46,7 per cent, a non-significant difference.

Although the sample of companies is limited, the results confirm the previous findings that shareholders do not significantly change their behavior vis-à-vis the (role and position of the) general meeting.

[67] The law on the adequacy of the remuneration of the management board, Bundesgesetzblatt I S. 2509 (Nr. 50).
[68] The law to enforce corporate governance of listed entities, Belgisch Staatsblad 23 April 2010.

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Figure 1 Attendance at German and Belgian meetings of the year during which the shareholders had to approve the remuneration system/report and the previous year



Source: own research based on the hand collected agendas, minutes of the general meetings and results of polls of 2009 and 2010 for German companies and 2010 and 2011 for Belgian companies

4. CONCLUSION

An appropriate division of power between the board of directors and shareholders of the company is quintessential to equilibrate the board's responsibility to take discretionary business decisions and the shareholders rights to monitor board's behavior. When corporate governance became fashionable, both the European and the national member states' legislators refined corporate law and allocated more (monitoring) powers in the hands of the (general meeting of) shareholders. This study addressed the powers of the general meeting of shareholders in a comparative perspective. First, the powers that were provided in the European company law directives were briefly described. Next the "national" powers of (1) ordinary general meeting and (2) extra-ordinary meetings (or special resolutions) are addressed and compared and the restrictions to make use of these rights are provided. Third, the law in action is used to analyse the developments of shareholder rights and shareholder attendance and voting at general meetings of listed entities. Three different techniques are presented to assess how shareholders practice and make use of the powers of the general meeting of shareholders. First the importance of the general meeting of shareholders and the importance of the agenda items is used in comparison with the attendance of shareholders. We found no significant relationship between the number of items or the importance of items

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to be voted at the meeting and the attendance of the shareholders. Next we studied the voting results of a number of items on the agenda. All items received overwhelming support of the shareholders. Only exceptionally an agenda item is voted down. Third, we studied the interest of shareholders in say-on-pay and compared shareholder participation in Germany and Belgium when the remuneration report or system was an agenda item and the previous year when it was not an item. There is no evidence that the remuneration issue influences shareholders' attendance behavior.

In its Green Paper on corporate governance the European Commission recognized the importance of shareholder voting improving long-term value creation.[69] Our research sheds doubt on the current role of shareholder voting in listed companies as a strategic governance tool for this type of value creation. A large part of the shareholders are either free riding or apathetic. Second, shareholders that attend the meetings support as good as all agenda items. Third, legislators struggle with the delineation of powers of the shareholders and the board as table 2 and 3 illustrates. It is more than likely that more serious consideration is necessary to optimize the role of general meetings. It seems unlikely that the suggestion to disclose the voting policies of investors[70] can be sufficient to reach the goal of a "stewardship committed" shareholder. We therefore would like to make a plea for an in depth analysis of the needs and requirements of shareholders to participate in the decision making process of the company and assess the alignment of their desires with the European view on the stakeholder interests in the company, before launching new initiatives.

[69] European Commission, *Green Paper – The EU Corporate Governance Framework*, Brussels, 5 April 2011, COM(2011) 164 final, 24 p.
[70] *Ibid.*, 12.

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