
ПРИВРЕДНА ДРУШТВА

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QUESTION TIME?

THE SHAREHOLDER'S RIGHT TO ASK QUESTIONS AS APPROPRIATE STEWARDSHIP TOOL

Summary

In many European countries the right to ask questions is explicitly provided in corporate law. However this right is often significantly limited. In this paper we first provide in a brief history of the right to ask questions in a comparative perspective. Next we address this right in the aftermath of the Shareholder Rights Directive 2007/36/EC: who can ask questions, what can be asked, who has to provide the answer, when does the question and the answer need to be provided as well as which rights do companies have to refuse an answer. The countries for which the right to ask questions is studied are Belgium, France, Germany, the Netherlands and the United Kingdom. Third we investigate the use of this right in practice through an assessment of the questions raised during the general meeting of shareholders 2011 of Dutch listed companies. Section five will conclude. In light of the field of application of the Directive we limit the study to the right to ask questions in companies of which shares are listed on a regulated market.

Key words: *shareholder, corporation, shareholders' rights, Shareholders' Rights Directive, right to ask questions, general meeting of shareholders.*

I Introduction

Organizations need a governance system to facilitate decision making. Corporate law assigned most of the decision making to the board of directors. The board is empowered to make decisions binding and carries responsibility for it. The board of directors is accountable vis-à-vis the company for performing these duties. The shareholders have only limited powers and gathered in the general meeting the shareholders are entitled to approve or disapprove a number of board actions, to elect the board members as well as to take decisions regarding the organization of the company itself. There is hardly any control over day-to-day operations of this company and even decisions on policy issues are hardly influenced by the shareholders. Every year the board of directors has to call a general meeting of shareholders and allow shareholders to vote on the aforementioned classes of decisions. While the legal technicalities on which and how the different motions are voted differ substantially, all agree that how powerful or powerless the shareholders and general meetings might be, they need to be informed on the voting issues and more in general about the (financial) condition of the company.

Information is key to financial markets. Market participants and more in particular listed companies can voluntarily disclose this information to attract investors to become shareholders of the company. However voluntary disclosure is not always the most efficient technique and can result in market failure.¹ Legislators and regulators intervened to mitigate the failures and require from companies both quantitative and qualitative information. In most developed countries there are at least three different classes of information for which dissemination is regulated. First, companies need to disclose financial reports on a regular basis, be it annually, semi-annually or quarterly. Over the years the financial reports have been expanded with qualitative information regarding the future perspectives of the company and corporate governance statements. Next, the creation or continuation of false markets must be prevented. For this aim inside information as well as other relevant information must be disclosed as soon as possible, i.e. ad hoc disclosure. Third and this can be considered as a specific European Union requirement originating from the transparency directive, major holdings of voting rights must be disclosed.

How detailed, elaborated and clear the information might be, not all information on the aims and ambitions of the company, the company's prospects as well as the company's markets can be provided to the shareholders. Next and notwithstanding or due to some high levels of standardization,

1 G. A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', 89 *Quarterly Journal of Economics* (1970) pp. 488–500. Akerlof used his theory of information asymmetry to explain the deficiencies of the second car market.

shareholders might have difficulties in understanding the disclosed information. Therefore, it seems logic that shareholders can question the board of directors about the information that the company discloses and for which the board of directors carries responsibility as well as about the performance of their duties. It follows from the accountability of the board that the shareholders have a right to be fully informed on the board's behavior before they debate and vote on the items of the agenda of the general meeting. However, a shareholder's right to question the board of directors is often underexposed. In many American and UK corporate law textbooks the right to ask questions is not even mentioned.

In many European countries the right to ask questions is explicitly provided in corporate law. However this right is often significantly limited. In this paper we first provide in a brief history of the right to ask questions in a comparative perspective. Next we address this right in the aftermath of the Shareholder Rights Directive 2007/36/EC: who can ask questions, what can be asked, who has to provide the answer, when does the question and the answer need to be provided as well as which rights do companies have to refuse an answer. The countries for which the right to ask questions is studied are Belgium, France, Germany, the Netherlands and the United Kingdom. Third we investigate the use of this right in practice through an assessment of the questions raised during the general meeting of shareholders 2011 of Dutch listed companies. Section five will conclude. In light of the field of application of the Directive we limit the study to the right to ask questions in companies of which shares are listed on a regulated market.

II Brief Historical Perspective

While unregulated in the older editions of the UK companies acts, the right to ask questions is long recognized in the UK. In *National Dwellings Society v. Sykes* the court considers the chairman of the general meeting be responsible that "the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting".² It follows from this court ruling that shareholders generally have the right to speak at the meeting, that questions are allowed and that shareholders do make use of this right to ask questions. In some textbooks it was argued that the chairman must make sure that a resolution must reflect the sense of the meeting but it does not mean that each individual member has the right to speak (and hence ask questions).³ Next, there was no statutory duty for the directors to answer the questions. There is only a right for directors to speak on a reso-

2 National Dwellings Society v. Sykes 1894 3 Ch 159.

3 P. Xuereb, *The Rights of Shareholders*, Oxford, BSP Professional Books, 1989, p. 114.

lution to remove the directors.⁴ It was common practice that chairman of the meeting responded to questions put to the board by the shareholders. In Germany the right to ask questions was introduced in 1937. Before 1937 it was not regulated and controversial.⁵ Article 112 German Aktiengesetz 1937 provided shareholders the right to ask questions related to all issues that were discussed during the meeting. An answer must not be provided if there is a predominant interest of the company or subsidiary or the common benefit of the people or the country. In the 1965 edition of the Aktiengesetz this right was further regulated.⁶ Originally the Belgian Companies Act explicitly acknowledged the right to ask questions in 1984 in its article 70ter. The Netherlands legally recognized the general meeting the right to ask questions in 1971 when the Dutch “structuurregime” was introduced. However, long before its enactment, the right to ask questions was recognized in the legal doctrine of both Belgium and the Netherlands.⁷ The doctrine argued that this right to ask questions will make the participation of shareholders in general meetings useful. The French Companies Code already fine-tuned the right to ask questions in 1984.⁸ According to article 162 of the French Code 1966 as modified in 1984 each shareholder had the right to address the board of directors in writing as soon as all proxy materials for the general meeting of shareholders are published. The proxy materials should contain all relevant information about the management and the business of the company. All questions of the shareholder must be answered during the meeting. This right to address the board in writing did not prevent the shareholder the right to ask oral questions during the general meeting.⁹

The Shareholder Rights Directive 2007/36/EC attempted to harmonize the right to ask questions and the relevant article 9, §1 of the directive reads: “*Each individual shareholder has a right to ask questions related to items on the agenda.*” Companies must guarantee that these questions receive an answer. This right is limited in specific circumstances as provided in §2 of article 9 of the Directive: “*The right to ask questions and the obligation to answer are subject to the measures which Member States may take, or allow companies to take, to ensure the identification of shareholders, the good order of general*

4 Section 304 Companies Act 1985.

5 C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, Köln, Carl Heymanns Verlag 2010, 11, nr. 2.

6 Cf. *infra*.

7 C. Resteau, *Traité des sociétés anonymes*, Brussel, Polydore Pée, 1933, III, pp. 333–334 for Belgium and J. Maeijer, *Vertegenwoordiging en rechtspersoon*, Zwolle, Tjeenk Willink, 2000, p. 313 for the Netherlands.

8 Article 13 Loi n° 84–148 du 1 mars 1984 relative à la prévention et au règlement amiable des difficultés des entreprises, *French Journal Official* 2 March 1984.

9 M. Cozian, A. Viandier, *Droit des Sociétés*, Paris, Litec, 1996, p. 302.

meetings and their preparation and the protection of confidentiality and business interests of companies. Member States may allow companies to provide one overall answer to questions having the same content.”

Finally the Directive also takes into account efficiency arguments and allows “Frequently Asked Questions” sections (FAQ) to discard superfluous questions: “*Member States may provide that an answer shall be deemed to be given if the relevant information is available on the company’s Internet site in a question and answer format.”*

It results from article 9 of the Directive that the Member States have several rights to further regulate the right to ask questions. First, the Member State can regulate how to identify the shareholders and other procedural topics. Next the Member State can allow companies to combine similar questions and third the Member State can authorize companies to provide information through its website. As regards the content of the answers to the questions the member states can regulate how confidentiality and business interests of the company can be protected. The Directive guarantees shareholders a minimum protection but Member States can also provide additional rights to shareholders or other securities holders. In all countries the Shareholders Right Directive resulted in amendments of the companies acts: *Wet betreffende de uitoefening van bepaalde rechten van aandeelhouders van genoteerde vennootschappen* of 20 December 2010 in Belgium¹⁰, *Ordonnance n° 2010–1511 portant transposition de la directive 2007/36/ CE du 11 juillet 2007 concernant l’exercice de certains droits des actionnaires de sociétés cotées* of 9 December 2010 in France¹¹, the *Gesetz zur Umsetzung der Aktionärsrechterichtlinie (ARUG)* of July 30 2009 in Germany¹², *Wet tot wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen (PbEU L 184)* of 30 June 2010 in the Netherlands¹³, and *The Companies (Shareholders’ Rights) Regulations 2009* of 3 August 2009 in the UK. However, not all amendments to transpose the Directive included a modification of the right to ask questions. In Germany the legislator did not amend section 131 of the *Aktiengesetz*. Legal scholars already criticized that the article has not been modified and need to be read in accordance with the Directive.¹⁴ Also the Netherlands consid-

10 Belgisch Staatsblad 20 April 2011.

11 *Journal Officiel* n° 0286 of 10 December 2010, 21612, texte n° 16.

12 Bundesgesetzblatt I, p. 2479.

13 Staatsblad, p. 257.

14 C. Kersting, “Ausweitung des Fragerechts durch die Aktionärsrechterichtlinie”, *Zeitschrift für Wirtschaftsrecht (ZIP)*, 2009, p. 2317.

ered that the right to ask question was already in line with the Shareholder Right Directive. France did only add the right for companies to refer to the FAQ section and to group questions having the same content and claimed it was already in accordance with all the other requirements of the Directive regarding the right to ask questions. Only the UK and Belgium significantly amended their companies acts. The next section will study how the different countries treat this shareholder right to ask questions.

III Corporative Legal Analysis of the Right to Ask Questions

1. Shareholder Right

According to the Shareholder Rights Directive every shareholder has the right to ask questions. It is necessary but sufficient if member states allow shareholders to ask questions. The limitation of the right to ask questions to shareholders is emphasized in the second part of §1 of article 9. The company only must answer questions of shareholders. Article 2 of the Directive defines the shareholder as “*the natural or legal person that is recognised as a shareholder under the applicable law*”. As the Directive does not make any difference between shares with (multiple) voting rights and shares without voting rights, it must be concluded that both types of shares provide its owner the right to ask questions. Notwithstanding this right it does not prevent the possibility that the rights related to the shares, including the right to ask questions, are suspended.¹⁵

Whether holders of other securities have a similar right depends on the national companies acts. According to Belgian law this right is limited to shareholders. However the majority of Belgian doctrine argues that the right to ask question is granted to all persons that have the right to participate in the general meeting according to the law or the articles of association.¹⁶ According to article 537 Belgian Companies Act bondholders, holders of securities

15 This is for instance the case when shareholders have the duty to inform their significant shareholdings and failed to do so. The rights related to these shares can be either automatically or after a court injunction be suspended (see eg § 28 German Wertpapierhandelsgesetz, article 516 Belgian Companies Code). The Dutch law explicitly provides that the right to attend the meeting (and hence to ask questions) can be suspended if the provisions in the law and the articles of association have not been taken into account (Artikel 117, §3 Boek 2).

16 F. Hellemans, “Het vraagrecht na de wet aandeelhoudersrechten: duidelijkheid verzekerd?”, in C. Van Schoubroeck, W. Devroe, K. Geens, J. Stuyck (eds.), *Liber Amicorum Herman Cousy*, Antwerpen, Intersentia, 2011, pp. 1328–1329. The author stresses that the general meeting can grant the right to participate to other persons like journalists which not necessarily includes the right to ask questions. Contra: E. Wymeersch argues that only shareholders are granted the right to ask questions (E. Wymeersch, “Nieuwe

convertible in shares (warrants) and the holders of certificates of voting shares issued in cooperation with the company have the right to participate in the general meeting with an advisory vote. In light of the argument that an advisory vote requires these securities holders to be fully informed, it must be argued that they also have the right to ask questions. In the Netherlands the holder of certificates of shares issued with the cooperation of the company has the right to attend the meeting and take the floor.¹⁷ We would like to argue that the equalization of the certificate holder with the shareholder includes the right to ask question as provided in article 2:107, as the (supervisory) board provides the general meeting all the required information. Holders of fractional shares must jointly exercise their rights.¹⁸ During the 1980s the French system created different kinds of financial instruments which are related to the capital of the company like “titres participatifs” issued by (previously) government controlled companies or CI – certificat d’investissement – and CDV – certificate de droits de vote. This system was modernized and substantially modified in 2004.¹⁹ As a result different kinds of shares, like ordinary, preferred and dividend²⁰ shares coexist. All holders are considered shareholders and have the right to attend the general meeting of shareholders and ask questions. Aforementioned it was indicated that in the United Kingdom the right to ask questions was unregulated and left to the authority of the chairman of the general meeting. The right to ask questions is provided to all members of the company (and their proxies), which are according to section 112 of the Companies Act the subscribers of the memorandum and all other persons agreed to become a member and entered in the member’s register. For the remainder it is left to the chairman of the general meeting how to organize the meeting. It is common for UK listed companies to allow other parties to attend the meeting but deny any other right like the right to ask questions.

Derived from the right to participate in general meetings, some Belgian legal scholars argue that also the holders of non capital securities and even third parties have this right to ask questions if the articles of association provided in the right to participate in the general meeting.²¹ We do not support this view as the right to participate should be disentangled of the right to ask questions. The latter approach is also supported in Germany. Securi-

voorschriften inzake vennootschapsinformatie”, in H. Braeckmans, E. Wymeersch (eds.), *Het nieuwe vennootschappenrecht*, Antwerpen, Kluwer, 1985, p. 90.

17 Artikel 117, §2 Boek 2.

18 Artikel 117, §1 Boek 2.

19 Ordonnance n° 2004–604 du 24 juin 2004 portant réforme du régime des valeurs mobilières émises par les sociétés commerciales et extension à l’outre-mer de dispositions ayant modifié la législation commercial, French *Official Journal* n° 147 of 26 June 2004.

20 “Action de jouissance”.

21 Hellemans, *De Algemene Vergadering*, Kalmthout, Biblo, 2001, nr. 464.

ties holders that participate in the general meeting other than shareholders are denied the right to ask questions.²² Similarly other invited parties like journalists, employees and the like do not have the right to ask questions. In the Netherlands profit certificates and participation certificates are denied any control rights and we believe these holders are only allowed to attend at the meeting and ask questions if it is provided in the articles of association. Conversely the Dutch law denies any limitation to limit the representation of the shareholder by an attorney, notary or registered auditor.²³

It should be noted that in some countries there are general meetings for bondholders.²⁴ These meetings are not investigated in this paper. Next, many company codes specifically address different kinds of property rights of shares and the accompanying rights. We can refer to the French rule that voting rights of the shares belong to the usufructuary at ordinary general meetings and to the naked property owner at extra-ordinary general meetings. Co-owners must be represented by one of them or a by the co-owners or court designated proxy.²⁵ It follows from these rules that the right to ask questions will belong to different persons in these different cases. The analysis of these differences is outside the scope of this study.

The right to ask questions is a right of an individual shareholder but it is also given to the holders of voting proxies on behalf of the shareholder as well as to those empowered to exercise votes in the shareholder's name. In the Netherlands article 2:117 Civil Code provides this right to every third party provided with a written proxy. The Belgian law also addresses the right to ask questions of proxy holders in article 547 Companies Code. For companies of which the shares are listed on a stock exchange the proxy must be provided in writing.²⁶ The proxy holder has identical rights as the represented shareholder. It is not even possible for listed entities to limit in the articles of associations the persons that can act as the proxy holder. The German corporation act does not explicitly provide the right of proxy holders to ask questions but it is generally accepted that she can ask questions regarding the items that requires a vote. German doctrine is divided as to the right of proxy holders to ask questions for items that do not require a vote.²⁷ This discussion is of

22 C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, Köln, Carl HeymannsVerlag 2010, 39, nr. 69.

23 Artikel 117, §1 Boek 2.

24 See for instance for Germany, Gesetz über Schuldverschreibungen aus Gesamtemissionen (Schuldverschreibungsgesetz – SchVG) of 31 July 2009 (BGBl. I S. 2512) and for Belgium article 568 Companies Code and following.

25 See article L225–110 France Commercial Code.

26 Article 547bis Companies Act.

27 C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, Köln, Carl Heymanns Verlag, 2010, pp. 37–38, nr. 66.

importance as the annual accounts are only “laid before” the general meeting of shareholders unless the management board and the supervisory board take the decision to empower the general meeting of shareholders to approve the annual report. Also in France the right to vote by proxy is explicitly provided²⁸ but the right to ask questions for the proxy holders is not. However, it can be argued that the general rule is applicable: the legitimate proxy holder has identical rights as the shareholders she represents. According to section 319A of the UK Companies Act the right to ask questions is limited to the members that attend the general meeting of shareholders.

More in general, in the Netherlands a debate was raised whether the right to ask questions belongs to the general meeting as corporate body.²⁹ This discussion follows from the Dutch law which reads that the board of directors and the supervisory board provide *the general meeting* all required information. This view of the general meeting’s right was followed by the Court of Amsterdam³⁰ but later overruled by the Dutch Supreme Court. The Court explicitly ruled that this right belongs to the shareholder but adds that the right to be receive additional information is a right of the general meeting as corporate body.³¹ The Court also referred to the Shareholder Directive to strengthen its argument. The general meeting is denied this right in Germany.³²

The French legislator extended the right to ask questions to shareholder groups or individual shareholders with more than 5% of the capital.³³ They can address the chairman of the board of directors (or the management board in case of a two-tier board structure) regarding the operational management of the company or its subsidiaries at any time. The chairman must answer the questions within one month. If the chairman does not respond or insufficiently responds, the shareholders can require the designation of one or more experts. Similarly shareholder groups can, under the same conditions, address the chairman of the board twice a year with questions regarding any

28 Article L225–106 Code de commerce.

29 M. Raaijmakers, *Ondernemingsrecht*, Deventer, Kluwer, 2006, p. 388.

30 Rechtbank Amsterdam, 15 June 1988, KG 1988/276.

31 Hoge Raad 9 July 2010, NJ 2010, 544 (ASMI), 4.6. In a short comment Kemperink and Reumkens quoted the supreme court’s ruling as follows: “In addition, every shareholder independently has the right to ask questions at a meeting, regardless of whether these pertain to items on the agenda, and the company must answer those questions.” (G. Kemperink, H. Reumkens, Netherlands, Individual Shareholders’ Right to Information”, <http://www.van-doorne.com/en/News/Individual-shareholders-right-to-information/>, last accessed 15 April 2012).

32 C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, Köln, Carl Heymanns Verlag, 2010, 39, nr. 68.

33 Cascading to 1% in case the capital when the capital is more than 15 mio. € (Article L225–120 French commercial code).

matter that jeopardizes the viability of the company.³⁴ As far as we could ascertain these rights to question the chairman of the board are unique in Western Europe.³⁵

2. Subject of the Questions

The Shareholder Rights Directive provides the right to ask questions related to each “*item on the agenda of the general meeting of shareholders*”. In a recent study we investigated the powers of the general meeting of shareholders in different Western European countries and found that there are several differences.³⁶ We can refer to company transactions with directors. In the UK and France different kinds of transactions between the director and the company require the approval of the general meeting while other countries, like Belgium provide other procedures to mitigate this kind of conflicting interest. Conversely major business transactions require the approval of the Dutch general meeting. It results in the *de facto* difference of the right to ask questions.

Regarding to the total number of agenda items that the general meeting in the five countries has to discuss, table 1 provides an overview of the main results. We collected the agenda and the minutes of the meetings of large companies that disclosed this information on their websites.³⁷ Overall the number of agenda items is the lowest in the Netherlands and the highest in France. At first glance, it results that a shareholder of a French company has more question rights than a shareholders of a Dutch company.

A one-way Anova was used to test for differences among the number of agenda items of AGMs in the five different countries. This number of agenda items differed significantly across the five countries, $F(4, 149) = 3.67, p = .007$. Bonferroni post-hoc comparisons of the five groups indicate that the list of items at French meetings ($M = 20.16, 95\% \text{ CI } [17.57, 22.76]$) is significantly higher than the list of items at Dutch meetings ($M = 12.10, 95\% \text{ CI } [9.84, 14.36]$), $p = .008$. According to the LSD post-hoc comparisons also number of items at German AGMs ($M = 16.76, 95\% \text{ CI } [12.36, 21.16]$), $p = .037$ is significantly higher. All other comparisons between the other groups were not statistically significant at $p < .05$.

However, some items should be considered as less relevant and are pure formalities. We recounted the agenda items excluding the items for which the

34 Article L225–232 French Commercial Code.

35 In both cases the registered auditor must be informed.

36 C. Van der Elst, “Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders”, *Belgrade Law Review*, 2012, in press.

37 As required by article 5 and 14 of the European Shareholders’ Directive.

shareholders can vote less the items which are pure formalities and counting the items, which have been subdivided in several sub-items as one item. The latter technique is applied to increase the comparability of the data. As an example we refer to the AGM of French companies where the last item of the agenda is almost always the authorization to the board or the chairman of the board to perform all the formalities related to the other items that the general meeting has approved. This item is excluded from the total number of items as the item does not increase the “importance” of the meeting. The number of net items differs less between the different countries but French AGMs had to approve more agenda items than Dutch AGMs. The one-way ANOVA was reiterated to test for differences among the “net” number of agenda items of AGMs in these five different countries. It results that the number of agenda items are no longer significantly different between the different countries, $F(4, 149) = 2.20, p = .071$. According to the LSD post-hoc comparisons still the number of items at French AGMs ($M = 13.27, 95\% \text{ CI } [11.38, 15.16]$), $p = .008$ and at German companies ($M = 11.03, 95\% \text{ CI } [9.90, 12.16]$), $p = .043$, is significantly higher than at Dutch AGMs ($M = 9.95, 95\% \text{ CI } [8.78, 11.12]$).

Table 1: Number of agenda items at the AGM 2010

		number of companies	“gross” number of agenda items			“net” number of agenda items		
			Mean	Min.	Max.	Mean	Min.	Max.
Belgium	Bel-20	17	16,2	6	40	12,4	5	37
France	Cac-40	37	20,2	7	38	13,3	6	30
Germany	Dax-30	29	16,8	6	50	11,0	6	18
The Netherlands	Aex-25	20	12,1	5	23	10,0	5	14
United Kingdom	Footsie 100	51	16,7	11	31	11,6	8	20
All		154	16,9	5	50	11,8	5	37

Source: own research of the agenda of the AGM meetings 2010 of large companies.

The empirical results should be read with due care. Even if the number of agenda items is significantly different, the individual member states can allow the shareholders to ask other questions than those related to the agenda items or can provide the shareholders with the right to raise questions outside the scope of the general meeting. As we will illustrate the European Directive did not result in harmonization with respect to the subjects that can be raised and the moments during which shareholders can ask questions.

The Belgian companies act broadened the right to ask questions to the report of the board of directors. The content of the report is in detail prescribed in the Companies Code.³⁸ It must inter alia contain information on the development of the business of the company and the expected development, and for listed companies with the corporate governance statement and a remuneration report. As the general meeting must only “listen” to the report and approve the annual accounts, this right to question the board of directors about the report can be considered a powerful tool in the hands of the shareholders.

The shareholder of a German company can address the management board with any question related to the company’s business (as well as regards to the affiliated companies’ business) if the information is necessary for the proper assessment of the agenda items. Whether the information is necessary for the assessment must, according to the German courts be determined via the rationally thinking shareholder.³⁹ German literature provides in a long list of questions that the courts consider to be related to the company’s business as well as questions that are considered outside the business scope.⁴⁰ Further, it has been decided by the German Supreme Court that the company can refuse to provide information that is readily available in the company’s annual accounts.⁴¹ In the UK the company must ensure that shareholder’s questions “related to the business” are answered. Unlike the German approach, the Companies Act does not relate the right to the necessity of the proper assessment of the agenda. The exemptions provided in the Companies Act are closely related to the exemptions of the Directive.⁴²

The French and Dutch law opened the floor for any kind of question raised by the shareholder. According to article L225–108 of the French commercial code every shareholder can ask questions in writing. The law does not relate this right to the items of the agenda or any other kind of topic. However, it is generally accepted in the legal doctrine that this right that the questions must be related to the items on the agenda of the meeting.⁴³ Asking

38 Article 96 Companies Code.

39 F. Wooldridge, “The right of shareholders in a German public company to information”, *The Company Lawyer*, 2011, nr. 33, p. 21.

40 See for a summary overview of more than 40 questions for which the answer must be provided as well as more than 20 questions that are outside the scope of the company’s business Semler and Volhard, *Arbeitshandbuch für die Hauptversammlung*, München, Beck, 1999, I F 51–54 – I F 56.

41 This decision is no longer in line with the Directive’s exemptions for companies to answer the questions of the shareholders.

42 Cf. *infra*.

43 M. Germain, “Les Droits des Minoritaires (Droit Français des Sociétés)”, *Revue Internationale de Droit Comparé*, 2002, p. 404, nr. 9.

questions about the operational management of the company or its subsidiaries and any matter that jeopardizes the viability of the company is also possible through the chairman of the board.⁴⁴ In the Netherlands there is only one limitation in the law as to when the board can refuse to answer: if the overriding interest of the company requires the board to refuse to answer the question.

3. Provider of the Answer

According to the European Directive it is up to the company to provide the answers to the questions. Article 9, §1, second sentence reads: “*The company shall answer the questions put to it by shareholders.*” The Directive avoids the difficult discussions in many countries as to who must answer these questions. Conversely the directive provides no legal guidance as to the items that refer to issues treated or dealt with by other parties. First, in many countries in this analysis, the general meeting of shareholders is taking note of the auditor’s report as being part of the resolution to approve the accounts. As an item of the agenda, each shareholder has the right to ask questions regarding this auditor’s report. The directive is silent as to whether these questions can be put directly to the auditor. Similarly, a number of European directives, like the directives on (international) mergers require expert reports to be provided to the members of the company. As the general meeting of shareholders has to approve these corporate actions it sounds logic that the shareholders can ask questions related to these reports before approving the merger. The directive does not provide that the independent expert can be addressed. It depends on the national legislator as to how these questions will be answered.

In Belgium it is not clear if the duty to answer the questions is put on the board of directors or on the director(s).⁴⁵ On the one side the board is considered a collegial body representing the corporation and it is its duty to answer the questions in name and behalf of the company. On the other side the Belgian companies act states that the board members must provide an answer. The heterogeneity of the composition of the board and the board members supports the second approach. Likewise, for the European Company, the Belgian companies code states that the board members, the members of the

44 Cf. supra.

45 H. Braeckmans, “Conflicten in vennootschappen en het wetboek van vennootschappen: de vlag dekt niet de lading”, *T.P.R.*, 2010, pp. 1628–1619, nr. 16. De Bauw considers it as the duty of the board of directors. However, he argues, individual directors can express a divergent opinion (F. De Bauw, *Les Assemblées générales dans les sociétés anonymes*, Brussel, Bruylant 1996, p. 246, nr. 579). This view is based on a decision of the highest court that a collegial decision does not exclude a dissenting opinion (Cass. 10 maart 1977 *Rechtskundig Weekblad* 1978–79, 359; *Revue Pratique des Sociétés* 1977, nr. 5947, p. 187, note F. Bauduin).

management board and the members of the supervisory board must answer the questions of shareholders.⁴⁶ This ambiguity does not exist in relationship to questions regarding the report of the registered auditor.⁴⁷

In Germany this discussion does not exist. The law provides that the management board is the addressee of the shareholders' questions. It follows that no other incumbents have the duty to answer the questions of shareholders. For registered auditors the Aktiengesetz even explicitly provides that he has no duty to provide information to a shareholder.⁴⁸ However, the auditor must attend when the deliberations related to the approval of the financial statements take place.⁴⁹ Like in Germany, the French legislation explicitly acknowledges that the board of directors or the management board must answer the written questions of the shareholders, during the meeting.⁵⁰ For questions that are asked during the year regarding the operational management of the company or its subsidiaries and any matter that jeopardizes the viability of the company the addressee is the chairman of the board of directors or the management board.

Some countries involve other parties in the duty to provide an answer to the questions of the shareholders. The Belgian legislator explicitly provided in the duty for the auditor to answer the questions of shareholders that are related to the report of the auditor. The law does not limit the right to ask questions related to the report of the auditing of the annual and consolidated accounts, and it results in the applicability on every report of the auditor.⁵¹ For many of these reports, the auditor has a monopoly if the company is required to elect an auditor. In other cases another registered auditor or external accountant can provide in this type of report. Hence, in the legal doctrine it is argued that the auditor and accountant attends the general meeting where there is an agenda item for which the auditor or accountant has to provide in a report so that he can answer the questions related to this report.⁵² In the UK some auditors voluntarily answer questions at the general meeting of shareholders, although there is no legal obligation to do so.⁵³

46 Article 924 Belgian Companies Code.

47 Cf. the next paragraph.

48 §176 (2), third sentence German Aktiengesetz.

49 §176, (2), first and second sentence German Aktiengesetz.

50 Article L225-108 French Commercial Code.

51 Like the report that is required in case of the issuance of shares with no par value (article 582 Companies Code), in case of an issuance without preemptive rights (article 596, 598 and 609), in case a merger (695 and 708), a division (728 and 746) or a conversion (777).

52 F. Hellemans, "Het vraagrecht na de wet aandeelhoudersrechten: duidelijkheid verze-kerd?"; in C. Van Schoubroeck, W. Devroe, K. Geens, J. Stuyck (eds.), *Liber Amicorum Herman Cousy*, Antwerpen, Intersentia, 2011, p. 1329.

53 The Institute of Chartered Accountants in England & Wales, *Shareholder Involvement – Questions to the Auditor*, London, 2005, p. 8.

In the Netherlands the duty to answer the questions of the shareholders remains in the hands of both the management board and the supervisory board.⁵⁴ The law does make any distinction as to which organ must answer which questions but as the law explicitly acknowledges the different roles of the management board and the supervisory board, it is logic that the questions will be answered according to the different duties of both organs.

The UK Companies Act copied the Directive as regards the provider of the answer to the questions of the members. According to section 319A Companies Act it is the company that must provide the answers. As no further specifications are provided we assume it is the chairman of the general meeting, elected in accordance with article 319 Companies Act must make sure that questions are properly addressed. The chairman of the meeting shall be a member of the company but the articles of association can provide otherwise. It is common to provide in the articles of association that the chairman of board acts as chairman of the general meeting.

4. Exception to the Right to Ask Questions and/or to Provide an Answer

The European Directive provides in exemptions to the right to ask questions and the duty to answer the questions of the shareholders. These exemptions are limited and must be explicitly provided by the member states or be allowed by the member states that companies provide in the exceptions to answer a particular question. The exemptions relate not only to technical and procedural matters but also to the content of the questions. Member states or companies empowered by member states can limit the right to ask and the duty to answer in five different situations:

1. Procedural: the identification of the shareholder. The *right to ask questions* must, according to the directive, only be guaranteed to shareholders. Logically, procedures can be in place as to control the identity of the questioner. It is difficult to classify the identification of the shareholder as a specific exemption as according to the Directive membership is a prerequisite to ask questions. One can consider the situation of the acquisition of shares after the record date and before the general meeting takes place as an exemption of the right to ask questions.
2. Procedural: the preparation of the general meeting. The preamble of the directive provides in the right for the member states to regulate “how” and “when” questions can be asked. According to the directive the member states or where appropriate the companies can require

54 Article 107, §2 Book 2 Civil Code.

that questions must be sent to the company before the general meeting takes place regarding the items on the agenda and limit questions during the meeting to commentaries during the meetings that require further explanation before the voting takes place. This limitation to *the right to ask questions* must, of course, provide in sufficient time for the shareholders to prepare the questions after the convocation of the general meeting and lasting at least until the record date has passed.

3. Procedural: the proper conduct of the meeting. Like every right, *the right to ask questions* can be abused and shareholders can through the right to ask questions obstruct the good order of the meeting. The Directive allows the member states and companies to limit the number of questions every shareholder can ask or constrain the time the shareholder can use as well as provide the chairman of the meeting to intervene if shareholders disturb the meeting, etc. Next, the directive facilitates the grouping of questions so as to assess their similarity and provide in one answer.
4. Content: protection of the confidentiality and business interests. This is an exemption that relates to *the duty to answer* the question. Obvious examples to refuse to answer the question are competition issues, inside information, pending processes for acquiring intellectual property rights, etc.⁵⁵ The European Directive is silent as regards the process applicable to refuse to answer as well as what shareholders can do against a refusal to answer a question which the company considers inappropriate.
5. Content: repeated answers. The directive allows companies not to answer questions for which answers already have been provided in a Q&A internet section. This is a limitation of *the duty to answer* an individual question. It is a prerequisite of the Directive that both the question and the answer can be found in this section. If the information is available in other internet sections or in printed documents of the company, the company must answer the question.

These exemptions have caused the modification of the Belgian companies act regarding the right to ask questions. Before the transposition of the Directive the board members must answer the question if the answer does

55 During the general meeting of Belgacom of Thursday 18 April 2012 an individual activist shareholder asked the chief executive officer the severance pay of his former direct assistant. According to the financial newspaper the board secretary (?) refused to answer the question as severance pays are considered to be part of privacy rules and confidentiality clauses (S. Rousseau, "Het evenwichtige loon van Belgacom-topman Didier Bellens", *De Tijd*, 19 april 2012, p. 15).

not (have to) contain data or facts that are seriously detrimental to the company, its shareholders or employees. For the registered auditors there is no exemption for not answering the question but the latter must be related to any kind of audit report.⁵⁶ The transposition of the directive changed the wording for refusing to answer the question into “[...] when the answer could damage the business interests of the company or the confidentiality to which the board members and the company are engaged”⁵⁷. Notwithstanding the different wording, the Belgian doctrine and legislator considers that the new provision does not change the Belgian approach vis-à-vis the right for the company to refuse to answer a question of a shareholder.⁵⁸ As previously mentioned, the German Aktiengesetz was not modified with respect to the right to ask questions. Section 131, (3) Aktiengesetz provides in a list of seven exceptions which the management board can invoke to refuse to answer the questions of the shareholders. The list is⁵⁹:

“1. to the extent that providing such information is, according to sound business judgment, likely to cause material damage to the company or an affiliated enterprise;

2. to the extent that such information relates to tax valuations or the amount of certain taxes;

3. with regard to the difference between the value at which items are shown in the annual balance sheet and the higher market value of such items, unless the shareholders’ meeting is to approve the annual financial statements;

4. with regard to the methods of classification and valuation, if disclosure of such methods in the notes suffices to provide a clear view of the actual condition of the company’s assets, financial position and profitability within the meaning of § 264 (2) of the Commercial Code; the foregoing shall not apply if the shareholders’ meeting is to approve the annual financial statements;

5. if provision thereof would render the management board criminally liable;

6. if in the case of a credit institution or financial services institution information about the applied balance sheet and valuation methods or calcu-

56 And the auditor has a duty of professional secrecy. Any violation of this duty can be criminally sanctioned.

57 Own translation.

58 F. Hellemans, “Het vraagrecht na de wet aandeelhoudersrechten: duidelijkheid verze-kerd?”, in C. Van Schoubroeck, W. Devroe, K. Geens, J. Stuyck (eds.), *Liber Amicorum Herman Cousy*, Antwerpen, Intersentia, 2011, pp. 1336–1337.

59 This list is taken from Norton Rose, *Stock Corporation Act – Translation as of 16 October 2009*, p. 78.

lations made in the annual financial statements, the management report, the consolidated annual financial statement or the group's management report need not be given;

7. if the information is continuously available on the company's internet page seven or more days prior to the shareholders' meeting as well as during the meeting."

For listed entities as defined in article 1 of the Directive, the exemptions must be interpreted in accordance with the exemptions of article 9, §2 of the Directive. It is relatively easy to interpret exemption 1 as a protection of the business interest and/or protection of confidentiality. Further exemption 5, although not having a similar exemption in the Directive, is easily read in accordance with the Shareholders' Directive. The second, third and fourth exemption that the management board can invoke to refuse to answer the question of the shareholder can hardly be read in accordance with the Directive. Information regarding tax valuations or the amount of certain taxes, the difference between the book value and market value of assets or the methods of classification and valuation will seldom need to be protected as business interest or confidential information.⁶⁰ In the legal doctrine exemption six is read in accordance with the Directive as to avoid a run on the bank which can be seen as a justifiable business interest.⁶¹ Finally according to the German law is it sufficient to provide the information timely on the website of the company. The directive requires the information to be provided in a question and answer format.

The right to ask questions can be further limited through the powers of chairman of the general meeting who has the duty to ensure the proper order of the meeting. This right of the German chairman must be granted through the articles of association or the rules of procedure pursuant to § 129 Companies Act, as introduced through UMAG in 2005.⁶² The chairman can limit the number of questions as well as the speaking time of the shareholder. In 2010 the German Supreme Court considered the limitation of the right to speak of each shareholder of 10 minutes if more than three shareholders stand up to the floor is acceptable in order to limit the meeting to a maximum of six

60 Compare C. Kersting, "Ausweitung des Fragerechts durch die Aktionärsrechterichtlinie", *Zeitschrift für Wirtschaftsrecht*, 2009, p. 2322. However, not all legal scholars agree with this view (for an overview of different opinions see C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, Köln, Carl Heymanns Verlag 2010, p. 148, nr. 327, note 656).

61 Not all legal scholars agree with this view, see for example D. Zetzsche, "Die neue Aktionärsrechte-Richtlinie: Auf dem Weg zur Virtuellen Hauptversammlung", *Neue Zeitschrift für Gesellschaftsrecht*, 2007, p. 688.

62 Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts of 22 September 2005, Bundesgesetzblatt 2005, I, nr. 60.

hours.⁶³ The German Corporate Governance Code reads in that perspective: “*The chair of the meeting provides for the expedient running of the General Meeting. In this, the chair should be guided by the fact that an ordinary general meeting is completed after 4 to 6 hours at the latest.*”⁶⁴ The legal change is a result of the abuse of the right to ask questions in some general meetings.⁶⁵ According to research of Schutzgemeinschaft der Kleinaktionäre of 2003, the average duration of the question and answer part of a general meeting of a DAX company was 7 hours, of a MDAX company 4 hours and 30 minutes and of a small German S-Dax company 4 hours and 5 minutes.⁶⁶ In the Netherlands a similar limitation of the right to speak is assumed the doctrine.⁶⁷ The shareholder must act pragmatic and take into account reasonableness and fairness.⁶⁸ Previously it was already indicated that the right to ask questions is in the Netherlands legally limited only by the overriding interest of the company.⁶⁹ The Dutch legislator does not provide in the exemption to provide in a Q&A section to limit the number of (superfluous) questions. It results that the shareholder always should receive an answer. A study of the general meetings of Dutch listed companies in 2008–2010 showed that the average duration of a meeting was 2 hours and 43 minutes with 15 minutes as a minimum and over 8 hours as a maximum.⁷⁰ Also in the UK it remains in the chairman’s ability to control the meeting and rule on eg. the number of questions and/or the speaking time.⁷¹ The French Commercial code does not provide in any exemptions for the board of directors or the chairman of the board to refuse to answer the questions of the shareholders with the

63 Bundesgerichtshof 8 February 2010, *Aktiengesellschaft*, 2010, p. 292; *Betriebsberater*, 2010, p. 385; *Der Betrieb*, 2010, p. 718.

64 Section 2.2.4. German Corporate Governance Code (<http://www.corporate-governance-code.de/eng/kodex/2.html>, last accessed 20 April 2012).

65 W. Meilicke and T. Heidel, “UMAG: ‘Modernisierung’ des Aktienrechts durch Beschränkung des Eigentumsschutzes der Aktionäre”, *Der Betrieb*, 2004, p. 1479; T. Wachter, “Beschränkung des Frage- und Rederechts von Aktionären”, *Der Betrieb*, 2010, p. 829.

66 SdK, *Stellungnahme der Schutzgemeinschaft der Kleinaktionäre e.V. (SdK) zum Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts*, 30 March 2004, München, pp. 9–10 (<http://sdk.softbox.de/pdf/umag.pdf>, last accessed 20 april 2012).

67 For an detailed analysis see A. Klaassen, “Handreikeningen voor de voorzitter tot beperking van het spreekrecht van aandeelhouders”, *Ondernemingsrecht*, 2011, pp. 66–76.

68 J. Maeijer, *Vertegenwoordiging en rechtspersoon*, Zwolle, Tjeenk Willink, 2000, p. 313.

69 Article 107, §2 Book 2 Civil Code.

70 A. Klaassen, “Handreikeningen voor de voorzitter tot beperking van het spreekrecht van aandeelhouders”, *Ondernemingsrecht*, 2011, p. 74. The maximum duration was reached in a large listed bank that needed a bail-out.

71 Institute of Chartered Secretaries & Administrators, *Guidance on the Implementation of the Shareholder Rights Directive*, London, 2009, p. 8.

exception of the questions that are already addressed in the Q&A section of the company. Therefore it can be argued that the board or chairman can only refuse to answer the questions of the company when the shareholder abuses the right to ask questions. It will depend on the interpretation of the courts as to the scope of the question rights what will be considered as abusive use. We think that the exceptions that the European directive provides can be of use for the board and chairman to refuse to answer on the basis of being adversarial to the corporate interest. In France, the Paris commercial court filed a verdict regarding the right to ask written questions to be answered during the general meeting of shareholders.⁷² Whereas all written questions must be answered during the meeting⁷³, it is generally accepted that shareholders can ask (other oral) questions at the general meeting.⁷⁴ This shareholder right is almost unrestricted and the number of questions is certainly unrelated to the number of shares of the shareholder. In this court case the shareholder asked during one meeting 20 questions and during another meeting more than 50 questions.⁷⁵ However, like every right, the right to ask written questions can be abused. The abusive use of the right to ask questions is present when the right is used for other purposes than the purpose for which the legislator provided the right, which is in this particular case, to provide the shareholder the necessary information to participate in the company decision process. In this case presented to the court of Paris, the shareholder wanted to obtain an additional compensation for the shares in a squeeze-out started by a subsidiary of the company. The court considered that these questions had another purpose. Belgian courts adopted the same approach with respect to purpose of the right to question.⁷⁶

The UK Companies Act almost literally transposed the Directive requirements. The company must not answer the questions of the shareholders if these questions “(a) (i) interfere unduly with the preparation of the meeting, or (ii) involve the disclosure of confidential information; (b) if the answer has already been given on a website in the form of an answer to a question; or

72 T. Com. Paris, 11 May 2004, *La Semaine Juridique Entreprise et Affaires*, nr. 31, 29 July 2004, p. 1154.

73 Article L225-108 Code de commerce.

74 M. Cozian. A. Viandier, *Droit des sociétés*, Paris, Editions Litec, 1996, nr. 826, p. 302.

75 The numbers come from the comment of A. Viandier, comment on T. Com. Paris, 11 May 2004, *La Semaine Juridique Entreprise et Affaires*, nr. 31, 29 July 2004, p. 1154, nr. 5.

76 Peace activists (each holding one share) asked a large number of questions during a general meeting of company that produces video walls and projectors. These products are of use in the military industry. The chairman of the meetings organized a vote to put a hold on the series of questions of these peace activists. The court upheld that the peace activists did not abuse their right to ask questions (Gent, 18 april 2002, *Tijdschrift voor Rechtspersoon en Venootschap*, 2002, p. 255).

(c) if it is undesirable in the interest of the company or the good order of the meeting that the question be answered.”⁷⁷ The remaining differences between the Directive and the Companies Act, like the right for the company to provide in a Q&A on a website, which could be read as *any* website, can be explained in accordance with the Directive as *a company’s* website. For the remainder it is up to the chairman to ensure the proper order of the meeting. He still has the right to control the meeting but must take into account that shareholders can ask questions and that the answer is only refused if it fits under one of the exceptions.⁷⁸

5. Timeframe and Modalities

The directive is silent as to when the questions can be raised as well when the questions must be answered. As regards the right to ask questions it is obvious that the agenda of the meeting must be available to the shareholders. The shareholders have the right to ask questions related to the agenda items. However, in many countries there are mandatory requirements as to the items that must be put to a vote at every annual general meeting. In theory, shareholders can already start asking questions earlier, if they are related to recurrent agenda items.

Belgian law allows both written questions as well as oral questions raised during the meeting. Written questions which can also take an electronic form, can only be sent to the company after the publication of the convocation. For listed entities the term to address the company ends ultimately six days before the meeting, while non-listed entities can set another term in the articles of the association. During the meeting the shareholders can raise other questions or eventually ask further clarifications after the answer on the written question has been provided.⁷⁹ Only for written questions the Belgian legislator explicitly requires that either the board members or the registered auditors provide an answer. As the board members and the registered auditor had sufficient time to prepare the answer on written questions, any adjournment is not acceptable. For oral questions the board members or auditors must answer the questions but adjournments are possible although this “right”⁸⁰ should not be frivolously used.

77 Section 319A, (2) Companies Act.

78 Institute of Chartered Secretaries & Administrators, *ICSA Guidance on the Implementation of the Shareholder Rights Directive*, London, 2009, p. 8.

79 Explanatory memorandum, *Belgian Chamber* 2010–11, nr. 421/1, p. 37.

80 It is not explicitly provided and cannot be seen as a legal right. It is to be seen in as a specific exception to the duty to answer questions for instance when the question is so specific that no readily available answer can be provided at the meeting (compare F. Hellemans, “Het vraagrecht na de wet aandeelhoudersrechten: duidelijkheid verzekerd?”).

The German approach is similar to the Belgian rule. Every shareholder has the right to ask questions which must be relevant for the assessment of the items on the agenda. The answers must be provided during the general meeting of shareholders. It follows that the questions can only be raised from the moment of publication of the convocation. However, the law is explained in a very formal way. The questions must be accessible for all shareholders. Questions that are posted to the company before the general meeting must be asked again during the meeting. The questions can be asked until the voting of the agenda item to which the question relates. Any obligation to inform the company of questions before the general meeting of shareholders is null and void. In the legal doctrine it is argued that an answer must be provided during the meeting and cannot be claimed on any other moment. The rigidity of the approach results in difficulties when the question is so specific that an immediate oral answer is not possible. It is recommended that a preliminary answer is provided and that, where appropriate, the shareholder receives in an electronic way or by written means a further answer but it must be taken care of that all shareholders can access the information in a similar way.⁸¹ In the case of group law exceptions do exist.⁸² In §131, 4 Aktiengesetz an exception has been provided in so far that information that has been provided to a shareholder outside the general meeting of shareholders and due to her position as shareholder, also will be provided to the general meeting, upon request. The requirement exists even if the information is not necessary to assess an item of the agenda. German legal literature indicates that the importance of the latter exception is insignificant.⁸³

The French law is explicitly addressing the timeframe within which questions can be asked and answers must be provided. Next to oral questions that can be asked during the general meeting of shareholders, written questions must be send via registered mail with return receipt or electronic mail to the chairman of the board not later than the fourth business day before the general meeting.⁸⁴ These questions must be answered during the meeting. Next for questions regarding the operational management of the company or its subsidiaries and any matter that jeopardizes the viability of the company the addressee is the chairman of the board of directors or the management board and these questions can be asked throughout the year. The questions must be answered within one month.

in C. Van Schoubroeck, W. Devroe, K. Geens, J. Stuyck (eds.), *Liber Amicorum Herman Cousy*, Antwerpen, Intersentia, 2011, p. 1334).

81 See for an analysis C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, pp. 219–224.

82 See § 308, 1, sentence 2 Aktiengesetz.

83 C. Kersting, §131 *Kölner Kommentar zum Aktiengesetz*, pp. 189–190, nr. 428.

84 Article R225–84 French Commercial Code.

The Dutch rules as to when the shareholders can address the management and supervisory board with questions was not very clear. The law provides the right to ask the floor during the general meeting but remains silent as to if the shareholders or general meeting can ask questions at any other time. In its court ruling of 9 July 2010 the Dutch Supreme Court explicitly decided that the shareholders only have the right to be informed during the general meeting of shareholders. There is no right to be provided with information at any other moment of the year.⁸⁵

The UK Companies Act does not provide much guidance as to the modalities to ask and to answer questions. Questions must be raised during the meeting and the company must cause the question to be answered. It is read as if the section does not require that the answer is provided during the general meeting.⁸⁶ It is possible that the company ensures a proper answer immediately after the meeting or at a later moment. However, the chairman should make careful use of this assumed possibility so as to guarantee that the members can vote in a fully informed way. Therefore it is advised that chairman call in the help of the board members or other representatives of the company to answer as many questions at the meeting itself as possible.⁸⁷

IV Use of the Right to Ask Questions

While section 3 shows the European Directive caused only partial harmonization of the right of shareholders to ask questions, it remains an open question as to the practices of this right to question. According to article 14 of the European Directive companies must disclose the voting results. Many companies limit the disclosure to this information. However, in the Netherlands the large majority of the companies disclose the full minutes of the meetings including all the questions that were raised. It allows a more detailed analysis of the use of the right to ask questions.⁸⁸ The minutes of the 2011 AGM meeting of 81 listed Dutch are publicly available via the website of the company.⁸⁹ The total number of questions was 2051 resulting in an average of 25.3 questions per AGM. Approximately 1/3 of the companies had to respond to between 20 and 30 questions. In one company out of five the

85 Dutch Supreme Court 9 July 2010, ASM International N.V., *Jurisprudentie Ondernemingsrecht* 2010/228.

86 Institute of Chartered Secretaries & Administrators, *ICSA Guidance on the Implementation of the Shareholder Rights Directive*, London, 2009, pp. 8–9.

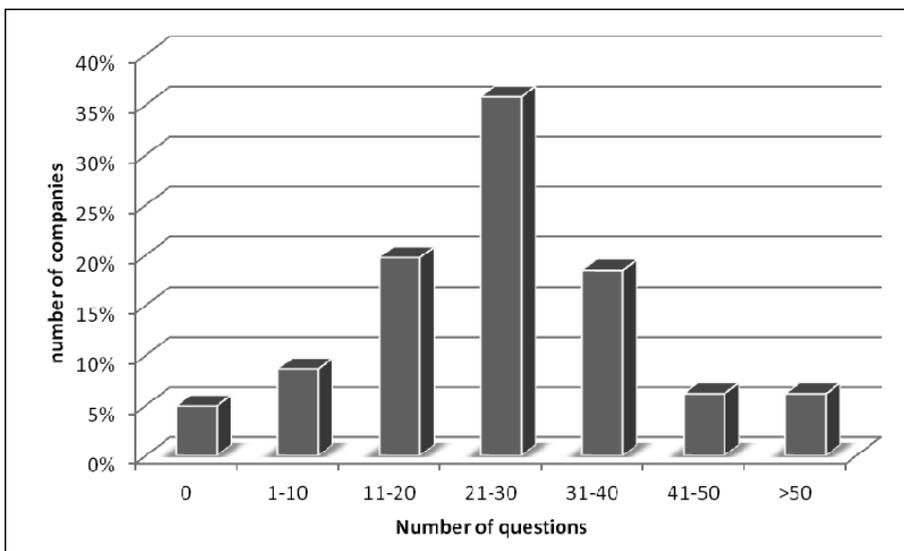
87 Institute of Chartered Secretaries & Administrators, *ICSA Guidance on the Implementation of the Shareholder Rights Directive*, p. 9.

88 We are grateful to Erik van Loon for providing research assistance.

89 12 companies published the minutes of the meeting with serious delay. Of those companies the minutes of the meeting of 2010 is included in the analysis.

number of questions was between 10 and 20 and another 20 percent of the companies received between 30 and 40 questions. In a limited number of companies shareholders did not ask any question while two companies experienced a total of more than 50 questions. The results of the number of questions per company are presented in figure 1. Most shareholders ask more than one question. The average number of questions per shareholder is six. There are significant differences between different shareholder classes as to the average number of questions each shareholder raises. While the average number of questions of individual shareholders is 11 questions and the representatives of small shareholders association even raises more than 15 questions at meetings in which they participate, (representatives) of institutional investors ask the boards on average 5,4 questions.

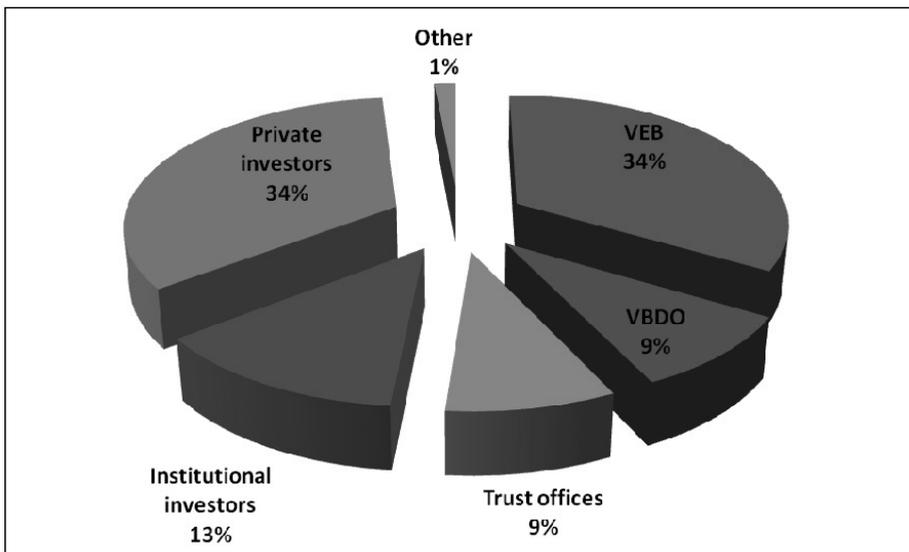
Figure 1: Number of questions at AGMs of the Dutch listed companies



In 80 minutes of the meetings the identity of the shareholder or the proxy is identified. In a large majority of the meetings small shareholders are represented by the “Vereniging voor Effectenbezitters” (VEB, Association for Securities Holders) (attending 89% of the meetings) and the “Vereniging van Beleggers voor Duurzame Ontwikkeling” (VBDO, the Association for Investors of Sustainable Development) (attending 56% of the meetings). These associations are very active in asking questions. Figure 2 provides some details on the identity of the shareholders or their representatives that ask questions. One third of all questions are raised by the VEB and VBDO raises 9% of all questions. Together with another third of the questions raised by private investors, it shows that the right to ask questions is particularly of importance

to small individual shareholders and their representatives. Three out of four questions are raised by this class of shareholders. (Representatives of) institutional investors are less active as questioners. Only 13% of all questions are raised by institutional investors, the large majority by representatives of mutual funds and far less by representatives of pension funds. According to Eumedion the ownership structure of (large) Dutch companies was as follows: 6% Dutch private investors, 10% Dutch non financial companies, 12% Dutch institutional investors and 72% foreign shareholders.⁹⁰ These data are not very detailed but it is obvious that Dutch private investors and their representatives are far more active shareholders measured through the number of questions than any other type of investors. It also suggests that the general meeting of shareholders must be considered as the most important mean for private investors to challenge the management board and the supervisory board and that other types of investors are either not active stewards or rely on other sources of information and meetings to be informed or discuss the corporate policies.

Figure 2: Identity of the questioner



90 Eumedion, *Evaluatie AVA seizoen 2010*, Amsterdam, 2010, p. 16 (http://www.eumedion.nl/nl/public/kennisbank/ava-evaluaties/2010_ava_evaluatie.pdf, last accessed 20 April 2012).

V Discussion and Policy Conclusion

Shareholder engagement and shareholder stewardship is high on the agenda of policymakers. In the green paper on corporate governance of April 2011, the European Commission addressed the issue of shareholder engagement as follows: “Shareholder engagement is generally understood as actively monitoring companies, *engaging in a dialogue with the company’s board, and using shareholder rights*, including voting and cooperation with other shareholders, if need be to improve the governance of the investee company in the interests of long-term value creation.” The means that shareholders can use to engage in a dialogue are relatively limited. An important mechanism is the right to speak at the general meeting, ask questions and receive answers.

The European Shareholders’ Directive is a major step forward to provide this right to all shareholders participating in the meeting. Before the Directive was transposed there was no statutory duty for the chairman of the general meeting of a UK company to provide in an appropriate question and answer session. Conversely, the Directive provides a legal framework for companies to protect business secrets and interests first and above shareholder interests and deny shareholders the right to acquire (ideas for inter alia) business opportunities. The Directive also seeks to enhance efficiency of the meeting through Q&A internet sections as to prevent superfluous questions or pure formalities.

Equal treatment of shareholders of listed companies in different European Member States has not been reached. First, there is no harmonization as to the powers of the general meeting of shareholders. As the items on the agenda of the AGM differ and questions must be related to these items, shareholders cannot always obtain all information through the right to ask questions. However, via a sufficiently elastic explanation of the relationship of the question and the agenda item, this technical legal difference can be surmounted. Similarly other legal difficulties do not seem to be very problematic. While the equal treatment urges German companies to ensure that the written questions are available to all shareholders, French legal doctrine argues that the full question must not be disclosed in extenso as to prevent disruption of the good order of the meeting.⁹¹ Further the provider of the answer is different – chairman, board of directors, director(s) – but the goal is to ensure that a proper answer is given. There are not indications that this goal is not reached.

More difficult to overcome are some of the different modalities. In the Netherlands the Supreme Court has explicitly denied the right of shareholders to ask questions outside the general meeting of shareholders, while the

91 P. Le Cannu and B. Dondero, *Droit des Sociétés*, Paris, Montchrestien, 2009, nr. 856.

French legislator provides shareholders several rights to address the chairman of the board of directors outside the general meeting. Finding the appropriate balance between the interests of the shareholders to see all questions being addressed while not jeopardizing the good order of the meeting remains an often more than difficult exercise. There seems to be different Q&A cultures in the different European countries as case law of the abusive use of the right to ask questions is almost non-existent in France, Belgium and the UK while it has put the legislator in action in Germany and the lawfulness of statutory restriction of the right to speak is already tested up to the Supreme Court.

Further, it is interesting to see that the shareholders have the right and even the duty to elect the auditor (and the company has to pay for his services), but with the exception of Belgium where the Companies Act explicitly provides this, shareholder have no the statutory right to directly address the auditor with questions.

The right to ask questions is an important right. Our analysis of the general meetings 2011 of Dutch listed entities illustrates that particularly individual shareholders make use of the right to ask questions during the meeting. Institutional investors are less interested to make use of the right to ask questions. Further research is required as to study why more powerful institutional investors do not need the right to ask questions as much as private investors. In the mean time, new developments might cause the use of the right to ask question of more relevance. In a recent case a major shareholder of Mabey and Johnson Ltd, Mabey Engineering (Holdings) Ltd settled with the Serious Fraud Office to pay back £130.000 pound it received as dividends “derived from contracts won through unlawful conduct”.⁹² In light of the stringent internal control, money laundering and anti-bribery rules that have been enacted in many countries recently, the settlement can be the driver for shareholders, and in particular institutional shareholders⁹³, to make more use of the right to ask questions as to prevent liability in case of shareholder gains from inappropriate company behavior.⁹⁴

92 See <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx> (last accessed 21 April 2012).

93 J. Pickworth and K. Coppens, “United Kingdom: UK Serious Fraud Office Increases The Burden On Institutional Investors”, <http://www.mondaq.com/x/170872/Compliance/UK+Serious+Fraud+Office+Increases+The+Burden+On+Institutional+Investors> (last accessed 21 April 2012).

94 See for a number of relevant questions: S. Kabagambe, Corruption. Questions shareholders should be asking at the AGM, 13 January 2012, 2 p. (<http://www.ethiopianreview.com/index/20113/?p=72988>, last accessed 21 April 2012).

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ВРЕМЕ ЗА ПИТАЊЕ?

ПРАВО АКЦИОНАРА НА ПОСТАВЉАЊЕ ПИТАЊА КАО АДЕКВАТНО СРЕДСТВО УПРАВЉАЊА ДРУШТВОМ

Резиме

Право акционара на постављање питања је у многим европским земљама уређено правом акционарских друштва. Међутим, ово право је често значајно ограничено. У овом раду се прво приказује крајња историја права на постављање питања кроз компаративну перспективу. Затим се ово право сагледава као последица примене Директиве о правима акционара, а нарочито се обрађују следећа питања: ко може да постави питање, шта се поставља као питање, ко је дужник давања одговора, као и под којим условима друштва могу да одбију давање одговора. Право на постављање питања је у овом раду проучавано поређењем права Белгије, Француске, Холандије, Немачке и Велике Британије. У следећем делу рада аутор приказује начин коришћења овог права на скујинским седницама холандских кофираних друштва у 2011. години. У последњем делу аутор износи закључке. У светлу примене Директиве о правима акционара, у овом раду је анализа ограничена само на акционарска друштва чијим се акцијама тржије на регулисаном тржишту.

Кључне речи: акционар, акционарско друштво, права акционара, Директива о правима акционара, право на постављање питања, скујина акционарске друштва.