Rights and obligations of shareholders

National regimes and proposed instruments at EU level for improving legal efficiency

STUDY

2012
Rights and obligations of shareholders

National regimes and proposed instruments at EU level for improving legal efficiency

Abstract

Shareholders are both partners with voting rights, who can take part in collective decisions concerning the company, and owners of equity securities, who are entitled to profit from selling them on.

In view of this dual aspect, it seemed that legal efficiency in terms of their rights and obligations could be improved by (i) recognising the primacy of corporate benefit and (ii) making concerted action possible.
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<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMF</td>
<td>French Financial Markets Authority</td>
</tr>
<tr>
<td>MCA</td>
<td>Misuse of Company Assets</td>
</tr>
<tr>
<td>GM</td>
<td>General Meeting (of shareholders)</td>
</tr>
<tr>
<td>BD</td>
<td>Board of Directors</td>
</tr>
<tr>
<td>SA</td>
<td>Statutory Auditors</td>
</tr>
<tr>
<td>CBS</td>
<td>Belgian Companies Code</td>
</tr>
<tr>
<td>CCI</td>
<td>Italian Civil Code</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>MD</td>
<td>Managing Director</td>
</tr>
<tr>
<td>MSC</td>
<td>Mid-sized Company(ies)</td>
</tr>
<tr>
<td>FSA</td>
<td>Financial Services Authority (Regulator in the United Kingdom)</td>
</tr>
<tr>
<td>FSC</td>
<td>Financial Supervision Commission (Regulator in Bulgaria)</td>
</tr>
<tr>
<td>LSE</td>
<td>London Stock Exchange</td>
</tr>
<tr>
<td>NV/SA</td>
<td><em>Naamloze Vennootschap</em> (in Dutch) / <em>Société Anonyme</em> (in French) (Belgian form of company)</td>
</tr>
<tr>
<td>TB</td>
<td>Takeover Bid</td>
</tr>
<tr>
<td>UCITS</td>
<td>Undertakings for Collective Investment in Transferable Securities</td>
</tr>
<tr>
<td>SME</td>
<td>Small and Medium-sized Enterprise(s)</td>
</tr>
<tr>
<td>POSA</td>
<td>Public Offering of Securities Act (Bulgaria)</td>
</tr>
<tr>
<td>CSR</td>
<td>Corporate Social Responsibility:</td>
</tr>
<tr>
<td>SL</td>
<td><em>Sociedad de Responsabilidad Limitada</em> (Spanish form of company)</td>
</tr>
<tr>
<td>UFA</td>
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## GLOSSARY

<table>
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<th>Actionnaire</th>
<th>Shareholder</th>
<th>Personne ou entité détenant des actions.</th>
<th>Person or entity owning shares.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ad nutum</strong></td>
<td><strong>Ad nutum</strong></td>
<td>Expression caractérisant le droit de retirer les pouvoirs qui ont été confiés à un mandataire social sans avoir à justifier des motifs de ce retrait, ni respecter un préavis.</td>
<td>Expression which characterises the right to withdraw the powers given to a board member without having to justify the reasons and without giving advance notice.</td>
</tr>
<tr>
<td><strong>Code de gouvernance d’entreprise</strong></td>
<td><strong>Corporate governance code</strong></td>
<td>Ensemble de recommandations relatives aux bonnes pratiques concernant les équilibres de pouvoirs des organes sociaux, édictées par des organismes publics ou privés.</td>
<td>Set of recommendations, providing good practices regarding the balance of powers and controls among corporate bodies, enacted by public or private bodies.</td>
</tr>
<tr>
<td><strong>Conflit d’intérêts</strong></td>
<td><strong>Conflict of interests</strong></td>
<td>Situation dans laquelle se trouve une personne qui est amenée à choisir entre son intérêt propre et l’intérêt supérieur qu’elle a pour mission de défendre, en particulier celui de la société dont elle est mandataire social ou actionnaire.</td>
<td>Situation of a person who has to choose between his/her own personal interest and the overriding interest of the company he/she shall defend, the company of which he/she is a board member or a shareholder.</td>
</tr>
<tr>
<td><strong>Contrôle interne</strong></td>
<td><strong>Internal control</strong></td>
<td>Aux termes du référentiel COSO1 (Committee of Sponsoring Organizations of the Treadway Commission), le contrôle interne est un processus mis en œuvre par l’organe de surveillance, la direction et le personnel de l’entreprise pour fournir une assurance raisonnable quant à la réalisation des trois objectifs suivants:</td>
<td>According to the COSO Framework (Committee of Sponsoring Organizations of the Treadway Commission), internal control is a process carried out by the supervisory body, the management and other personnel designed to provide reasonable assurance regarding the achievement of objectives in three areas:</td>
</tr>
<tr>
<td><strong>Convention réglementée</strong></td>
<td><strong>Regulated party agreement</strong></td>
<td>Convention entre une société et un mandataire social ou un actionnaire significatif qui est autorisée selon une procédure prévue par la loi.</td>
<td>Agreement and/or transaction between a company and a board member or a significant shareholder which is authorised by a procedure provided for by law.</td>
</tr>
</tbody>
</table>

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**Corporate governance**

Doctrine de la gouvernance des sociétés d’origine anglo-saxonne, fondée initialement sur la théorie de l’agence, qui privilégie l’intérêt des actionnaires. L’expression corporate governance peut aujourd’hui se définir (source OCDE) comme un ensemble de procédures et processus en vertu desquels une organisation est dirigée et contrôlée.

Refers to the theory of corporate governance, of Anglo-Saxon origin, initially based on the agency theory, which mainly aims at protecting shareholders’ interests. The term may nowadays be defined (OECD source) as a set of procedures and processes according to which an organisation is directed and controlled.
<table>
<thead>
<tr>
<th>Direction</th>
<th>Management</th>
<th>Personne(s) et/ou instance qui exercent le pouvoir exécutif.</th>
<th>Individual(s) and/or body exercising the executive power.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hard law</strong></td>
<td>Hard law</td>
<td>Ensemble de règles contraignantes (lois, règlements, décrets, etc.) édictées par des autorités publiques (autorités élues démocratiquement, autorités nationales des marchés financiers, etc.).</td>
<td>Set of binding rules (laws, regulations, decrees, etc.) enacted by public authorities (democratically elected authorities, national securities and markets authorities, etc.).</td>
</tr>
<tr>
<td><strong>Soft law</strong></td>
<td>Soft law</td>
<td>Mesures, telles que des lignes directrices, recommandations, déclarations ou avis qui, contrairement au droit «dur», ne sont pas contraignantes. En général, le droit souple a une dimension de communication eu égard au principe comply or explain.</td>
<td>Measures, such as guidelines, recommendations, declarations and opinions which, in contrast to hard law, are not binding on those to whom they are addressed. In general, soft law has a communication dimension based on the ‘comply or explain’ principle.</td>
</tr>
<tr>
<td>Droit des sociétés national</td>
<td>National company law</td>
<td>Règles contraignantes (hard law) nationales concernant les sociétés de l'Etat concerné.</td>
<td>Binding national rules (hard law) concerning companies of the concerned State.</td>
</tr>
<tr>
<td>Equilibre hommes-femmes</td>
<td>Gender balance</td>
<td>Objectif d’équilibre entre hommes et femmes (généralement en ce qui concerne la composition de l’organe de surveillance).</td>
<td>Objective of balance between men and women (generally as regards composition of the supervisory body).</td>
</tr>
<tr>
<td>Gestion des risques</td>
<td>Risk management</td>
<td>Aux termes du COSO II Report, la gestion des risques est un processus mis en œuvre par l’organe de surveillance, la direction et l’ensemble des collaborateurs de l’organisation. Il est pris en compte dans l’élaboration de la stratégie ainsi que dans toutes les activités de l’organisation. Il est conçu pour identifier les événements potentiels susceptibles d’affecter l’organisation et pour gérer les risques dans les limites de son appétence pour le risque. Il vise à fournir une assurance raisonnable quant à l’atteinte des objectifs de l’organisation.</td>
<td>According to the COSO II Report, risk management is a process implemented by the supervisory body, the management, and the stakeholders of the company. This process is taken into account when establishing the strategy of the company for each of its activities. It is designed to identify potential risks likely to affect the company, to manage them and to choose the ones the company is ready to undertake. It aims to provide a reasonable guarantee with regard to achieving the company’s objectives.</td>
</tr>
<tr>
<td>Gouvernance</td>
<td>Governance</td>
<td>Mode d’articulation juridique entre le pouvoir des actionnaires, le pouvoir exécutif et le pouvoir de surveillance.</td>
<td>Way the sovereign power of shareholders legally interacts with the executive power and the supervisory power.</td>
</tr>
<tr>
<td>Intérêt social</td>
<td>Corporate benefit</td>
<td>Intérêt de la personne morale qui suppose la performance sur le long terme.</td>
<td>Corporate benefit which assumes a long-term approach of performance.</td>
</tr>
<tr>
<td>Mandat social</td>
<td>Corporate duties</td>
<td>Missions et responsabilités qui incombent aux mandataires sociaux.</td>
<td>Duties and responsibilities incumbent upon the board members.</td>
</tr>
<tr>
<td>Mandataire social</td>
<td>Board member</td>
<td>Membre de la direction et/ou de l’organe de surveillance.</td>
<td>Member of the management and/or of the supervisory body.</td>
</tr>
<tr>
<td>Marché réglementé</td>
<td>Regulated market</td>
<td>Désigne un système multilatéral, exploité et/ou géré par une entreprise de marché, qui assure ou facilite la rencontre – en son sein même et selon ses règles non discrétionnaires – de multiples intérêts, acheteurs et vendeurs exprimés par des tiers pour des instruments financiers, d’une manière qui aboutisse à la conclusion de contrats portant sur des</td>
<td>Refers to a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in</td>
</tr>
<tr>
<td>Instuments financiers admis à la négociation dans le cadre de ses règles et/ou de ses systèmes, et qui est agréé et fonctionne régulièrement.²</td>
<td>respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly.²</td>
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<tr>
<td>Organe de surveillance</td>
<td>Supervisory body</td>
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<tr>
<td>Organe qui exerce le pouvoir de contrôle, quel que soit le système d’organisation de l’entreprise (dualiste ou moniste), étant précisé que dans le mode moniste une partie du pouvoir exécutif peut être exercée au sein de l’organe de surveillance.</td>
<td>Body exercising the supervisory power, irrespective of the system of governance of the company (one-tier or two-tier); if the company adopts the unitary system, part of the executive power may also be exercised within the supervisory body.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organe social</td>
<td>Corporate body</td>
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</tr>
<tr>
<td>Personne(s) ou collège exerçant l’un des trois pouvoirs (pouvoir souverain, pouvoir exécutif, pouvoir de surveillance).</td>
<td>Person(s) or college exercising one of the three powers (sovereign power, executive power, supervisory power).</td>
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<tr>
<td>Parties prenantes</td>
<td>Stakeholders</td>
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<tr>
<td>Groupe, personnes physiques ou institutions ayant un intérêt quelconque dans une société (actionnaires, salariés, créanciers, fournisseurs, clients, autres partenaires, etc.).</td>
<td>Group, individuals or institutions having any interest in a company (shareholders, employees, creditors, suppliers, clients, other business partners, etc.).</td>
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</tr>
<tr>
<td>Pouvoir de contrôle</td>
<td>Supervisory power</td>
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<tr>
<td>Pouvoir exercé par l’organe exerçant un pouvoir de surveillance sur l’organe exerçant le pouvoir exécutif.</td>
<td>Power exercised by the body exercising a supervisory power over the body exercising the executive power.</td>
<td></td>
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</tr>
<tr>
<td>Pouvoir exécutif</td>
<td>Executive power</td>
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<tr>
<td>Pouvoir exercé par la direction qui consiste à définir la stratégie de l’entreprise et à la mettre en œuvre.</td>
<td>Power exercised by the management which consists of defining the strategy of the company and implementing it.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pouvoir souverain</td>
<td>Sovereign power</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pouvoir exercé par les actionnaires réunis en assemblée.</td>
<td>Power exercised by the shareholders in a meeting.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Responsabilité sociale des entreprises (RSE)</td>
<td>Corporate Social Responsibility (CSR)</td>
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</tr>
<tr>
<td>«La responsabilité des entreprises vis-à-vis des effets qu’elles exercent sur la société». «Pour assumer cette responsabilité, il faut au préalable que les entreprises respectent la législation en vigueur et les conventions collectives conclues entre partenaires sociaux. Afin de s’acquitter pleinement de leur responsabilité sociale, il convient que les entreprises aient engagé, en collaboration étroite avec leurs parties prenantes, un processus destiné à intégrer les préoccupations en matière sociale, environnementale, éthique, de droits de l'homme et de consommateurs dans leurs activités commerciales et leur stratégie de base, ce processus visant: – à optimiser la création d’une communauté de valeurs pour leurs propriétaires/actionnaires, ainsi que pour les autres parties prenantes et l’ensemble de la société;</td>
<td>‘Responsibility of enterprises for their impacts on society’. ‘Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of: – maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large; – identifying, preventing and mitigating their possible adverse…</td>
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</table>
### Rights and obligations of shareholders

- à recenser, prévenir et atténuer les effets négatifs potentiels que les entreprises peuvent exercer.»

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</thead>
<tbody>
<tr>
<td>Société cotée</td>
<td>Listed company</td>
<td>Société dont les titres sont admis aux négociations sur un marché réglementé.</td>
<td>Company whose securities are admitted to trading on a regulated market.</td>
</tr>
<tr>
<td>Société non cotée</td>
<td>Unlisted company</td>
<td>Société dont les titres ne sont pas admis à la négociation sur un marché réglementé.</td>
<td>Company whose securities are not admitted to trading on a regulated market.</td>
</tr>
<tr>
<td>Société par actions simplifiée (SAS)</td>
<td>Simplified public limited liability company</td>
<td>Société par actions non cotée qui peut être composée d’un seul associé, pouvant être lui-même le président de la société, même s’il s’agit d’une personne morale. Dans cette hypothèse, le président représente la société vis-à-vis des tiers selon les statuts. Les statuts fixent les règles de la gestion.</td>
<td>Private limited liability company whose securities are not admitted to trading on a regulated market which can be composed of one single partner, which can be the president of the company. In this case, the president represents the company vis-à-vis third parties in accordance with the articles of association. The articles of association establish the management rules.</td>
</tr>
<tr>
<td>Système dualiste</td>
<td>Two-tier system</td>
<td>Système qui distingue et sépare strictement le pouvoir exécutif et le pouvoir de surveillance, qui s'exercent au sein d'organes distincts.</td>
<td>System which strictly distinguishes and separates the executive power and the supervisory power, which are exercised through separate bodies.</td>
</tr>
<tr>
<td>Système mixte</td>
<td>Mixed system</td>
<td>Système qui offre aux sociétés un choix entre le système moniste et le système dualiste.</td>
<td>System which gives companies a choice between the one-tier and two-tier systems.</td>
</tr>
<tr>
<td>Système moniste</td>
<td>One-tier system</td>
<td>Système dans lequel tout ou partie du pouvoir exécutif peut s’exercer au sein de l’organe de surveillance.</td>
<td>System in which all or part of the executive power may be exercised within the supervisory body.</td>
</tr>
</tbody>
</table>

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3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Corporate Social Responsibility: A renewed EU strategy for 2011-2014 [COM(2011) 681 final].

EXECUTIVE SUMMARY

The aim of this study, which concerns the rights and obligations of shareholders in the European Union, is to identify legal avenues for achieving a fair balance so as to create value overall, both:

- **for shareholders** holding these rights; and
- **for the company** towards which the shareholder has obligations.

The lack of shareholder engagement in the course of business, as pointed out by the Green Paper on the EU Corporate Governance Framework, is one of the main factors behind the abuses seen in practice.

These **abuses** can take the form of two types of behaviour:

- the excessive pursuit of satisfying shareholders’ personal interests; and
- promotion by the company directors of **business strategies** that are **incompatible with the nature or the object of the company**.

An efficient corporate governance system needs to be introduced to counter these two attitudes, which not only destroy value but also do great harm to the image of the business ecosystem as a whole.

We started by examining the main elements of EU law, both in terms of the main directives dealing with the issue of shareholders’ rights and obligations, and in the light of initiatives taken at EU level, often very recently (some of which are even currently in progress).

We then reviewed Member States’ legislative provisions and initiatives on shareholders’ rights and obligations, particularly in view of the responses to the questionnaires we sent to all our correspondents in the EU.

Substantive law within the EU was analysed in view of characteristic dual aspect of shareholders, which are simultaneously:

- **partners with voting rights**, who can take part in collective decisions concerning the company; and
- **owners of equity securities**, who are entitled to receive dividends and to profit from selling their shares on.

In order to be able to make proposals for a European initiative, we identified what seemed to us to be the best practices in the various Member States, which can inspire an EU-wide process of harmonisation.

Our analysis grid of European good practices was constructed around several themes which can be summarised as follows:

- **governance practices** identified as ‘good’ are those that help create value over the long term;
- this creation of long-term value relates to the organisation as a whole, as part of a process of **promoting its own interest (corporate benefit)**, and not just that of shareholders;
- as a result, this value creation, in line with an approach whereby specific interests converge rather than take precedence over each other, must also be
defined within the framework of a collective approach, through the notion of concerted action.

Rather than drawing up an exhaustive list of all the specific national provisions that can be found in the 27 EU Member States, we sought to establish common main themes.

The goal was to make recommendations which may be implemented, at EU level, by a binding legal instrument (directive), which we therefore sought to ensure would find a consensus among a majority of Member States.

However, the introduction of such an instrument at EU level is justified by the need to establish a real dynamic within the European Union, obliging the Member States to respect strong guiding principles and making all European company law consistent, beyond inevitable specific local factors.

Firstly, it is useful to define, at European level, corporate benefit as the interest of the legal person itself, while using a compulsory European provision to ensure its primacy over the combined specific interests of the various stakeholders.

This notion takes different forms in different EU Member States, depending on legislation or local case-law.

By way of example, depending on the areas concerned within a country (company law, stock market law, social law, etc.) corporate benefit may sometimes:

- result from the accumulated interests of individual shareholders (current but also future shareholders, allowing for the long-term growth of the company to be taken into account); or
- extend to the interests of the other stakeholders (employees, creditors, etc.), if we take a more economic approach of the company (see Corporate Social Responsibility 'CSR').

However, the common denominator of all these definitions of corporate benefit is that it cannot amount to a combination of specific interests, as it must be distinguished as the interest of the (independent) legal person, which must take precedence over all others.

That is why it was important to us to reaffirm this important general principle by means of an EU-level binding text, which would of course let Member States specify the aspect they want to emphasise in their own company law (shareholders or stakeholders, for example).

This unified concept of corporate benefit, meaning the interest of the legal person, would make it possible to promote the establishment of real proportionality between the rights and obligations of shareholders in relation to the issuing company:

- shareholders’ rights could be restricted on an exceptional basis in the event of failure to comply with their obligations;
- shareholders’ obligations would only relate to the common objective, which is to serve the interest of the company (and not the personal interest of its directors).

For the sake of consistency, certain existing EU legal provisions should also be amended, in order to:

- authorise portfolio managers to exceptionally derogate from the principle whereby unit-holders take precedence, when this would risk conflicting with the interest of the company in which they have invested (MiFID Directive);
• establish the principle that the ultimate criterion of validity of the means of defence against a hostile takeover bid must be to take account of the corporate benefit of the target, which is a guarantee of long-term growth for the company (Takeover Bids Directive).

Secondly, it is useful to introduce a binding EU legal provision to extend the scope of concerted action, which is currently generally limited to certain provisions of stock market law (exceeding thresholds, submitting mandatory takeover bids, etc.).

The notion of concerted action is objectively the best way to set up a stable group of shareholders, united by the desire to pursue (in the long term) a common policy with regard to the company, or to take (then to exercise) joint control.

In terms of shareholders’ rights, EU company law should be encouraged to take account (and not only in stock market terms) of the collective size of groups of shareholders, acknowledging their rights, since they make up – collectively – significant percentages.

In terms of shareholders’ obligations, all members of these shareholders’ groups should be subject to the same obligations, placing a joint responsibility on them, since they act in concert and their common interests are at stake.

Finally, it is appropriate for the above-mentioned instrument (EU directive) also to include the notion of a ‘group of companies’, so that shareholders’ rights and obligations can – as appropriate – account for the fact that some majority shareholders can be companies.

However, these companies have their own corporate benefit (although a way needs to be found to prioritise all these corporate benefits within the group) and are presumed to act in concert with the companies they control (which can lead them to be jointly responsible with regard to minority shareholders).
Rights and obligations of shareholders

Recommendations

1. In order to promote balance between shareholders’ rights and obligations, while promoting long-term value creation by the issuing company, it is recommended to adopt a directive affirming the principle of the primacy of corporate benefit, which would be achieved by the following provisions.

- **defining corporate benefit as the interest of the corporate entity itself** giving a public nature to the **primacy of this corporate benefit** over the specific interests of the various stakeholders;
- **standardising** within the EU the practice of giving **blank powers to the president**, who is obliged to vote in accordance with the corporate benefit;
- **establishing a procedure of prior authorisation by corporate bodies** for agreements (outside current operations) concluded with the company by a director or a significant shareholder (who can exert an influence over the company) **to ensure that these agreements comply with the corporate benefit**;
- establishing civil penalties for inappropriate behaviour, making derivative corporate action possible and sanctioning abuses of voting rights (abuse of majority powers or abuse of minority powers); and
- establishing penalties for inappropriate criminal behaviour: misuse of company assets, abuse of powers.

2. In order to reinforce shareholders’ rights and to enable shareholders to exercise their rights more effectively, it is recommended that the above-mentioned directive promote **cooperation between shareholders and draw the consequences in terms of obligations**:

- **extend the notion of concerted action** to company law as a whole;
- **accept the notion of joint control**;
- make it compulsory to **disclose concerted action**;
- subject **groups of shareholders** to the **same obligations**, placing a joint responsibility on all parties to a concerted action, since their common interests are at stake

3. In order to take account of the fact that some majority shareholders may be companies, the above-mentioned directive must also **include the notion of a ‘group of companies’**, which means:

- exceptionally derogating from the principle of the primacy of corporate benefit, when the interest of the group is at stake;
- imposing a **joint responsibility** on companies making up the group with regard to their minority shareholders.

4. Additionally, and for the sake of consistency, the following steps should also be taken:

- amend Directive 2004/39/EC (MiFID Directive) to authorise portfolio managers to exceptionally derogate from the principle whereby unit-holders take precedence, when this would risk conflicting with the interest of the company in which they have invested;
- amend Directive 2004/25/EC (Takeover Bids Directive) to lay down the principle that the ultimate criterion of validity of the means of defence against a hostile takeover bid should be to take account of the corporate benefit of the target.
INTRODUCTION

The aim of this study, which concerns the rights and obligations of shareholders in the 27 Member States of the European Union, is to identify legal avenues for achieving a fair balance between these rights and obligations so as to create value overall, both for the holder of these rights and for the issuing company towards which the shareholder has obligations.

Shareholders as creators of value

With a view to creating common value for the company itself, and indirectly for society as a whole (at least through jobs, fiscal and social redistribution and balance of the foreign trade of an EU Member State⁵), the company should prosper and be economically sound, particularly as a result of the quality of management of the legal person it embodies, exerted by the directors that the shareholders have collectively chosen.

This implies, and this will be one of the working hypotheses of this study, increased shareholder engagement in the course of business, supported by appropriate information (more than complete or exhaustive information, an objective which has probably been achieved in many respects but which shows no great effectiveness) between the corporate bodies, to the greatest satisfaction of shareholders, since the shares they own will yield more for them (dividends) or will increase in value with a view to resale (capital gains).

Well before the recent crisis, it was not possible to show how useful were rules the rules currently in use in terms of increasing the value of companies or their productivity. Most empirical studies conducted several years ago in this regard are inconclusive⁶ and some of them merely note better performance in closely held companies, which are generally those with the simplest governance systems and least transparency (at least towards minority shareholders)⁷.

Current problems

In any case, the Green Paper on the EU Corporate Governance Framework shows that the lack of engagement of shareholders in the course of business is one of the main factors behind the abuses for which directors may sometimes be held responsible or culpable.

In our view, these abuses can essentially take the form of two types of behaviour:

- the excessive pursuit of satisfying their personal interests, central theme of the agency theory developed in the 1930s in the midst of an economic crisis, by the Americans Berle and Means⁸; and

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⁵ The issue of the company’s contribution to society concerns another meaning of the concept of value, the convergence of which with the first may be an objective – embodied in particular by the approach to corporate social responsibility – but is not a natural consequence thereof.


⁷ A. Shleifer, R.W. Vishny 1986; A. Shivdasani 1993; J.E. Bethel, J. Liebeskind 1993; A. Agrawal, C.R. Knoeber 1996. Contra, the study of H. Demsetz, K. Lehn [1985] who found no evidence of a link between a company’s performance and the concentration of capital or C. Holderness, D. Sheehan [1988] who argue that there is no difference in performance between firms with diffuse capital and those whose capital is held by a majority shareholder.

⁸ Agency theory, developed in the 1930’s by Berle and Means (The modern corporation and private property, A. A. Berle and G. C. Means, New York, Macmillan, 1932), is based on the hypothesis that the development of the share capitalist corporate structure results in a risk of appropriation of power by the directors to the detriment of a dispersed and thus also weak group of shareholders. This specific situation creates risks of conflicts of interests, incurring significant ‘agency costs’ (the director pursuing his or her own personal interests to the detriment of those of the shareholders) and constitutes a source of inefficiency for companies.
• the promotion of business strategies with a risk profile that is unsuited to the nature or purpose of the company, whether this is excessive exposure to intrinsically risky activities (e.g. excessive financial speculation by non-financial operators), or the opposite, that is, insufficient investment in the medium or long term, dooming the company, failure to innovate and adapt to the market, to losing market share, or even disappearing.

In both cases, these abuses show an individualist temptation in the exercise of power, tending towards reprehensible selfishness at one extreme, and towards blind authoritarianism at the other, due to a lack of proper control, particularly by shareholders. While these two attitudes do not correspond to the majority of cases, it is certain that these two behaviours, which destroy value as well as the image of the business ecosystem as whole, require an effective corporate governance system to be introduced.

Thus, we will adopt the approach advocated in particular by Professors Charreaux and Wirtz in France, according to whom 'the study of organisations and governance, from the viewpoint of efficiency associated with value creation, involves ... questioning the determining factors behind the presumed link between the structure and the functioning of the governance system and the value creation process'¹⁰.

However, if it were to be confirmed -beyond a somewhat inaccurate representation- this analysis of behaviours that destroy value in the long term follows on from acknowledging that in practice the responsibility for 'wrongdoings' is probably shared:

• shareholders are not very interested in the company's medium/long-term prospects, because (especially in their symbolic and simplistic incarnation of the 'market') they are motivated by the goal of selling on their shares to produce the largest possible gains as quickly as possible;
• the directors may be tempted to 'profit' from this situation, which grants them a kind of impunity at shareholders' general meetings (hereinafter 'general meetings'), which are characterised by shareholder absenteeism, to the point that they could be suspected of encouraging it.

**European good practices**

Our analysis grid of European good practices will, with regard to the above, be constructed around several themes that can be summarised as follows:

• governance practices identified as 'good' are those that help create value over the long term;
• this creation of long-term value relates to the organisation as a whole, as part of a process of promoting its own interest (corporate benefit), and not just that of shareholders;
• as a result, this value creation, in line with an approach whereby specific interests converge rather than take precedence over each other, must also be defined within the framework of a collective approach, through the notion of concerted action or the principles of Corporate Social Responsibility (CSR).

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¹ The role of the supervisory body in controlling these excesses cannot, of course, be overlooked but, apart from the fact that it is beyond the scope of this study, it is nevertheless true that this body rarely has the power to remove the management, the ultimate sanction of the excess of managers.

Details regarding the scope of the study

In developing this study, account should be taken of the different forms companies can take: the situation of a large listed company whose shareholders are all members of the public – to the point that they become merged with the market on which the shares are mass-consumption products – is not seen in the same way as the situation of a small and medium-sized enterprise (SME, employing fewer than 500 employees) or mid-sized company (entreprise de taille intermédiaire (ETI), employing between 500 and 5000 employees), the majority of whose capital is often held by a group – often a family group – which consequently exerts strict control over its direction (if not having family members in different company posts).

Company law generally distinguishes between public and private companies. However, this is often not fully relevant in practice. In today’s reality, three basic types of company can be identified: listed companies (whose shares are regularly traded), "open" companies (whose shares could be regularly traded), and "closed" companies (whose shares are only occasionally traded).

In view of the number of different company forms in the EU, our study is limited to joint-stock companies as indicated, for each EU Member State, in Annex 1 to Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)11. However, we will also mention, as appropriate, some specific forms of joint-stock companies in our study (e.g. limited partnerships).

On the other hand, we will not cover limited liability companies that do not issue shares (for example the société à responsabilité limitée – SARL – in France, the Gesellschaft mit beschränkter Haftung – GmbH – in Germany, the Besloten Vennootschap – B.V. – in the Netherlands or the società a responsabilità limitata – Srl – in Italy, or the z ograniczoną odpowiedzialnością – z.o.o. – in Poland, or the Sociedade Limitada – SL – in Portugal and the SRO in Slovakia and in the Czech Republic), nor any other company forms, such as partnerships (e.g. the société en nom collectif (general partnership) and the société civile (civil law partnership) in France) or those devoid of legal personality (e.g. the société de fait (de facto company) or société en participation (holding company) in France).

After examining the main elements of EU law (Part 1), we will move on to a review of the legal provisions and initiatives of a selection of Member States (Part 2), before attempting to make proposals for a European initiative based on examples of best practices identified in specific Member States (Part 3).

1. EUROPEAN UNION LAW

EU law only began to address the rights and obligations of shareholders relatively late; it was only at the start of the 21st century that a series of directives began to address this topic, essentially from the perspective of the stock market, i.e. prioritising the shareholders of listed companies (on regulated markets).

The Community approach to harmonising company law had previously given priority to protecting the interests of stakeholders and third parties; companies and their shareholders were often only ever viewed by directives in economic and financial terms, as participants in a major market that was in the process of harmonisation.

In this traditional view of the company in European law, securities issued by stock companies are treated more like products (and their owners like consumers) than tools, enabling the partners of a corporate entity to exercise their rights by participating in the general meeting of shareholders, i.e. the company’s governing body.

This probably explains the specific emphasis placed on listed companies, the distribution of whose shareholdings among countless institutional investors that make up an anonymous ‘community’ is better suited to this economic approach, which prioritises the circulation of stocks and shares (purchase/resale), than that of a family business, in which stability of control is more common thanks to the support of directors by shareholders, who make up a genuine ‘hard core’ within the company.

Nonetheless, conscious of the abuses caused by the excessive financialisation of relations between a listed company and its shareholders, the latter acting as investors without any real involvement in social policy, the EU has established a body of corporate governance principles and rules.

This consists of a number of recommendations on the independence of non-executive directors on board committees and on remuneration and which also requires listed companies to provide a corporate governance statement (this does not generally apply to mid-sized companies, in which the directors interact even more ‘naturally’ with the shareholders, to the extent that they themselves are shareholders and as such exercise control over the company).

After having reviewed the main directives affecting the rights and obligations of shareholders within the EU since 1968 (Chapter 1.1), we shall mention the recent initiatives undertaken by the European institutions, some of which are still being implemented (Chapter 1.2).

1.1. IMPACT OF DIRECTIVES ON THE RIGHTS AND OBLIGATIONS OF SHAREHOLDERS SINCE 1968

Since 1968 (first company law directive), about 20 directives have allowed new provisions on the rights and obligations of shareholders with regard to the issuing company (which itself is represented by its corporate bodies, in particular by directors and supervisory bodies) to be transposed into the national legislation of the Member States.

A chronological review of the various core points of the directives, once completed, makes it possible to use a more thematic approach to pinpoint the contemporary problems and legal and social objectives that should be considered in order to achieve the objectives of sound and
sustainable corporate governance without damaging (and with a view to improving) the competitiveness of companies, by taking a shareholder-focused approach.

1.1.1. DIRECTIVE 68/151/EC

Directive 68/151/EC highlighted the mandatory publication of data (such as the instrument of constitution, amendments made to the company and details on representatives of the company such as appointment, termination of duties, etc.), the publication of company information in the national gazette appointed for that purpose by the Member State, the consideration of the publication date of this information to make the articles of association reliable as against third parties and certain rules relating to the responsibility of the founders of the company (validity of the acts done by the organs of the company and the nullity of the company).

1.1.2. DIRECTIVE 77/91/EC

The Second Council Directive 77/91/EEC of 13 December 1976 coordinates safeguards to be imposed by Member States on companies within the meaning of the second paragraph of Article 58 of the Treaty for the protection of the interests of partners and third parties, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital - with view to making such safeguards equivalent.

This Directive establishes specifications aimed at protecting shareholders and creditors of public limited liability companies through the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital.

The Directive lays down minimum requirements with regard to information. The articles of association or the instrument of incorporation of the public limited liability company must always include the following information:

- type and name of the company;
- the objects of the company;
- amount of capital;
- rules governing the appointment of persons, particularly those responsible for the management, administration and supervision of the company;
- the duration of the company, where applicable.

Other information should be disclosed in the articles of association, the instrument of incorporation or in a separate document, including:

- the registered office;
- the value, number and type of the shares subscribed;
- the amount of subscribed capital;
- the identity of the signatories to the instrument of incorporation or the articles of association.

The Directive also sets out regulations regarding:

- the minimum amount of capital;
- the issuing and acquisition of shares;
- the distribution of dividends;
- financial assistance provided by companies for the acquisition of their shares;
- capital increases and reductions;
- the winding-up of public limited liability companies.
Within the framework of these capital increases or reductions, the Directive aims in particular to guarantee that the laws of the Member States ensure that the principles of equal treatment of shareholders in the same position, and of protection of creditors, are observed.

The Second Directive limits the possibility of a public limited liability company acquiring its own shares. In order to prevent misappropriation, Directive 92/101/EEC then extended this rule to all capital companies covered by Directive 68/151/EEC in which the company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence, even if this other company is governed by the laws of a third country, provided that it has a comparable legal form.

1.1.3. DIRECTIVE 2003/51/EC

The main objective of Directive 2003/51/EC (consolidated accounts) is to promote the legibility of the financial and non-financial information intended for shareholders and the public. This Directive also specifies that possible derogations granted to certain companies are not applicable to listed companies, which are governed by the internal legal provisions of each Member State.

1.1.4. DIRECTIVE 2003/58/EC

Directive 2003/58/EC saw the emergence of electronic means as an indispensable development in company law, both through the reform of the first Directive (removing the obligation to publish information in paper form provided that the information is published by electronic means) and by taking into account technological developments in the analysis of the shareholders’ rights in the light of the reporting obligations.

1.1.5. DIRECTIVE 2003/58/EC


1.1.6. DIRECTIVE 2003/71/EC

Directive 2003/71/EC (Prospectus), which pursues the objective of stock exchange harmonisation, focused mainly on defining financial securities and transferable securities as well as categories of investors (qualified or unqualified) and highlighted the problems associated with best practices that should be followed by companies with regard to transparency and systemic risk and with regard to internal regulations issued by national authorities.

1.1.7. DIRECTIVE 2004/25/EC

Directive 2004/25/EC (takeover bids) focused on the development of the national supervisory authorities in the area of stock markets, and allowed relations between shareholders (definitions of securities and attached voting rights, information regarding operation, protection of minority shareholders) and the management, administrative and supervisory bodies of companies (objectives of transparency, effective monitoring, attachment to the establishment of codes that do not contain mandatory provisions) to be clarified.
1.1.8. **DIRECTIVE 2004/109/EC**

Directive 2004/109/EC (Transparency) established **cooperation** among national authorities with regard to **stock exchange supervision** and introduced a requirement for the publication of half-yearly reports. **Transparency** is predominant, both in remuneration policies and in terms of the **issuer’s** responsibility towards the administrative, supervisory or management bodies, or towards investors.

1.1.9. **DIRECTIVE 2005/56/EC**

Directive 2005/56/EC (cross-border mergers) emphasised the **protection of shareholders** (publicising the draft terms of the merger, approval by the general meeting, effects on shareholders, protection of employee shareholders) for various types of company.

1.1.10. **DIRECTIVE 2006/43/EC**

Directive 2006/43/EC (auditing) focused on harmonising audits, highlighting the **ethical** dimension of auditing (no interference by auditors in the internal decision-making process). The primary aim of this Directive is, of course, to provide shareholders with sound, reliable **information**.

1.1.11. **DIRECTIVE 2006/46/EC**

Directive 2006/46/EC established the principle of **comply or explain**, extending the scope of the obligation placed on companies to publish the annual corporate governance statement. The **information** that is to be provided to shareholders, both regarding the accounts and the statement, involves the collective responsibility of the management, administrative and supervisory bodies (on drawing up and publishing the accounts and the statement).

1.1.12. **DIRECTIVE 2006/48/EC**

Directive 2006/48/EC already anticipated the problems that a crisis could have generated, since it reinforces the **obligation** of credit institutions and investment service providers to establish and maintain a remuneration policy (creation of a remuneration committee as part of governance if justified by the size of the company).

Thus, the objectives of this Directive are: sound practice with regard to remuneration, the establishment of a risk-prevention strategy, the establishment of a balance between fixed and variable pay, with the effect of making **information** on remuneration more transparent and strengthening **communication** on securitisation.

1.1.13. **DIRECTIVE 2006/68/EC**

Directive 2006/68/EC focused on public limited liability companies and alteration of their capital as well as, more indirectly, the prevention of market abuse.

The decision-making aspect of these capital alterations concerns both the bodies of the company and the shareholders’ meetings (including, furthermore, the **protection of minority shareholders** by the expert’s report, the **publication** of operations, decisions authorising the buy-back of shares by the company, etc.).

1.1.14. **DIRECTIVE 2007/36/EC**

Directive 2007/36/EC (rights of shareholders) highlighted the fact that obstacles blocking voting rights attached to shares transferred several days before a meeting must be removed.
In this sense, i.e. **strengthening the rights of shareholders**, the effectiveness of the information that is to be provided to shareholders (pre-meeting information, availability of documents, possibility to submit written questions and submit points for inclusion on the agenda), equal treatment and monitoring the effectiveness of voting on instructions becomes clear.

Establishment of a system for **preventing the abuse of proxy voting**. The fact that an increasing number of shareholders in listed companies are **outsiders** has led to the realisation that it is necessary to **include** them and to facilitate and improve their **active participation** within the company.

### 1.1.15. Directive 2007/63/EC

Directive 2007/63/EC (independent expert) extends the **protection of shareholders** within the scope of mergers in that it only permits an exemption from the obligation to have a report drawn up on the draft terms of merger if all shareholders concerned (in both companies) approve.


Similarly, Directive 2009/109/EC makes it possible to **reduce the impact of a merger on the shareholders** of a subsidiary in which the parent company acquiring the subsidiary holds at least 90% of the shares, while authorising an independent expert’s report (with the aim of simplifying the administrative details of the operations).

### 1.1.17. Directive 2010/73/EC

Directive 2010/73/EC (Prospectus II) introduces the idea of a European financial supervisory authority and of cooperation between it and the national authorities. **Protection** is always the key objective for shareholders, despite the reduction of administrative requirements (which are known to be aimed primarily at informing these shareholders and the public).

The level of professional investment has increased (the original level was EUR 50 000) and the **disclosure** regime is proportionate to the scale of the operation.

### 1.1.18. Directive 2010/76/EC

Directive 2010/76/EC views **shareholder protection** in terms of systemic risk and, as a consequence for governance, from the point of view of the need for robust corporate governance arrangements (structure, organisation of responsibilities, risk management and sound management).

### 1.2. European Initiatives

As the Commission indicates on its website, the harmonisation of rules on company law and corporate governance as well as accounting and auditing is **essential** for the creation of a single market for financial products and services.

According to the Commission, in the areas of company law and corporate governance, the focus must be on:

- ensuring equivalent protection for shareholders and third parties with an interest in companies;
- ensuring freedom of establishment for companies throughout the EU;
- promoting the efficiency and competitiveness of businesses;
- promoting cross-border cooperation among companies in different Member States; and
- encouraging discussion among the Member States on modernising company law and corporate governance.

Forty years after the creation of the European Community, a clear need to conduct an in-depth review of company law in Europe has emerged, since many people recognise that European company law has not been able to follow the developments which determine its role and its application.

Its main objectives are the creation of the single market, of which investors and companies wish to make the most efficient use, the growth of European securities markets and their increased regulation, the development of modern information and communications technologies, which are to be facilitated and may be used to improve the enforcement of company law, and the development of corporate governance practices and standards.

1.2.1. REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE (2002)

A High-level group of company law experts was set up by the European Commission in September 2001 to make recommendations on a modern regulatory framework in the EU for company law.

The first recommendation concerns shareholder involvement, which is especially weak in listed companies, where the general meeting is poorly attended. The Group concluded that it was therefore necessary to encourage shareholder involvement, particularly through the means offered by modern technology to (i) ask questions and propose solutions or (ii) vote in absentia, including while abroad.

However, feedback from the consultation did not support an obligation to vote, and the Group agrees that there are no convincing reasons for imposing such an obligation.

On the other hand, the special investigation procedures laid down in several Member States is an important deterrent and should be recognised at EU level.

A second recommendation concerns the more active role that should be played by non-executive (‘independent’) directors or supervisory boards, particularly in cases where shareholders are too dispersed to monitor management directly or where there is a (group of) controlling shareholder(s). In such cases, the general oversight role is of particular significance in three areas where conflicts of interests may arise: nomination of directors, remuneration of directors and auditing to assess the company’s performance.

The Group considers that aligning the interests of executive directors with the interests of the shareholders, so as to ensure that their remuneration is linked to the share price, could have a series of negative effects. Therefore, the Group considers that there is no need for a prohibition of remuneration in shares and share options, but that appropriate rules should be put in place.

Recent corporate scandals in American companies (Enron) and feedback from the consultation highlight the key importance of trust in financial statements. In this respect, the introduction of a framework rule on wrongful trading was opposed by some respondents, who argued that this is a matter of insolvency law.

The Group rejects this view: the responsibility of directors when the company becomes insolvent has its most important effect prior to insolvency and is a key element of an appropriate corporate governance system and should therefore be the subject of a framework at EU level. Similarly, misleading disclosure by administrators should be properly sanctioned,
Rights and obligations of shareholders

for example through the disqualification of a person from serving as a company director across the EU.

In order to allow the recommendations laid down in this report to be implemented, the Group recommended that the Commission prepare a Company Law Action Plan to set the EU agenda, with priorities for regulatory activities in the area of company law, and agree such an action plan with the Council and the European Parliament.

1.2.2.  **COMMISSION COMMUNICATION ON ‘MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION – A PLAN TO MOVE FORWARD’ (2003)**


In a context marked by financial scandals, the tendency of European companies to operate throughout the EU (which has been expanded with 10 additional Member States), the continued integration of European capital markets and the rapid development of new information technologies, the Communication defines key political objectives that should inspire all future action to be taken at EU level in these areas.

However, the Commission was aware that these objectives could only be achieved through the implementation of a fully integrated approach which encompasses numerous initiatives linked with this Action Plan but still distinct from it, namely:

- The Financial Services Action Plan\(^\text{12}\) (1999);
- The Financial Reporting Strategy\(^\text{13}\) (2000)\(^\text{14}\);
- The Commission Communication concerning Corporate Social Responsibility (CSR)\(^\text{15}\) (2002);
- The Commission Communication on Industrial Policy in an Enlarged Europe\(^\text{16}\);
- The Commission Communication on the priorities for the statutory audit in the EU\(^\text{17}\).

The Action Plan is based on an extensive package of proposals grouped into six large chapters: corporate governance, maintenance and alterations of capital, groups and pyramids, business restructuring and mobility, the European private company, cooperatives and other types of company.

It was subject to a three-month public consultation, which closed on 13 August 2003. When the results of this consultation were released, the Commission announced that the first initiatives provided for in the Action Plan with regard to corporate governance were expected to be implemented in the second half of 2004.

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\(^\text{15}\) Commission Communication concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development’ (COM(2002)347 of 2 July 2002 The European Multi-Stakeholder Forum on CSR brings together representative organisations of business, trade-unions and civil society. It will present in 2004 a report about its works to the Commission, which should then make an evaluation of its results, decide on its future and consider any other appropriate initiative.


\(^\text{17}\) (use of ISAs, public oversight of auditors, etc.)
In this regard, the Commission declared that it considered the following initiatives to be the most urgent:

- a recommendation aimed at promoting the role of non-executive (independent) or supervisory directors (nomination, remuneration and audit committees);
- a recommendation regarding **remuneration of directors**, aimed at increasing transparency and reinforcing the influence of shareholders.

These recommendations were actually implemented on 14 December 2004 and 15 February 2005. They were then supplemented with Recommendation 2009/385/EC of 30 April 2009, insofar as the experience gained over the previous years and especially in relation to the financial crisis had showed that remuneration structures had become increasingly complex, too focused on short-term achievements and in some cases had led to excessive remuneration, which was not justified by performance.

In this regard, the Commission stated that it was essential for shareholders, especially institutional investors, to exercise their voting rights with regard to the remuneration of directors, but that, in order to avoid conflicts of interest, non-executive directors should not be remunerated in the form of stock options.

Implementation of the Action Plan had hardly begun when the EU was faced with one of the worst crises of the last 30 years, which led the Commission to reflect on the future of European company law, focusing in particular on the issue of corporate governance.

One of the lessons arising from the financial crisis is that corporate governance, which, until now, was generally based on self-regulation, has not been as effective as it could have been. Thus, it remains essential that businesses are better managed, not only to reduce the risk of crisis, but also to improve their competitiveness.

While the European Parliament engaged in an initiative regarding the remuneration of directors of listed companies and in financial institutions (2010/2009 (INI)), the Commission also began by looking into the specific case of financial institutions, launching a consultation in June 2010 in the form of a Green Paper on the governance of such institutions.

### 1.2.3. **EUROPEAN PARLIAMENT RESOLUTION ON REMUNERATION OF DIRECTORS OF LISTED COMPANIES AND REMUNERATION POLICIES IN THE FINANCIAL SERVICES SECTOR (7 JULY 2010)**

Combining considerations relating to the remuneration policy (wages) within financial institutions and recommendations on effective governance within limited companies, the Parliament’s Resolution includes a number of guidelines relating to remuneration committees (composed of non-executive directors), shareholders’ votes on remuneration policies for directors (respecting the principle of equality between men and women), based on predetermined, measurable performance criteria (not only quantitative measures, but also measures that are quality-linked and even human judgement), achieving a good balance between fixed and variable pay (with deferral of at least 40 % of the variable remuneration component), which would promote the long-term viability of the company, setting an upper limit for ‘golden parachutes’ to the equivalent of two years of the fixed component of directors’ pay (banning severance pay in cases of non-performance or voluntary departure).

In particular, the European Parliament considers that ‘**directors should not be driven by personal financial interest in their management of listed companies**’ since ‘**the personal financial interest of directors linked to variable remuneration is in many cases in conflict with the long-term interest of the company, including the interests of its employees and stakeholders**’.
1.2.4. GREEN PAPER ON CORPORATE GOVERNANCE IN FINANCIAL INSTITUTIONS AND REMUNERATION POLICIES (2 JUNE 2010)

This Green Paper\(^{18}\) stated that the relative disinterest of shareholders in monitoring senior management in financial institutions had contributed towards diminishing the responsibility of the latter and may have encouraged excessive risk-taking among these institutions.

Shareholders benefit fully from the advantages of such a strategy while it works, although they only share in the losses until the value of the shares they hold drops to zero, after which the losses are borne by creditors (we speak of ‘limited liability’ of shareholders).

The growing importance of financial markets in the economy, due in particular to the multiplication of sources of financing/capital injections, has created new categories of shareholders who show little interest in the long-term viability of the business because of their relatively short, or even very short (quarterly or half-yearly) investment horizons\(^{19}\).

In this respect, the sought-after alignment of directors’ interests with those of these new categories of shareholder has amplified risk-taking and, in many cases, contributed to excessive remuneration for directors, based on the short-term share value of the company as the only performance criterion\(^{20}\).

Furthermore, risks of conflict of interest can also arise between a financial institution and its shareholders/investors, particularly where there is cross-shareholding or business links between an institutional investor (for example through the parent company) and a financial institution in which it is investing.

A number of factors could also play a part in dissuading investors from playing an active role in the corporate bodies of the financial institutions in which they have invested:

(i) the lack of effective rights allowing shareholders to exercise control (such as, for example, the lack of voting rights on director remuneration in certain jurisdictions),

(ii) the maintenance of certain obstacles to the exercise of cross-border voting rights,

(iii) uncertainty over certain legal concepts (for example that of ‘acting in concert’), and

(iv) financial institutions’ disclosure to shareholders of information which is too complicated and unreadable, in particular with regard to the risks encountered by financial institutions.

Naturally, with regard to excessive risk-taking, the behaviour of shareholders in financial institutions could be a special case because of the complexity and obscure nature of the operations of these institutions.

However, the Commission was aware that this problem did not affect only financial institutions, since it more generally raised questions about the effectiveness of corporate governance rules based on the presumption of effective control by shareholders.

As a result of this situation, the Commission decided to launch a broader review covering listed companies in general, which was done in 2011 with an additional Green Paper.

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\(^{19}\) See article by Rakesh Khurana and Andy Zelleke, Washington Post, 8 February 2009.

1.2.5. GREEN PAPER ON THE EU CORPORATE GOVERNANCE FRAMEWORK (5 APRIL 2011)

On 5 April 2011, the European Commission launched a public consultation in the form of a Green Paper on the ways in which corporate governance of European companies can be improved. Corporate governance is traditionally (although somewhat narrowly - please refer to our Glossary) defined as the system by which companies are managed and controlled.

In this regard, Mr Michel Barnier, European Commissioner for Internal Market and Services, said: ‘\textit{in the current economic situation, we need more than ever to ensure that companies are well governed and consequently reliable and sustainable. Too much short-term thinking has had disastrous consequences. That is why we have launched today a debate on the effectiveness of the existing corporate governance framework. Above all, we need company boards to be more effective and shareholders to fully assume their responsibilities.’}’

The Green Paper also aims to launch a general debate on a number of issues, particularly the following:

- means of ensuring the effective functioning of boards of directors and ensuring they are composed of a mixed group of people, e.g. by enhancing gender diversity, a variety of professional backgrounds and skills as well as nationalities. Functioning of boards, namely in terms of availability and time commitment of directors are also under scrutiny, as well as questions on risk management and directors’ pay.

- how to improve monitoring and enforcement of the existing national corporate governance codes in order to provide investors and the public with meaningful information. Companies that do not comply with national corporate governance recommendations have to explain why they deviate from them, but too often, this does not occur.

The Green Paper asks whether there should be more detailed rules on these explanations and whether national monitoring bodies should have more say on companies’ corporate governance statements.

- how to enhance shareholders’ involvement on corporate governance issues and encourage more of them to take an interest in sustainable returns and longer term performance, but also how to enhance the protection of minority shareholders. It also seeks to understand whether there is a need for shareholder identification, i.e. for a mechanism to allow issuers to see who their shareholders are, and for an improved framework for shareholder cooperation. With regard to this last topic (which is of particular interest to us within the scope of this study focusing on the rights and obligations of shareholders), reference was clearly made to the Green Paper on Corporate Governance in financial institutions, which was published in June 2010 (see above).

The conclusions of the 2010 Green Paper on the insufficient involvement of shareholders and the causes of this phenomenon also apply largely to the behaviour of shareholders in listed companies with dispersed ownership. In companies with a dominant or controlling shareholder, the major challenge seems to be guaranteeing adequate protection of the (economic) interests of minority shareholders.

1.2.5.1. Lack of appropriate shareholder engagement

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.
1.2.5.2. Short-termism of capital markets

Major developments in capital markets in recent decades, including innovative products and technical change, mostly focused on the trading function of the capital markets and facilitated faster and more efficient trading.

Innovations such as high-frequency and automated trading seem to have resulted in increased liquidity but have also helped to shorten shareholding periods.

Over the past two decades, investment horizons have shortened considerably. Turnover on the major equity exchanges is now running at 150% per year of aggregate market capitalisation, which implies the average holding period is eight months.

1.2.5.3. The agency relationship between institutional investors and asset managers

The Commission recognises that not all investors need to engage with investee companies. Investors are free to choose a short-term-oriented investment model without engagement.

Short-termism and asset management contracts

However, the agency relationship between institutional investors (asset owners) and their managers contributes to capital markets’ increasing short-termism and to mispricing²¹.

It appears that the way asset managers’ performance is evaluated and the incentive structure of fees and commissions encourage asset managers to seek short-term benefits, which probably has an impact on shareholder apathy.

Lack of transparency about the performance of fiduciary duties

More transparency about the performance of fiduciary duties by asset managers, including their investment strategies, the cost of portfolio turnover, whether the level of portfolio turnover is consistent with the agreed strategy, the cost and benefits of engagement, etc. could shed more light on whether or not asset managers’ activities are beneficial for long-term institutional investors and long-term value creation on their behalf.

Furthermore, publishing information about the level of and scope of engagement with investee companies that the asset owner expects the asset manager to exercise, and reporting on engagement activities by the asset manager could be beneficial²². As a consequence of such improved monitoring, long-term institutional investors might decide to renegotiate asset management contracts to introduce portfolio turnover caps and require their asset managers to be more active stewards of the investee companies²³.

1.2.5.4. Other possible obstacles to engagement of institutional investors

Conflicts of interest

Conflicts of interest in the financial sector seem to be one of the reasons for a lack of shareholder engagement. Conflicts of interest often arise where an institutional investor or


asset manager, or its parent company, has a business interest in the investee company. An example of this can be found in financial groups where the asset management branch may not want to hide the fact that it actively exercises its shareholder rights in a company to which its parent company provides services or in which it has a shareholding.

**Obstacles to shareholder cooperation**

Individual investors, in particular those with diversified portfolios, may not always engage successfully in the course of business. Shareholder cooperation could help them to be more effective.

Many respondents to the 2010 Green Paper proposed that existing EU law on acting in concert, which may hinder effective shareholder cooperation, should be amended. The Commission recognises that clearer and more uniform rules on acting in concert would indeed be beneficial in this respect.

**1.2.5.5. Proxy advisors**

Institutional investors with highly diversified equity portfolios face practical difficulties in assessing in detail how they should vote on items on the agenda of the general meetings of investee companies. Consequently, they make frequent use of the services of proxy advisors, such as voting advice, proxy voting and corporate governance ratings.

The influence of proxy advisors raises some concerns due to the fact that they are not always sufficiently transparent about the methods applied with regard to the preparation of the advice. More specifically, it is said that the analytical methodology fails to take into account firm-specific characteristics and/or characteristics of national legislation and best practice on corporate governance.

**1.2.5.6. Shareholder identification**

There have been demands recently for EU action to increase the level of investor transparency towards issuers of shares. Proponents argue that means of identifying their shareholders will enable issuers to engage in a dialogue with them, in particular in matters of corporate governance. This could also generally increase the involvement of shareholders in the companies they invest in.

Others disagree with the demand to create a European tool for shareholder identification.

(i) They consider that modern means of communication have made it very easy to inform shareholders and potential investors about corporate governance issues and to get their views.

(ii) Better knowledge of shareholders could also lead to management entrenchment, i.e. help management to better defend themselves against any actions by shareholders to challenge their conduct of business.

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25 This issue was also raised in the Green Paper – Corporate governance in financial institutions and remuneration policies of 2 June 2010 (COM(2010) 284, which, however, was limited to financial institutions.

26 The Commission already looked at the risk of abuse connected to ‘empty voting’ in its consultation on the Transparency Directive. This consultation pointed out that the problem was linked to record date capture (appropriation of voting rights by borrowing shares on the closing date).
(iii) In certain Member States there may also be privacy considerations related to data protection rules forbidding intermediaries to pass on information on shareholders to issuers.

1.2.5.7. Minority shareholder protection

Minority shareholder protection is relevant for the role of shareholders in corporate governance for a number of reasons.

Minority shareholder engagement is difficult in companies with controlling shareholders, which remain the predominant governance model in European companies. This raises the question whether the ‘comply or explain’ system is viable in such companies, particularly where adequate protection of minority shareholders is not guaranteed.

Secondly, the question arises whether the existing EU rules are sufficient to protect minority shareholders’ interests against potential abuse by a controlling shareholder (and/or the management), particularly when this occurs during related party transactions (which are covered by EU accounting regulations). This is why it was suggested that a stricter procedure should be established:

(i) It has been suggested that, above a certain threshold, the board should appoint an independent expert to provide an impartial opinion on the terms and conditions of related party transactions to the minority shareholders.
(ii) Significant related party transactions would need approval by the general meeting.
(iii) The publicity associated with general meetings might dissuade controlling shareholders from some transactions and give minority shareholders the chance to oppose the resolution approving the transaction, but some propose that controlling shareholders should be precluded from voting.

1.2.5.8. Employee share ownership

Employees’ interest in the long-term sustainability of the company for which they work is an element that a corporate governance framework should take into account. Employees’ involvement in the affairs of a company may take the form of information, consultation and participation in the board. But it can also relate to forms of financial involvement, particularly to employees becoming shareholders. Employee share ownership has a long tradition in some European countries.

Such schemes are mainly considered as means to increase the commitment and motivation of workers, raise productivity and reduce social tension. However, employee share ownership also involves the risk of a lack of diversification: if the company fails, employee shareholders may lose both their job and their savings. However, employees as investors could play an important role to increase the proportion of long term-oriented shareholders.

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28 See the statement on the rights of minority shareholders of the European Corporate Governance Forum.

CONCLUSION

The consultation closed on 22 July 2011. The Commission stated that it would examine all responses carefully and publish a summary in autumn 2011. On the basis of this summary, a decision will be taken on whether legislative proposals are necessary. However, these will only be presented after a more in-depth impact assessment has taken place.

It is interesting to note that certain participants in the consultation (such as EcoDa – European Confederation of Directors’ Associations) stigmatised the effect of the commercial management of stock exchanges by companies, whose business models are based on increasing transactions, on short-term shareholder behaviour (particularly with regard to institutional investors who are financial professionals).

The same responses also highlight the role played by the IFRS accounting standards, which prioritise the market value and undoubtedly thereby encourage the rapid circulation of shares from owner to owner (the average duration of share ownership is just eight months), in order to make profits on their resale. The indexation of the remuneration of portfolio managers on these immediate profits is an additional factor that has undeniably had the same effect.

1.2.6. REFLECTION ON THE FUTURE OF EUROPEAN COMPANY LAW (2012)

European company law is a cornerstone of the internal market. EU company law has evolved significantly over the last 40 years, with the scope of EU harmonisation covering: the protection of interest of shareholders and others, the constitution and maintenance of public limited-liability company capital, takeover bids, mergers and splits, shareholder rights and related areas such as accountability and financial reporting.

In recent times, however, the adoption of European company law initiatives has become more difficult, although at the same time, the cross-border dimension of business has grown tremendously both from a company and from a consumer perspective.

Against this backdrop, DG Internal Market and Services launched a reflection exercise at the end of 2010 with the creation of an ad hoc reflection group composed of eminent academics.

This group presented a report to the Commission which contained a number of recommendations for action. The report was discussed at a public conference in Brussels on 16 and 17 May 2011.

In February 2012, the Commission launched a public consultation to gather the views of all stakeholders. This consultation included the following questions:

Objectives and scope of European company law
- What should be the main objectives of EU company law?
- Are the existing rules fit for today’s challenges? In which areas is there need for further evolution?
- What relationship between company law and corporate governance?

Codification of European company law
- Should the existing company law Directives be merged in a single instrument in order to make the regulatory framework more accessible and user-friendly?

The future of company legal forms at European level
- What are the advantages and shortcomings of European company forms?
- Do existing company forms need to be reviewed?
- Should alternative instruments be explored?
Cross-border mobility for companies
- What can be done to facilitate the cross-border transfer of a company’s seat?
- What if a company splits into different entities cross-border?
- Should the rules on cross-border mergers be reviewed?

Groups of companies, i.e. a set of companies under a single management or source of control
- Is there need for EU policy action in this field?

Capital regime for European companies
- Should the existing minimum legal capital requirements and rules on capital maintenance be modified and updated?

Towards the end of the first half of 2012, Michel Barnier will announce possible initiatives on corporate governance and company law.

For the sake of consistency with the public consultation carried out in 2011 on corporate governance (Green Paper), any follow-up actions in these two fields will be announced jointly in the second half of 2012.

Both policy fields are closely linked: some corporate governance rules are enshrined in company law, and company law deals to a large extent with corporate governance issues.

1.2.7. Resolution of the European Parliament on a corporate governance framework for European companies (29 March 2012)

For its part, the European Parliament, while it welcomes the Commission’s revision of the EU corporate governance framework initiated by the Green Paper, regrets that important corporate governance issues have been left out of the Green Paper, including:

- board decision-making,
- directors’ responsibility, directors’ independence,
- conflicts of interest or stakeholders’ involvement.

For this reason, the European Parliament has adopted a resolution that devotes numerous developments to issues relating to shareholders.

1.2.7.1. Shareholder engagement

The European Parliament believes that shareholders’ engagement with the company should be encouraged by enhancing their role, but that this involvement should be a discretionary choice and never an obligation.

Therefore, Parliament calls on the Commission to amend the Shareholders’ Rights Directive in such a way as to evaluate by what means shareholders’ participation can be further enhanced, especially with regard to cross-border shareholders, taking into account, for example, the role of electronic voting at general meetings of listed companies.

There also seems to be a need for a clear-cut definition of ‘acting in concert’, as the lack of uniform rules constitutes one of the main obstacles to shareholders’ cooperation.

Finally, although the protection of minority shareholders is an issue which is addressed by national company law provisions, Union action might be useful to promote proxy voting.
1.2.7.2. Shareholder identification

Measures to incentivise long-term investment should be considered, as well as a requirement for full transparency of voting for any borrowed shares, apart from bearer shares.

With regard to the form these shares might take (which determines the anonymity that can be claimed by their holders), companies should be entitled to choose between a registered shares regime and a bearer shares regime.

As a result, if they choose registered shares, companies should be entitled to know the identity of their owners and minimum harmonisation requirements should be set at EU level for the disclosure of material shareholdings, although this should be without prejudice to the right of the owners of bearer shares not to disclose their identity.

1.2.7.3. Institutional investors

Institutional investor behaviour aimed at creating liquidity and keeping good ratings should also be reconsidered, as this only encourages short-term shareholding by such investors.

The specific case of institutional investors warrants further elaboration: these have the fundamental duty to protect their investments. Therefore, it is their responsibility to monitor the asset manager they have appointed with regard to strategies, costs, trading and the extent to which this asset manager engages with the investee companies, and therefore to require adequate transparency in the performance of the fiduciary duties.

In this connection, institutional investors should be free to design the relevant incentive structures in their professional relationships with asset managers.

1.2.7.4. Transparency

The Shareholders’ Rights Directive endorses the principle of equal treatment of shareholders and therefore all shareholders (institutional or not) are entitled to receive the same information from the company, irrespective of their stake.

Consequently, the Commission should bring forward proportionate proposals for Europe-wide guidelines on the type of information released to shareholders in annual company reports, whereby this information must be of a high quality and informative.

More importantly, there is a lack of long-term focus within the market and the Commission should therefore review all relevant legislation to assess whether any requirements have inadvertently added to short-termism.

Under these circumstances, the Parliament believes that there is reason to welcome, in particular, the Commission’s proposal to abandon the quarterly reporting requirement in the Transparency Directive, a requirement which adds little to shareholder knowledge and simply creates short-term trading opportunities.

1.2.7.5. Management of conflicts of interest

Proxy advisors play a very significant role, but their activities are often subject to conflicts of interest. Thus, conflicts of interest, including those of a potential nature, should always be disclosed and appropriate action is needed at EU level;

In this regard, the guidelines contained in the statement issued by the European Corporate Governance Forum on related party transactions for listed entities on 10 March 2011 must
be endorsed, with an invitation to the Commission to take action at EU level by means of a soft law measure such as a recommendation.

Accordingly, the Commission should ensure further regulation of proxy advisors, giving special attention to transparency and conflict-of-interest issues. By way of example, proxy advisors should be prohibited from providing consulting services for the investee company.

1.2.7.6. Corporate Governance

The development of Stewardship Codes for institutional investors across the European Union should be welcomed, but the real challenge lies in developing a European Stewardship Code drawing on existing models and in collaboration with national authorities.

However, the question of employee share ownership schemes is one which should be regulated at Member State level and left to negotiations between employers and employees: the possibility of participating in such a scheme should always be of a voluntary nature.
2. LEGISLATIVE PROVISIONS AND INITIATIVES OF THE MEMBER STATES

- When we examine the shortcomings of the situation with regard to corporate governance, the first question that arises is whether it is possible to oblige shareholders to exercise their rights, starting with the most important of these rights: the right to vote.

- For its part, the issuing company is obliged to respect every shareholder’s right to ‘vote with their feet’, i.e. their freedom to withdraw from the company by selling the shares they own under the best possible financial conditions, which assumes that adequate information is provided by the directors.

As our Belgian correspondent highlights, when it comes to shareholders’ rights as they are recognised by company law, the following rights can generally be distinguished, categorised according to their nature (financial or non-financial):

- Non-financial rights:
  - the right to attend, speak and address questions to directors or via the auditor in general meetings;
  - the right to vote on resolutions at general meetings (for example, on the appointment or removal of directors, on any change to the company articles of association or on fundamental restructuring);
  - the right to call a general meeting and add items to the agenda, provided that the shareholder represents at least 20% of the registered share capital;
  - the right to determine the overall remuneration of the management board unless otherwise stipulated in the company articles of association;
  - the right of control conferred on every shareholder in a unlisted company if the company has not appointed an external auditor.

- Financial rights:
  - right to receive dividends;
  - pre-emptive subscription right to a capital increase with a cash injection.

This traditional analysis is perfectly correct in company law, but we will add to it – with regard to the ‘financial’ rights of an equity securities holder – the right to sell one’s shares at the best price, even if that is a little far removed from company law proper and moves towards an inclusion in our reflection of the principles that make up the stock exchange regulations (which are often of EU origin).

It must also be said that questions regarding the rights (and obligations) of shareholders in the EU are usually prompted by the analysis of deficiencies observed in numerous listed companies in terms of corporate governance (the assumption being that the latter suffers due to a lack of engagement on the part of shareholders).

Generally, when we consider the rights of shareholders (and the responsibilities they hold alongside these rights), we distinguish between non-financial rights, which are linked to the shareholder’s role as partner with voting rights (Chapter 2.1) and financial rights, which are more closely connected with the role of the holder of an equity security (Chapter 2.2).
2.1. RIGHTS AND OBLIGATIONS OF SHAREHOLDERS AS PARTNERS WITH VOTING RIGHTS

Regarding the voting rights of shareholders in particular (1) – and their corresponding obligations (2) – it seemed that it would be interesting to compare the approaches adopted in the different Member States to determine the kind of rationale preferred in each system:

(i) Is it a case of establishing a soft incentive that includes an abundance of information intended to convince shareholders to demonstrate a now fully informed consent (voting, inclusion of resolutions, etc.) at general meetings?

(ii) Or is it rather a case of more mundane methods involving a good mix of the ‘carrot’ (with rewards for the stable portion of the shareholders) and the ‘stick’ (with punishment for disloyal behaviour)?

It must be noted that at the moment, the first point above represents the main rationale applied within the EU and is driven in particular by EU law, which has concentrated on the consideration of shareholders’ rights in connection with the holding of shareholders' meetings in listed companies to date.

2.1.1. RIGHTS OF SHAREHOLDERS AS PARTNERS WITH VOTING RIGHTS

The right to vote is one of the main prerogatives of a shareholder, since it allows the shareholder to behave as a ‘partner’, participating in collective decisions taken at the general meeting of shareholders.

The general meeting is the major opportunity given to shareholders to acknowledge their capacity as partners and give free rein to their personal ideas, which may prompt them to become attached to the affairs of the company (affectio societatis), although this latter is objectively weakened in a public limited liability company (a fortiori if it is listed) as compared with the situation in partnerships (which lie outside of the scope of this study).

In order to be able to fully exercise this right to vote, it is essential to be properly informed on the subjects that will be addressed during the general meeting, so that the consent given at the meeting will be fully informed.

When we examine the various national laws governing joint-stock companies within the EU, it also becomes apparent that the majority of rights granted to individual shareholders (viewed as partners) concern the information provided to them, either directly or indirectly (appointment of an auditor, management expertise, etc.) on the running of the company with which they are associated.

Naturally, these rights to information are really only of interest to shareholders who are not at the head of the company and are therefore not leading the company.

As a result, these rights are generally associated with the role of minority shareholder, which is common among the shareholders of listed companies (at least in those whose capital is widely dispersed among the public – which is not the case for the majority of SMEs and mid-sized companies).

It must also be said that EU law is especially concerned with the provision of information to shareholders in the case of listed companies, which are bound by an obligation to keep their shareholders continuously informed.
One of the rights that stands out with regard to the (non-financial) rights of the shareholder as a partner is the right to information (2.1.1.1.), which is essentially linked with the right to vote at a general meeting (2.1.1.3.), after a preparatory phase, if applicable (2.1.1.2.).

**2.1.1.1. The right to information**

Shareholders’ right to information, which allows them to act effectively as partners at meetings includes constant access to information in listed companies (A), together with regular information on the accounts (B) where appropriate, but it is mainly based on the provision of timely information linked to the convening of the general meeting (C).

**A) Right to continuous information**

The right to continuous information for shareholders (provided by the company through its directors) is expressly recognised in limited companies, although it must be recognised that the actual beneficiary of this information is really the ‘market’ – insofar as the communication of information that is deemed to be ‘insider information’ (in the sense of the ‘Market Abuse’ Directive) is intended for the public and not just for those who can be considered partners of the company.

This does not prevent certain Member States from laying down provisions authorising shareholders – including those in unlisted companies – to put questions to the company management.

In Lithuania, for example, shareholders who hold or control more than 50 % of the capital have the right to access all company documents on the condition that they will not divulge secrets linked to the activities of the company or any other confidential information. There may be doubts about how appropriate it is to include such an extreme level of transparency in the list of best practices while matters of economic intelligence are particularly acute in a world that is more open than ever to competition. In this regard, the risk of leaks seems to outweigh the benefits that can be expected from this system, despite its merits.

This right to ask questions is generally open ‘at any time’, but the directors of the company are not always obliged to respond to questions asked in relation to this right outside of the institutional framework of a meeting.

Indeed, shareholders' meetings are the forum in which the dialogue between shareholders and the management and/or supervisory bodies can truly develop (see below).

**B) Right to regular information (accounts)**

The second element prioritised by EU law with regard to shareholder information concerns financial statements and/or accounts that are communicated regularly to shareholders.

Here, too, a particular emphasis is placed on listed companies, which by definition have more shareholders than private companies (which face different problems, particularly with regard to protecting trade secrets).

In Sweden, in companies with 10 or fewer shareholders, each shareholder or shareholder representative may examine the accounts and the other documents relating to the company’s operations insofar as this shareholder is in a position to carry out these checks. The management or administrative body may also assist the shareholder, for example by...
providing surveys, or documents necessary for assessment of the company if the associated cost is reasonable. These documents must not be issued if doing so would harm the company.

Naturally, such a right would be incomplete were it not to be accompanied by the right to have these accounts verified by impartial experts.

Therefore, many Member States recognise the right of the shareholder to examine the matter in more detail.

Thus, in Latvia (for example), shareholders are granted the following rights:

- right to appoint an expert from the commercial registry to inspect the conditions in which the company was founded (valid one year from the founding of the company);
- right to object to the appointment of an auditor, valid for two months from the appointment;
- right to call in another auditor at his own expense;
- right to request the deferral of the company’s annual report;
- right to request an internal audit within the company;
- right to request the company auditor (if appointed) to audit the company’s activities and the annual report.

In Denmark, shareholders who hold at least one tenth of the capital can elect an additional auditor.

In France, the law (Article L. 242-6 of the Commercial Code) provides additional protection for shareholders by penalising false accounting with a prison term of five years and a fine of EUR 375 000. This offence is defined as ‘the publication’ - by a director, for example- ‘or the presentation to shareholders, even without any distribution of dividends, of annual accounts that do not present an accurate reflection of the results for the year’s operations, the financial situation and the assets at the end of this period with a view to concealing the true situation of the company’.

The content of the accounts (consolidated where applicable) is an important factor in informing shareholders about the quality of the management provided by the company directors, under the supervision of the competent body (board).

C) Right to timely information

In order for shareholders to know what to stand by and to be encouraged to make any possible contributions, it is normal that they are informed about the agenda planned by the company management and/or its supervisory body for the next general meeting to which they will be invited.

In Greece, upon the request of any shareholder, the board must provide those attending the general meeting with the specific information requested about the company’s affairs with regard to the items on the agenda.

At this point, it is important to highlight that this meeting of shareholders, who are invited to make up the highest-ranking body of the company – entitled to question the management mandate entrusted to the directors – takes place (at least) once per year as a matter of necessity, even if this is only to approve the accounts for the financial year that has just closed.
2.1.1.2. Right to participate in the preparation of the general meeting (general meeting)

In view of the major significance of the general meeting for shareholders, to whom it offers a rare opportunity to fulfil their role as partners (A), it is normal for company law to grant them a number of rights related to the preparation for such a meeting (B).

A) The major significance of a general meeting

Frequently described as the ‘supreme’ or ‘sovereign’ corporate body, the general meeting is solely responsible for taking the most important decisions – for the long term – in the lifetime of a company.

These include:

(i) not only approval of the accounts and nomination of the members of the supervisory bodies;

(ii) but also amendment of the statues where necessary (the object of the company, capital increase or reduction) or the removal of the company (mergers or liquidation).

In many Member States, the first set of resolutions (paragraph (i) above) are generally adopted by a simple majority at an ‘ordinary’ general meeting (OGM), while the second set are adopted by a qualified majority at an ‘extraordinary’ general meeting (EGM).
## Table 1: Majority at general meeting

<table>
<thead>
<tr>
<th></th>
<th>Simple majority: (OGM)</th>
<th>Qualified majority (EGM)</th>
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<tbody>
<tr>
<td><strong>Germany</strong></td>
<td>• Amendment of articles of association</td>
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<td>• Modification of company structure</td>
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<td>• Authorisation of decisions that lie outside of the articles of association</td>
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<td>• Appointment of auditors</td>
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<td>• Approval of all decisions directly and significantly affecting the interests of shareholders</td>
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<td><strong>Austria</strong></td>
<td>• Appointment of members of management bodies</td>
<td>Majority: 3/4</td>
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<td>• Determination of their remuneration</td>
<td>• Amendment of articles of association</td>
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<td>• Acceptance or rejection of a takeover bid</td>
<td>• Share capital increases or decreases</td>
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<td>• Stock option plan</td>
<td>• Transformation of the company into a European company</td>
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<tr>
<td><strong>Belgium</strong></td>
<td>• Approval of the annual accounts</td>
<td>Quorum: 1/2 at the first meeting, no quorum for the second meeting</td>
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<td></td>
<td>• Approval of the management report</td>
<td>Majority: 3/4</td>
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<td>• Approval of the auditor’s report</td>
<td>• Amendment of articles of association</td>
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<td>• Capital increase</td>
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<td>• Amendment of rights</td>
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<td>Quorum: 1/2 at the first meeting, no quorum for the second meeting</td>
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<td>Majority: 4/5</td>
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<td>- Modification of the object of the company</td>
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<td><strong>Bulgaria</strong></td>
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<td><strong>Majority:</strong> 2/3</td>
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<td>- Amendment of articles of association</td>
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<td>- Capital increases or decreases</td>
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<td>- Change to corporate form of the company</td>
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<td>- Winding-up of the company;</td>
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<td><strong>Cyprus</strong></td>
<td><strong>Majority:</strong> 3/4</td>
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<td><strong>Denmark</strong></td>
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<td>Country</td>
<td>Simple majority: (OGM)</td>
<td>Qualified majority (EGM)</td>
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</table>
| Spain   | • Amendment of articles of association  
          • Modification of company structure  
          • Buy-back of company shares or shares in another company  
          • Approval of the annual accounts  
          • Allocation of profits and losses  
          • Appointment and removal of members of the management bodies  
          • Liquidation of the company |  |
| Estonia | • Approval of the annual accounts  
          • Allocation of profits and losses  
          • Appointment and removal of members of the management bodies  
          • Determination of their remuneration  
          • Appointment of auditors | Majority: 2/3  
          • Amendment of articles of association |
| Finland | • Approval of the annual accounts  
          • Appointment and removal of members of the management bodies  
          • Allocation of profits and losses | Majority: 2/3  
          • Amendment of articles of association  
          • Buy-back of company shares or shares in another company  
          • Issue of shares with or without the right of pre- |
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<tr>
<th>Country</th>
<th>Simple majority: (OGM)</th>
<th>Qualified majority (EGM)</th>
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<tr>
<td>France</td>
<td>Quorum: 1/5 at the first meeting, no quorum for the second meeting</td>
<td>Quorum: 1/4 at the first meeting, 1/5 for the second meeting</td>
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<td>Majority: 1/2</td>
<td>Majority: 2/3</td>
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<td>- Approval of the annual accounts</td>
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<td>- Appointment and removal of members of the management bodies</td>
<td>- Capital increase</td>
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<td>Greece</td>
<td>Amendment of articles of association</td>
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<td>- Share capital increases or decreases</td>
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<td>- Allocation of profits and losses</td>
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<td>- Winding-up, liquidation, mergers of the company</td>
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<td>Hungary</td>
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<td>Approval of financial aid for the purchase of or subscription for shares</td>
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<td>Approval of an agreement between the company and its creditors</td>
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<th>Ireland</th>
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<td>Quorum: 1/2 at the first meeting, 1/3 at the second meeting</td>
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<td>Approval of the annual accounts</td>
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<td>Appointment and removal of members of the management bodies</td>
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<td>Determination of their remuneration</td>
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<td>Decisions on liability of members</td>
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<td>Allocation of profits and losses</td>
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<p>| Quorum: 1/2 at the first meeting, 1/3 at the second meeting |
| Majority: 1/2 at the first meeting, 2/3 at the second meeting |
| Approval of the annual accounts |
| Appointment and removal of liquidators and determination of their powers |</p>
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<th>Simple majority: (OGM)</th>
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<td>• Appointment of auditors</td>
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<td>Latvia</td>
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<td>• Amendment of articles of association</td>
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<td>• Allocation of profits and losses</td>
<td>• Issue of financial products</td>
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<td>Lithuania</td>
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<td>• Shareholder renunciation of right of pre-emption for acquiring newly issued</td>
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<td>Modification of company structure</td>
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<td>Share capital increases within the authorised limits</td>
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<td>Authorisation of members of the administrative board to conduct a capital increase</td>
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<td>Winding-up, liquidation, mergers of the company</td>
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<td>Appointment and removal of auditors</td>
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<td>[Netherlands</td>
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<td>Issue of shares with or without the right of pre-emption</td>
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<td>Reduction of share capital;</td>
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<td>Approval of significant contracts concluded by the</td>
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<td>Simple majority: (OGM)</td>
<td>Qualified majority (EGM)</td>
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<td>• Appointment and removal of members of the management bodies</td>
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<td>• Winding-up, liquidation, mergers or splitting of the company</td>
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<td><strong>Poland</strong></td>
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<td>• Amendment of articles of association</td>
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<tr>
<td>• Approval of the annual accounts and operations of the company</td>
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<td>• Issue of convertible bonds with or without the right of pre-emption</td>
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<td>• Capital increase through subscription for warrants</td>
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<td>• Buy-back of company shares or shares in another company</td>
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<td>• Winding-up, liquidation, mergers of the company</td>
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<td><strong>Portugal</strong></td>
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<td>• Appointment and removal of members of the management bodies</td>
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<td><strong>Quorum:</strong> 1/3 at the first meeting, no quorum for the second meeting</td>
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<td><strong>Majority:</strong> 2/3</td>
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<td>• Winding-up, liquidation, mergers of the company.</td>
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*Note: if the quorum is 1/2 at the second meeting, a simple majority*
<table>
<thead>
<tr>
<th>Czech Republic</th>
<th>Simple majority: (OGM)</th>
<th>Qualified majority (EGM)</th>
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<tr>
<th>Romania:</th>
<th>Quorum: 1/2 at the first meeting, no quorum at the second meeting</th>
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<td></td>
<td>Majority: 1/2</td>
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<td></td>
<td>• Determination of their remuneration</td>
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<td></td>
<td>Quorum: 3/4 at the first meeting, 1/2 at the second meeting</td>
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<td></td>
<td>Majority: 1/2 at the first meeting, 1/3 at the second meeting</td>
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<td></td>
<td>• Amendment of articles of association</td>
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<td>(OGM)</td>
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<td>• Change of company registered office</td>
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<td>• Modification of the object of the company</td>
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<td>• Extension of company lifetime</td>
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<td>• Winding-up of the company;</td>
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<td><strong>United Kingdom</strong></td>
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<td>• Amendment of articles of association</td>
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<td>• Capital reduction</td>
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<td>• Buy-back of company shares or shares in another company</td>
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<tr>
<td>• Removal of auditors</td>
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<td>• Approval of limitation of the liability of the auditor with regard to the company</td>
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<td>• Change to corporate form of the company</td>
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<td><strong>Slovakia:</strong></td>
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<td>• Amendment of articles of association</td>
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<td>• Share capital increases or decreases</td>
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<td>• Appointment and removal of members of the management bodies</td>
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<td>• Determination of their remuneration</td>
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<td>• Approval of the annual accounts</td>
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<td>• Winding-up, liquidation, mergers, splitting of the</td>
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<td>Country</td>
<td>Simple majority: (OGM)</td>
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| Slovenia | Appointment of a special commissioner for:  
- monitoring the decisions of the company  
- reporting on the decision to increase or decrease the share capital  
- verification of the annual accounts |
| Sweden   |  
- Approval of the annual accounts  
- Appointment and removal of members of the management bodies  
- Determination of their remuneration  
- Allocation of profits and losses |

**Source:** Jeantet Associés
B) Rights relating to the preparation of a general meeting

Directive 2007/36/CE contains a series of rules aimed in particular at protecting the interests of minority shareholders in listed companies within the EU, although it also applies to shareholders in general and includes, inter alia, provisions regulating:

- the organisation of the general meeting of shareholders and the content of the relevant notification,
- the right to include items on the agenda of the general meeting,
- the right to vote electronically, and
- the right to ask questions in advance of the meeting.

In France, it is possible to address **written questions** to the management board, which the board is obliged to answer (during the general meeting or by posting on the company’s website) if the legal deadlines have been observed. The content of the response is always left fully to the discretion of the board, although the submitter may not be satisfied with it.

With regard to the understanding of these rights, it is interesting to note that certain Member States have tried to make distinctions based not only of the degree of participation, but also on the length of time the shareholders have held capital in the company, in order to prioritise those who can prove having held their shares for longer.

Furthermore, in Bulgaria, shareholders are permitted to call a general meeting and submit items for the agenda for this general meeting **if they have held shares making up at least 5 % of the company’s capital for more than three months.**

The majority of Member States have set a limit below which shareholders may not exercise their rights, which thus benefits only ‘significant’ shareholders who are, on this basis, considered **legitimate** in terms of the right to influence the holding or the content of a general meeting.

In this regard, a distinction is often made whereby the right is based on **the inclusion of an additional resolution (or ‘items’) on the agenda** of a general meeting that has already been called or on the **convening** itself of the general meeting (which may require a higher percentage of shares).

The threshold beyond which a shareholder is considered significant (in particular for the purposes of being permitted to call a general meeting) varies from country to country, although the figure of **5 %** seems to represent a minimum value (which, incidentally, is in line with the stock market regulations on the **passing of thresholds** based on the Transparency Directive, which also begin to apply from 5 %).

To give one example (although there are many others), in Poland, one or more shareholders making up at least one-twentieth of the share capital of a joint-stock company may call an extraordinary general meeting (Articles 236 and 400 of the Polish Commercial Company Code).

Nonetheless, there are exceptions regarding the willingness of certain Member States to prioritise minority shareholders, including when their importance in terms of the capital of the company can be seen as minimal.

In Italy, too, the right to request additions to the agenda in writing (Article 126a UFA) is expressly granted to shareholders who, individually or jointly, represent **at least 2.5 %** of the equity capital.
It should also be highlighted that the law on the protection of investors (Savings Law) was adopted by the Italian Parliament on 28 December 2005. It entered into force on 12 January 2006.

This law provides that a listed Italian company is obliged to reserve at least one post of director for a minority shareholder.

This post must be reserved for the minority shareholder holding between 0.5% and 2.5% of voting rights (this percentage varies based on the size of the company) who gets the largest number of votes.

In principle, the agenda for a general meeting (which, where applicable, includes draft resolutions submitted by shareholders) is intangible and the general meeting may normally not rule on other matters (which explains the importance of being able to change it) with the exception of removing corporate officers during the meeting.

Nonetheless, in Estonia, a resolution that was not initially included on the agenda for a general meeting can be included in the meeting with the consent of at least nine-tenths of the shareholders participating in the general meeting (if their shares represent at least two-thirds of the capital).

2.1.1.3. Right to vote

Aside from the preparations for a general meeting, the main associate right available to a shareholder is the right to participate in this meeting, either directly, by exercising his own right to vote (A) (with the possibility to increase this right in some cases based on criteria such as his seniority (B)), or indirectly, by appointing another person as a proxy holder (C).

A) Distinction between ‘participating and ‘voting’

In some European countries (such as France), a ‘subtle’ distinction is made between the right to vote at the general meeting (which assumes that shares have been registered at least three days previously – ‘record date’) and the right to participate ‘physically’ in the general meeting, including the right to participate without a right to vote (which is the case for people who have become shareholders after the ‘record date’) but by taking part in the discussions.

In France, the right to ‘participate’ in general meetings constitutes the fundamental right all partners should hold (even if they do not have any voting rights, as in certain cases of division of share ownership whereby all voting rights – both at OGMs and at EGMs – are granted to the usufructuary).

This right (which can nonetheless be considered as logically being accompanied by the right to express one’s will by means of a vote) is recognised by the Civil Code and protected by the law, since the law penalises interference, which consists in preventing a shareholder (by force, if applicable) from exercising this right by entering (and remaining in) the room in which the general meeting is taking place.

In Spain, the articles of association of a public limited liability company can make it a requirement to hold a minimum amount of capital in order to have the right to attend the general meeting.
B) Multiple voting rights

Although the ‘one share/one vote’ rule is generally applied within the EU (to the extent that certain countries, such as Bulgaria, are making it mandatory, especially in listed companies), many Member States recognise the possibility to award multiple voting rights to certain share categories, thereby allowing their owners more weight in collective decisions than their percentage of the capital would otherwise permit.

Thus, Polish law allows plural or differentiated voting rights to be granted in certain circumstances.

- These rights can be granted upon the issue of shares that are allocated special rights (preferred shares – Articles 174 and 351 of the Commercial Companies Code) or to a particular shareholder (personal rights – Article 354 of the Commercial Companies Code).

- The granting of these rights may depend on the period for which the shares have been held. However, in the case of a joint-stock company, a share may not be allocated more than two votes (Article 352 of the Commercial Companies Code).

According to Danish company law, all shares are allocated voting rights. Nonetheless, the articles of association may provide that certain shares do not carry any voting rights and that the voting power associated with certain shares differs from that associated with other shares.

- One possible solution would be to increase the voting power in proportion to the period for which the shares have been held, but this mechanism is rarely used.

- A system with additional voting rights for certain shares requires considerable preparation and continuous maintenance of the share registration system in which the period of ownership of the shares is recorded and monitored.

- Currently, neither the Danish Business Authority nor the majority of companies are prepared to do this. Furthermore, these actions could complicate the transfer of control of businesses, since the buyer cannot benefit from additional voting rights linked to the period of ownership.

A study conducted in 2007 under the leadership of ISS Europe showed that instruments allowing for the separation of control from capital ownership through various control-enhancing mechanisms (CEMs) were used in 44% of the 464 European companies considered. The countries in which CEMs are most frequently used (in decreasing order) are France, Sweden, Spain, Hungary and Belgium.

This analysis, carried out by the Commission services, does not allow us to conclude that such mechanisms are harmful (contrary to the general feeling amongst investors).

Therefore, it could be suggested that the development of incentive systems aimed at granting more voting rights to those shareholders who can prove deeper loyalty by continuing to hold company capital should be encouraged.

The Reflection Group on the Future of European Company Law focused on the French example of the double voting rights that are automatically granted to registered shareholders whose names are in the company register for more than two years continuously (the articles of association may determine the minimum period).
C) The right to grant a proxy

Directive 2007/36/CE strengthens the rights of shareholders in listed companies within the EU, particularly with regard to proxy voting rights, the possibility of participating in general meetings via electronic means and ensuring that cross-border voting rights can be exercised.

In Sweden, permission signed and dated by the shareholder allows the proxy recipient to attend the general meeting in his place.

In Belgium, a shareholder may normally vote by proxy at the general meeting and the articles of association of listed companies may not limit the possibility to designate people as representatives (Article 547(a) CBS).

However, certain restrictions still apply. Thus, in a limited liability company (NV/SA) which makes a public offering (such as a listed company on a regulated market), a proxy application must mention the following (Article 548 CBS):

- the agenda;
- a list of instructions for exercising voting rights with regard to the various topics on the agenda;
- a communication on how the representative shall vote in the absence of instruction from the shareholder;
- if the application does not contain this information, it may be declared null and void.

In Greece, the representative is still bound to vote in accordance with the voting instructions provided by the shareholder and must even keep a record of these instructions for at least one year from the meeting minutes being sent to the competent authority.

Furthermore, before the general meeting begins, the person acting as a representative for a shareholder must also communicate to the company all the specific facts which may be relevant for the shareholders in assessing any risk that the proxy holder might pursue any interest other than the interest of the shareholder.

The option open to a shareholder to be represented by more than one representative differs according to whether the company is listed or not.

- In unlisted companies, only shareholders who are legal persons may be represented at any general meeting by a maximum of three people.
- In listed companies, a similar restriction (a maximum of three representatives) is provided in the law for all shareholders, whether these are legal persons or natural persons.

The articles of association of Italian unlisted companies may exclude the use of proxies. The representative may only be replaced by the person named in the proxy. Proxies may not be granted to a person representing more than 20 shareholders.

In listed Italian companies, any person with voting rights may nominate a single representative for each shareholders’ meeting (with certain exceptions), without prejudice to the right to nominate substitutes (Article 135h UFA).

In Finland, dividing the voting rights of a shareholder who grants proxies to several representatives (each one of whom can express a fraction of the total vote) is not possible in an unlisted company, although it is possible in listed companies.
In the United Kingdom, a shareholder may also not grant more than one proxy (split not allowed) and the recipient of a proxy must vote according to the instructions of the shareholder being represented.

In France, since the entry into force of Order No 2010-1511 on 9 December 2010 (this Order only applies to listed companies on a regulated market or on the Alternext market), any shareholder may now appoint a representative of his choice, even if this representative is not a spouse or another shareholder.

In Spain, the identity of the recipients of a proxy varies according to the type of company and/or whether its shares have been admitted for trading on a regulated market.

- In SL companies (Sociedad de Responsabilidad Limitada), the shareholder may only be represented by his spouse, a parent or child, another shareholder or by any person who holds a general mandate in the form of a public document permitting him to administer all the assets of the shareholder in question.
- In unlisted public limited liability companies: the recipient of the proxy must not be a shareholder and the option to use a proxy may be removed by the articles of association. Proxies are granted in writing or by means of distance communication and for each meeting.
- In listed public limited liability companies: a clause preventing a shareholder from appointing a representative is null. The articles of association may prohibit the replacement of the recipient of a proxy by a third party without prejudice to the nomination of a natural person when the nominator is a legal person (Article 522 of the Capital Company Act (LSC)). A situation of conflict of interest must be anticipated: prevention or information if the conflict of interest arises in the course of the mandate. The mandate may be revoked at any time and shall be considered null if the shareholder ultimately attends the meeting.

Polish law permits the granting of a proxy by the shareholders to another person to attend the general meeting and exercise their voting rights, provided that the representative is neither a member of the management nor an employee of the company (Articles 243 and 4122 of the Commercial Companies Code), unless the company is a listed company.

2.1.2. OBLIGATIONS OF SHAREHOLDERS AS PARTNERS WITH VOTING RIGHTS

None of the Member States of the EU plans to oblige shareholders to exercise their voting rights: each is free in principle to do so or to abstain.

With regard to the possible imposition of penalties in the case of absenteeism from the general meeting (a problem that affects many listed companies in the EU), this is clearly a ‘taboo’ issue in most Member States, but a number of them accept that shareholders’ rights can be cut back substantially (loss of dividends, for example) when they fail to pay-up the price of their shares by the prescribed legal deadline.

It must be said that paying-up shares seems to be unanimously considered a shareholder ‘obligation’, while voting is exclusively viewed as a ‘right’ (which, as a result, all shareholders are free to exercise or not).

However, the idea that shareholders should be ‘obliged’ to fulfil their duties as partners by voting re-emerges periodically, as with, for example, the suggestion by the Commission in its Recommendation 2009/395/EC that ‘shareholders should be encouraged to attend general meetings where appropriate and make considered use of their votes’.
However, the Commission added in this regard that ‘in particular, institutional shareholders should take a leading role in the context of ensuring increased accountability of boards with regard to remuneration issues’.

It is true that institutional investors constitute a particular category of shareholder, while their investment managers often belong to regulated professions (investment service providers, credit institutions, etc.) over which the national regulators can have an influence as supervisory authorities.

Thus, with regard to Undertakings for Collective Investment in Transferable Securities (UCITS), a legal incentive is in place in France for managers to participate in general meetings. If they fail to attend, they must explain their reasons for not doing so.

Currently, rather than obliging shareholders to use their votes at the general meeting, the approach taken in EU law is to encourage and facilitate proxy voting, accepting that shareholders may even be solicited in this sense.

In Italy, the UFA regulates the active solicitation of proxies (i.e. a request made to more than 200 shareholders for a proxy, accompanied by a specific voting intention or by recommendations, declarations or other indications likely to direct the vote). Solicitation is carried out by the promoter by means of the publication of a prospectus and a proxy form. In such a case, the proxies may only be granted for a meeting that has already been called, remaining in effect for subsequent meetings if appropriate. Proxies must not be granted ‘carte blanche’ and must indicate the date, the name of the person nominated and the voting instructions. The representative may also be elected for a limited number of voting proposals indicated in the proxy form, or for certain items on the agenda.

By contrast, the freedom to vote is not absolute and can be subject to limitations, particularly regarding the obligations imposed on shareholders with regard to the company.

In Germany, we see the recognition of a shareholder’s duties as applicable with regard to a higher interest, even if he is the sole shareholder. Corporate benefit is always the priority, both in management decision-making and in meetings.

In Austria, abuse of voting rights contrary to fiduciary duties with regard to the company and/or other shareholders may result in the annulment of the resolution of the shareholders having perpetuated such abuse.

Similarly, Czech law recognises the concept of the duty of loyalty for shareholders with regard to the company, which prohibits them from acting contrary to the interests of the business (without there being a body responsible for defining such an interest). This concept (developed based on case-law) is rather new in the Czech Republic and was influenced by the German concept of shareholder relationships (amongst themselves and with regard to the company) in limited liability companies (akciová společnost).
Map 1: Countries that have imposed limitations on the freedom to vote

Although we cannot yet speak of a true ‘fiduciary duty’ of shareholders (outside of the countries highlighted on the map above) with regard to the company of which they are partners (a role that offers them voting rights within the sovereign corporate body, i.e. the general meeting), it seems normal that, along with the rights they enjoy, shareholders should be bound by certain corresponding obligations.

Thus, the notion that it would be beneficial to hold a real dialogue between the company and its partners is rather widespread, particularly with regard to listed companies, the shareholders of which are often presumed to be widely distributed amongst the public (although a great many listed mid-sized companies are also controlled by family or entrepreneurial shareholders as unlisted companies, some of which, by contrast, are open to a multitude of small shareholders).

Naturally, the main opportunity for such a dialogue arises each year at the ordinary general meeting (at which the accounts are approved and the mandates given to the directors are confirmed as appropriate), in which it is therefore important for shareholders to participate. But such participation may also be anticipated, and this assumes that the company (and its directors) has information about its shareholders (at least the main shareholders) in order to contact them.

According to the Reflection Group on the Future of European Company Law, there is no valid reason why a company should be refused the right to know the identities of its shareholders (and therefore, the latter are obliged to reveal this information), provided, however, that this information can remain confidential and will only be used by the company for its own needs, such as to enter into dialogue with its shareholders.
Conversely, some Member States apply criminal penalties to ensure the quality of this dialogue on the part of the shareholders. In Estonia, also, the provision of incorrect information to the shareholders present at a general meeting by the representative of a shareholder is punishable by a fine of up to 100 krooni\textsuperscript{30} (Estonian currency unit).

The establishment of a real, quality ‘dialogue’ between the company and its associates primarily involves a reporting obligation being imposed on the shareholders (2.1.2.1.) who must also adopt a ‘disinterested’ attitude with regard to their participation in the general meeting (2.1.2.2.) or abstain from voting in certain special cases (2.1.2.3.).

\subsection*{2.1.2.1. Reporting obligation}

The first duty of shareholders with regard to the company of which they are partners is to make themselves known, whether this be by means of an identification procedure initiated by the issuer (A), by providing notice of crossing of thresholds (B) or by registering with the intention of participating in a general meeting (C), with specific obligations restricting ‘empty voting’ (D).

\subsubsection*{A) Identification by the issuer}

Many Member States have provided that issuers may enquire as to the identity of the persons who hold or ‘control’ (which allows the scope to be widened to include economic beneficiaries) their shares, including more severe penalties which are applied directly to deny shareholders their rights in cases when the required information is not provided.

In Poland, a shareholder may also not exercise his voting rights if he has not responded to questions on the number of shares or votes held (Article 6(4-5) of the Commercial Companies Code).

The same applies in the United Kingdom (Part 22 of the Company Act 2006) and in France, where shareholders who fail to provide this information can be deprived, not only of their voting rights, but also of their right to dividends.

\textit{Registration}

With regard to the individual identification of shareholders, nothing can replace their registration in the company records (kept by the company itself or by one of its representatives).

However, from the outset, it must be recognised that this basic process is not sufficient if the intention is to have a precise idea of the real powers present in a listed company whose shares are widely distributed among the public.

Indeed, this registration does not reveal the alliances or common interests that may exist between the various shareholders named on the registers.

It is also for this reason that the regulation of threshold crossings (which integrates this dimension through assimilation among those acting in concert) remains relevant.

\textsuperscript{30} EUR 1 = EEK 15 6466 on 1 January 2011
**Conversion to bearer**

However, the right to convert the form to the bearer is generally considered to promote the fluidity of transactions, particularly share transactions, although the majority of companies have adopted it.

This is why certain Member States (such as France) have made provisions authorising issuers whose shares are anonymous for the sake of conversion to the bearer to lift this veil, requesting the central depository to reveal the identity of these bearers.

The fact remains, however, that this (relatively costly) procedure is necessarily an exception and is far from satisfactory from the perspective of entering into dialogue with shareholders, since the shareholders may have changed before the company has received the results.

**Final beneficiary**

Furthermore, it is not always clear that the person registered in the accounts (if the account is a personal account, whether it is purely personal or administered, or an open account opened with an authorised intermediary) is the real owner of the shares, particularly if they come from a country that recognises the idea of beneficial ownership.

This is why certain Member States (such as France) have established procedures allowing issuers to cut through the screen in front of the apparent shareholders to ask them to reveal the names of their clients (final beneficiary).

Conversely, certain measures can be planned to encourage the financial institution in which the shares are deposited to participate in general meetings and vote at these meetings in the name of and on behalf of their clients (See ‘registered intermediaries’ in France).

In Germany, financial intermediaries and institutional investors may not exercise the rights linked to shares ownership in their own names, but may **only do so in the name of the shareholder**.

Conversely, in Spain, an investment service provider (ISP) may exercise votes in its own name if its clients have granted it proxy.

**B) Threshold crossing**

The reporting obligation is even more important in listed companies, since their shareholders are subject to a very high level of turnover, with each shareholder only involved with the company capital for an average of eight months.

For this reason also, in 2004, the Transparency Directive supplemented – and updated – the old system established by the 1988 Directive, which included the obligation to publicly declare the crossing of a certain number of thresholds (expressed as a percentage of voting rights) considered to be significant.

However, this information is not exclusively aimed at the issuer, so as to promote possible contact with its most important shareholders, with which it may be appropriate to engage in a constructive dialogue from the perspective of corporate governance (see above).

Regulating threshold crossings in listed companies goes hand in hand with information provided to the market supervisory authorities and, indirectly, investors among the public: the composition of the shareholder body (in big groups) as well as its development (block movements) is a rich source of details likely to affect the share price (which is relevant for shareholders as owners of capital shares).
Rights and obligations of shareholders

Similarly, when the issuing company pursues its activities in a regulated sector (banking, insurance, investment), this particularity justifies the necessity for its shareholders to be known, but this is more the business of the supervisory authority for the sector than the issuer itself. Sanctions may thus consist in contesting the rights of the incompliant shareholder before the authority.

Thus, in Bulgaria, a shareholder who has acquired shares in an insurance company or a bank without the prior approval of the responsible supervisory authority may not exercise rights with regard to the shares acquired (i.e. the acquisition is considered invalid).

It is also interesting to note that before the modification of the Transparency Directive, which suggests that the Member States’ regulatory authorities have the right to deny incompliant shareholders part of their voting rights, this type of sanction had already been provided for in national regulations.

In France, this denial of rights is considered ‘automatic’ until the expiry of a deadline of two years from the situation being resolved and is based on the total voting rights corresponding to this part of the shares exceeding the threshold, and for which no regular reporting was carried out.

In other EU countries, this penalty is not automatic and implementing it requires the intervention of a criminal or civil court judge.

For example, in Ireland, a person who does not meet the obligation to disclose an interest in a company within the appropriate period shall be considered guilty of an offence (Article 53(7) of the Companies Act 1990). Section 58(3) of the Companies Act 1990 lays down that a person failing to fulfil an obligation to which he is subject may not enforce any right or interest of any kind in respect of the shares concerned in a court action or prosecution, unless an exemption order is obtained from the High Court.

In Austria, the articles of association of a joint-stock company (Satzung) may provide that voting rights can be partially or fully suspended where a shareholder does not meet his disclosure obligations, which, for companies listed on a stock exchange, may include the legal requirement to declare ownership of 5 % or more of the shares of a company, but also contractual reporting obligations based on exchange regulations.

- The shareholder concerned may either be prevented from voting (in this case, his votes will not be taken into consideration in the calculation of capital or in the calculation of the required majority) or have the percentage of votes available to him reduced (which allows him to participate in a vote, where his votes will be taken into consideration for the required majority).
- Generally, the power to exercise voting rights will be suspended until the shareholder has fulfilled the applicable reporting obligations. The suspension of voting rights does not apply to a transferee of the shares concerned unless the transferee himself is in violation of the reporting obligations.

In Poland, with regard to listed companies, a shareholder must abstain from exercising his voting rights where he has not provided information to the competent authorities (Financial Supervision Authority) or the company with regard to the crossing of certain thresholds or if he has neglected to follow the applicable procedure for the acquisition of shares beyond certain thresholds (when the sale/exchange of shares has been requested) (Article 89 of the Takeover Act).

The law on transferable securities in the Republic of Lithuania includes an obligation for persons who have acquired 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 %, 75 % or 95 % of the votes at the General Shareholders’ Meeting to inform the issuer and the supervisory authority about the voting rights acquired within four trading days at the latest. If a person fails to fulfil
this obligation, that person may only use the number of votes that was correctly communicated in line with the aforementioned procedure.

For a company listed on a regulated European market with its registered office in the Czech Republic or whose admission to trading has been approved by the Czech regulator and with capital exceeding CZK 100 000 000 (approximately 4,000,000 EUR), the shareholder may not exercise his voting rights if he has failed to report the crossing, above or below, of a threshold of voting rights until the matter has been resolved.

According to Belgian law on transparency, the company and the Belgian supervisory authority ('FSMA') must be notified of a significant shareholder in a listed company:

- the rules on disclosing such a stake must be respected, particularly when the voting rights are acquired through securities lending;
- apart from some exceptions, in the event of non-disclosure of a significant stake five days before the general meeting, the voting rights concerned may be suspended (Article 545 CBS);
- for example, the rule laid down in Article 545(1) CBS does not apply to transferable securities granting less than 5% of the total amount of voting rights on the date of the general meeting;
- the committee may postpone the general meeting by up to five weeks if, in the 20 days before the general meeting, the company receives notification of the holding of a significant stake or is aware that such notification should have been given.

It should be noted that the same rule can be applied to unlisted limited liability companies in their articles of association.

**C) Registration prior to the general meeting**

In general, shareholders who wish to participate in (and vote at) the general meeting must be able to demonstrate that they are partners.

In Finland, only shareholders who are **registered** may attend the meeting and exercise their voting rights.

According to Hungarian company law, the shareholders of a limited partnership may only exercise their rights as shareholders once they are listed on the register of shareholders. Similarly, where shares are transferred within a Hungarian limited liability company, the acquirer must inform the company within the eight days following the acquisition. Following this notification, the director must register the new shareholder on the 'list of shareholders', which must be kept at the company’s registered office. The new shareholder may only exercise his voting rights after notification and after his registration on the 'list of shareholders'.

The same applies with regard to notifying the company of the powers from which a representative may benefit.

In Greece, for example, the representation documents (**proxies**) must be sent to the company at least three days before the general meeting.

Directive 2007/36/EC generalised the concept of the record date to allow shareholders to prove their status as shareholders several days before the general meeting and avoid having the underlying shares 'frozen' until the actual meeting.

In Greece, in order to participate in the general meeting, a shareholder must previously register his shares with the company, at the Deposits Office, at a credit institution or at
another location provided for within the articles of association (Article 28 of Law No 2190/1920).

The registration of shares must take place at least five days before the date of the general meeting. The aforementioned deadline applies both to the provision to the company of proof of share registration and to proxies (representatives).

Where a shareholder does not fulfil the above obligations, he may not participate in or vote at the general meeting unless the remaining shareholders decide to allow him to do so.

In the Czech Republic, the company articles of association or the decision to call a general meeting may determine the deadline that must be respected in order for the shareholder to be allowed to attend the general meeting.

If the shares of the company are admitted to trading on the European regulated market, the deadline that must be met for the shareholder to attend the general meeting is always the **seventh day** before the date of the general meeting.

Rights associated with shares may only be exercised with regard to the company by the person authorised to exercise these rights by the deadline, even if these shares are transferred after that date.

In Italy, for companies whose shares are registered at a central depository, the company articles of association may require shareholders intending to participate in a shareholders’ meeting to register their shares at the company’s registered office or at the bank branch indicated in the notice of the meeting, provided that these shares are not sold by the shareholder before the shareholders’ meeting has taken place.

This provision does not apply to listed companies, for which the record date rule was recently implemented, allowing shareholders to sell their shares within the period between the registration date and the date of the meeting.

**D) Specific obligations restricting ‘empty voting’**

A number of Member States have been concerned by the emergence of ‘empty voting’, which means that the persons who have a vote at the general meeting do not correspond to the real owners of the shares (the share owners being the only people in theory who may claim that they are partners).

As a result, regulations have been introduced in order to better deal with this phenomenon, which leads in particular to the multiplication of security lending transactions the day before the general meetings of many listed companies.

In France, it is now (law of 22 October 2010) mandatory for any person who holds, on a temporary basis, a number of shares representing more than 0.5 % of the voting rights in a listed company to inform the company and the Financial Markets Authority by the third working day before the general meeting at the latest (record date). This statement must include the number of shares acquired, the identity of the transferor, the contract date and expiry date and, if applicable, the voting agreement.

In Finland, whenever the real owner is not listed in the company records, the provisional owner may not attend the meeting unless this is for the purposes of registration endorsing the temporary transfer of shares.
2.1.2.2. ‘Disinterested participation’ obligation

The right to vote is an essential right of the shareholder in his capacity as a partner, but as such, it cannot be exchanged for money (A) and the right to be represented at the general meeting must not lead to an ‘abandonment’ of power, notably to the advantage of the company directors (B).

A) Prohibition of (financially) ‘interested’ voting

Many Member States forbid – in some cases, subject to criminal sanctions – any payment associated with the ‘trafficking’ of voting rights.

In Estonia, offering or accepting certain benefits in return for voting a certain way or abstaining from voting at a general meeting is punishable by a fine of up to 200 krooni (Estonian currency unit).

In France, the trafficking of voting rights, which is defined as ‘the act of accepting the agreement, guarantee or promise of benefits for voting a certain way or abstaining from the vote as well as the act of agreeing, guaranteeing or promising these benefits’ is an offence punishable by a two-year prison term and a fine of EUR 9 000 under Article L. 242-9 of the Commercial Code.

As a general principle of Romanian law, the transfer of voting rights is prohibited by Article 128(1) of Law No 31.

In Spain, voting rights are linked to the status of shareholder and cannot be transferred separately from this status.

In Austria, only the registered owner of the share (legal owner) is entitled to exercise the right to vote, and the right to vote may not be transferred separately from the ownership of the share.

In Lithuania, agreements between shareholders with regard to voting rights are null and void if the commitment made by a shareholder assumes that the shareholder will vote as instructed or abstain from voting in return for payment.

The Commercial Code of the Czech Republic provides that an agreement by which the shareholder undertakes to respect the instructions of the company or its bodies on how to vote on proposals made by the corporate bodies, or to exercise his voting rights in a certain manner or abstain from voting in return for benefits provided by the company is not valid.

This provision does not mean, however, that the shareholder’s vote pursuant to the agreement will not be valid. It is simply not possible to force the shareholder to vote in line with the agreement, which means that these agreements will be unenforceable.

In Poland, Article 59 of Law No 2190/1920 provides that any shareholder knowingly acting in an illegal manner, who accepts special benefits or promises of these benefits in return for voting in a particular way at the meeting or not attending the meeting, as well as the person

31 EUR 1 = EEK 15 6466 on 1 January 2011
who provides or promises these benefits to a shareholder for the aforementioned purposes shall be subject to a jail sentence of up to one year and a fine of EUR 1 000 or both.

**B) Obligation to remain independent with regard to directors**

![Proxy restrictions in various countries]

**Proxies**

Certain Member States prohibit shareholders from designating company directors as proxy holders.

Thus, Danish company law limits the use of proxies for members of the management board.

Similarly, in Italy, proxies may not be granted (i) to members of the administrative or supervisory boards or employees of the company and (ii) to controlled companies or management or supervisory board members or employees of such companies.

According to Hungarian law, while any shareholder can be represented at the shareholders’ meeting by a duly authorised person (proxy holder), it is expressly specified that managing directors, directors, members of the supervisory board and the auditor may not act as authorised representatives. The same applies if the company is listed. However, if these persons have the written authorisation of the principle shareholders, containing specific voting instructions for each resolution on which the proxy holder is to vote in the name of the shareholder, the aforementioned restrictions do not apply.

In Bulgaria, a member of the management/supervisory board (either in one-tier or two-tier system) is not permitted to represent a shareholder. However, this restriction does not apply to listed companies if the shareholder being represented by a proxy holder has expressly indicated how he wishes to vote with regard to each item on the agenda.

**Voting agreements**

In Lithuania, agreements between shareholders with regard to voting rights are **null and void** if the commitment made by a shareholder assumes that the shareholder will:

- vote as instructed by the management bodies of a corporate entity;
- vote for all the proposals made by the management bodies of a corporate entity.

Similarly, in Belgium, a voting agreement (or one of its specific clauses) shall be considered null and void in the following circumstances:

- if a shareholder undertakes to vote in accordance with the directives of the company, a subsidiary or a corporate body;
- if a shareholder agrees with the company, a subsidiary or the bodies of these companies that the proposals of the company’s corporate bodies should be approved;

In Romania, where the parties undertake to exercise their voting rights in accordance with instructions received from or suggested by the company or a person representing the company, the agreement shall be considered void pursuant to Article 128(2) of Law No 31.
However, there is discussion on how this Article should be interpreted, with one hypothesis suggesting it pertains to an agreement in the form of arrangement between shareholders. The two solutions are practised in Romanian law in case-law and doctrine.

In Poland, agreements between shareholders that impose an obligation to vote according to the instructions of the administrative board are null and void.

2.1.2.3. Obligation to abstain from voting in the case of a conflict of interest

In practice, it is relatively rare for a shareholder to be obliged to abstain from exercising his voting rights, since doing so constitutes one of his main individual powers. However, the fundamental freedom from which he benefits is generally secondary to the collective interest when the shareholder finds himself in a situation of conflict with the company, whether this is a ‘normal’ situation (A) or, a fortiori, if it is a dispute situation (B).

A) ‘Normal’ conflict of interest situation

The prohibition of shareholder from participating in a vote on a resolution that would place the shareholder in a situation of conflict of interest is not recognised unanimously throughout the EU, at least when the shareholder is not also one of the directors of the company.

In Belgium, the legal doctrine considers that shareholders placed in a situation of conflict of interest are not limited with regard to participating in and voting at the meeting. This doctrinal position has been confirmed in case-law.

In Italy, the shareholder in a situation of conflict of interest may still vote at the general meeting. However, those resolutions that would not have been carried without the favourable vote of the shareholder in a situation of conflict of interest may be contested in line with the CCI if they may be damaging to the company.

In Spain, there is no prohibition preventing the shareholders of an SA company (listed or unlisted) from exercising their voting rights unless they are also members of the management board, since the latter are not permitted to participate in a vote when there is a conflict of interest.

Nonetheless, the prevention of a shareholder from exercising his voting rights when he is in a situation of conflict of interest is still widespread throughout the EU.

In Austria, shareholders are not permitted to exercise their voting rights in certain areas defined by law, particularly in cases of conflict of interest. A vote cast in violation of this rule is invalid and may not be considered when the required majority of votes is being calculated.

In Romania, when a shareholder has interests contrary to those of the company, he must abstain from voting (Article 127(1) of Law No 31).

In the Netherlands, the only situation in which a shareholder’s voting rights may be limited arises when it would be in conflict with the interests of the company (for example, where the sustainability of the company would be at risk) or those of the other shareholders, were the shareholder to vote.

This prohibition on participating in the vote in situations of conflict of interest may, if appropriate, also be extended to shares for which the shareholder concerned holds a proxy. Thus, in Italy, a proxy granted to a representative who is in a situation of conflict of interest is
permitted on the condition that the representative informs the shareholder in writing of the circumstances giving rise to this conflict of interest and provided that the shareholder provides specific voting instructions for each resolution on which the proxy holder is to vote in the name of the shareholder (Article 135i UFA).

**Regulated agreements – Contractual agreements concluded with the company**

In Greece, Article 23a of Law No 2190/1920, which is currently in force, prohibits or limits certain kinds of transaction between a company and a natural person or a legal person who has a particular relationship with the company, including, in particular, shareholders who have control over the company.

Contracts (other than loan agreements) concluded by the company with such persons are prohibited and, if they are concluded, must be considered null and void unless special permission is granted by the general meeting, before or after the conclusion of the contract, and provided that such authorisation is not denied by the minority shareholders. This prohibition is not applicable in the case of actions that are part of the normal course of the company’s business.

In Bulgaria, the Public Offering of Securities Act (POSA) requires the approval of the general shareholders’ meeting for certain important transactions between the listed company and an interested party, defined as a member of the management or supervisory board of the listed company, the managing director or any persons who hold, directly or indirectly, at least 25 % of the votes in the general meetings of the company or who control the company.

This includes in particular the following transactions:
- transactions resulting in the acquisition, transfer, use or guaranteed use of shares representing long-term assets with a global value exceeding 2 % of the value of these assets according to the most recent company accounts, in cases where an interested party is involved in the transaction;
- transactions following which the company incurs liabilities to the benefit of the interested parties that exceed the value referred to in point (i) above;
- transactions on the debts of the company with interested parties and which do not exceed 10 % of the value in point (i) above.

All other transactions involving an interested party are subject to the prior approval of the executive body. The interested party may not participate in the decision-making procedure with regard to this transaction.

In France, the same applies to agreements (apart from those involving current accounts and concluded under normal conditions) that will be concluded with a shareholder (direct or indirect) who represents more than 10 % of the capital of the company. This shareholder may not participate in the vote on approval that must take place (a posteriori) before the next general meeting.

**Allocation of individual benefits not enjoyed by other shareholders**

Relatively frequently within the EU, a shareholder who benefits from preferential treatment (as compared with the other shareholders) does not have the right to participate in the vote in the general meeting on the resolution through which the company will declare itself in his favour.

In Lithuania, a shareholder shall not be authorised to vote on a capital increase, if the agenda for the General Meeting of Shareholders provides that the right to subscribe to the shares is reserved for this shareholder, a close relative of the shareholder, the shareholder’s spouse or his domestic partner (if the partnership has been registered in line with the procedure established by law), and a close relative of his spouse, in case the shareholder is a natural
person, or the parent company of the shareholder or the shareholder’s subsidiary, in case the shareholder is a legal person, unless the shareholder has acquired all the shares of the company.

In France, the recipient of a reserved capital increase does not have the right to vote at the general meeting (Article L 225-138 of the Commercial Code). The same applies in the case of the allocation of special conditions or contributions in kind (Article L 225-147 of the Commercial Code).

In the Czech Republic, the shareholder may not exercise his voting rights if the general meeting has to decide on a capital increase in exchange of a non-monetary contribution or on whether or not the shareholder must be relieved of an obligation or removed from his post as the member of a body of the company for having failed to fulfil his obligations during the execution of his duties in this post.

B) Dispute situation with regard to the company

Naturally, the prevention of a shareholder from exercising his voting rights within the highest corporate body (general meeting) also occurs in cases of direct opposition to the company in many Member States.

In Sweden, a shareholder against whom a legal proceeding has been opened, or who is seeking exemption from liability with regard to the company may not vote, either directly or by proxy.

In Germany, a shareholder is not permitted to exercise his voting rights if the company is legally challenging his liability.

In Denmark, a shareholder may not participate in a vote at a general meeting, whether in the name of other shareholders, by proxy or acting as a representative, if the general meeting is related to legal proceedings against the shareholder or the liability of the shareholder with regard to the company.

A shareholder may not participate in any vote concerning legal proceedings against other shareholders or concerning their liability, if that shareholder has a substantial interest in the case which may be contrary to the interests of the company.

In Estonia, a shareholder may not vote if he has concluded a contractual agreement with the company or in the case of litigation against the company or a dispute regarding the evaluation of the activity of the company. In such cases, the votes of this shareholder may not be taken into consideration in determining the rules of quorum and majority.

In Latvia, the shareholder does not have the right to vote in cases where a decision is being taken concerning his liability with regard to the company.

In Greece, where the general meeting has been called to decide whether the company should bring legal action against members of the board of directors for claims arising from the management of the company’s affairs, a shareholder who is also a member of the board of directors is prohibited from exercising his right to vote. This prohibition is provided for in Article 66 of the Greek Civil Code.

In Austria, a shareholder may be denied his voting rights in the following cases:

- the waiving by the company of a debt owed to it by the shareholder;
• the allocation of a benefit to the shareholder that may potentially damage the company;
• the conclusion of a transaction between the company and the shareholder;
• the conclusion and termination of an employment contract with the shareholder;
• the commencement or conducting of proceedings against the shareholder.

However, a shareholder is **not prohibited** from exercising his voting rights if he has been elected or removed as a director or a member of the supervisory board.

As a rule, under Hungarian company law, the shareholder of a company may not submit a vote in the process of adoption of a resolution if such a resolution (i) relieves the shareholder of one of his obligations or (ii) grants the shareholder a **benefit**. In addition, a shareholder with whom an agreement has been concluded or against whom legal proceedings have been initiated pursuant to the resolution is not permitted to vote in the adoption process for that resolution.

Polish law outlines certain situations in which a shareholder who is in a situation of conflict of interest may not exercise his voting rights (Articles 244 and 413 of the Polish Commercial Company Code):

• when the candidature of the shareholder for the administrative board is being considered,
• when the shareholder is being absolved of all liability with regard to the company, or
• when a dispute arises between the shareholder and the company.

Furthermore, shareholders who are members of the administrative board are not permitted to vote on matters related to their **remuneration**.

In the situations outlined above, the shareholder is not permitted to vote, either personally or by proxy or as a representative for another shareholder (with the exception of listed companies for the last point).

The right to vote is individual, but it is exercised collectively, within a collegial corporate body (general meeting), which will take decisions on behalf of the company (corporate entity) based on a rule of majority and not unanimity.

Thus, it must be accepted that ‘shareholder democracy’ is necessarily expressed in an indirect manner and is based essentially on trust (between two general meetings) placed in corporate representatives.

### 2.2. RIGHTS AND OBLIGATIONS OF SHAREHOLDERS AS EQUITY SECURITIES HOLDERS

With regard to shareholders’ property rights (1) – and their corresponding obligations (2) – it seemed interesting to review the approaches used in different Member States to determine the kind of rationale followed in each system:

• an **institutional** rationale concerned with safeguarding collective wealth in the long term by safeguarding the wealth of the company whose – greater – interests guide the corporate bodies (general meeting acting by a majority, management answering to its head)?
or a contractual rationale whereby each shareholder is free to individually pursue their own profit in the short term, even at the cost of losing assets (selling their shares)?

However, in the latter scenario, which encourages listing shares on the stock exchange, there may be a risk that the exercise, by shareholders, of their rights could seem like ‘desertion’ (insofar as the investor ceases to be a ‘shareholder’ by selling his shares and therefore abandons the company of which he is no longer a partner).

### 2.2.1. RIGHTS OF SHAREHOLDERS AS EQUITY SECURITIES HOLDERS

As an equity securities holder, the shareholder is an investor who has a greater chance of making a profit by selling his shares (particularly on the stock market) and acquiring added value, than by waiting for a ‘reimbursement’ which will probably never come – unless the company is liquidated – and which will, in any case, be subject to great uncertainty as it will only happen once all of the company’s creditors have been paid off.

In Romania, certain provisions applicable to limited liability companies have supported the general principle of preserving the company’s assets. According to this principle, shareholders cannot, directly or indirectly, recover their contributions and only have a right to receive dividends or recover capital payments after a decrease in share capital or liquidation.

Bearing in mind the financial risks involved, it is therefore essential that shareholders are given as much information as possible about their investment, starting with a description of the target company, before even buying shares.

This aspect has been specifically taken into account in EU law, particularly with regard to listed companies, since the quality of information provided when shares are sold to the public is subject to strict monitoring (see Prospectus Directive).

Once ownership of securities has been shared between several actors on the market, the regulatory framework surrounding the obligation to provide continuous and/or periodic (accounting) information takes over (see above – Developments concerning information for investors).

Generally, a listed company must (without undue delay) divulge and disclose to the authority in charge of public trading all information about the issuer that could affect the values of the shares. It is often up to the issuing company itself (that is, the directors of the company) to determine what information it should disclose under its reporting obligation.

This information from the issuing company (under the responsibility of its directors) together, where appropriate, with information from other market actors, particularly if the company is listed, will allow equity securities holders to evaluate the market value of their assets at any time.

In addition, acquiring securities which are available to a large number of buyers (shareholdings of listed companies) is also subject to a regulatory framework (established by the EU – see Takeover Bid Directive), the main objective of which is to verify the quality of the information provided by the author of the takeover bid (the future owner of the shares).

In these conditions, one of the main rights of a shareholder with equity securities is that they should receive as much information as possible about the company (2.2.1.1.) to be able to evaluate whether it is wise to continue increasing capital or to let it be diluted (2.2.1.2.) but also – and most importantly – to get the best price when selling shares, assuming of course that the shareholder is free to do so, which is another of his essential rights (2.2.1.3.).
2.2.1.1. Right to dividends

As an equity securities holder, the shareholder has a right to any dividends which could be paid, which represents remuneration for his contributions, i.e. his shares. To this end, it may seem legitimate for the most loyal shareholders to receive a seniority bonus (A) and for equity holders to be protected against any possible embezzlement on the part of the managers of the company for which they have provided equity financing (B).

A) Differential treatment depending on seniority of shares

In France, shareholders who have held shares for more than two years have the right to a loyalty dividend (up to an increase of 10%). In 2009, in the middle of the financial crisis, the Institut Montaigne, an influential think tank in France, even promoted the idea that reducing shareholders voting rights 32, depending on how long they have held shares, would also allow long-term shareholders to be rewarded over short-term shareholders by having an influence over management bodies33.

Polish law allows certain financial and non-financial rights to be granted to shareholders who have held shares for a certain period of time.

This can be done by issuing preferred shares (Articles 174 and 351 of the Commercial Companies Code) or by granting certain personal rights (Article 354 of the Commercial Companies Code).

For example, (i) shareholders who have held shares for at least three years may be entitled to additional voting rights (more than one vote per share) or loyalty dividends (more than 10% of the dividend) per share, (ii) a given shareholder, who has held shares for two years, may have the right to representation on the board of directors.

The articles of association may also grant some general rights to all shareholders depending on how long they have held their shares.

In Italy, the articles of association of listed companies may provide for each share which has been held continuously by the same shareholder for a certain period of time, and, in any case, for at least one year, to be granted the right to a 10% increase compared with the dividend distributed for other shares. The articles of association may provide for additional conditions in order to grant such a financial right (Article 127c UFA).

In Spain, the articles of association of an SA (listed or otherwise) can establish the creation of different classes of shares, which could include preferential distribution of financial rights (such as, for example, a preferential dividend) for shareholders who have held shares for a certain period of time.

In the Netherlands, although no such provision has been made in Dutch company law, the Dutch Supreme Court (Hoge Raad) confirmed in 2008 that ‘loyalty dividends’ were legitimate as long as they were not created to undermine the concept of the equal treatment of shareholders. These dividends apply to shareholders who have held shares for more than

32 Along the lines of the approach taken in the Scandinavian countries, in Switzerland, in the Netherlands (see below) and even in the United States ...
three consecutive years. However, these particular dividends have been deemed illegal and are no longer used.

**B) Right to monitor the quality of the management of funds entrusted to the company by shareholders**

It is important to note that shareholders have **no guarantee** of actually receiving dividends, even if there are positive results, as the general meeting may decide to **retain all of the profits**.

In the Netherlands, case-law states, however, that a majority shareholder would not be authorised to pursue a distribution policy whereby dividends are not paid simply to exclude minority shareholders. Such a decision could be annulled.

Given this uncertainty (**lack of guaranteed returns** for capital investors), some EU Member States have granted shareholders — throughout their time as shareholders — the **right to be treated appropriately** by the directors in charge of the company, whose shares they have bought.

In Belgium, shareholders of limited liability companies (NV/SA) have the following rights:

- **individual right of action** against the directors concerned. This right applies to any shareholder facing a net loss to compensate for the damages caused by a violation of the manager’s obligations (tortious liability: 1382-1383 Belgian Civil Code);
- **individual right of action** against the directors (who are, in principle, jointly and severally liable) for any shareholder facing a net loss to compensate for damages resulting from a violation of the CBS or company articles of association (528 CBS).

In Lithuania, shareholders with shares representing at least 10% of the capital have the **right to ask the court to appoint experts** who must determine whether a company or management body or one of its members has acted appropriately.

- The court may decide to revoke the decisions taken by the corporate bodies, suspend powers or exclude someone from the management body.
- It may also decide to liquidate a company and appoint a liquidator, etc.

In Ireland, any minority shareholder of a company may apply to the Court under Article 205 of the Companies Act 1963 if he believes that the affairs of the company are being conducted in a manner **oppressive** to him or any of the shareholders, or in disregard of his or their interests as shareholders. A similar application may be made under Article 213(g) of the 1963 Act, but this only applies if the company is bankrupt.

### 2.2.1.2. Right to resist dilution

Given that shareholders only individually own a fraction of the company’s capital, they are at risk of being diluted in case of any operation relating to said capital, which generally justifies them being granted a preferential right of subscription (A), but also protection against any ‘economic’ dilution (B).

#### A) Preferential right of subscription

Shareholders generally have preferential rights of subscription proportional to their share of capital, allowing them (as with pre-emption rights for the transfer of securities) privileged access to capital increases made after they have invested in the company. This means that they can avoid being diluted (following the operation), and can even subscribe in place of
those who do not have the financial means to do so, given that preferential rights of subscription may also be traded, as long as the holder of those rights cannot exercise them.

In Spain, shareholders have rights proportional to their shares which make it possible for them to resist dilution resulting from a capital increase. These rights may, however, be removed if it is in the interest of the company to do so and if certain conditions are fulfilled. For listed companies, the conditions for excluding preferential rights of subscription are lower. The general meeting may decide to issue new shares without preferential rights of subscription after receiving the report from the management and the statutory auditors.

In France, the withdrawal of preferential rights of subscription (which, in theory, benefit shareholders) because of any capital increase resulting from cash contributions, is subject not only to the vote of a qualified majority (two thirds) of the shareholders present and represented at the general meeting, but also to the obligation of the board of directors and the statutory auditors to draw up reports detailing the reasons and characteristics (particularly the financial characteristics) of such an operation.

B) Protection against ‘economic’ dilution

Apart from mathematical dilution, which results from a capital increase without preferential rights of subscription, shareholders are also at risk of ‘economic’ dilution if the issue price used for another investor is excessively advantageous.

Many Member States have therefore established mandatory regulations setting out the conditions for determining the stock entry price within the framework of operations that do not benefit all shareholders.

In France, in listed companies, given that the issue price of shares is an offer to beneficiaries who have not been identified by the general meeting (offer to the public or a private placement), it is covered by law (maximum below par rating of 5 % of the market price).

In Denmark, any resolution put forward with the aim of increasing share capital to a price that is less than market value, in order to benefit certain existing shareholders, must be agreed upon unanimously by all shareholders.

2.2.1.3. Right to dispose of property

The right of every shareholder to dispose of his shares only applies if it falls under company law: not only does the transferability of shares depend on their legal status (as tradable securities) (A), but even the objective of maximising profit by getting the best resale price on the market would not apply to the issuing company, which has nothing to gain from this (B). The only point worth mentioning is the company managers’ duty of loyalty to transferring shareholders (C).

A) Transferability

Apart from the possibility (which, in practice, is rare) of a statutory non-transferability clause (which, moreover, must be time-limited: see below), the right of any shareholder to sell his shares is part of the nature of those shares, which are transferable securities defined specifically by their free tradability (that is, their capacity to be transferred from one holder to another expeditiously).

This dimension was also historically the first (and for a long time the only) characteristic of shareholders (in their capacity as equity securities holders) to be taken into account by EU law in accordance with the economic approach of companies, which was initially its own approach
for boosting trade (cross-border mergers, takeover bids, organisation of market trading, etc.) within the internal market of the EU.

B) Maximising profit

Where appropriate, the stock entry price may be regulated by company law, as the subscription price for issuing shares (which will lead to capital increases and acquisitions by investors outside of the company in their capacity as shareholders with equity securities) is sometimes subject to a legislative framework.

However, the exit price is rarely used by the company itself (unless the company finds itself in the position of a buyer, although this is still exceptional bearing in mind that it is prohibited for an issuer to acquire their own shares: see Directive 77/91/EEC of 13 December 1976).

This issue has been covered abundantly by EU law: it could even be said that it is THE (only) shareholders’ right which has been dealt with in directives for a long time, given that it is the main driving force behind the functioning of the stock market. Therefore, the primary objective of the obligation to provide information to the public (and, consequently, to prevent the distribution of false or delayed information) is to ensure that the market price reflects the best possible market value of shares so that shareholders know how much their property is worth and what price it could fetch on the market at any given time.

Furthermore, the Takeover Bid Directive was established to harmonise throughout the EU the rules according to which all shareholders in a listed company may be given the opportunity to transfer their equity securities at the best price (taking into account any possible higher bids and competing offers which could pull up this price).

It is revealing that the company issuing the shares, being the subject of a takeover bid, does not have the opportunity to do anything to defend itself, nor to interfere with this process of its securities being bought (much to the delight of minority shareholders, whose financial interests are clearly the only ones to be taken into account).

This shows that, even recently, EU law on listed companies was not concerned with the interests of the company itself and that the interests of its shareholders were only taken into consideration from a financial perspective during operations, at the end of which they were given the opportunity to transfer the equity securities they had held until that point, which is paradoxical to say the least.

C) Importance of directors’ duty of loyalty

There is still, however, one area in which company law is used effectively to protect shareholders’ right to transfer their equity securities: ensuring that company directors are loyal to shareholders when they are involved in the transfer process (whether as a counterparty because they are offering to buy the shares being sold themselves, or as intermediaries).

It is essential that company directors, who often have privileged information about the company (including, or especially, when the company is not listed and therefore not obliged to communicate such information to the public) to which shareholders do not have access, do not exploit this differential (either for their own profit or for that of a third party transferee who would do a ‘good deal’ by buying the securities at less than their real value).

This duty of loyalty, which transferring shareholders have a right to expect from company directors, has been recognised in particular by the case-law of the Court of Cassation in France. In civil terms, it is equivalent to the offence of insider trading in terms of how it is punished in criminal (administrative) matters in the EU Member States that have transposed the Market Abuse Directive (particularly the provisions on exploiting privileged information).
For Estonian listed companies, the members of the board of directors and the supervisory board are not authorised to issue shares on their own account or through an intermediary during the period starting from the week before the end of the reporting period until the day after the financial results have been disclosed.

In the United Kingdom, in the case of ‘premium’ listed companies, no one who has privileged information is authorised to conduct/participate in share transactions (this is obviously aimed at shareholders). Other provisions are in place for insider trading operations for companies which are not listed as ‘premium’.

Is the right to no longer be a shareholder – still – a shareholder’s right? Does this really fall under company law (fiduciary duty of directors towards shareholders who wish to receive the best price for the sale of their shares) or does it fall under financial market law, which logically relates to the concerns of investors who wish to liquidate their property?

2.2.2. OBLIGATIONS OF SHAREHOLDERS AS EQUITY SECURITIES HOLDERS

Alongside the basic obligations that may apply to capital investors (for example, paying-up the subscription price of shares), which are generally recognised by company law in most EU countries, EU law has largely contributed to the harmonisation of the mandatory procedures which apply to shareholders of listed companies. This goes both for majority shareholders (who will be asked to provide a ‘way out’ and liquidity for minority shareholders who want it, particularly in the case of any change to the initial investment pact: takeover, concentration of capital depriving the market of liquidity, etc.) and minority shareholders (who will be asked to provide capital when their holdings fall below a minimum amount).

Shareholders may also be subject to local obligations affecting the ownership of equity securities. For example, in Finland, shareholders may, under certain circumstances, be obliged to buy the shares of another shareholder if he has played a part in taking a decision contradicting the principle of the equal treatment of shareholders, or if he has violated the provisions of company law or the company articles of association. The process of buying up shares and determining the sell-out price is carried out in accordance with the rules of Finnish company law.

As co-owners of the company, which assumes in particular that they have paid the stock entry price, part of which they have subscribed to (2.2.2.1), shareholders may be subject to obligations relating to the acquisition (2.2.2.2) or transfer of equity securities issued by the company (2.2.2.3).

2.2.2.1. Obligation as a shareholder

Apart from the obligation to pay-up the subscription price of newly issued shares (A), shareholders must show patience in their capacity as holders of equity securities rather than debt securities (B), and indeed must hold on to their property for a certain period of time (C).
A) Obligation to pay-up the subscription price

The first obligation of an investor who has just acquired shares by subscribing to a capital increase is to pay for his shares. Failure to do so could result in the shareholder losing his rights (particularly voting rights) and even losing his shares (exclusion).

In Estonia, if at the time of registering the company or increasing capital, the value of a shareholder’s non-monetary contributions is less than the nominal value of his shares, the company may then require the shareholder to make up the difference. The limitation period of the claim is five years from the registration of the company or the capital increase. Until his debt has been recovered, the shareholder is only a provisional shareholder and he may be stripped of his rights (particularly voting rights) if he does not fulfil this obligation within the time limits set by law.

In the United Kingdom, the Czech Republic, Romania and Latvia, shareholders who do not pay the full amount for the shares they have acquired cannot vote using their associated voting rights.

In Italy, shareholders who do not pay the price due by law for share subscriptions cannot exercise their voting rights (Article 2344 of the Italian Civil Code or ‘CCI’).

In Hungary, shareholders who have not fully paid-up their capital within the set time cannot exercise their voting rights in limited partnerships or joint-stock companies.

In Belgium, if shares are not fully paid-up when payment of the subscription is due and has rightly been sought by the company, the exercise of voting rights is suspended (Article 541(3) CBS).

Similarly, Polish law (Article 411(2) of the Commercial Companies Code) supports the general rule that a shareholder is prohibited from exercising his voting rights if the full amount of his shares has not been paid-up (in certain situations shareholders may take part in decisions and are obliged to pay-up the capital at the end of a certain period).

According to Bulgarian law, a shareholder in a company (listed or otherwise) may be excluded from the company if he has not paid-up his shares within the time limit stated in the company articles of association (the period cannot exceed two years).

- Exclusion is only authorised if one month’s notice has been given in writing asking the shareholder to make the payment within the set time limit.
- The notice must be made public in the trade register unless the transfer of shares is not subject to the company’s agreement. If the shareholder does not pay the contributions due within this one-month period, he is deemed to be excluded from the company.

B) Obligation to show patience

The obligation to pay-up the issue price of shares is essential as it gives a better understanding of the nature of the relationship between shareholders and companies: any shareholder, even if he has only bought shares on the (stock) market and if he has never contributed a single cent to the issuing company, derives his rights as a shareholder from the initial offeror (in cash or in kind) from whom he has ‘inherited’ securities by buying them from him.
In Lithuania, however, it is prohibited to transfer shares which have not been fully paid-up. That is why some consider shareholders the **first creditors**, even though they are the **last** to be reimbursed after all other creditors have been bought out when a company is dissolved. In practice, they get a return on their investment by selling their shares to another shareholder or a third party.

In Italy, the law states that reimbursing shareholder loans is subordinate to satisfying the demands of other creditors. In addition, if the reimbursement takes place during the year before a company is declared bankrupt, then the amounts must be returned.

Apart from paying-up their capital, shareholders must also be subject to legal obligations designed to strengthen companies’ own funds, which are not immediately used to redistribute their capital.

Therefore, shareholders cannot generally receive dividends if the **legal reserve** has not been fully met.

In Romania, anyone who violates the obligation to meet reserves (20 % of share capital) could face one to five years’ imprisonment. Any person responsible for this violation is also responsible for the damages caused to the company.

### C) Obligation to retain stock temporarily

Several Member States allow for the possibility of imposing the non-transferability of equity securities on the shareholders who own them. However, this measure, which is detrimental to shareholders’ rights, remains exceptional and must be time-limited.

In Spain, clauses making shares non-transferable are **void**.

In Poland, shareholders’ pacts can limit the transfer of shares in a specific way at shareholders’ discretion. In a joint-stock company, Polish law authorises agreements for restrictions on share transfer, but for a maximum duration of **five years** from the date on which the agreement is concluded (Article 338 of the Commercial Companies Code). With regard to restrictions resulting from company articles of association, share transfer may be (i) dependent on authorisation from the board of directors or (ii) restricted in another way (Articles 182, 337 and 338 of the Commercial Companies Code).

In the case of Italian unlisted companies, the articles of association may restrict the transfer of registered shares and may impede their transfer for a period of time of no more than five years from the date on which the company was formed or from the moment the prohibition was drawn up.

In Belgium, a non-transferability clause would only apply if the following conditions had been fulfilled (Article 510 CBS):

- the clause must be stipulated in the articles of association or in a shareholders’ agreement;
- the clause must be subject to a time limit (in practice an average period of **10 years**);
- the clause must be justified by the interests of the company (for example, to stabilise the company, to increase control over the board of directors, etc.);

Similar conditions would also be required in France.

In the Czech Republic, the articles of association of a joint-stock company can only limit the transferability (free transfer) of registered shares. The limitation may take on any form, but
cannot lead to the exclusion of free transfers as such. Legal regulation provides expressly for the possibility of restricting this free transfer with the consent of a corporate body. That depends, however, on the regulations contained in the articles of association of the company in question.

In reality, the main restriction that the articles of association can impose in order to limit shareholders' freedom to transfer their shares to whomever they want is by forcing them to obtain the approval of the transferee.

For public limited companies in Latvia, which may be listed or unlisted, shares may be transferred freely. However, the articles of association may require the sale to be subject to the consent of all shareholders.

According to Finnish company law, the free transfer of equity securities can only be restricted by incorporating a specific sell-out clause or ‘consent’ clause (i.e. the transfer of shares requires the company’s specific consent). Nasdaq OMX Helsinki Ltd regulations provide for the free transfer of shares admitted to a regulated market.

**D) Statutory approval clauses**

The principle of approval clauses varies widely across the EU, which shows that companies are often given the right to choose their shareholders.

Polish law allows shareholders to impose restrictions on transfers. This can happen in both listed and unlisted joint-stock companies. Restrictions may be established either in the articles of association (such restrictions being in force from the formation of the company) or in a shareholders’ pact (when the restrictions have no effect on the company but only on the stakeholders). In joint-stock companies, these restrictions can only apply to registered shares (Article 337 of the Commercial Companies Code).

In practice, this type of clause is generally reserved for unlisted companies, as it hinders the fluidity of transactions which is characteristic of stock markets.

As our Belgian correspondent points out, securities admitted to trading on the NYSE Euronext market must be ‘freely transferable and negotiable’ (Article 6.6 of the Euronext Rule Book, Book I: Harmonised Rules). In this regard, agreements between shareholders who restrict the transfer of shares may be problematic for companies wishing to list their shares on the NYSE Euronext market.

In Denmark, Section 2.3.3 of the rules for issuers of shares on NASDAQ OMX Copenhagen A/S states that the free negotiability of shares is a general prerequisite to become publicly traded and admitted to trading on the exchange. However, when the company articles of association stipulate limits on the transferability of shares, these limits can generally be considered restrictive to free transferability, and so the company will not be able to be listed on the stock market.

In Bulgaria, the Public Offering of Securities Act bans any restriction on the transfer of shares in companies (listed or otherwise) whose shareholdings are open to the public.

In Greece, national legislation authorises shareholders to lay down provisions in the articles of association allowing them to limit shareholders’ right to sell their shares freely. In accordance with Article 3(7) of Law No 2190/1920, blocked registered shares may be issued, whose transfer will be subject to the approval of the company. This may be authorised by provisions in the articles of association. Approval is given by the board of directors or the general
mechanism as laid down in the articles of association. The articles of association may give the reasons for which this approval may be refused.

With the exception of share transfers due to death, the articles of association may also provide for other kinds of restrictions on the transferability of registered shares, in particular:
- shares cannot be transferred if they have not firstly been offered to the rest of the shareholders or some of the shareholders,
- the company has indicated shareholders or third persons who are to acquire the shares, should a shareholder wish to transfer them. The articles of association must provide for the procedure, conditions and time limit in which the company must approve the transfer or indicate a buyer. If the time limit expires, the transfer of shares is not affected.

The aforementioned legal provision states that such restrictions in the articles of association cannot render the transfer impossible and that transfers carried out in violation of the provisions of the articles of association are not valid.

In Belgium, the validity of an approval and pre-emption clause is subject to the condition that the restriction of the transferability of shares lasts no more than six months from the date of the request for approval or the invitation to exercise the right of pre-emption; if this is not the case, the duration of non-transferability is automatically reduced to six months (Article 510 CBS).

The articles of association of Austrian unlisted companies may call for prior approval from the company for the transfer of registered shares, which can only be refused with just cause. If approval is not granted, the shares of the transferring shareholder may be bought by the company itself in order to invalidate them, or even by the other shareholders who consequently benefit from a sort of right of pre-emption.

In Italy, the provisions of the articles of association establishing that the transfer of shares may only take place upon approval from corporate bodies or other shareholders are null and void if these clauses do not provide for (i) the obligation of the company or of the other shareholders to buy these shares or (ii) the seller’s right of withdrawal (Article 2355a CCI).

In France, when the issuing company buys back shares, it is only a default solution (if the shares have not been bought up by shareholders or an approved third party).

If a shareholder in a Hungarian company wishes to sell his shares, the other shareholders, the company or a person appointed by the shareholders’ meeting have a right of pre-emption in that exact order for the amount which needs to be transferred by a sale purchase agreement. This right of pre-emption may be excluded from the company’s articles of association.

Bearing in mind how they are implemented, statutory approval clauses are often considered rights of pre-emption for the benefit of shareholders.

In Estonia, both mechanisms work alongside each other:
- in unlisted companies, company shareholders have a right of pre-emption which they can exercise during a time limit of one month after the share transfer agreement has been presented. The articles of association may also state that the transfer cannot be carried out until it has been authorised, either by the supervisory board or by another body. The transferee must submit his transfer contract to the management body, which then notifies the other shareholders. This transfer must be the subject of a notarial act;
- in listed companies, the articles of association may restrict the free transfer of shares by granting shareholders a right of pre-emption over the shares. This right of pre-emption may be exercised within two months of the transfer agreement being
presented. The company must register a right of pre-emption if this right is provided for in its articles of association.

The articles of association of a Dutch unlisted company may include restrictions on the transfer of shares. There may be a) a provision which states that the shareholder must obtain approval for the transfer of his shares from a corporate body or b) a provision establishing a right of pre-emption for the other shareholders.

Similarly, in Denmark, the articles of association of an unlisted company may provide for a restriction on the transferability of company shares, stating that any transfer of shares will be subject to the approval of company management (namely, the board of directors). The company articles of association may also include a right of pre-emption for the company’s shareholders by giving them the opportunity to buy shares within a specific acceptance period before the shares can be offered to third parties.

In the United Kingdom, the articles of association of unlisted companies often highlight the possibility of pre-emption or restrict the possibility of shareholders freely selling their shares.

In Irish unlisted companies, the articles of association generally state that directors must have a discretionary power to refuse to authorise any transfer of shares. In Irish listed companies, it would be very unusual for there to be a restriction on the free negotiability of shares. However, in certain limited circumstances, the articles of association may state that the company can restrict the transfer of shares if it believes that the shareholder has failed to comply with the obligations regarding declarations of interest on company shares.

In Lithuanian unlisted companies, shareholders have a right of pre-emption to acquire all the shares offered for sale. This restriction is applicable when the shares are transferred within the framework of the sales contract (and not under an exchange contract or a donation).

The transferring shareholder must then comply with the following procedure:
- the shareholder must present a written notice to the company of his intention to sell shares;
- the manager must inform each shareholder of the shares offered for sale and, within 30 days of the date of receipt of the notice from the shareholder of his intention to sell the shares, the manager must inform the shareholder of the other shareholders’ willingness to buy all of his shares offered for sale;
- if the demand for the shares offered for sale is greater than the supply, the shares will be given to the shareholders wishing to acquire new shares pro rata to the number of shares they hold;
- if the other shareholders do not wish to acquire the shares, the shareholder has the right to sell the shares at his discretion, at a price that is no lower than that indicated in the notice of his intention to sell the shares.

In Spanish unlisted companies, the restrictions on the free transfer of SA shares will only be valid if the shares are registered and if these restrictions are explicitly set out in the articles of association. There are three main types of restrictive clauses:
- those involving a right of first refusal for one or more of the company’s shareholders or for a third party, on the condition that the cases where such a right is applicable are clearly specified;
- those requiring prior authorisation from the company;
- those establishing specific characteristics for the buyer.

When no provisions are laid down in the articles of association, the following rules apply in terms of approval: (i) voluntary transfers between shareholders or to the benefit of a group, or of an ascendant or descendant, or of a company in the same group may be made freely, (ii) the member wishing to transfer his shares must inform the directors and specify the number of shares at stake as well as the characteristics of the shares and the beneficiary of
the transfer. These transfers must be authorised by the general meeting, (iii) the shareholders attending the general meeting must have a right of pre-emption.

In Germany, a company may choose to issue registered shares which can only be transferred with the company’s consent. The conditions under which the company may refuse to give this consent are not clearly defined by the law, but transferring the shares to one of the company’s competitors could be a reason, which shows that this circumventing of shareholders’ rights to freely dispose of their shares is based on corporate benefit.

2.2.2.2. Obligations arising from owning a significant proportion of a company’s capital

Depending on the size of their share in co-owning the company’s capital, or their desire to do so, some shareholders may be subject to specific obligations with regard to either communicating additional information to the company and the other shareholders (particularly about their intentions) (A) or acquiring other shareholders’ shares (particularly in the case of a takeover) (B).

A) Reporting requirements

In order to allow the other shareholders to position themselves on the market in full knowledge of the facts, investors who are acquiring a significant proportion of the shares of a listed company, or who intend to do so, are often subject to obligations to declare their intentions or their plans.

- Declaration of intentions

Together with the obligation to declare the crossing of certain thresholds which are considered particularly significant (more than 10 % of the capital, but not enough to cross a threshold considered a threat to the control of the issuer), shareholders may be asked to publicly declare their intentions with regard to the company over the course of the next six to twelve months.

More specifically, these intentions relate to their willingness to acquire a bigger part of the company’s capital, even to take control of the company, also in link with their desire to be represented on the board of directors of the company in which they had previously been important shareholders.

Such a system can be found in France, where violations of reporting requirements (and requirements to respect their terms) are subject to the same type of sanctions as declarations of crossing of thresholds, namely stripping the shareholder of his voting rights for up to five years upon request from the director of the issuing company, a shareholder or the French Financial Markets Authority (AMF).

- Preparing a financial transaction involving a listed company

In accordance with EU law (Market Abuse Directive), any investor preparing a large-scale financial transaction involving a listed company (and which could have a significant impact on the stock market value of its shares) must inform investors in the market, i.e. the public, of this as soon as possible.

In France, there is a specific obligation if the planned transaction is a takeover bid. In this regard, the general regulation of the AMF states that, particularly when an issuer’s financial
instruments market is subject to significant price variations or unusual volumes, the AMF may ask persons who could be considering preparing a takeover bid, either alone or in concert, to inform the public of their intentions. This happens particularly when there are disputes between the issuers concerned or when boards are being appointed in view of preparing a takeover bid.

B) Obligation to acquire minority shareholdings

On various occasions, majority (or ‘controlling’) shareholders may be obliged to offer to buy the shares of other shareholders in order to become owners.

- Takeover

Under Hungarian company law, in the case of the acquisition of a significant share of the company (generally more than 75 %) in an unlisted company, a member (shareholder) of the company being taken over may request that his shares be bought up by the owner of the significant share. The right of minority shareholders may be exercised within 60 days of them being notified of the acquisition of the significant share. The owner of a significant share must buy such shares at the market value in force when the request was submitted, with this value being no less than the value of the shares which represent the company’s own equity.

In the United Kingdom, company articles of association and instruments of incorporation generally protect minority shareholders in the case of a takeover resulting from the transfer of a majority bloc (tag-along provision).

It should be remembered that the regulation on the mandatory deposit of a Takeover Bid when taking over a listed company originally came from the EU (Takeover Bid Directive), although it has since been transposed in most EU Member States.

For most listed companies within the EU, the threshold of 30 % of voting rights corresponds to the mandatory takeover bid threshold which sanctions takeovers, but we can see that this percentage varies markedly from country to country within the EU.
It is interesting to note that some Member States have made provisions whereby defaulting shareholders could be stripped of some of their rights, particularly voting rights.

This is the case in Germany, but also in France and Italy. In the case of a violation of the provisions laid down in Italian law with regard to mandatory takeover bids, the voting rights attached to the entire holdings of the shareholders concerned cannot be exercised. Any resolution or act adopted, where votes cast in violation of the ban have been the deciding votes, may be contested under the CCI (Article 110 of Legislative Decree No 58/1998, the Unified Financial Act or ‘UFA’).

- Substantial change to the company decided by majority shareholders

Aside from a takeover, minority shareholders may be granted the right to withdraw capital (at the cost of majority shareholders/controllers – if there are any) when the company adopts radical measures which have a strong impact on the essence of the company, to the point of altering the implicit terms of the investment pact agreed by the shareholders when they decided to acquire shares.

In Spain, the law grants minority shareholders of SA and SL companies the right to leave the company, which applies in the following cases, but only on the condition that they did not vote for the resolution in contention and only after having addressed the company in writing within one month of the publication of the resolution adopted by the general meeting:

- Substantial change to the object of the company;
- Reactivation of an inactive company;
- Extension of the life time of the company;
- Creation or modification of an obligation (unless otherwise stated in the articles of association);
This right to leave the company is also there to protect minority shareholders from a strategy by other shareholders to give them fewer dividends. This right may be exercised within five tax years of the registration of the company by any shareholder who has voted for dividends not to be distributed. This right does not apply to shareholders of listed companies.

Spanish company articles of association may provide for other reasons allowing shareholders to leave the company, but the articles of association must have been approved by all shareholders.

In Latvia, (minority) shareholders have the right to require their shares to be bought up if they have voted against the increase in share capital or the reorganisation of the company as approved in the general meeting by the majority shareholders.

- High concentration of capital in the hands of majority shareholders

When majority shareholders control a very high percentage of the capital (over 90%), this means that, in practice, that company's share market has lost all its liquidity, even though many national legislations have since stated that these ULTRA-majority shareholders had an obligation to offer to buy up their shares in order to achieve such liquidity.

In Denmark, a minority shareholder can require their shares to be bought up if more than 90% of the capital and voting rights are held by one shareholder.

In Poland, minority shareholders in an unlisted joint-stock company who do not represent more than 5% of the share capital have the right to demand that a resolution be adopted making it mandatory for their shares to be bought up (by more than five shareholders holding in total no less than 95% of the share capital). If no such resolution is adopted, the joint-stock company is forced to buy the shares belonging to the minority shareholders within three months of the general meeting (Article 4181 of the Commercial Companies Code).

In France, the Financial Markets Authority (AMF) may force majority shareholders holding more than 95% of the capital or voting rights of a company to deposit a buyout at the request of the minority shareholders, who must, however, show that they are suffering from a lack of market liquidity which they could not have avoided.

2.2.2.3. Obligation to withdraw capital

The last straw for shareholders – in their capacity as equity securities holders – is to be forced to sell their shares and losing their capacity as shareholders. This can happen in case of open conflict between the shareholders and the company (A), when a statutory exclusion clause is applied (B), but also in cases where there is a high concentration of capital in the hands of majority shareholders (C).

A) Dispute between the shareholder and the company

In accordance with Hungarian company law, a shareholder of a company may be expelled by a court ruling following a petition submitted by the company against the shareholder (on the basis of a resolution by the shareholders, which, if adopted, would prevent the shareholder who risks being expelled from voting).
- This petition may only be submitted if the presence of the person in question in the company's capital poses a serious threat to carrying out the company’s purpose.
- A shareholder may not be excluded from a company if the company does not have more than two shareholders.
- In addition, a shareholder holding at least three quarters of the votes cannot be expelled.

There are no such rules for listed companies.

In Belgium, some shareholders may be forced to buy or sell their shares.
- one or several shareholders holding a certain percentage of the share capital or equity securities carrying voting rights may bring legal action against another shareholder to force them, ‘for well-founded reasons’, to sell all their shares to them along with their subscription, exchange and conversion rights (exclusion, Article 636 CBS);
- similarly, legal action may be taken by one shareholder against the other shareholders to force them to buy his shares, convertible bonds and subscription rights ‘for well-founded reasons’ (buyback, Article 642 CBS).

Furthermore, Articles 636-641 of the Companies Code (CBS) provide for dispute settlement procedures which do not apply to joint-stock companies (SA/NV) which list shares publicly (for example, companies listed on NYSE Euronext). These procedures may be used in the following circumstances:
- Persons empowered to request the exclusion of a shareholder:
  - one or several shareholders collectively holding shares representing 30 % of the voting rights attached to all of the company’s shares;
  - one or several shareholders collectively holding shares representing 20 % of the voting rights when the company has issued shares which are not representative of share capital;
  - one or several shareholders collectively holding shares representing 30 % of the company’s capital;
- Well-founded reasons for requesting the exclusion of a shareholder:
  - fault which has seriously and irrevocably sufficiently harmed the interests of the company;
  - abuse of majority or minority;
  - serious, lasting disagreement among the shareholders;
- Examples of cases in which dispute settlement procedures may be used:
  - violation of a non-competition clause: a person who is a shareholder and director of two competing companies may be excluded from the capital of one of the two companies;
  - a clear violation of an agreement, for example of the obligation to buy a certain amount of goods supplied by the company;
  - refusal of a shareholder to vote for a capital increase, thereby putting the company in serious financial difficulties;
  - non-compliance with the obligation of subscribed contribution;
- Exclusion procedure for a shareholder:
  - The request must be submitted to the President of the Court of Commerce. The company must then be subpoenaed.

While the defendant is engaged in the proceedings, he may no longer dispose of his shares or establish real rights with regard to those shares, unless it is approved by the judge or the parties involved in the proceedings (except for the right to dividends). A judge may order the suspension of the rights attached to the shares needing to be transferred.

The President of the Court evaluates the legitimacy of the shareholders’ agreements limiting the transferability of shares and may order these shareholders’ agreements to be transferred to the purchaser(s).
The President of the Court may intervene in the application of pre-emption clauses, determining the price and duration for exercising the right of pre-emption; in addition, he may refuse to apply any approval clauses concluded between the shareholders.

The President of the Court may sentence the defendant to sell his assets to the plaintiff(s) within the time limits and at the price set by the President of the Court. Generally, after any possible pre-emption rights have been exercised, the shares are transferred to the plaintiffs in proportion to their respective stakes in the company’s share capital.

Furthermore, Article 513 of the CBS provides for the possibility of forced exclusion of minority shareholders by the majority shareholder:
- any physical person or legal person, acting alone or in concert, with 95% of shares carrying voting rights in a company following a takeover (voluntary or mandatory) may force the minority shareholders to transfer their shares to them;
- in a listed limited liability company (NV/SA) which has not publicly issued shares, the minority shareholders have the right to refuse the sale of their shares, but the law on this could change;
- there is currently a proposal aimed at changing the threshold of 95% to 90% and abolishing the right of minority shareholders to refuse the sale of their shares in the case of a merger by absorption on the part of a NV/SA.

In the Netherlands, there are two different provisions giving majority shareholders the opportunity to exclude minority shareholders.
- A general provision applies to listed and unlisted companies. This states that a shareholder with more than 95% of the capital may ask the court of appeal in Amsterdam to order minority shareholders to transfer their shares. The judge will determine the value of the shares with the help of an expert.
- In 2007, another provision entered into force for listed companies only. It gives the offeror the opportunity to buy the shares of the remaining minority shareholders within three months of the takeover bid. In this case too, the majority shareholders must hold at least 95% of the capital.

The purchase price is considered reasonable when the takeover bid is mandatory or when the offeror has purchased at least 90% of the shares he did not hold before. Minority shareholders can demonstrate that the circumstances following the takeover bid justify a higher price.

In general, with regard to the possibility that shareholders may be forced to withdraw capital, the law in Member States often makes a distinction based on whether the company is unlisted (in which case the exclusion mechanism is statutory) or listed (in which case the provisions of EU law (Takeover Bid Directive) on squeeze-out often have to be transposed in the Member States (see below)).

**B) Exclusion clause**

The two forms of Spanish companies, SL and SA, may establish exclusion clauses in their articles of association (Article 351 LSC). Incorporating these clauses into the articles of association requires the consent of all the shareholders in the company. SL companies may in particular decide to exclude a shareholder who (i) does not willingly fulfil his statutory obligations or (ii) a member of the executive power who infringes on the competition ban (Article 230(1), LSC) which applies to members of the management body, or who has been ordered to pay damages for having threatened the interests of the company.
The articles of association of a British unlisted company with a closed shareholding will generally provide for shares being bought from someone who is no longer an employee or a member of a management or supervisory/administrative body.

In the case of Polish companies, a shareholder who hinders the operations of the company may be excluded. This may be done on the basis of a court ruling issued at the request of all the other shareholders representing more than half of the share capital. The excluded shareholder’s shares must be bought by the remaining shareholders. The articles of association may provide for this right to be exercised by less than all of the other shareholders.

The aforementioned right may only be exercised if there are important reasons (for example, disloyalty and anti-competitive practices due to the use of confidential information obtained in the context of holding shares in the company) (Article 266 of the Commercial Companies Code).

C) Right of squeeze-out

In most Member States, the right of squeeze-out, under which minority shareholders are required to sell their shares to a (ultra) majority shareholder, is only recognised in listed companies, within the framework of the transposition of the Takeover Bid Directive.

However, some Member States have clearly extended the squeeze-out mechanism to unlisted companies, using a different percentage for the majority holding where appropriate.

In accordance with the Takeover Bid Directive, the holding percentage needed to justify the right to expropriate minority shareholders varies between 90% and 95% across Member States. However, it should be noted that this Directive has apparently not been transposed in Romania, as Romania does not have a squeeze-out procedure.

In Sweden, a shareholder holding more than 90% has the right to buy the remaining shares in order to hold them all. Conversely, the other shareholders can oblige the majority shareholder to buy their shares.

For Estonian listed companies, a shareholder holding at least 90% of the capital may exclude the other shareholders in exchange for fair compensation.

In the United Kingdom, minority shareholders can be bought out if, in the course of the takeover bid, the offeror manages to obtain 90% of the shares at stake, or the voting rights attached to the shares at stake if they are voting shares.

If the squeeze-out did not work, the offeror could force the shareholders to sell by a scheme of arrangement, that is, by accepting a buyback proposal. This proposal is mandatory on the condition that it is both approved by a majority representing three quarters of the value of the shareholders voting at the meeting and approved by the court.

In Polish listed companies, a squeeze-out is possible when a majority shareholder holds at least 90% of the company capital (Article 82 of the law on takeovers).
Map 3: Percentage of holding required to justify the right to expropriate minority shareholders

In Italy, an offeror who holds at least 95% of the share capital of an Italian listed company after submitting a takeover bid has the right to buy all the remaining shares within three months of the bid being accepted, if the intention to exercise this right has been declared in the document concerning the takeover bid. Where more than one class of shares is issued, the squeeze-out right must only apply to equity securities for which the threshold of 95% has been crossed (Article 111 UFA).

In Bulgaria, the Public Offering of Securities Act (POSA) grants squeeze-out rights to majority shareholders in listed companies who acquire more than 95% of the votes in the general meeting, that is, the right to force the remaining shareholders to sell them their shares. To this end, the majority shareholders submit a takeover bid to buy the shares held by the rest of the shareholders.

In France, the holding percentage is also set at 95% of the capital and voting rights.

In Romania, a squeeze-out may be carried out by a shareholder who holds 95% of the capital or who has acquired 90% of the shares within the framework of a takeover bid.

In Lithuania, the law on equity securities states that a shareholder in the issuing company (listed company), acting independently or in concert with other persons and having acquired no less than 95% of the capital and voting rights, has the right to require all the remaining shareholders in the issuing company to sell their shares. The law on equity securities requires that a fair price be offered for the shares.
Two main rules have been established:
- if the mandatory/voluntary takeover bid has been submitted before reaching 95% and
  no more than three months have passed between the expiration date of the takeover
  bid and the presentation of the shareholder’s squeeze-out notification, the price of the
  share may be defined as the price which has been paid throughout the
  mandatory/voluntary takeover bid by the initiator;
- as the price of shares established by the person acquiring shares ensures an equitable
  price.

In Latvia, it is laid down that a shareholder of a listed company who holds 95% of the capital
 carrying voting rights or who has concluded agreements can ask the remaining shareholders
to sell their shares.

There is no similar provision for unlisted companies, with the exception of the provisions in the
law on groups of companies which states that when a company has directly or indirectly
acquired 90% of a company’s shares, each shareholder in the dependant company can ask
the dominant company to buy the shares held by this shareholder.

For all companies, commercial law states that a court may expel a shareholder of a company
on the basis of legal action by the company initiated by half of the shareholders if he has,
without just cause, failed to fulfil his obligations or otherwise caused substantial harm to the
interests of the company, or, if after receiving a written warning from the company, he or she
has not fulfilled his or her obligations, or has not put an end to the harm caused.

In Germany, if a shareholder holds, directly or via affiliates, 95% of share capital, he may
choose to oust the minority shareholders. He is then obliged to provide adequate
compensation. These rules apply to listed and unlisted companies.

Finnish company law contains specific provisions concerning sell-out rights and the obligation
of shareholders holding more than 90% of the company’s shares and voting rights to buy the
shares of other shareholders at an equitable price (squeeze-out). This provision applies to
both listed and unlisted companies.

If an offer has been made to acquire all the shares in a category in the capital of an Irish
company which is listed on a regulated market and it has been successful for at least 90% of
the shares, the initiator may acquire the shares of the remaining minority shareholders who
did not accept the bid. If the company is not listed on a regulated market, the threshold from
which the squeeze-out may be exercised will be 80% of the nominal value of the shares.

In Greece, a squeeze-out right is laid down in the Greek law on listed and unlisted
companies. A shareholder who is qualified to exercise this right must hold at least 95% of
the company’s capital in the case of unlisted companies and 90% of the voting rights in the
case of listed companies.

- Greek unlisted companies

  If a shareholder holds at least 95% of a company’s share capital after following the
  constitution of the company, he may acquire the shares of the minority shareholders
  for a consideration that corresponds to the real value of those shares.

  This right may be exercised within five years of the majority shareholder acquiring the
  percentage above.

  Further to a petition signed by the majority shareholder, the competent court examines
  the conditions for exercising the right of acquisition and thereby determines how they
  are taken into account.
The majority shareholder deposits the total consideration in a credit establishment, which pays the shareholders concerned, once their rights have been verified.

The exercise of this right as a majority shareholder is null and void if it is not done through a public declaration in accordance with the minimum requirements with regard to content as specified by the law.

The declaration is published as set out in the law and is recorded in the Companies Register. From the date of the last publication or registration, minority shareholders’ assets are automatically transferred to majority shareholders and the minority shareholders can immediately receive their compensation.

If the minority shareholders are known, the aforementioned public declaration may be replaced by an individual notification at their disposal.

- Greek listed companies

  Offerors may exercise squeeze-out rights once a takeover bid has been addressed to all the shareholders for all of the company’s shares.

  The offeror may exercise such a squeeze-out right and acquire the remaining shares from the shareholders who did not accept the offeror’s takeover bid on the condition that the offeror has acquired 90 % of the voting rights of the company in question since the launch of the takeover bid.

  Squeeze-out rights may be exercised within three (3) months after the time allowed for the acceptance of the takeover bid has expired, on condition that the offeror has included his intention to do so in the information note included in the takeover bid.

  It is worth noting that the compensation for the acquisition of the remaining shares of the company in question must be of the same class and at least equal to the consideration offered in the takeover bid, given that the alternative of a cash payment of the compensation must be made available.

In Austria, the exclusion of shareholders is regulated by the law applicable to all listed and unlisted companies (Gesellschafterausschlussgesetz).

- A shareholder who holds at least 90 % of the company’s shares (known as the main shareholder) may require the exclusion of the company’s minority shareholders. Exclusion requires the approval of the general meeting of shareholders by a majority of votes and the approval of the majority shareholder.

- The law states that the management has an obligation to publish a report for the shareholders about the exclusion, which must be examined by an external expert and then by the supervisory board. The shareholders may, however, reject these reports and take control by unanimous decision.

- Ownership of the shares of minority shareholders is automatically transferred to the main shareholder once the general meeting’s resolution has been included in the trade register. The minority shareholders have a right to receive appropriate compensation for the exclusion in cash.

- The articles of association may, however, prohibit the exclusion of minority shareholders.

- The law also includes special provisions for the exclusion of shareholders in the case of a takeover bid which provides for a simplified procedure.

In Denmark, the articles of association of a company – listed or unlisted – may include provisions for forced sell-out, on the condition that the arrangements for reimbursement and
the persons who have the right to require sell-out are specified. The shares held by a shareholder can only be sold together, unless otherwise stated in the articles of association.

- Any shareholder holding more than 90% of a company’s shares and the corresponding votes may require the other shareholders to sell their shares to him. In this case, the other shareholders will be asked to transfer their shares to that shareholder within one month.
- The reimbursement arrangements and the basis used to determine the sell-out price must be stated in the request. It must also be indicated in the framework of the redemption that in the case where no agreement can be reached on the sell-out price, this price will be set by an expert appointed by the court in the jurisdiction of which the company’s headquarters are located.
- If the sell-out is carried out within the framework of a takeover bid, under the rules of the Danish Securities Trading Act, the rules for determining the price do not apply to the sell-out unless one of the minority shareholders calls for the price to be set by an expert. Lastly, the request must include a declaration by the central administrative body of the limited liability company on the general terms of the sell-out.
- If a provision on the sell-out is included in the company articles of association while the company is listed, the articles of association must indicate a deadline for taking a decision on the sell-out and the establishment of a reasonable price, for example the highest price that the majority shareholder could have paid for the shares in the last six months.

When the squeeze-out is not the result of a stock market procedure but of a mechanism that is specific to company law, the squeeze-out is generally decided by the general meeting of shareholders, which represents the highest body of the company.

In the Czech Republic, shareholders holding at least 90% of the share capital in a joint-stock company have the right to call on the board of directors to call a general meeting to vote on the transfer (for their benefit) of all of the company’s remaining shares. The adoption of the resolution by the general meeting requires the consent of at least 90% of the votes of all the shareholders. A notarial act is drawn up with an annex including the expert’s report on the value of the consideration in cash or another justification of the value of the consideration.

For Estonian unlisted companies, a general meeting of shareholders, held at the request of a shareholder who holds at least 90% of the share capital, may decide to exclude a shareholder. To exclude a minority shareholder, a resolution must be adopted by the shareholders holding at least 95% of the capital. The shareholder must be offered fair compensation (the compensation must take into account the value of the shares 10 days before the general meeting was held).

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34 This squeeze-out procedure was used by UNIPETROL for PARAMO, or in ArcelorMittal Ostrava as the acquisition of control of V a LCOVNYPLECHU (currently ArcelorMittal Frýdek-Místek a.s.).
3. PROPOSALS FOR A EUROPEAN INITIATIVE (BASED ON MEMBER STATES’ BEST PRACTICES)

On the basis of existing legislation at EU level (see Chapter 1.1 above), we have conducted an analysis of the shortcomings and disparities which threaten the homogeneity of company law in Europe.

However, it seemed to us that harmonising the ‘best practices’ observed in some national legislations would improve overall legal efficiency.

We have therefore tried to extract the main outlines which could improve future legislation at EU level, beyond its current or prospective content.

In this regard, two main aspects seemed particularly relevant:

- Promoting the concept of ‘corporate benefit’ under one name or another at European level. This notion may be crucial for reaching a balance that guarantees a general increase in value for the company and its shareholders, as, by acting as a ‘compass’, it can establish a form of proportionality between shareholders’ rights and obligations with regard to the issuing company, with rights being restricted in exceptional circumstances in the case of failure to comply with obligations (Chapter 3.1).

- Recognising (in company law and no longer just in stock market law) the positive phenomenon of collective responsibility which would unite the members of a joint share with regard to respect for legally binding obligations to the company in exchange for the ability it would give them to openly exercise greater rights by joining forces (Chapter 3.2).

It is obviously not up to us to make claims about the kinds of instruments that could be put in place at European level to reach these objectives; however, we have tried to list them in the form of 21 concrete recommendations.

3.1. RIGHTS AND OBLIGATIONS OF SHAREHOLDERS IN THE LIGHT OF CORPORATE BENEFIT

Most Member States recognise the principle whereby a company – as a legal person – has its own interest: corporate benefit.

Therefore, the Belgian Companies Code (CBS) and the Belgian Corporate Governance Code, which apply to listed companies, contain several references to the notion of ‘corporate benefit’, although no definition of the concept is provided.

In Spain, it is case-law which has recognised that management bodies and the general meeting should take decisions based on corporate benefit, which comes before their own interests. The concept of corporate benefit has not, however, been given a strict legal framework or any definition, strictly speaking.

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35 In France, for example, it was quite recently of general interest of the undertaking concerned.
Naturally, this corporate interest often corresponds to an **accumulation of the interests of shareholders**.

Therefore, in Bulgaria, it is specified that managers must exercise their duties **in the interest of all shareholders**, but in practice it is often up to the board of directors to ensure that the managers’ running of the company is carried out in accordance with corporate benefit, which should not necessarily be confused with the interests of shareholders, even when understood as the interests of shareholders as a whole.

In Poland, the nature of corporate benefit is often debated. The debate focuses on the question of knowing whether it should be identified as the **economic interests of shareholders** or whether it is an **autonomous abstract formula** which is not related to shareholders.

- The prevailing opinion in the academic theory and case-law is that corporate benefit is the **interests of all groups of shareholders**, taking into account the shareholders’ common objective (which may be determined explicitly by the articles of association), which is usually to make a profit.
- The interests of the company are therefore considered not to be the interests of the majority, but a **compromise** reached between the – sometimes contradictory – interests of minority shareholders and majority shareholders.

EU Member States are divided, however, on the question of knowing whether corporate benefit should cover (aside from the interests of shareholders) the expectations of all the other stakeholders in the company (economic approach), including those outside the company (legal approach).

In Belgium, the meaning of corporate benefit and, more specifically, whose interests are covered by the notion, are subject to academic debate. According to the chosen definition, corporate benefit corresponds to:

- the common interests of **current shareholders**,  
- the interests of the company as regards concerns over management and leadership, including the interests of **future shareholders**,  
- or the interests of the company and **all its stakeholders**. Case-law is also divided with regard to how the concept should be interpreted.

That being said, the majority of Belgian authors and Belgian case-law tend to adopt a **broad vision**, which brings together the concepts of the **long-term interests of the company**, the interests of the stakeholders, and indeed the general (or public) interest.

**CURRENT AND FUTURE SHAREHOLDERS**

The Belgian system’s reference to ‘current’ but also ‘future’ shareholders is interesting as it could allow us to reconcile the two dimensions examined above (See Chapter 2):

(i) firstly, by encouraging companies to take shareholders’ interests into consideration at a given time (as **partners** with voting rights which they can exercise at the next general meeting)  
(ii) secondly, by assuming that the shares are registered within a time frame which corresponds to the long-term forecasts of the issuing company, whose equity securities can circulate throughout this time between the hands of successive **owners**.

Some understandings of corporate benefit even seem to refer to the company’s place within its **financial and/or economic environment**, therefore moving away from the sole point of view of shareholders.
Therefore, in Greece, particularly with regard to listed companies, there is an ongoing fundamental theoretical debate about the nature of company interests, taking into account the drafting of Article 2(1) of Law No 3016/2002, which provides for ‘the continuous effort to increase the firm’s long-term market value and the protection of the general corporate interest is the ultimate responsibility and duty of the members of the Board of Directors in every listed company’.

At first glance, such a provision seems to introduce a distinction between company interests and the company’s long-term market value. Jurists maintain that corporate benefit is a broad notion which includes long-term market value, given that management efforts in favour of company interests will also increase the value of the company. Other researchers have criticised this provision for being unclear and leaving room for uncertainty about how it should be applied.

In the United Kingdom, the teams dedicated to company management make all management decisions in the light of the interests of the company (such as long-term decisions, interests of employees, sustainability of relationships with third parties, the company’s reputation, etc.).

In Austria, the board of directors in joint-stock companies (Aktiengesellschaft) is not bound by direct instructions from the shareholders, but must manage the company for the good of the company (das Wohl des Unternehmens), taking into account the interests of shareholders, employees and the public. The interests of the company are understood particularly to mean securing the existence and growth of the company, which means achieving the best possible operational results in examining the long-term evolution of the company. In the day-to-day management of the company, the board of directors takes this corporate benefit into account, respecting the limits set by law with regard to the company’s aim as stated in the articles of association and taking into account the interests of the company’s stakeholders.

In Lithuania, the task of the management body is specifically to maintain a balance of interests between the different groups concerned (creditors, employees, shareholders, etc.). Consequently, shareholders have the right to contest the decisions adopted by the majority of shareholders should these decisions run counter to the essential provisions of the law, the instruments of incorporation, the principles of reasonableness and good faith or the interests of creditors.

Conversely, there are countries where this wider notion of corporate benefit is not recognised. For example, in Finland, only shareholders’ interests are taken into account with regard to the mechanisms regulated by company law, while the theory of stakeholders is not applied (except within the framework of CSR).

In France, corporate benefit is frequently opposed to the specific interests of one category of shareholders or another (minority or majority, for example), leading us to believe that corporate benefit comes instead from the overall combination of shareholders’ interests (if only to transcend them). However, certain peripheral regulations (labour law, business criminal law, insolvency law) use a broader definition of corporate benefit which can cover the interests of third parties (non-shareholders).
Recommendation 1: DEFINING CORPORATE BENEFIT AS THE INTEREST OF THE COMPANY

Whether it is the accumulation of the interests of individual shareholders (current but also future shareholders, allowing for the long-term growth of the company to be taken into account) or whether it extends to the integration of other stakeholders (employees, creditors, etc.) in a rather economic approach of the company, corporate benefit cannot be reduced to a combination of specific interests, since it must be distinguished as the interest of the (independent) corporate entity, which must take precedence over all others.

Aside from the exact perimeters of corporate benefit, which can vary from one country to another depending on local sensibilities or traditions, indeed depending on the specific objectives of one regulation or another, it seems essential that this concept, once it is has been unified, and moreover defined, as much as possible, is able to serve as a ‘compass’ for European company law (if necessary, through the EU affirming the principle of the primacy of corporate benefit) in order to evaluate the scope of shareholders’ rights (1) and obligations (2).

3.1.1. RIGHTS OF SHAREHOLDERS IN THE LIGHT OF CORPORATE BENEFIT

Taking into account corporate benefit – and recognising its primacy – cannot reduce shareholders to silence before a company (legal person represented by managers with regard to third parties) in which they are and remain partners, participating in the collective decisions adopted within the highest corporate body (general meeting).

In this regard, many Member States (such as France) recognise the principle according to which shareholders’ commitments cannot be increased against their wishes by the company (regardless of the competent corporate body).

In Poland, for example, any modification to the articles of association which increases benefits for shareholders or decreases their personal rights requires the consent of all shareholders concerned.

However, the prism of corporate benefit (understood as the ‘compass’ of the company in the long term) may lead to legitimising a certain differentiation between shareholders in spite of the principle of equal treatment by distinguishing between those who behave like partners (with voting rights) and those who seem more like investors (owners of a financial instrument which gives them access to capital).

This differentiation between shareholders with a strong spirit of cooperation who want to be involved in the management or running of the company in the medium to long term and those who behave more like investors concerned about maximising their profits in the short term by quickly selling off their shares to add value is at the heart of the functioning of companies which have chosen to issue shares (for example, joint stock companies in France (SCA)).

However, even though this model is not very common (any more) within the EU, the fact remains that we often find these two kinds of shareholders in most limited liability companies (without having to give them labels such as ‘majority’ for the first group or ‘minority’ for the second).

If they wish, assuming that they truly want to act as ‘partners’, shareholders can play a central role in achieving corporate benefit insofar as they have the right not only to define corporate benefit (3.1.1.1.) but also to ensure that it is respected (3.1.1.2.), as well as the right to sanction any possible violations (3.1.1.3.).
3.1.1.1. Right to define corporate benefit

Taking into account the definition of corporate benefit, which must (even exclusively) be considered in view of all of the individual interests of shareholders (or from a balanced position), it is naturally up to them to define corporate benefit by drafting the articles of association (A), but also by expressing (at each general meeting) their collective will with regard to the company policy that is being led (B).

A) Statutory determination of company purpose

By voting on the constitution of the company, otherwise known as its articles of association, and by then ensuring that they are applied, shareholders set the legal framework that will apply to managers (but also to the supervisory body) in their management for the general interests of the company, in particular through the statutory determination of the objectives that the company should pursue.

This connection between shareholders establishing a road map (together in the general meeting) and the concrete implementation of the daily activity of the company (in accordance with its own interests) probably explains the differing responses we have obtained from our correspondents in EU Member States with regard to identifying the competent corporate body to determine this corporate benefit.

In Belgium, with regard to the issue of knowing whether it is the shareholders’ meeting or the board of directors which is in charge of corporate benefit, the debate is the subject of differing opinions in the legal doctrine:

- on the one hand, all of the decisions taken by the board of directors must comply with corporate benefit. During the vote on decisions by the board of directors, directors cannot be solely motivated by their own interests or those of the shareholders they represent. Therefore, it could be argued that the board of directors defines the interests of the company;
- on the other hand, although there may be circumstances in which the shareholders can take decisions which are exclusively or mainly motivated by their own interests, it is generally accepted that shareholders must also act in the interests of the company. Therefore, for some, it may be understood that the shareholders’ meeting is the ultimate guardian of corporate benefit.

In Estonia, it is up to the managers and the supervisory body (board of directors) to define corporate benefit, as, according to the Estonian Commercial Code, all decisions taken by these bodies, in all circumstances, should be taken in respect of this greater interest.

Similarly, in Spain, management bodies seem the most likely to represent this interest, taking into account the economic dimension.

However, even when the board of directors determines corporate benefit at its discretion, as is the case in Poland, the general meeting of shareholders can influence the decisions of the board in this regard using certain measures (for example, by stating in the articles of association of the company to what extent all decisions by the board of directors require the prior consent of the partners or by threatening to dismiss the members of the board of directors in case of failure to do so – Article 393 and 370 of the Commercial Companies Code).

In accordance with the provisions of Romanian law, a company is only authorised to conclude agreements if these agreements correspond to the company purpose. The company is bound to carry out its activities in view of generating profits and in accordance with the company
Rights and obligations of shareholders

purpose, as indicated in the articles of association. All acts or agreements concluded by Romanian companies in violation of the company purpose are null and void.

In Denmark, legal proceedings may be brought by a shareholder if a resolution adopted by the general meeting has not been legally adopted or violates the articles of association of the company or Danish company law.

- Apart from in certain specific situations detailed in Danish company law, legal proceedings must be initiated no later than three months after the date of the resolution. Otherwise, the resolution will be considered valid.
- If the court finds that the resolution has not been legally adopted or violates Danish company law or the articles of association of the company, it must be modified or annulled by a court ruling.
- However, the resolution can only be modified if a claim is made to this effect and if the court is able to establish the appropriate content of the resolution.

The court decision also applies to shareholders who have not taken legal action.

B) Validation of the policy led by the company

Supposing even that the notion of corporate benefit can be defined and reasonably shared among the shareholders (under the supervision of the competent courts), it only becomes relevant when confronted with situations of conflict which it could help to resolve.

However, the main source of conflict between corporate benefit and individual interests lies in the legal nature of companies, which have autonomous legal personalities, but which can only express themselves and interact with third parties through corporate bodies, particularly the body which represents the company on a daily basis, namely its director.

In these conditions, the director(s) of a company focus(es) on the majority of criticisms, insofar as they are structurally placed at the heart of this – ‘natural’ – situation of conflict of interests, since they are both the interface between the company and its shareholders (with potentially different or even diverging interests) and the embodiment of the tension that can exist between the interests of the company they are managing as a whole and their own personal aspirations.

That being said, there is a similar situation each year when the general meeting takes place to discuss the results of the last tax year. The choice to distribute the fruits of the company’s activities to partners represents one of the main examples of the (potentially conflicting) clash between the interests of the company (which may prefer to hold on to profits to boost development) and those of shareholders who are hoping for a return on their investment, seeing dividends as a kind of remuneration for the capital they have invested.

In Romania, it was decided that the corporate body in charge of defining corporate benefit was the general meeting of shareholders as it was able to set the principles relating to the company and its activities and to decide on the payment of dividends.

Every year, the shareholders are invited to (re)define corporate benefit when holding the ordinary general meeting, which is responsible for approving the accounts from the last financial year – a way of evaluating how the company was managed in the past and learning from it.

It must not be forgotten that in countries such as France, company directors put their jobs on the line as a matter of course – once a year – as the general meeting has the option of dismissing them ad nutum (that is, even if this issue does not feature explicitly on the agenda, even though the agenda is in principle intangible).
In the end, it is up to the shareholders (brought together in the general meeting) to ‘sanction’ any inadequacies between the results obtained and the remuneration received by the directors as they are putting their mandates on the line every year.

It is also worth noting that the reflection group on the future of European company law has addressed this insecurity, which is linked to the dismissibility ad nutum that applies in most EU countries, as one of the possible factors for short-termism, the harmful nature of which has been brought to light by the crisis.

That is why the reflection group on the future of European company law has suggested authorising shareholders to statutorily move away from this structural instability, so as to put the directors of limited liability companies in a more permanent position (encouraging them to think more about the long term rather than about renewing their mandate), which would bring their position into line with that of managers in public limited liability companies.

In return for this stability, the directors must, however, be put in a position where there is a real legal risk and must bear responsibility for poor management. Therefore, in the resolution of 7 July 2010, the European Parliament stressed that ‘directors’ and officers’ liability insurance designed to protect companies’ directors, officers and senior managers against claims arising from risky or negligent decisions and actions taken whilst managing their business are not in line with sustainable risk management in the field of remuneration’.

**Recommendation 2: ABANDONING THE PRINCIPLE OF DISMISSIBILITY AD NUTUM FOR COMPANY DIRECTORIES**

The principle of dismissibility ad nutum as it stands in many Member States – at least in theory – could be revised to promote the stability of company management, with concern for the permanence of the policy put in place to serve corporate benefit while keeping poor management the responsibility of directors.

Therefore, not only does the general meeting choose the members of the board of directors who will be in charge of appointing company managers and supervising activity for the company – whose interests will be the only ‘compass’ indicating the (right) direction to follow, but it is (also) the general meeting that will grant them discharge.

In this regard, it may be considered – paradoxically – that shareholders may also be involved in defining corporate benefit by adhering purely and simply to the policy led by the corporate bodies, to the point of entrusting them (some would say blindly) with blank powers during general meetings.

Historically, the mechanism of ‘blank powers’ – by which returning a power of attorney with no indication from the person being represented is said to be equivalent to approving the decisions taken by the board of directors (the president of the board will therefore use the shareholders’ votes for what the board wants) – was ‘invented’ (by case-law) to reduce the risk of a deadlock resulting from the requirement of having a minimum quorum at the ordinary general meetings to approve the company accounts.

Nevertheless, this system (which may seem more like the loss of sovereignty than democratic expression) no longer has the same relevance, taking into account not only the possibilities of voting by correspondence (indeed, by electronic means) or appointing a proxy (even outside of the ranks of other shareholders: See proxy solicitors).

Some countries, such as Italy, ban the issuing of blank proxies. Proxies must be conferred in writing and the company must retain the relevant documentation. Furthermore, the proxy can always be revoked, regardless of whether any agreement has been made to the contrary.
Similarly, we have seen (See Chapter 2.1.2) that many countries have a complete ban on shareholders entrusting their powers to members of company management or agreeing to follow their instructions (see map below, such countries are coloured in purple).

**Map 4: Countries which ban shareholders from entrusting their powers to management**

This practice may also seem to have lost its primary justification with the **disappearance of quorums** on second notice in many Member States. In France, this system, which originated in case-law (legalised in 1983) has, however, been maintained.

This mechanism of 'blank powers' amounts to leaving the company (as a legal person) to take part itself in votes at meetings of its own corporate body (general meeting of shareholders), contrary to the rule banning the issuer from voting with the voting rights attached to treasury shares (directly or indirectly).

**Recommendation 3: ENCOURAGING THE USE OF ‘BLANK POWERS’**

The ‘blank powers’ mechanism (under which shareholders supporting the current policy led by company management may authorise the management to exercise their voting rights on their behalf during the general meeting) could be standardised throughout the EU to combat absenteeism: not only would shareholders be invited to get involved (even if this means abdicating their individual freedom) rather than remaining 'silent', but this would also allow the company to neutralise the effects of opportunistic voting by opponents who have sometimes only been shareholders for a short time (and will no longer be shareholders after the general meeting).

If we are in favour of such an expression of corporate benefit, then the possibility of allowing shareholders to issue ‘blank powers’ could be considered **legitimate** and Member States would have to change their national legislation banning shareholders from asking company directors to vote on their behalf (see map above), since they would have to bring the ‘blank powers’ system into line with that of proxy solicitors.
The general meeting of shareholders would then represent a sort of ‘parliament’ within which some members would knowingly choose to place their full trust in the executive power, renouncing their right to individually express their vote on each text proposed, but fully adhering to the general policy (which of course does not stop their adversaries from mobilising in favour of the opposition, but encourages the establishment of a ‘legitimist’ majority).

3.1.1.2. Right to ensure corporate benefit is respected

Shareholders are in a position to ensure that managers respect corporate benefit by examining the remunerations received by company representatives (A), but also the procedures aimed at neutralising situations of conflict of interests involving the physical persons who represent the legal person and third parties (B).

A) Approval of remunerations

As the Commission highlighted in its Recommendation 2004/913/EC, remuneration is one of the key areas where ‘executive’ directors (that is, those who oversee the executive management of the company) may have a conflict of interest and where due account should be taken of the interests of shareholders – in their entirety, otherwise known as corporate benefit.

With regard to the structure of remuneration policy, Commission Recommendation 2009/385/EC introduces the principle of proportionality of remuneration within the company, that is a standard used to compare the directors’ remuneration with that of other executive directors on the board of directors and company workers or executives who are also stakeholders and who can have a say in defining corporate benefit.

The European Parliament has gone even further by confirming in its resolution of 7 July 2010 that ‘directors should not be driven by personal financial interest in their management of listed companies’ as it ‘considers that the personal financial interest of directors linked to variable remuneration is in many cases in conflict with the long-term interest of the company, including the interests of its employees and stakeholders’.

The Commission had concluded that remuneration systems should therefore be subject to appropriate corporate governance supervision, based on adequate information rights.

In this respect, the Commission stressed, however, that it was important to fully respect the diversity of corporate governance systems within the EU, which reflect Member States’ different views about the role of companies and the bodies responsible for determining the policy on directors’ remuneration and the remuneration of individual directors.

- Direct intervention by shareholders with regard to remuneration

Although certain regulators (such as AMF in France) have declared themselves in favour of general meetings of shareholders authorising directors’ remuneration in listed companies, the fact remains that this issue still today relies on the exclusive competence of supervisory bodies (board of directors or supervisory board).

It is true that it is difficult to evaluate the impact that such a change would have if it had to be standardised, given that the countries where this direct recourse to ‘democratic’ expression is practised do not seem to be the countries which have best dealt with increasing remunerations (far from it), insofar as shareholders seem to be rather ‘generous’.
That is why it often seems preferable to use specialists (for example an *ad hoc* committee of ‘independent’ directors – in the sense that they are ‘non-executive’ directors) to provide answers to these questions (by evaluating, where appropriate, certain confidential data such as competitive references), since they need to be referred to shareholders at a later stage for their information.

In this regard, remuneration committees, as referred to in Recommendation 2005/162/EC, play an important role in drafting a company’s remuneration policy, preventing conflicts of interest and supervising the behaviour of the board of directors and the management board with regard to remuneration.

To strengthen the role of those committees, Commission Recommendation 2009/385/EC states that at least one member thereof should have expertise in the field of remuneration.

In its Recommendation 2004/913/EC, the Commission considered, in this regard, that the remuneration policy should be submitted to the annual general meeting for a vote, but that this vote could be advisory, so that the rights of the relevant bodies responsible for remuneration would not be altered.

We must of course make a distinction here (that is, what the Commission has not sufficiently done) between the remuneration of directors and that of ‘non-executive’ directors, which may be left in the hands of the shareholders to whom shares have been issued. The attendance fees are therefore frequently set by the ordinary general meeting.

The European Parliament itself seems to have chosen this path, as it considers in its resolution of 7 July 2010 that ‘where appropriate, shareholders should be given the opportunity to contribute towards the determination of sustainable remuneration policies, and could for this purpose be given the opportunity to express their views on remuneration policies by means of a non-binding vote on the remuneration report at the company’s general meeting’.

Of course, it may be different for aspects of remunerations which affect the articles of association, whether it is a question of granting directors privileged access to the company’s capital (stock options, free shares, equity securities which give them access to capital), or granting them special financial advantages (industry contribution, specific rights attached to performance).

In such a case, shareholders must give their prior authorisation to the implementation of remuneration procedures, even if they can take a decision on the principle without necessarily having to go into detail about individual allocations, which generally requires the competence of corporate bodies other than the general meeting.

This distinction was made clearly in Commission Recommendation 2004/913/EC, with national regulations brought into line in 2006, but it did not apply to companies listed on a regulated market (although this criterion seems unconcerned with regard to giving shareholders the opportunity to vote on this issue).

- Information on fixed/variable components

An appropriate remuneration policy ensures that remuneration is based on performance and encourages directors to ensure the medium and long-term sustainability of the company, which of course can only boost corporate benefit.

To promote the long-term sustainability of the company, Commission Recommendation 2009/385/EC provides for:
– a balance between long-term and short-term performance criteria;
– deferment of payment of variable components of remuneration;
– a minimum period of time for the final acquisition of share options and shares and
– minimum retention of some of the shares until the end of the mandate.

Further, companies should be able to reclaim variable components of remuneration that were paid on the basis of data which proved to be manifestly misstated. Likewise, termination payments (‘golden parachutes’) should also be limited to a certain amount and should not be payable in case of failure.

It is important that the primary purpose of termination payments, i.e. as a safety net in case of early termination of the contract, is respected. To that purpose, termination payments should be limited to a certain amount or duration beforehand, which, in general, should not be more than two years’ annual remuneration (on the basis of only the non-variable components) and not be paid if the termination is due to inadequate performance or if a director leaves on his own account.

This does not preclude termination payments in situations of early termination of the contract, due to changes in the strategy of the company or in merger and/or takeover situations, as it seems that corporate benefit can remain intact in such cases.

In order to bring remuneration more into line with performance, which is said to correspond to corporate benefit, as the company can only profit from good performance, this recommendation (which, in principle, does not concern listed companies but which all companies could take inspiration from, as the concept of corporate benefit is a shared concept) requires a balance to be established between fixed and variable remuneration and states that award of variable components should be subject to predetermined and measurable performance criteria.

- Stock option plans

The idea of remunerating directors by involving them in company stock option plans (with the side-effect of diluting shareholders, if new shares are issued) presents the double advantage of representing a saving for companies with no cash to spend, but also establishing a link of proportionality between the profits expected by the director when selling his shares and the good (financial) health of the company, which will reflect the market value of his shares (especially in the case of a quotation).

We can also hope that by making directors share the investment risks faced by other shareholders, conflicts of interest will be reduced.

This means, however, that the presence of directors in stocks is not just symbolic.

However, in this approach, it is important to avoid certain harmful consequences, the reality of which has recently been recognised by Parliament, ‘whereas remuneration policies have been such as to encourage transactions seeking short-term profits, with increasingly risky business models being developed to that end, to the detriment of workers, savers and investors, and sustainable growth in general’36.

Some empirical studies have even been able to show, in no uncertain terms, that a patrimonial interest from directors using their company’s stock options tended to influence their policy on presenting accounts, and even encouraged them to manipulate them37.

36 European Parliament resolution of 7 July 2010 (2010/2009 (INI))
That is why Commission Recommendation 2009/385/EC had stated that ‘in order to further prevent conflicts of interest of directors who hold shares in the company, these directors should be obliged to retain a part of their shares until the end of their mandate’.

**Recommendation 4: FORCING DIRECTORS TO RETAIN SHARES AWARDED FOR REMUNERATION PURPOSES**

Stock options for company directors should imply an entrepreneurial logic of long-term involvement, leading directors to share the risks and hazards faced by other investors with shares, and not simply remuneration ‘on paper’ but rather cash remuneration.

Furthermore, in some Member States, founder shares (or shares by another name) confer specific financial rights to their holders without shareholders necessarily having to make any kind of contribution in cash or in kind to acquire them.

The benefit of these shares is actually linked to the **personal qualities** of those holding them, whose contribution to corporate benefit is considered crucial and therefore deserves to be remunerated in a different way from other shareholders.

We can also see another example with managers’ remuneration (most often in shares) in private limited companies with shares. This often comes with a commission that is proportional to the results, the arrangements for which are defined in the articles of association (which can only be modified by joint agreement between all categories of partners). In practice, payment of this commission therefore assumes that the accounts have been approved by the shareholders (partners with shares).

**B) Regulated party agreements procedure**

In most EU countries, a special procedure aimed at neutralising conflicts of interest between the company and its directors has been put in place in order to tackle situations in which an agreement (other than for current operations under normal conditions) would be concluded – directly or indirectly – between the legal person and the physical persons responsible for representing it (putting them in a position as double signatories in such an agreement, as both debtors and creditors).

In Bulgaria, listed companies which enter into conflicts of interest in operations with their shareholders or members of the board are bound to obtain prior approval from the non-interested shareholders. The transaction must be made at market price or a price evaluated by an independent expert.

In France, the Commercial Code (Articles L 225-38 et seq.) establishes the procedure which applies to such agreements (so-called ‘regulated’ party agreements) as follows:

- **Prior authorisation of the agreement by the supervisory body**
  The signing of the agreement by the legal representative of the company (director) is subject to prior approval from the supervisory body, the collegiate composition of which is in itself a **guarantee of impartiality**, especially as the person concerned does not have the right to take part in the decision-making.

- **Statutory auditors’ report**
  The president of the board of directors then forwards all agreements authorised in this way to the statutory auditors so that they can present a special report on these agreements at the general meeting of shareholders.
Ratification in the general meeting

The agreements are submitted at the next general meeting to be examined – a posteriori – by shareholders. It is a simple ratification which does not jeopardise the legal validity of the agreements.

It is therefore stated that the agreements approved by the meeting, as well as the agreements that are rejected, shall affect third parties except when they are annulled in the case of fraud.

However, even in the absence of fraud, the consequences of the rejected agreements, which are harmful to the company, may be placed in hands of the interested party and, possibly, other members of the board of directors.

Furthermore, and without prejudice to the responsibility of the interested party, the regulated party agreements which would have been concluded without prior authorisation from the board of directors may be annulled if they have harmful consequences for the company.

Invalidity action lapses after three years from the date of the agreement (unless the agreement has been dissimilated, in which case the starting point for the deadline of the lapse is postponed to the day on which it was announced).

However, shareholders still have the upper hand in evaluating how these agreements comply with corporate benefit, as invalidity may be covered by a vote in the general meeting on a special statutory auditors’ report exposing the circumstances in which the authorisation procedure was not followed.

Recommendation 5: PROCEDURAL FRAMEWORK FOR ‘REGULATED PARTY AGREEMENTS’

The conclusion – by a director or significant shareholder who can exercise influence over the company – of an agreement with the company (outside of the framework of current operations concluded under normal conditions) should be submitted to a specific procedure involving collegiate corporate bodies (board of directors/supervisory board, but also the general meeting for ratification at a later date) so as to ensure that it complies with corporate benefit.

It should be noted that the same procedure was recently extended to listed companies, to the commitments made to the benefit of managers either by the company itself or by another entity of the same group, which would correspond to elements of remuneration, bonuses or benefits due or which may fall due as a result of acceptance, termination or changing of their positions or acceptance of subsequent positions (golden parachutes).

French legislation has, however, strictly prohibited (without the possibility of authorisation from the general meeting of shareholders) all elements of remuneration, payments and benefits, if they were not subject to the conditions related to the performance of the beneficiary, evaluated with regard to those of the company, again showing the supremacy of corporate benefit.

3.1.1.3. Right to sanction violations of corporate benefit

Shareholders’ privileges in terms of determining corporate benefit would not be complete without the ability to ensure that inappropriate behaviour is sanctioned, whether this behaviour falls under civil law (mismanagement) (A) or whether it is reprehensible under criminal law (B).
A) Option to sanction mismanagement

As our correspondent in Italy points out, the interests of the company are defined in particular by the shareholders to serve as a ‘compass’ for the body exercising executive power, which is solely responsible for the management of the company and the implementation of company purpose.

In Estonia, members of decision-making bodies (supervisory/management bodies) may be held personally liable (under civil, administrative and/or criminal law) in case of harm done to the company.

In Austria, the board of directors has fiduciary duties towards the company, which lead, in particular, to a legal prohibition for members of the management from exploiting competing companies or to respecting confidentiality obligations. Failure to fulfil fiduciary duties will mean that the board of directors is responsible for any damages towards the company and may lead to its dismissal.

In Greece, it is specified that the members of the board of directors are bound to manage the company’s affairs while taking into account the interests of the company exclusively.

In this regard, case-law repeatedly refers to the definition of company interests (for information, see Athens Court Ruling 419/2005).

Therefore, the members of the board of directors will not be held responsible for failing to meet their fiduciary obligations to the company if they can prove that their actions or omissions represent reasonable business decisions, taken in good faith, on the basis of adequate information and exclusively in the interests of the company.

However, given that the concept of corporate benefit is defined on an ad hoc basis every time depending on the factual context and due to the lack of specific criteria for comparative analysis, it is often difficult for the members of the board of directors to be sure that their actions fall within the framework of corporate benefit on the one hand, and for the company to prove the liability of the members of the board within the framework of legal action against them (actio societatis), on the other.

Derivative company action (action ut singuli)

In Poland, the board of directors is generally obliged to manage the company’s affairs in a way that is not harmful to the company (under pain of civil and criminal accountability – Article 296 of the Criminal Code, Article 415 of the Civil Code), which means that members of the board of directors prefer the interests of the company to the interests of one of the individual shareholders (or even all of these interests).

In Belgium, shareholders can bring legal action on behalf of the company as a whole against the directors concerned (actio mandati) if the claimants have voted against the discharge and if certain thresholds have been crossed (Article 562, CBS). The costs of proceedings must be borne by the losing party.

In Bulgaria, shareholders with at least 10 % of the share capital may lodge a claim against the members of the board of directors for damages caused to the company. If the company is listed, shareholders who hold at least 5 % of the capital are authorised to take legal action to claim compensation for damages caused to the company, intentionally or by gross negligence, as a result of acts or omissions on the part of the members of the board of directors.
In Lithuania, any shareholder has the right to take legal action to obtain compensation for damages caused to the company by managers and/or members of the Board failing to carry out their duties.

Conversely, the option granted to the shareholders to file a lawsuit – on an individual basis – against members of the management or the supervisory body should by strictly regulated, as this will not necessarily work for corporate benefit.

**Recommendation 6: MAKING DERIVATIVE COMPANY ACTION POSSIBLE**

Shareholders must be able to take legal action – on behalf of the company – to demand compensation for the damage suffered by the company due to the wrongful behaviour of its managers. However, it must be clearly stated that the claimant shareholders shall not be the direct beneficiaries of any compensation to be paid.

**B) Legal protection against abusive practices**

A clear distinction must be made between the director’s liability within the framework of his job (which should systematically be covered by the company on behalf of which he is acting) and the director’s personal responsibility in the case of gross misconduct, that is, behaviour which obviously cannot fall under the ‘normal’ exercise of his corporate duties.

In this last case, any shareholder should be able to hold the director to account, but once it goes beyond individual, distinct injury to that shareholder, it is the company (as a whole) which will be seen as the victim of the manager’s actions and which will be able to claim compensation in the form of damages.

Taking into account the costs of such legal action (and the difficulties that may arise in terms of gathering evidence), it is fortunate that the law in some Member States (such as France) punishes under criminal law certain acts of misconduct committed by managers against the company, allowing public authorities to take such matters into their own hands.

- **Misuse of company assets**
  
  In France, misuse of company assets (MCA) constitutes a crime under Article L. 242-6 of the Commercial Code, inflicting a five-year jail sentence and a fine of EUR 375 000. The criminal act is defined as the directors using ‘the company’s property or credit, in bad faith, in a way which they know is contrary to the interests of the company, for personal purposes or to encourage another company or undertaking in which they are directly or indirectly involved’.

- **Abuse of powers**
  
  Again in France, the same article of the Commercial Code sanctions (under the same penalties of imprisonment and/or a fine) the crime of abuse of powers (invoked less frequently than its ‘sister’ crime, MCA), which is defined as a member of the supervisory board or the board of directors using ‘the powers which they possess or the votes which they have in this capacity, in bad faith, in a way which they know is contrary to the interests of the company, for personal purposes or to encourage another company or undertaking in which they are directly or indirectly involved’.

- **Insider trading**
  
  This presentation of criminal (or administrative) law provisions aiming to combat company managers' abusive practices concerning the interests of the company would not be complete if we did not include the crime of exploiting privileged information (commonly known as ‘insider trading’), which is a form of MCA (with which it shares most constitutional elements) concerning this particular ‘company asset’, that is, non-public information about a listed
company which a reasonable investor would be able to use to make decisions about buying or selling company shares (See definition in the Market Abuse Directive).

This criminal dimension is also justified with regard to threats to public order which could result from a manager's abusive behaviour (where appropriate, a controlling or even single shareholder) towards a legal person which cannot defend itself and therefore requires State protection.

This also means that the company is recognised as a legal person in its own right, making part of a greater economic and legal environment, which is concerned with issues going beyond the simple functioning of the company's own internal bodies.

In Estonia, minority shareholders have the right to ask the court to annul a resolution of the general meeting (adopted by a majority vote), if the resolution is contrary to customs and immoral.

In this ambitious approach to corporate benefit, which is part of a vision seeking greater balance in the overall economy for European countries and not just the internal functioning of local companies, which fully justifies it being part of EU law, shareholders themselves must be subject to the principle of primacy.

**Recommendation 7: Giving a Public Dimension to the Primacy of Corporate Benefit**

The primacy of corporate benefit must be applicable to the shareholders themselves (whether they are majority shareholders or control the management of the company or whether they are passive minority shareholders). It may, where appropriate, involve the intervention of public authorities to speak on behalf of the legal person (under legal supervision).

**3.1.2. Obligations of Shareholders in the Light of Corporate Benefit**

The primacy of corporate benefit (that is to say that of the company itself, as a legal person) cannot be interpreted in such a way that the latter (or indeed some of the stakeholders of the company) can pursue remedies against its shareholders by imposing on them – against their will – additional obligations going beyond the commitments entered into when subscribing to the articles of association.

In Denmark, for example, any resolution (i) modifying the principle of equal rights for all shareholders, or (ii) increasing the obligations of shareholders towards the company, requires the unanimous consent of all the shareholders.

**Recommendation 8: Prohibiting Divergence Between Corporate Benefit and Shareholders Benefit**

Corporate benefit must not result from a theoretical approach, without link to the legal person, nor shall it differ substantially from the interest of all shareholders together, to the point that the latter are penalised by the company (speaking through its management), despite being its partners having the absolute right to dissolve it.
However, consideration of corporate benefit may nonetheless periodically justify the imposition of certain obligations on the shareholders, often intended to limit the exercise of their rights.

Pursuance of the common good (which is assessed over time) may in fact sometimes legitimise an attack – albeit measured – on individual freedom, especially when the personal interests of the shareholder conflict with those of the company, which must systematically prevail.

Most importantly, we need to recognise that, while the principal right of the shareholder/partner (that is to say the right to vote) is an individual right, it can only be exercised collectively, in the context of a general meeting of shareholders (general meeting), the decisions of which – being also those of the company whose supreme authority is the general meeting – are taken by majority vote (among those who make the effort to attend or to be represented at the meeting).

As a result, once the shareholder has agreed to ‘play the game’ of corporate life, he must be prepared to accept its rules, which include those that organise the proper functioning of corporate bodies.

In this context, despite its legal definition as supreme (or sovereign) authority, the general meeting itself is required to respect the respective areas of competence of the different bodies participating in the expression of the legal person embodied by the company.

Therefore, even taken collectively (as partners of the general meeting), the shareholders must also defer to certain principles such as the autonomy of the management bodies, because it is corporate benefit that is (again) at stake.

A company is in fact based both on the hierarchical structure of its bodies and the distribution of roles among them, which means that there is an obligation to comply with corporate benefit at all levels, and it is not possible to establish an order of precedence within the legal person.

Recommendation 9: IMPOSING THE SEPARATION OF POWERS AMONG THE CORPORATE BODIES

All the bodies (management/supervisory/general meeting) of a company contribute to the conduct of its activities for the benefit of the company. However, that does not mean that they can substitute for each other. Each has its own unique sphere of competence, notwithstanding the natural hierarchy that may exist between them, taking into account the rules under which their respective partners are appointed.

Poland has therefore specified that the management body is bound neither by the shareholders nor by the resolutions of the supervisory board and acts independently for the benefit of the company (and not of its shareholders) (Article 3571 of the Commercial Companies Code).

Therefore, not only are all shareholders (be they majority or minority shareholders) obliged to adhere to the principle that corporate benefit takes precedence over their own special interests (3.1.2.1.), but minority shareholders must also comply with the interests of the company for which collective decisions are made by a majority in the general meeting (3.1.2.2.).
3.1.2.1. Obligation to respect the primacy of corporate benefit

The obligation of shareholders to respect the primacy of corporate benefit requires the introduction of specific prohibitions (with regard to borrowing from the company, for example) (A), the establishment of a procedure to deal with conflicts of interest (B), and the definition of certain types of shareholder behaviour towards the company as abusive (C).

A) Specific prohibitions

The fact that some shareholders hold a fraction of the share capital of a company may preclude them from benefiting from certain transactions with this company, given the situation of conflict of interest that could arise in such a case with regard to the company.

In Sweden, for example, a company cannot lend to or act as guarantor for a person who holds shares in the company or in a company of the Group, a member of the board of directors or the managing director of the company or of a company of the Group, the spouse, cohabitee, direct ascendant or direct descendant of one of the aforementioned persons, to a person related by marriage under the same conditions (direct relationship, etc.), or to a legal person influenced by any of the aforementioned persons.

In Estonia, a company may not grant a loan to one of its shareholders holding more than 1% of the share capital, or to a shareholder holding more than 1% of the share capital (5% in the case of a listed company) of its parent company.

An Estonian company may not guarantee a loan granted by the aforementioned persons. This does not apply to a guarantee for a loan taken out by the parent company or by a shareholder of the parent company, if such a guarantee does not harm the interests of the company’s creditors.

In the two years following the registration of an Estonian company, the latter may not acquire from a shareholder or from a person with an ‘economic interest’ an asset having a value greater than one tenth of the share capital. This does not apply to the acquisition of assets in the course of commercial activities.

In Greece, loans may not be granted by the company to the persons who control it and, if they are granted, they are absolutely null and void. This prohibition also applies to the granting of credit to these persons, in any way whatsoever, and to the granting of guarantees to third parties acting on behalf of these persons.

Notwithstanding this, the granting of a guarantee or of another surety for the aforementioned persons may be exceptionally authorised, but only in the following cases:

- the guarantee or the surety serves the interests of the company;
- the company is entitled to bring an action before the court against the principal debtor or the person for whom the surety is granted;
- it is stipulated that the guarantee or the beneficiaries of the guarantee will only be satisfied after full payment or with the consent of all the creditors whose claims had already been established at the time of publication; and
- the general meeting has already given its consent. This consent is not granted if shareholders representing a least one tenth of the share capital represented at the general meeting (one twentieth in the case of a listed company) opposes the decision.

The board of directors shall submit a report on the fulfilment of these conditions to the general meeting.
In Lithuania, company law regulates the **right of shareholders to lend to the company**. It is specified that, when borrowing from its shareholders, the company cannot pawn its assets for the benefit of shareholders. When the company borrows from a shareholder, the interest may not be higher than the average rate of interest offered by the commercial banks of the place where the lender has his place of residence or business, or than the rate that was in force on the date the loan agreement was concluded. In such a case, the company and the shareholders must be prohibited from negotiating a higher rate of interest.

In Finland, the general meeting may not adopt a decision conferring an **undue advantage** on a shareholder or another person to the detriment of the company or another shareholder. A shareholder, the board of directors, one of its members, or the managing director may declare such a decision (revocation or modification of the resolution) invalid before the courts.

Similarly, in Sweden, the general meeting may never adopt a resolution that would grant an undue advantage to a third party **to the detriment of the company**. This rule is backed by the possibility for the shareholders, the executive management body, and the managing director (MD) to take legal action to obtain the annulment of the contested resolution.

**B) Management of conflicts of interest**

There is every likelihood that a conflict of interest may arise between a shareholder and the company. That is why it is essential to establish the principle of the primacy of corporate benefit, as this is the only way to resolve such conflicts, which are not prohibited per se but which must be **clearly identified**, if appropriate, in writing or by means of specific procedure.

In Finland, shareholders may participate in the decision-making process regarding a contractual agreement to be concluded with the company, but are not entitled to vote on an issue relating to a possible civil action against them or to exemption from liability which the company may grant them.

Finnish company law contains provisions according to which a contract between the company and its sole shareholder (which does not fall within the company’s normal activity) may only be concluded with the management body’s assent.

Furthermore, in accordance with stock exchange rules (Nasdaq OMX Helsinki Oy) and the obligation to provide continuous information, an agreement concluded between a listed company and one of its shareholders must be published.

- **Requirement of formalism**

  In Denmark, agreements concluded between a shareholder and the company are not valid unless they are drawn up in a manner that can then be verified (that is to say **in writing**), except for agreements concluded under normal conditions and in the normal course of the company’s business.

  The same provision is found in Hungary, but only when a limited company concludes an agreement with its sole shareholder: in such a case, the said agreement must be set out in an official record or in a private record, which constitutes conclusive evidence. In all other cases, the shareholders meeting has exclusive competence to approve a contract to be concluded between the company and one of its shareholders.

  By contrast, the relevant legislative provisions of Hungarian company law stipulate that a contract concluded between the company and its shareholders must comply with the principle of **negotiation of a responsible company**. This means that a company may conclude a contract with its shareholder if it would have done so – under the same terms and conditions – with a third, independent party. There is a similar concept in the English-speaking business world called the ‘arm’s length transaction’ principle. The same principle can also be found in Lithuania.
- Purchase of substantial assets.

In Italy, the ordinary general meeting must authorise the purchase of assets or loans from the company's founders, shareholders or directors if the value of the assets is equal to or greater than one tenth of the company's share capital and the purchase is carried out within two years of the company's registration (Article 2343a of CCI).

  - The seller must submit a report by a sworn expert containing the evaluation criteria, among other things, as well as a statement to the effect that this value is not lower than the compensation to be paid by the company.
  - Within thirty days of the authorisation, the directors must submit the minutes of the shareholders’ meeting as well as the expert report to the register of companies.
  - Should the aforementioned provisions be violated, the directors and the seller are jointly and severally liable for the harm done to the company, the shareholders and third parties.
  - These provisions do not apply to purchases made under normal conditions and in the normal course of the company’s business, or which take place on the stock market or under the supervision of the judicial or administrative authorities.

In the Czech Republic, if a company acquires a shareholder's assets for an amount at least equal to one tenth of the share capital or transfers assets of this value to a shareholder, the value of these assets must be stipulated on the basis of an evaluation made by a court-appointed expert. If the acquisition takes place within three years of the founding of the company, it must be approved by the general meeting.

- Regulated agreements

In the Netherlands, company law does not provide for specific rules concerning agreements concluded between shareholders and the company, in contrast to those concluded between a member of the supervisory board and the company. However, although Dutch law on insolvency proceedings does not provide for specific rules concerning agreements concluded between any party and the company, it is up to the bankruptcy administrator to assess whether or not the performance of the contract concluded with a shareholder serves the interests of the company, failing which the transaction may be cancelled.

In Spain, public limited companies and private limited companies can freely conclude contracts with their shareholders under the condition that the companies’ interests take precedence over those of their shareholders. Moreover, the terms and conditions of the contracts must be in line with usual practices, that is to say the price must be the actual market price. Companies are also under an obligation to disclose these agreements in their annual balance sheet.

Similarly, agreements between a company and its shareholders are generally acceptable under Polish law, but there are certain circumstances in which such an agreement is subject to restrictions or is governed by specific rules. This would be the case if the shareholder who intends to take out a loan, conclude a guarantee agreement or a similar agreement with the company is, at the same time, a member of the board of directors; the execution of such an agreement requires the prior consent of the general meeting (Article 15 of the Commercial Companies Code). The absence of prior consent renders the agreement null and void. This is also the case regarding an agreement or a dispute between the company and one of its shareholders who is also a member of the board of directors; The company will be represented by the supervisory board or an officer authorised by resolution of the shareholders (Articles 210 and 379 of the Commercial Companies Code). Non-compliance renders the agreement invalid.

In Italy, an agreement concluded between a shareholder and the company could be considered a related party transaction. As a result, in such case, CONSOB Regulation
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No 17221, published on 12 March 2010, which sets out the principles to be respected by Italian listed companies, in order to ensure the transparency and fairness of these transactions, will apply.

Regulation No 17221 also requires the management body of a company to adopt internal procedures to be followed in approving related party transactions. These procedures can only be adopted following the favourable opinion of a committee composed exclusively of at least three independent directors. The applicable procedure must be different depending on whether the transaction is of greater importance or of lesser importance (depending on specific thresholds).

As regards transactions of greater importance between related parties, the internal procedure must make it possible, among other things, to obtain a favourable opinion of a committee of independent directors who are not related parties prior to each transaction. As regards the dual system, such an opinion must not be regarded as binding. In any event, if a negative opinion is issued, the transaction must be submitted to the meeting of the shareholders concerned in order to obtain a non-binding resolution. Furthermore, Regulation No 17221 obliges companies to adopt specific rules for the transaction to be approved by the general meeting, if the independent directors issue a dissenting opinion.

In the case of transactions of lesser importance, Regulation No 17221 provides for a reasoned and non-binding opinion to be issued by a committee composed of non-executive directors who are not related parties prior to each transaction between related parties, and subject to approval by the competent body.

Regulation No 17221 provides that disclosure requirements only apply to transactions of greater importance between a company and its shareholders and will be deemed satisfied through the publication of an information document containing the details of the transaction concerned.

In the United Kingdom, the obligation to obtain the prior approval of shareholders for all (significant) transactions between the company and a related party, without the latter being able to take part in the vote, is reserved for premium listed companies, but the Financial Services Authority does not rule out extending it to all listed companies. Premium listed companies (companies with a premium listing on the London Stock Exchange) are subject to numerous reporting obligations concerning, in particular, transactions between a shareholder holding or having held in the last twelve months 10% of the voting rights and the company (or a subsidiary), at least when the transactions cannot be regarded as ‘normal’. In this regard, agreements benefiting a company or a third party external to the contracting parties would probably be regarded as abnormal (indirect link with the shareholder attempting to benefit a company), in the same way as an agreement benefiting the shareholder (absence of compensation).

See Recommendation 5 (above) on ‘regulated party agreements’.

C) Characterisation of abusive behaviour

The notion of abuse of the right to vote is recognised by many Member States, even though, at times, the matter is addressed in a rather vague manner, for example by Czech law, which merely indicates that the abusive use of a majority or a minority of votes in a company is prohibited. It is up to the court to determine, in the light of the facts, if there has been actual improper use of voting rights.

Italian law does not contain specific provisions sanctioning abuse of the right to vote. However, according to specialists and case-law, shareholders must exercise their corporate rights in accordance with the principle of good faith, which governs contractual relations. On the basis of this principle, the law stipulates that, if minority or majority shareholders
believe that other shareholders have exercised their voting rights for the sole purpose of causing them harm and that the resolution was adopted in the absence of corporate benefit, they are entitled to contest the resolution adopted by the general meeting in accordance with the CCI.

In cases where majority shareholders of a Danish company have voluntarily contributed to the adoption of a resolution by the general meeting which could clearly give certain shareholders an undue advantage over the other shareholders of the company, or have abused the influence they have over the company, or contributed to a violation of Danish company law or the company’s articles of association, the court may, at the request of shareholders representing at least one tenth of the share capital, decide that the company will be dissolved, if special reasons, such as the duration of the abuse or other circumstances, justify it.

In accordance with the general principles of the Estonian Civil Code, if shareholders exercise their voting rights to gain advantages for themselves or for a third party to the detriment of the legal person, the resolution adopted may be revoked.

In the event of abuse of majority powers, minority shareholders may petition the court to order the buyback of their shares or the sale of the shares of the benefiting shareholder to the other shareholders at a reasonable price, fixed with due regard to the company’s financial situation and the circumstances of the case.

Although there is no specific sanction for the abuse of the right to vote in Spanish law, a resolution of the general meeting which would harm the company to the benefit of a shareholder or third party may be contested by (i) shareholders who attended the general meeting and who voted against the resolution, (ii) absent shareholders, (iii) shareholders unlawfully deprived of their voting rights, and (iv) directors.

In Poland, certain provisions may be interpreted as sanctioning abuse of the right to vote. Polish law provides that a resolution adopted by shareholders may be revoked when it is contrary to ‘good practice’ and, at the same time, detrimental to a company or to a shareholder (Articles 249 and 422 of the Commercial Companies Code).

- The term ‘good practice’ is identified with reference to the behaviour of an honest man (equity).
- The resolution is detrimental to the company’s interests when, for example, the decision taken by shareholders (i) reduces the company’s assets or (ii) threatens the company’s existence.
- This would be the case if a resolution authorises the payment of a dividend despite the fact that the company did not have sufficient funds and such a decision was not well founded.

In the light of the foregoing, despite the fact that the resolution was adopted in accordance with legal procedures by a majority of shareholders, it may be revoked as constituting an abuse of the right to vote.

However, sanctioning an abuse of the right to vote does not necessarily relate to the validity of the resolution adopted.

In Romania, for example, shareholders must exercise their rights in good faith, with due regard to the rights and legitimate interests of the company and of the other shareholders (Article 1361 of Law No 31).

- Law N 31 does not provide for any specific penalties in the event of abuse, but a shareholder may take legal action if a shareholders’ decision does not comply with the aforementioned legal provision.
• The appropriate court may revoke the decision and rule on tortious or contractual liability, if the company is harmed or at the request of the shareholder.

In Ireland, controlling shareholders do not have a duty to act through altruism towards the company or the other shareholders, but when shareholders exercise control over the company's affairs, they owe the other shareholders an obligation not to exercise control over the company in a way that could go against or fail to take account of the other shareholders' interests (sound control).

In Greece, for example, a decision of the general meeting may be revoked if it was taken through abuse of majority powers under the conditions provided for by Article 281 of the Greek Civil Code, which provides that 'the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the social or economic purpose of that right'.

This decision may be subject to revocation on the basis of a complaint lodged by a member of the board of directors or by shareholders representing at least 2% of the share capital within three months of the presentation of the relevant minutes to the appropriate authority, or to the Register of companies, if such a decision is subject to publication.

Shareholders who do not hold the required percentage of the portion mentioned above may claim compensation for the damage they have suffered due to the fact that the decision in question was taken through abuse of the voting rights of the majority or for other reasons for such a claim, as provided for by law.

The abuse may just as easily concern the exercise of a majority vote as the negative attitude of minority shareholders.

For example, Czech company law prohibits the abuse of majority powers as well as the abuse of minority powers. In the event of abuse, depending on the circumstances, the court may decide to revoke the resolution of the general meeting or the act.

In Belgium, a distinction is made between abuse of the right to vote by majority shareholder(s) and that committed by minority shareholder(s).

• Abuse of majority powers
  – ex ante control by the court in the event of a serious threat of abuse of majority powers: suspension of the convening of the general meeting, appointment of an ad hoc administrator, or prohibition on majority shareholders voting in a specific manner;
  – violation of corporate benefit by the majority: application for suspension or revocation of the shareholders’ decision made to the court by any interested party, provided that the requesting party did not vote in favour of or subsequently approve the decision, unless consent was vitiating.

• Abuse of minority powers
  – ex ante control by the court in the event of a serious threat of abuse of minority powers;
  – right of the company or the majority shareholders to seek damages before the court in the event of separate and personal injury.

Other rights to a legal remedy for the minority shareholders are the subject of debate among Belgian legal commentators.

Recommendation 10: PROHIBITING ABUSES OF MAJORITY OR MINORITY POWERS

Abuses of majority or minority powers, the common feature of which is to undermine corporate benefit, may be committed by shareholders pursuing their own interests to the detriment of the interests of the company, and must therefore be prohibited and punished.
3.1.2.2. Obligation to submit to majority rule

Minority shareholders cannot rely on the general principle of the equal treatment of shareholders to refuse to accept the decisions taken at the general meeting in compliance with corporate benefit (A) and may even be liable to penalties in the event of abuse of a blocking minority, which would be contrary to corporate benefit (B).

A) The principle of equal treatment shall not prevent majority decisions from being binding on minority shareholders.

The institutional operation of public limited companies is based on decisions of the general meeting adopted by a majority of shareholders present or represented.

For example, the Italian legal system applies the principle of the majority rather than the individual consent of all the shareholders of a company. Therefore, if the decisions of the general meeting are adopted in accordance with the law and the articles of association, they bind all the shareholders of the company, even if they voted against them or were absent.

As a result, the majority vote is binding on all minority shareholders, including when the motion on which the vote is cast is the disappearance of the company itself, which may be acquired by another, with the result that the shareholders become owners of shares that are different from those they had acquired.

However, the law may sometimes provide for higher majorities in order to protect minority shareholders.

This is the case in Spain in the following cases:

- In SA and SL companies, increasing the share capital through increasing the value of the share is permitted. The share capital increase must therefore be adopted by unanimous vote of the shareholders, unless it is covered by balance-sheet profits or reserves.
- As regards important decisions, such as the removal or limitation of preferential subscription rights, transformation of the company, merger, transfer of company assets, transfer of registered office, relevant resolutions must be adopted by shareholders holding more than two thirds of the share capital.
- In public limited companies, resolutions adopting capital increases as well as amendments to the articles of association, removal or limitation of pre-emption rights, transformation, merger, transfer of company assets, transfer of registered office, must be adopted by at least half of the shareholders present (1st sitting) or by at least 25% of the shareholders present (2nd sitting).

In many EU Member States, the most important decisions, most notably decisions to amend the articles of association, that is to say the company's charter (the yardstick against which corporate benefit can therefore be assessed), require a qualified majority for their adoption by the general meeting, which leaves minority shareholders the option to form a group to obstruct their adoption.

For example, for the most important decisions Polish legislation requires a qualified majority of the votes cast. That enables the minority to block the adoption of resolutions that may be contrary to their interests. These issues include (Articles 246 and 415 of the Commercial Companies Code) (i) the amendment of the articles of association, (ii) the sale of the company (which requires a three-quarters majority for a company limited by shares).
In Austrian public limited companies, there are certain rights of veto and different qualified majority requirements for certain decisions or activities such as, for example, amendments to the articles of association, certain mergers or scissions, the removal (revocation) of members of the supervisory board, capital increases, etc.

In Denmark, the resolutions proposed below amending the articles of association must be adopted by at least nine tenths of the votes cast as well as at least nine tenths of the share capital represented by the general meeting:

- resolutions aimed at reducing the rights of shareholders to receive dividends or the distribution of the company’s assets;
- resolutions aimed at limiting the transferability of shares or at increasing existing restrictions;
- resolutions requiring shareholders to buy back their shares under equal conditions, with the exception of the dissolution of the company or in the event of buyout in accordance with Danish company law;
- resolutions through which the right of shareholders to exercise their voting rights is limited to a specific part of the voting rights or of the voting capital;
- resolutions aimed at authorising the general meeting to be conducted in a language other than Danish, Swedish, Norwegian or English without arranging for simultaneous interpretation to and from Danish for all the participants.

In Estonia, if minority shareholders account for more than 25% of votes, it is possible for them to oppose the removal of the preferential subscription right during a capital increase and, with more than one third of the votes, they can veto the amendment of the articles of association, the merger, scission or transformation of the company or the premature withdrawal of a member of the supervisory board.

B) Punishment of abuses of minority powers (blocking minority)

The issue of a possible abuse of minority powers only arises in companies in which certain decisions are taken in a general meeting by a reinforced majority of shareholders present or represented (see map below), which enables minority shareholders to oppose the adoption of a decision in cases where they have a blocking minority.

In France, in order to consider abusive the opposition manifested by minority shareholders exercising their right of veto, the following conditions must be met:

- the attitude adopted by the minority is contrary to corporate benefit because it prohibits carrying out a transaction that is essential for the company;
- the adopted approach has the sole aim to serve the interests of the minority shareholders to the detriment of the other shareholders.
In these countries, the punishment for abuse of minority powers cannot be the nullity of the resolution adopted since, by definition, the veto of the minority shareholders prevented the general meeting from taking a decision.

However, the misuse of a veto may expose its holders to prosecution by the company and/or the majority shareholders seeking to be compensated for the harm suffered (loss of opportunity).

Exceptionally, a mediator may be appointed by the court to enable the general meeting to take decisions despite opposition from the minority shareholders and to enable the company to carry on, especially if its survival is threatened.

*See Recommendation 10 (above) on abuses that may be committed by shareholders against the company.*
GENERAL RECOMMENDATION CONCERNING THE NOTION OF CORPORATE BENEFIT

- In view of the necessary cohabitation, within the company, of divergent interests (shareholders, management, employees, etc.), it is necessary to establish the right balance between the rights and the obligations of the shareholders with regard to the company.
- In this regard, it is essential that the ultimate reference, commonly shared within the EU, is the primacy of corporate benefit, understood as that of the legal person, which transcends the sum of the interests of the different stakeholders, including those of shareholders.

... AND AN ADDITIONAL RECOMMENDATION

For the sake of consistency, if the principle of the primacy of corporate benefit were to be adopted and recognised by European company law, it would be logical to modify – or to bend – the rules of EU law relating to certain categories of shareholders (such as institutional investors) or to certain circumstances affecting companies (for example, when they are the target of a hostile takeover bid).

Derogation from the principles governing portfolio management activity on behalf of a third party

In principle, portfolio managers (members of a regulated profession placed under the oversight of national regulators who are also responsible for ensuring compliance with the essential goal of market) follow the rule of systematically putting the interests of their clients, who are in fact the unit holders for the investment funds they manage, first. However, recognition of the primacy of corporate benefit (that is to say, that of the body issuing the shares making up the managed portfolio) could result in managers being authorised to derogate exceptionally from such a rule when the individual interests of their clients could potentially conflict with the greater interest.

This allows us to think that long-term economic imperatives will win out over shorter-term considerations of achieving immediate financial gains.

Possibility of mounting a defence against a hostile takeover bid

Today, there is limited room for manoeuvre available to the corporate bodies of a listed company threatened with a hostile takeover bid to defend it against such an operation initiated by a third party, who may be an investor in search of a fruitful investment (with the idea of dismantling the company to maximise his own financial profit) or a rival whose activities duplicate those of the target (and who seeks to get rid of a competitor), but who is not necessarily an important shareholder when he implements his plan.

The Takeovers Directive in fact left it up to the Member States to transpose (or not) Article 9 (prohibition on the board of directors to take any action which may result in the failure of the bid, other than to seek out a ‘white knight’, that is to say a third party to put in an alternative bid) and Article 11 (prohibition on shareholders to organise an effective defence through the articles of association or an agreement), subject to a reciprocity clause, the application of which is highly complex.

The result is not only that there is great disparity across the EU but also that priority seems to have been given to an approach that is purely financial on the part of the company, treated as a mere commodity at the mercy of stock market players, while it is corporate benefit, guarantor of long-term growth for the company, which should be the ultimate reference criterion.
3.2. RIGHTS AND OBLIGATIONS OF SHAREHOLDERS ACTING IN CONCERT

It is generally accepted that cooperation between shareholders is one an area which the EU should encourage to develop further.

However, certain disappointing national experiences, such as the creation of an official Internet platform in Germany (shareholders’ forum, Section 127a of the German Stock Corporation Act) show that it may be necessary to go beyond the mere provision of technical resources.

That is why the idea to promote the emergence of genuine ‘concerted action’ among shareholders, with rights and obligations to be attached thereto, has gradually taken hold (see the Forum Group’s report on the future of European company law).

In this study, the terms ‘action in concert’ and ‘concerted action’ will be used interchangeably to refer to any voluntary grouping among shareholders, including those who act exclusively in an ad hoc manner, in order to be able to exercise their rights and do not therefore have a longer-term perspective- the latter dimension is essential when it comes to imposing obligations on shareholders acting in concert.

Within the meaning of the former Article L. 233-10 of the French Commercial Code, ‘concerted action’ is defined (somewhat tautologically, as it simply involves acting ‘collectively’ as shareholders) as the situation of ‘persons who have concluded an agreement with the intention of acquiring, disposing of or exercising voting rights in order to implement a joint policy with regard to the company’.

One could even add (again drawing on France, where legislation has the advantage of not being limited to listed companies) that such an agreement is presumed to exist in a number of cases: (i) between a company, the chairman of its board of directors and its managing directors or the members of its executive board or its managers, (ii) between companies of the same ‘group’ connected to each other through relations of control, (iii) between the different actors of a trust.

Belgian legislation defines the expression ‘persons acting in concert’ as:

- natural or legal persons who have concluded an agreement to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the company in question;
- natural or legal persons who have concluded an agreement to hold, acquire or dispose of equities to which voting rights are attached;
- natural or legal persons who cooperate with the offeror or the offeree company or with other persons on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring or retaining control of the offeree company or at frustrating the successful outcome of a bid.

Under Hungarian capital market rules concerning listed companies, the expression ‘persons acting in concert’ is defined as natural or legal persons who cooperate on the basis of an agreement in order to acquire an interest in the share capital of the offeree company or to acquire control of the offeree company or to frustrate the successful outcome of a bid.

In the light of the last example, it appears that one of the main obstacles to the adoption of this approach within listed companies is the existence of regulatory constraints linked to taking account of concerted action in order to define whether the thresholds for a compulsory takeover bid have been attained.

For example, Finnish company law does not contain specific provisions concerning concerted actions apart from the law on financial markets, which contains provisions concerning
shareholders acting in concert in particular as regards the obligation to launch a takeover bid. However, the rules concerning the obligation to carry out a takeover bid only concern listed companies.

This difficulty should therefore be removed by strictly limiting compulsory takeover bids to cases in which the objective pursued by the shareholders is to take control of the issuing company. Moreover, this limitation appears to be consistent with the spirit in which the Takeovers Directive was drafted, which links the obligation to launch a takeover bid to the change of control and not to the creation of a countervailing power composed of minority shareholders.

**Recommendation 11: Removing Concerted Action from the Pure Stock Market Context**

In the case of listed companies, taking shareholders’ concerted action into account must be disconnected from the specific consequences of such action on the stock market (threshold crossing, mandatory takeover bids), in order to allow this concept to spread throughout company law across the EU.

It would essentially mean extending to ‘ordinary’ company law (for listed and unlisted companies) the principles of European stock exchange law already governing the rights (1) and obligations of shareholders (2), taking into account their voluntary groupings.

### 3.2.1. RIGHTS OF SHAREHOLDERS ACTING IN CONCERT

EU law already recognises the allocation of rights to shareholders acting in concert, even though it is essentially in the stock market sphere, to authorise closure offers (buy-out offers), or indeed the expropriation of (ultra) minorities.

In Poland, for example, no specific account is taken of the rights of shareholders acting in concert, save as regards listed companies, since, in the event of a concerted agreement between the shareholders, if their total participation exceeds 90%, they have the right to purchase the shares of the remaining shareholders in the company (Article 82 of the Act on Public Offerings).

Nevertheless, as regards the possibility for shareholders to join forces so that they are in a position to exercise their rights more effectively, this is not a new idea within the EU. Many Member States already recognise this phenomenon, in particular in listed companies, the ownership of which is so dispersed that individual shareholders necessarily have to act together to get their voices heard. It is not by chance that Directive 2007/36/EC encouraged the development of practices of actively soliciting powers (voting mandates) in such companies.

In Belgium, *public proxy solicitation* is possible under certain conditions (Article 549 CBS):

- the proxy may only be requested for one general meeting, or for subsequent meetings with the same agenda;
- the proxy can be revoked;
- the proxy form must contain the information mentioned under the first point above, as well as a description of and justification for the objectives of the party soliciting the proxy. (A proxy holder must comply with the instructions of the shareholder, except under special circumstances.)
- If the party soliciting the proxy is a limited liability company which makes public calls for capital, the financial supervisory authority must receive a copy of the request three days prior to disclosure.
Furthermore, proxy holders are required to follow the instructions of shareholders, except under exceptional circumstances. They shall be liable if they fail to do so. The instructions must be kept for one year.

In Spain, a public application for representation by proxy (from three shareholders) is generally made public. The proxy is therefore attached to the agenda and contains instructions on the line of voting to be taken in the absence of precise instructions from the client. (The restrictions do not apply in cases of general public mandates or if the representative is the spouse of the shareholder giving the proxy).

**Recommendation 12: SPECIFYING THE DEGREES OF LIABILITY TO WHICH PERSONS ACTING IN CONCERT ARE EXPOSED**

Concerted action is a multidimensional concept covering a wide variety of situations, ranging from simple ad hoc collaboration to the formation of a sustainable alliance among shareholders. Depending on the extent of the commitments undertaken by the persons acting in concert, their liability may vary significantly. Greater standardisation of the notion would therefore be recommended.

Beyond the mere **collection of powers**, as carried out by corporate governance consulting professionals, the active solicitation of voting mandates may be one of the ways used by shareholders seeking to assert themselves as ‘conductors’ at the head of a concerted action involving shareholders sharing the same interests, in the medium-to-long term.

Without necessarily going as far as this, minority shareholders may simply form an alliance – for just a brief period of time, if appropriate – in order to reach, as a group, the thresholds above which holders of a significant share of the share capital are considered to be ‘legitimate’ holders of certain partners’ rights.

**Taking concerted action may meet the need of certain shareholders to be recognised as such despite the weakness of their individual shareholding in the company’s share capital (3.2.1.1), to join forces to face up to company executives better (3.2.1.2.), or to form a genuine ‘hard core’ inside the company (3.2.1.3.).**

**3.2.1.1. Right to be collectively recognised as partners, despite the weakness of their individual shareholding**

The joining together of shareholders, whether it takes the form of a genuine structured ‘concerted action’ or not, gives minority shareholders access to certain partners’ rights, which require crossing a certain capital threshold (A). It also makes it possible to identify the different components of the shareholding structure so that they can be granted a right of expression proportional to their level of representation (B).

**A) Joining together to reach a minimum threshold conferring certain partners’ rights**

In the majority of EU Member States, it is necessary to gather together – several times, if appropriate – a minimum fraction of the share capital to be able to exercise certain partners’ rights, such as that of (i) requesting the inclusion of a resolution on the agenda of the general meeting, (ii) requesting a management evaluation in urgent application, (iii) petitioning the
court for the designation of an authorised agent responsible for convening a general meeting, or (iv) instituting liability proceedings against company executives.

In France, for example, it is possible for minority shareholders to join together (if appropriate, within an association) in order to reach the threshold of 5% of the share capital (this percentage decreases with the company’s market capitalisation), which enables them to exercise all the aforementioned rights.

The minimum percentage required may also vary depending on the listing of the company or on the amount of its share capital.

For example, in the Czech Republic, shareholders who hold shares with a total nominal value of at least 3% of the share capital of a company whose capital is greater than CZK 100 000 000, and shareholders who hold shares with a total nominal value at least equal to 5% of the share capital of a company whose capital is CZK 100 000 000 or less may direct the board of directors to convene an extraordinary general meeting to discuss the matters raised.

In Estonia, minority shareholders who hold at least one tenth of the share capital (one twentieth in the case of a listed company) may demand (i) an audit of the company to enable the auditor to determine the company’s management and financial situation, (ii) the exclusion of a member of the supervisory board or that of an auditor, (iii) the convening of an extraordinary general meeting and setting of the agenda, as well as (iv) the notarisation of the minutes of the general meeting.

Sometimes, in particular as regards the inclusion of items on the agenda, the minimum percentage of share capital required for the exercise of partners’ rights may be relatively small, making it pointless for several shareholders to form a group, but it may be valuable to mobilise a large number of shareholders to show that the subject is relevant.

For example, in the Netherlands, in listed and unlisted companies, a shareholder holding more than 1% of the share capital may place an item on the agenda. To convene a general meeting, one or more shareholders representing at least one tenth of the share capital (a larger or smaller holding possibly being provided for in the articles of association) may be authorised by a decision of the court.

In Belgium, in listed public limited companies, one or more shareholders representing jointly at least 3% of the share capital may place items on the agenda, including those concerning proposals to amend the articles of association (Article 533a of the CBS).

One might take the view that it is particularly important for shareholders to be able to join together in order to obtain the minimum percentage enabling them to call for the convening of a general meeting, since it is through this corporate body that they will be able to regain control of the conduct of the company’s business until then ensured on a daily basis by previously appointed company executives.

In Denmark, shareholders who hold more than 5% of the share capital in a listed company may convene an EGM.

In Hungary, shareholders controlling at least 5% of a company’s voting rights may require at any time that the company’s supreme body be convened.
The company’s articles of association may also grant this right to shareholders who control a smaller percentage of the votes.

If the company’s management does not comply with such a request within thirty days, the court competent on the company's registration must convene a general meeting (the supreme body) within thirty days of the shareholders’ request, or the same court may authorise shareholders who so request to convene a general meeting themselves.

In some countries, such as Greece for example, measures protecting the rights of minority shareholders under Greek company law (Law No 2190/1920, as amended) do not benefit each individual shareholder but, for the most part, several shareholders as a ‘group’ totalling a determined percentage of the share capital.
| Shareholders representing at least 2% of the share capital may call for the revocation of a decision of the general meeting if the decision was taken in violation of the law or the articles of association, if the shareholders oppose the decision or were not present at the meeting. |
| Shareholders representing at least one twentieth of the share capital may: |
| - request that an extraordinary general meeting be convened on specific items on the agenda; |
| - instruct the board of directors to include additional elements on the agenda of a general meeting that has already been convened; |
| - instruct the chairman of the general meeting to postpone, once only, the adoption of resolutions of an ordinary or extraordinary general meeting in respect of all the items or just some of them. |
| - instruct the board of directors to notify the annual general meeting of the amounts that, in the previous two years, were paid for any reason whatsoever by the company to members of the board or managers or other employees of the company, of any subsidies paid to these persons, and of any contract concluded by the company with these persons. |
| - request that a decision be taken on all items on the agenda of the general meeting by means of a roll call vote; |
| - request that the company be audited by the appropriate court (of the place where the company has its registered office) in the event of a suspected violation of the articles of association or resolutions adopted at meetings. |
| Shareholders representing at least one tenth of the share capital may: |
| - reject a resolution relating to the payment of the salary / remuneration of a member of the board of directors; |
| - call for the board of directors to take legal action against members of the board; |
| - petition the court to remove company executives who have been directly ‘appointed’ by one or more shareholders on serious grounds. |
| Shareholders representing at least one fifth of the paid-in share capital may: |
| - instruct the board of directors to provide the general meeting with information on the conduct of the company’s business and the status of its assets; |
| - request that the company be audited by the appropriate court if the overall progress of the company’s business leads them to believe that the company’s business is not being managed in an honest and prudent manner. |
| Shareholders representing at least one quarter of the share capital and who are present at the general meeting may reject a resolution of the board of directors concerning the settlement or the waiver by the company of rights to obtain compensation for the harm caused by a member of the board of directors. |
| Shareholders representing at least one third of the share capital and who are present at the general meeting may reject a resolution of the board of directors relating to the approval of a contract between the company and a member of the board of directors. |

**Source:** JeantetAssociés
In Spain, the grouping together of shareholders may also be justified for the exercise of rights requiring shareholders to hold a minimum percentage of the share capital. Examples include:

- In a SL or SA company, any shareholder who holds at least 5% of the share capital may instruct the directors to convene a general meeting and contest decisions adopted by the board of directors in order to revoke them. Any shareholder who holds 25% of the share capital may call for a general meeting to be extended.

- In a public limited company, any shareholder representing at least 5% of the share capital may examine documents substantiating the company’s financial status and may request the presence of a notary at the general meeting. Any shareholder who holds at least 25% of the share capital may request information or details about the agenda of the general meeting (which can, however, be refused).

- In a public limited company, any shareholder who holds at least 5% of the share capital may call for the appointment of an independent expert to determine the value of the company’s assets and may also call for the addition of items to the agenda. Any shareholder who holds at least 25% of the share capital may request information or details on the agenda and these requests cannot be rejected. Any shareholder who holds at least 1% of the share capital may require that a notary be present at a general meeting. Any shareholder who holds at least one twentieth of the share capital may petition the court to remove liquidators, stating the reasons.

Italian law also provides that minority shareholders may form a group to protect their interests by collectively exercising the following rights (non-exhaustive list):
**Table 3: Italian law: rights of minority shareholders**

<table>
<thead>
<tr>
<th>Right</th>
<th>% of the share capital to be held to be authorised to exercise the right</th>
</tr>
</thead>
<tbody>
<tr>
<td>To petition the court to convene a shareholders’ meeting to take a decision on the liquidation of the company (Article 2487 of the CCI)</td>
<td>All shareholders</td>
</tr>
</tbody>
</table>
| To take legal action against the directors asserting their liability for breach of duty towards the company’s shareholders (Article 2393a of the CCI) | Unlisted companies: at least 20 % (or the percentage provided for by the articles of association, which cannot be > 33 %)  
Listed companies: at least 2.5 % (or a lower percentage established by the articles of association) |
| To take legal action against the directors for breach of their obligations causing direct harm to such a shareholder (Article 2395 of the CCI) | All shareholders                                                         |
| To propose the reversal of a decision adopting a resolution of the general meeting in violation of the law or the articles of association (Article 2377 of the CCI) | Absent shareholders, those having voted against the resolution or having abstained  
Unlisted companies: at least 5 % of the shares granting a voting right in respect of this resolution  
Listed companies: 1 % of the shares granting a voting right in respect of this resolution  
The articles of association may reduce or exclude both these thresholds. |
| To propose the reversal of a resolution of the general meeting, if (a) the meeting was not convened, (b) the relevant minutes were not drawn up, or (c) the subject of the resolution was impossible or unlawful (Article 2379 of the CCI) | All shareholders                                                         |
| To instruct the directors to convene a shareholders meeting (Article 2367 of the CCI) | Unlisted companies: at least 10 %  
Listed companies: at least 5 %  
The articles of association may specify lower percentages |
| To call for the postponement of a meeting for up to 5 days when there is not enough information (Article 2374 of the CCI) | Shareholders present at the meeting and representing at least one third of the share capital |
| To request a report of the Board of Statutory Auditors concerning the management of the company which the shareholder deems reprehensible (Article 2408 of the CCI) | All shareholders                                                         |
| To file a claim with the appropriate court to obtain files if the directors are suspected of serious irregularities which could harm the company or the entities controlled by it (Article 2409 of the CCI) | Unlisted companies: at least 10 %  
Listed companies: at least 5 % |
In Romania, minority shareholders may form a group, where appropriate, in order to benefit from the following rights:

- shareholders representing, individually or collectively, at least 5% of the company’s share capital may (i) instruct the company to call a general meeting provided that the request relates to matters on which the meeting has the authority to decide (Article 119 of Law No 31), or (ii) call for the addition of items to the agenda of the general meeting (Article 1171(1) of Law No 31);

- one or more shareholders representing, individually or collectively, at least 10% of the company’s share capital may (i) ask the appropriate court to appoint one or more experts with the necessary authority to analyse certain operations relating to the company’s activity and prepare a report to be submitted to the shareholder(s) concerned, the directors and members of the supervisory board as well as the company’s non-voting directors or internal auditors, which will be analysed and on the basis of which appropriate measures must be proposed (Article 136(1) of Law No 31).

In Finland, shareholders holding at least one tenth of all the shares may call for a minority dividend to be paid out to them. Moreover, where, in a company, an auditor has not been appointed in accordance with the law or the articles of association, the general meeting must nonetheless make such appointment if shareholders holding at least one tenth of all the shares or one third of the shares represented at the general meeting so require.

**Recommendation 13: AUTHORISING SHAREHOLDERS TO FORM GROUPS SO THAT SHAREHOLDERS’ RIGHTS CAN BE EXERCISED COLLECTIVELY**

All the rights benefiting an individual shareholder (especially if they require the shareholder to hold a minimum percentage of the share capital) should be exercisable collectively by a group of shareholders if the latter take concerted action to that effect.

**B) Right of expression of the various components of a company’s shareholding structure**

While not calling into question the principle of equality among shareholders, which is central to the law of many Member States, the fact remains that concerted action among shareholders sharing the same interests allows the focus to be put on various components of a company’s shareholding structure, by giving making them eligible for proportional representation within the corporate bodies, starting with the general meeting.

This may first involve reconciling the legal definition with the reality of the situations that may be observed in many companies. Thus, it would probably not appear unusual to envisage as a homogeneous ‘whole’ this or that block of shareholders sharing the same characteristics and behaving in the same way over several years (founding partners, members of a family group, circles of friends gathered around business leaders, etc.).

- Employees

Employee shareholding schemes, which are the fruit of a long tradition in certain EU countries (most notably in Germany), are vital for stability and commitment over the long term, given the links connecting the shareholders to the issuer, who is also their employer.

Moreover, this category of investor includes people who objectively share many common interests (the main one being that they are also creditors of their company in the amount of their salaries).
Accordingly, it would seem that recognising concerted action of the various members of a company’s employee shareholding scheme would allow a unified and more efficient expression of that component, which deserves to be represented at the level of the corporate bodies and to influence decision-making in proportion to its true importance.

- Institutional investors

A distinction doubtless needs to be made within the category of professional investors commonly referred to as ‘institutional investors’ (to which the Green Paper devoted a lot of attention, to the extent that they are perhaps accorded undue importance in relation to their true weight in the share capital of European companies, notably those not included in the major stock market indices).

Whereas some of them (pension funds, investment funds, insurance companies) tend to consider an issuing company in the share capital of which they are invested a pure object of speculation in the short term, by contrast others (private equity) are traditionally very involved in monitoring the strategy and management of companies they support over the long term.

Therefore, the prospect of structuring themselves in the form of a group acting in concert in order to have a greater voice in the dialogue with those concerned with the management of the company and other shareholders will probably be of more interest to the latter than to the former.

However, the fierce competition that may exist between some minority shareholders, especially institutional investors whose action aims at seizing the opportunities presented (in order to gain the maximum advantage), the last thing on their mind being to cooperate with each other, should not be ignored.

**Recommendation 14: Presumption of Concerted Action Among the Stakeholders of a UCITS**

An idea would be to establish a preseption of concerted action among the various stakeholders of UCITs (management company, depositary, unit holders) who implicitly contribute to the exercise, by the institutional investors (sometimes structured in the form of mutual funds without legal personality), of their shareholders’ rights.

**3.2.1.2. Right to join forces to face up to company executives**

In the context of confrontation (and sometimes opposition) between company managers on the one hand and shareholders on the other, it is in the latter’s interest to conclude voting agreements amongst each other to bring greater influence to bear in the general meeting (A) or to group forces to launch collective action against company managers (B).

**A) Legality of voting agreements**

According to the Finnish Financial Supervision Authority, reaching agreement on a single resolution of the general meeting or appointing this or that member of a body does not constitute concerted action (but its opinion only bears on the legal obligation to make a takeover bid in the event of a change of control).
The majority of Member States currently acknowledge the legality of voting agreements, but there are exceptions.

In the Netherlands, for example, voting agreements are considered illegal but do not directly affect the decisions of the general meeting. For example, if a voting agreement is concluded between two (or more) shareholders and if one of them votes contrary to what is specified in the agreement, his vote is perfectly legal.

In Belgium, voting agreements are legal if the following conditions are met:

- they must be **time-limited** (of ‘reasonable duration’, taking the interests of the company into consideration); implicit renewal clauses are considered valid (Article 551 CBS); a voting agreement that exceeds the ‘reasonable duration’ is not sanctioned by nullity, but its duration is automatically reduced.
- they must be justified by the **interests of the company** (Article 551 CBS);
- they cannot deprive the general meeting of its right to take decisions that fall within its area of competence (Court of Cassation, 13 April 1989).

In this respect, it is possible, for example, for shareholders who are party to an agreement to decide that a director must be chosen from a list of candidates established by a group of minority shareholders, because the general meeting does of course retain the right to chose from this list.

However, in the following circumstances a voting agreement (or a specific clause in this agreement) is null and void:

- if the voting agreement is contrary to the Belgian Companies Code; for instance, if the voting agreement changes the legal task division between the different corporate bodies;
- if the voting agreement is contrary to the corporate interest; in this respect, the motivation of the voting agreement is of high importance;
- if a shareholder agrees to vote according to the guidelines of the company, of a subsidiary or of a corporate body of the company;
- if a shareholder agrees with the company, a subsidiary or the corporate bodies of these companies to approve the proposals of the corporate bodies of the company;
- if the voting agreement is affected by error, violence, deceit or qualified unbalance between the reciprocal rights of the parties.

As a rule, this nullity is absolute and may be invoked by all interested parties and by the court. Nullity is only partial, provided that only certain clauses, and not the voting agreement as a whole, violate the applicable legal provisions.

The votes cast during a general meeting on the basis of an invalid voting agreement are null and void (Article 551(3) CBS). The nullity of the votes implies the nullity of the decisions of the general meeting, unless the votes did not influence the validity of the decision and the voters had no influence on the deliberation and the consultation of the general meeting.

It should be pointed out that non-compliance with a voting agreement cannot lead to the nullity of the decision of the general meeting if the agreement is not included in the company’s articles of association. Indeed, if it falls outside the scope of the articles of association, the voting agreement – and the violation thereof – is not enforceable against the company.

Hungarian company law does not contain any special provisions or limitations in respect of voting agreements. Therefore, shareholders may freely conclude voting agreements among each other.
However, such agreements may only create a contractual relationship between the parties thereto. This means that, in the event of a violation of the voting agreement, the resolution thus adopted cannot be rescinded and parties that have not violated the voting agreement will not be entitled to claim the specific performance. They will only be entitled to seek damages or contractual penalties if this has been agreed.

In Denmark, too, shareholders may conclude a shareholders’ agreement as regards the exercise of voting rights. The areas habitually covered by shareholders’ agreements are the appointment of directors and obtaining the majority required for substantive decisions.

These shareholders’ agreements are not binding on the company or in respect of the resolutions adopted in general meetings. Therefore, such agreements cannot be imposed on the company.

However, shareholders’ agreements will be legally binding on the parties. In the event of violation, injured parties may take legal action to enforce agreements.

Normally, shareholders’ agreements can only be terminated in the event of material breach. Parties will only be released from their obligations under the agreement when they transfer their shares.

This issue is not expressly regulated by Bulgarian law, namely there are no conditions or limitations on concluding voting agreements. Nevertheless, if shareholders do not carry out their contractual obligation to vote or abstain, they may be punished by the other parties under the voting agreement but, in any event, they may not be legally obliged to fulfil their obligation to vote.

In Spain, voting agreements between shareholders specifying their voting behaviour are only effective between the parties and cannot bind the company. A violation of these agreements does not affect decisions taken at a general meeting.

Greek company law does not impose conditions or limitations relating to voting agreements, which can be legally concluded on the basis of the principle of contractual freedom. The fact remains, however, that certain provisions of Greek law on contracts in general are applicable to voting agreements and can lead to restrictions.

Therefore, the terms of the agreement must be neither unethical nor extremely inconvenient for or abusive to minority shareholders (for example, an agreement having a duration equal to that of the company).

In Italy, shareholders’ agreements governing the exercise of voting rights in unlisted companies (or their controlling bodies) cannot last more than five years. If a duration is not specified, each party has the right to withdraw with 180 days’ notice (Article 341a of the CCI).

Shareholders’ agreements governing the exercise of voting rights in Italian listed companies or their controlling bodies cannot last more than three years. If duration is not specified, each party has the right withdraw with a six months’ notice (Article 123 UFA).

In the Czech Republic, it is debatable whether voting agreements are valid, since, under the Civil Code, an agreement in which rights are waived is not valid. The validity of these agreements will also be considered in terms of conformity with ‘good manners’ as well as the principles of honest business relations.

Voting agreements are acceptable under Polish law in accordance with the civil law rule of freedom of contract (Article 3531 of the Civil Code), on condition that the provisions of such
agreements do not violate the principles of social life, in which case they risk being null and void (Article 58 of the Civil Code).

The following agreements would therefore be null and void:

- an agreement contributing to the establishment of ‘minority governance’; in other words minority shareholders have a decisive vote (while the influence of majority shareholders is limited);
- an agreement containing provisions that are prejudicial to the interests of a company or to a shareholder.

Recommendation 15: RECOGNISING THE LAWFULNESS OF VOTING AGREEMENTS

The conclusion, between several shareholders, of a voting agreement enabling them to implement the common policy they have adopted among themselves in respect of the company should be lawful, the only limitation being its compliance with corporate benefit.

In return for the recognition of the lawful character of voting agreements, certain reporting requirements may nevertheless be imposed on their signatories (see below).

B) Class actions

Bringing charges against corporate managers presupposes not only that the necessary financial resources are available (which can, in itself, justify the shareholders pooling their resources) but also, occasionally, that the legitimacy of such an action can be demonstrated if it gathers a large number of shareholders.

It is true that such legal proceedings often follow on from the prior collection of evidence (management investigation, etc.), which also requires a minimum percentage of the share capital.

In Austria, a group of shareholders acting in concert may also be justified, insofar as several shareholders holding at least 10% of the issued share capital can call for the appointment of a different auditor or of a special external auditor, instruct the company to seek damages against the directors or other shareholders, call for the postponement of the general meeting if they disagree with the annual report, or petition the court to remove a member of the supervisory body.

In Bulgaria, for example, only shareholders holding at least 10% of the share capital may lodge a claim against the members of the boards for damage caused to the company. The Public Order and Security Act (POSA) also introduces certain minimum thresholds for the exercise of certain rights. In particular, shareholders of a listed company holding at least 5% of the company’s capital are authorised to institute legal proceedings for compensation for harm caused to the company by the acts or omissions of board members.

In Hungary, it is also possible for minority shareholders to form a group to call into question the management of the company, despite the support the latter could receive from the majority shareholders:

- if the general meeting rejects a proposal to have a check carried out on the last annual report drawn up (in accordance with Hungarian accounting law) or on any other event related to the management over the course of the two previous years, or if it has ignored such a proposal, in which case the examination may be ordered by the competent court at the request of shareholders controlling at least 5% of the votes.
- If (i) the company’s supreme body rejects a request to enforce a claim against those concerned with the management of the company, members of the supervisory board or
against the company’s auditor, or (ii) this body fails to adopt a decision concerning a proposal that has been correctly submitted, in which case the shareholders holding at least 5% of the votes may enforce the claim themselves on behalf of the company in a judicial proceeding within 30 days of the meeting of the supreme body.

In Italy, the prevalence of the majority principle is demonstrated by the fact that all claims for damages against directors charged with an offence must be decided by the shareholders’ meeting. Nevertheless, it should be pointed out that the law also provides for the possibility for proceedings to be instituted by a qualified percentage of minority shareholders.

In Latvia, a company with share capital is obliged to make a claim against the founders, management or the supervisory body, if a request is made by shareholders representing at least one twentieth of the share capital and that does not represent less than LVL 50 000 (Lithuanian currency).

(See Recommendation 6 (above) on the derivative (corporate action ut singuli) that may be taken, in the name of and on behalf of the company, by a shareholder (where appropriate in concert with others) against corporate officers who have committed an offence against the company).

3.2.1.3. Right to form a ‘hard core’ within the company

Concerted action is objectively the best way to set up a group of stable shareholders, united by the desire to pursue (in the long term) a common policy with regard to the company (A) or to take (and to exercise) joint control (B).

A) Bringing stakeholders together to govern the company jointly

It was unanimously noted that the traditional problems of ‘corporate governance’, which, for example, gave rise to the Green Paper consultation in 2011, were mainly encountered in ‘large’ listed companies, the shares of which were widely dispersed, but were less present in companies (often smaller, although this is not an explanatory criterion) – listed or unlisted – the ownership of which was more concentrated, for example around a family or entrepreneurial block.

In such a configuration, the shareholders making up this ‘hard core’ are in a position to fully exercise their prerogatives in respect of the company and its corporate managers in such a way that the excesses that are encountered in the ‘star’ companies in the major stock market indices are often absent.

In Spain, all the shareholders of a public limited company can request information on the company, which must be given to them prior to the general meeting, except in cases where to do so would risk causing damage to the company. However, this restriction does not apply to shareholders holding at least 25% of the share capital.

This example shows that having a significant holding in a company’s share capital helps to transform shareholders (or groups of shareholders) into privileged partners of the company, which ceases to treat them as external third parties in respect of whom (or which) certain information is confidential, by granting them the status of true partners.

Therefore, a group of shareholders, even if they remain minority shareholders, may express a desire to be more involved in the company’s business as a reaction to the ‘passive’ behaviour of certain institutional investors, for example. As a consequence of such a desire to become involved, it would be logical for shareholders coming together to take concerted action to seek to be represented within a company’s supervisory bodies.
Rights and obligations of shareholders

Certain local practices merit attention. In Italy, for example, the law grants minority shareholders special rights to appoint directors, which may encourage them to form a group to vote for a common candidate.

In Poland, shareholders representing at least one fifth (20%) of the share capital can request to participate in the election of the supervisory board of a public limited company by voting in separate groups. Separate groups are created by dividing the total number of shares represented at the general meeting by the number of members of the supervisory board. Each group may elect a member of the board (Article 385(3) of the Commercial Companies Code).

In Belgium, on a voluntary basis Belgacom (which is a public company majority-owned by the state) has half of its ‘non-executive’ administrators appointed by its minority shareholders.

- **Independent directors**

  In the various Member States, the concept of ‘independent director’ varies, because their ‘independence’ is not necessarily recognised with regard to the same persons. Some directors are ‘absolute third parties’ who must not have any links with any of the stakeholders of the company of which they are nevertheless directors (which would, in particular, prohibit them from being affiliated to, where applicable, minority, shareholders). Other are rather ‘non-executive’ directors, that is to say directors who can be a real countervailing power of management within this ‘supervisory’ body (to use the terminology of the Commission Green Paper) and thus effectively represent the interests of shareholders (meaning minority shareholders, because majority shareholders – if they exist – have allegedly brought these executives to power).

  To resume the analysis of the reflection group, it is not certain that absolute ‘independence’ is the best criterion to contribute to the implementation of a positive and constructive dialogue within the board of directors. Therefore, we would tend to recommend an approach aimed at balancing the representation of the different shareholding components (at least as regards the most stable of them, which will contribute to favouring shareholders – even minority shareholders – who share the objective of a long-term presence in the company’s capital).

- **Employee representatives**

  Naturally, the presence of employee shareholder representatives acting in concert is not quite as essential in countries like Germany, which already legally reserves half the seats to representatives of the company’s employees (when the company is co-managed), whether the employees hold shares or not.

  Similarly, public companies in France have an obligation to include representatives of their employees on the board of directors, even though they often do not hold any shares.

  The fact remains that, apart from these specific cases, it may seem easier to justify the appointment of a director representing employees if the latter are shareholders and confirm that they act in concert (which means that a common policy can be defined).

**Recommendation 6: ALLOWING THE PROPORTIONAL REPRESENTATION OF GROUPS OF SIGNIFICANT SHAREHOLDERS WITHIN CORPORATE BODIES**

Each homogeneous component of the ownership structure of a company should be able to obtain representation within the corporate bodies, provided its members total a significant fraction of the share capital and they join forces to support a candidate acting as their spokesperson.
B) Ability to form a group to acquire joint control of the company

The concept of concerted action is frequently associated with that of control:

- in the United Kingdom, the relevant takeover authority (takeover panel) makes a distinction between voting together on a particular resolution, which would not constitute concerted action (Note 2 on Rule 9.1 of the Takeover Code), and the initiative to propose a resolution aimed at acquiring control of the board of directors, which creates a presumption of concerted action on the part of the shareholders who support it (and the candidates for election to the board of directors);

- in France, the acquisition of control has become (since the Banking and Financial Regulation Act of 22 October 2010) one of the two objectives pursued by shareholders acting in concert, the other being simply the implementation of a common policy with regard to the company (without necessarily wanting to take control of it, with control possibly having belonged to the parties acting in concert for a long time or being beyond their reach if they are simply minority shareholders).

Therefore, the first manifestation of the application of the concept of concerted action in general company law is likely to be the formation of groups of shareholders who, individually, do not have control over the company, but whose aim will be to exercise joint control over the company.

In France, joint control over a company is defined by Article L 233-3 of the French Commercial Code as two or more (legal) persons acting in concert to determine which decisions are taken in a general meeting.

**Recommendation 17: ESTABLISHING THE CONCEPT OF JOINT CONTROL**

Shareholders acting in concert should be able to exercise joint control over a company, provided they actually determine which decisions are taken within the corporate bodies collectively.

As a matter of fact, the concept of joint control is already accepted by EU law, which understands it, in particular, in the context of the establishment of consolidated accounts, but also in relation to the law on mergers and cartels. Harmonisation across the EU, through making all these cross-cutting concepts consistent, could, moreover, be envisaged.

### 3.2.2. OBLIGATIONS OF SHAREHOLDERS ACTING IN CONCERT

Concerted action will only really exist, from a legal point of view, when the persons acting in concert have to meet certain obligations which they would not have to meet as individual shareholders holding only their own share of the capital.

In Spain, for example, each shareholder holding shares that have been grouped together has to meet all his obligations as a shareholder of the company, in the same way as if this grouping had not taken place and all the shares belonged to him alone.

In the majority of Member States, this is currently only valid for all stock market obligations (declaration of the crossing of thresholds, mandatory takeover bid, etc.) which EU law already imposes on shareholders of listed companies when they act in concert.
However, this may be seen as evidence that the concept is already known across the EU, recognising furthermore that the case-law of the CJEU in competition matters owes much to the neighbouring concept of cartel.

However, the implications of extending this - originally stock market- concept (also in view of the fact that it shares many common features with concepts such as collusion in civil law or complicity in criminal law) are even more significant, since it is simply a case of recognising the joint and several liability of shareholders involved in such a collective activity with regard to all the obligations of company law.

Therefore, it is to be feared that candidates for the voluntary legal definition of ‘parties acting in concert’ are a bit thin on the ground, because that would increase the burden of legal obligations weighing upon them.

In these circumstances, it appears that the first obligation of shareholders acting in concert should be to declare themselves as such, because the communication (either spontaneous or not) of information relating to concerted action is the indispensable prerequisite for it to be taken into account and for the consequences to be drawn from it in terms of rights – but, above all – in terms of obligations for its members.

Beyond the obligation to inform third parties of the existence of a group involved in concerted action, its composition and the policy pursued by its members (3.2.2.1.), taking concerted action into account should result in those taking the concerted action being jointly and severally liable under the rules governing shareholders (3.2.2.2.), which could have a major impact on the way in which conflicts of interest within the company are managed (3.2.2.3.).

3.2.2.1. Obligation to provide information

Shareholders acting in concert should be obliged to inform third parties (starting with the company and its executives) of the existence of their ‘group’ (A) as well as its size and composition, in particular through declarations of the crossing of thresholds in the case of listed companies (b), but also of the policy they pursue collectively.

A) The existence of concerted action

The existence of concerted action can be revealed on the occasion of notification of the formal conclusion of a (written) agreement among several shareholders, whether it is an agreement on the ownership of shares or a voting agreement.

In France (Article L 233-11 of the French Commercial Code), only shareholders’ agreements containing clauses that set preferential conditions for the disposal or acquisition of shares covering more than 0.5% of the share capital (or voting rights) of a listed company must be sent by the signatories to the company and the French Financial Markets Authority (AMF), which will issue a notice accordingly, within five trading days of the signature of the agreement or of the amendment incorporating the clause concerned. If the relevant agreements are not transmitted, the effects of this clause are suspended (and the parties released from their commitments) during bidding time. The company and the AMF must also be informed of the date on which the clause ends.

In Spanish listed companies, even if voting agreements only bind the parties, the latter must send these agreements to the company and to the financial markets regulatory authority.
In Italy, shareholders’ agreements governing the exercise of voting rights in a listed company (Article 122 UFA) must be:

- notified to the Commissione Nazionale per le Società e la Borsa (CONSOB);
- published in abstract form in the Italian daily press;
- filed with the registry of companies in which the company is registered; and
- notified to the issuer concerned.

Should a shareholder fail to comply with its information obligations relating to shareholders’ agreements on the exercise of voting rights, the voting rights attached to the shares for which the disclosure requirements were not complied with cannot be exercised (Articles 120 and 122 UFA and Article 234b CCI).

However, it is important to point out that the conclusion of an agreement - which does not have to be in writing (for instance, the Finnish Financial Supervisory Authority has indicated that concerted action can be based on an explicit, written deed or a tacit, unwritten deed) - binding several shareholders will probably be an initial - important - indication of the existence of concerted action, without, however, constituting definitive proof. Not only shareholders can sign an agreement without, however, having the slightest intention of acting collectively in concert with the others.

In this regard, according to the Finnish Financial Supervision Authority, reaching agreement on a single resolution of the general meeting or appointing this or that member of a body does not constitute concerted action. However, its opinion relates exclusively to the legal obligation to make a takeover bid in the event of a change of control.

In the Netherlands, concerted action is defined as an agreement concluded between at least two shareholders to harmonise the future exercise of their voting rights. The Financial Markets Authority is of the opinion that there is no concerted action if each shareholder retains control over the final decision to vote in one way or the other with his shares. However, the majority of contractual obligations entered into in this way may be violated more or less voluntarily by their signatories, with the result that the criterion determining whether they are – still – parties acting in concert (irrespective of the validity of their legally binding agreements) will be their actual behaviour.

As their name indicates, persons acting in concert act in a coordinated manner, which is generally explained by the joint preparation of their movements, but must not be confused with simple parallel behaviour, which may occur by chance, especially when the choices they face are binary: to vote for or against the resolutions proposed by the company’s board/to purchase or to sell shares.

This is, indeed, the reason why no analysis based on a range of indications, which would be conducted (from outside) by observers not belonging to the group acting in concert, may ever replace the declaration made by the persons taking concerted action themselves, which means that the declaration should be made mandatory.

However, this does not exclude recourse to legal presumptions (simple, that is to say rebuttable), like in Greece for example, where companies controlled by another natural or legal person are presumed to be acting in concert with that person.

**Recommendation 18: IMPOSING THE DISCLOSURE OF CONCERTED ACTION**

The parties acting in concert should be subject to the obligation to disclose the existence of their group (as well as its main characteristics: size, composition, common policy pursued) in order to be able to benefit collectively from shareholders’ rights (but also to comply with the corresponding obligations) in accordance with company law.
However, the most appropriate sanction in the event of failure on the part of shareholders acting in concert to comply with this disclosure requirement remains to be determined. The deprivation of voting rights in case of crossing of thresholds and mandatory takeover bids (while raising a number of difficulties when applied to a ‘group’ the size and composition of which may vary over time) has been tried by many Member States.

**B) Size and composition**

Information relating to the size and composition of a group of shareholders acting in concert is currently given by those same shareholders (or at least by one of them, who is often the one acting as ‘conductor’ and who takes the lead) on the occasion of a crossing of thresholds (in share capital or in voting rights) in a listed company.

In Bulgaria, (as everywhere else), if the shareholders of a listed company directly or indirectly acquire or transfer voting rights at the general meeting, or if their voting rights reach, exceed or fall below 5 % (or a multiple of 5 %) of the number of voting rights at the general meeting, the shareholder must notify the Financial Services Commission (FSC) and the listed company.

It is specifically stated that this disclosure requirement applies to a shareholder who is entitled to acquire, transfer or exercise voting rights held by a third party with whom the shareholder has concluded an agreement relating to the pursuit of a long-term common policy on the management of the company through the common exercise of the voting rights held by them.

**C) Determination of the ‘common policy’ pursued by the parties acting in concert**

It is essential that shareholders who claim to be acting in concert are able to define the ‘common policy’ they intend to pursue with regard to the company of which they are members. It is the common policy that gives ‘soul’ to the concerted action and enables the limits of the community of interests created in this way between the parties acting in concert to be set.

Naturally, the content of this ‘policy’ is likely to be appraised in the light of the resulting obligations for shareholders, especially if their objective is to acquire control of a listed company.

In the United Kingdom, the ‘policy’ pursued by shareholders acting in concert varies depending on whether it is pursued in the context of a takeover bid or a crossing of thresholds, which simply has to be declared:

- Under the Takeover Code, certain persons are considered to be acting in concert (groups, target pension funds, fund managers). Concerted action otherwise means formal or informal cooperation aimed at reinforcing control or frustrating the successful conclusion of a competing bid, or a way of controlling 30 % of the voting rights of a target company.
- Under Disclosure Rules and Transparency Rules (DTR) 5, persons will also be ‘indirect’ holders of shares held by a third party (hence falling within the scope of concerted action) if they agree that they must adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the company in question.

(See Recommendation 11 (above)).

In order to broaden the concept of concerted action to take account of all ordinary company law across the EU, it will probably be necessary to step back from this teleological concept of concerted action (perceived solely on the basis of its purpose, which is to create obligations as
regards crossing thresholds and takeover bids), so as to be able to characterise its presence outside issues relating to the stock market.

3.2.2.2. Joint and several liability of parties acting in concert

The joint and several liability of parties acting in concert, well known on the stock market when, for example, a takeover bid is made targeting the shares of a listed company (A), could be extended to cover all the obligations which company law imposes on an individual shareholder.

A) Stock market obligations

In view of the procedure of transposing the Transparency and Takeover Directives into internal law, concerted action is generally used by EU Member States to compel a group of shareholders that has crossed a threshold to declare it, or indeed to make a takeover bid for the remaining share capital, if the threshold crossed is regarded as conferring control of a listed company.

- Notice of threshold crossing

In the Netherlands, when concerted action results in one of the thresholds provided for by law being reached, this threshold must be notified to the Netherlands Authority for the Financial Markets. Acting in concert in this way has the same consequences as if a shareholder had reached the threshold alone.

In Germany, for example, shareholders acting in concert are obliged to disclose the total number of voting rights they can exercise, should they exceed certain thresholds. The shares held are added together, which compels the shareholders acting in concert to make a takeover bid when they exceed the threshold of 30%.

Similarly, in Ireland, when shareholders are deemed to be ‘acting in concert’ their holdings are grouped together for the purpose of disclosing the company's interests. In addition, if the company is listed, any acquisition of additional shares resulting in the total participation of the parties acting in concert equalling 30% or more of the company's shares will oblige all the parties acting in concert to make a bid to acquire all the company's shares.

- Mandatory takeover bid

In Belgium, the definition of ‘persons acting in concert’ is essential for the implementation of the following obligations:

- In listed companies, persons acting in concert will be taken into account for the purposes of calculating the necessary thresholds enabling shareholders to make a takeover bid for the outstanding shares following a voluntary takeover bid. The shares not presented will be deemed transferred for the benefit of the offerors (Article 513(1) CBS);
- In unlisted companies, persons acting in concert will be taken into account for the purposes of calculating the thresholds enabling majority shareholders to make a takeover bid for the outstanding shares. The shares not presented will be deemed transferred for the benefit of the offerors unless indicated otherwise by the owners concerned (Article 513(2) CBS).

Concerted action is addressed in the Austrian Takeover Act (Übernahmegesetz). The holdings of several individuals or entities acting in concert with an offeror aiming to acquire control of a public listed company or acting in concert with the target company in order to counter the success of a takeover bid will be added together in respect of the obligations
under the Takeover Act. Therefore, as in the case of a single offeror, if the members of a group of shareholders acting in concert do not meet the requirements to disclose or make a takeover bid under the Takeover Act, their voting rights will be suspended.

In Bulgaria, the POSA requires a shareholder of a listed company who acquires, directly or indirectly through related parties, more than 50 % of the votes at the general meeting:
- to register with the FSC to buy out the remaining shareholders;
- to transfer the necessary number of shares in order to hold, directly or indirectly through related parties, less than 50 % of the votes at the general meeting.

The aforementioned rules also apply to shareholders who hold more than 50 % of the voting shares and have concluded an agreement to control the management of a listed company through the joint exercise of their voting rights, or if other persons hold, on behalf of a shareholder of a listed company who acquires directly or indirectly through related parties more than 50 % of the votes at the general meeting, the voting shares and the total number of votes representing more than 50 % of all the votes at the general meeting.

The POSA also requires shareholders who acquire more than two thirds of the votes at the general meeting to make a mandatory offer for the outstanding shares.

In Italy, if the parties acting in concert obtain a total holding exceeding the percentages triggering mandatory takeover bids following purchases made by a single shareholder, they must launch a mandatory takeover bid. However, this obligation does not apply if the parties acting in concert obtain the same holding by concluding a shareholders’ agreement, unless the parties to the said agreement obtained a total holding exceeding the percentages mentioned above within twelve months prior to the signing of the agreement.

In France, the formation of a group of parties acting in concert resulting in its members collectively exceeding the threshold of 30 % of the share capital and voting rights is regarded as equivalent to the acquisition of such a controlling interest and therefore obliges the parties acting in concert to make a takeover bid, even if they have not purchased any cash securities. This situation may make it difficult to determine the ‘fair price’ at which the takeover bid should be launched.

- Application of the rules governing takeover bids
  In Estonia, the initiator, the target issuer and the persons acting in concert with them are required to refrain from carrying out any transaction likely to cause an unusual fluctuation in the price of the target’s shares during the term of the bid.

In the United Kingdom, persons acting in concert are treated as a single entity in the context of a takeover bid for the shares of a listed company. When a company enters an offer period, all persons holding 1 % or more of any category of shares of a target company is required to publish this information. Persons who hold less than 1 % but who act in concert with another person such that the aggregated holding of the parties is equal to or greater than 1 % must publish this information. Any transaction carried out by any one such person during the offer period must be made public.

- Other stock market procedures
  In Bulgaria, the POSA grants a number of rights to shareholders, regardless of whether control is acquired or not. In particular:
  - shareholders who acquire more than 90 % of the votes at the general meeting are authorised to submit an offer for the purchase of the shares held by the remaining shareholders;
  - shareholders who acquire, following a takeover bid, more than 95 % of the votes at the general meeting are granted a squeeze-out right.
Recommendation 19: MAKING THOSE SHAREHOLDERS ACTING IN CONCERT JOINTLY AND SEVERALLY LIABLE

The joint and several liabilities of shareholders acting in concert are self-evident to all EU Member States, especially as regards obligations relating to the ownership of shares (due to EU law, which harmonised stock market rules relating to takeover bids). Therefore, all that remains is to follow the same procedure in respect of obligations which are more a matter of company law and which stem from shareholders' capacity as partners with a voting right.

B) Obligations arising from company law

This study has shown that the obligations of shareholders in their capacity as partners (holders of a voting right) are relatively few (compared to those of shareholders as owners of equity).

However, EU law should be consistent and should stress that the collective dimension resulting from the formation of a 'group' of shareholders acting in concert must be taken into consideration in both cases (where the shareholder is regarded as an owner of share capital or as a partner with a voting right).

In France, Article L. 233-10 of the Commercial Code (which applies to both listed and unlisted companies) establishes the general principle of the joint and several liability of parties acting in concert with regard to their legal and regulatory obligations, without limiting the scope of this principle, which may therefore potentially concern all the provisions of company law governing shareholders’ obligations.

- Joint control
  It may seem relatively natural that shareholders having majority control over the company through an agreement to act in concert are subject to the same obligations as those to which majority shareholders are subject.

In the Czech Republic, persons acting in concert must meet the resulting obligations jointly and severally. If shareholders acting in concert jointly hold the majority of a company’s voting rights, they are regarded as persons controlling the company and they cannot exert their influence to adopt a measure or conclude an agreement that may damage the controlled company unless (i) the persons causing such damage do not desist as quickly as possible, or (ii) within the same period an agreement is concluded specifying the appropriate period during which the controlling person is required to repair/stop such damage and how the said person intends to set about doing so.

In Poland, if parties acting in concert acquire a dominant position, all the regulations concerning the obligations of a dominant company would apply (for example, notifying the company of its dominant position) (Article 4(1)(4) of the Commercial Companies Code). This would be the case, for example, if a shareholder, under an agreement with another entity (acting in concert), held, directly or indirectly, the majority of votes at the general meeting or on the board of directors of another company or had the power to appoint or dismiss the majority of the members of the board of directors or of the supervisory board of another company.

- Conflicts of interest
  If one of the parties acting in concert is involved in a conflict of interests bringing it into conflict with the company (see the notion of corporate benefit developed above), it seems natural that his responsibilities in this situation (in which the primacy of corporate benefit must be preserved) should be extended to all the other parties acting in concert.

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In Belgium, the legal definition of ‘persons acting in concert’ therefore implies the prohibition of a share capital increase by contribution in kind decided by the board for the benefit of an existing shareholder which exceeds 10%. The shares held by persons acting in concert with the contributor are taken into account for the purposes of calculating the threshold.

It has been pointed out to us that, in the Czech Republic – in special cases – shareholders acting in concert cannot exercise their voting rights if at least one of them is prohibited from voting. The prohibition on voting applies when the general meeting decides whether the shareholder is to be relieved of an obligation or removed from his position as a member of a corporate body for having failed to fulfil his responsibilities while in office.

One could also consider the need to prohibit employee shareholders acting in concert from participating in the vote on setting up an employee share ownership plan of which they would be the main beneficiaries.

This approach, which is considered revolutionary in most EU Member States (including those which, like France, have, however, already begun to put forward the idea of concerted action in the world of unlisted companies), would make prohibitions on voting general within a group of persons acting in concert.

Such an approach is only possible if a clear distinction is made between whether the conflict with corporate benefit is due to the personal position (intuitu personae) of the shareholder acting in concert or if it involves all the parties acting in concert, taking account of (i) the planned transaction and (ii) its integration in the common policy pursued by the parties acting in concert (see above).

**Recommendation 20: NO SOLIDARITY WITHOUT A COMMON POLICY**

The principle governing groups of shareholders acting in concert must be that their members are jointly and severally liable for complying with the obligations that company law imposes on individual shareholders, but only if the behaviour concerned falls within the scope of the collective approach (most notably by forming part of the common policy of the parties acting in concert).

**GENERAL RECOMMENDATION ON SHAREHOLDERS ACTING IN CONCERT**

The joint and several liability of persons acting in concert (with regard to their legal and regulatory obligations) is an essential dimension of the concept of concerted action, because it potentially grants it structural influence over company law, by forcing the latter to take account of the collective dimension of groups of shareholders, not just by granting them rights once their number reaches certain percentages considered to be significant (generally between 5 % and 10 % depending on the Member State), but also by submitting them collectively to the same obligations since their common interests are at stake.
3.3 SUMMARY: THE NOTION OF A GROUP OF COMPANIES

CONCERNING THE GROUP OF COMPANIES

It is not a question of advocating the establishment, at EU level, of a genuine ‘right of groups’ similar to what may exist in Germany in particular, but of drawing the logical conclusions from the combination of, on the one hand, the primacy of ‘corporate benefit’ and, on the other, the recognition of the collective dimension through concerted action among several shareholders.

Moreover, there are similar concerns at national level, such as in the Netherlands for example, where a debate is taking place on the concept of a company as an economic or legal unit, keeping in mind that the concept of group objective could overcome this debate.

Moreover, this avenue had already been explored by the reflection group on the future of European company law, which advocated the recognition, across the EU, of the concept of ‘group interest’, which, of course, presupposes that one knows precisely what constitutes such a ‘group’.

- The concept of ‘group interest’

The definition of ‘group interest’ results directly from the combination of the recognition of the primacy of corporate benefit as well as of the recognition of concerted action. When the company is integrated into a larger framework (the ‘group’) composed of entities related to each other by links of share capital and control (resulting in all the members of the group being shareholders of each other) and practising a well identified ‘common policy’ making them parties acting in concert, its own benefit must be interpreted in the light of that of the group to which it belongs.

As in the relationship between corporate benefit and the individual benefit of shareholders, what is at issue is not ensuring that the former triumphs over the latter but recognising that, in the event of conflict – apart from clear-cut abuse – the inclusion of the community (here of the ‘group’) must, logically, triumph for the good of the greatest number. The aim is to encourage the economic development of the broadest whole (which is not the same thing as that of the head of the group, just as corporate benefit goes well beyond that of the majority shareholders or company executives).

This idea had already been put forward in 2002 by the High Level Group of Company Law Experts, whose report dealt with ‘contradictions between the interests of the group and those of its parties’, noting that a number of Member States did not recognise the interests of a group as such, while those who replied to the consultation were in favour of the formation of groups, regarded as economically legitimate, although it was essential to protect certain interests.

Recognising the legitimacy of groups should in fact result in appropriate consideration being given to the special situation created by belonging to a group. In several Member States, a transaction carried out for the benefit of the group is only legitimate if the harm suffered by a particular company is offset by other advantages.

That is why the Group of Experts made the following recommendation 38: Member States should be required to provide for a framework rule covering groups that allows those concerned with the management of a company belonging to a group to adopt and implement

38 (see p. 113).
a co-ordinated group policy, provided that the interests of that company’s creditors are effectively protected and that there is a fair balance of burdens and advantages over time for that company’s shareholders.

The reflection group could only conclude (with regret) that, in ten years, nothing had been done at European level to engage with the issue of ‘group interest’, although, objectively, it is fertile ground for harmonising the practices of corporate government across the EU.

It is in Germany that the concept of ‘group’ has been most successful at gaining legislative recognition, which has subsequently served as a model for other countries wishing to follow the German example.

In Hungarian company law, for example, members responsible for the management of a company must – as a general rule – give priority to the interests of the company when carrying out their duties.

Nevertheless, in the case of a ‘controlled company’, those concerned with the management of the controlled company must manage the company – in accordance with the control agreement – by giving priority to the interests of the ‘recognised group of companies’ as a whole.

In Greece, the prohibition and restriction of regulated agreements (see above) do not apply to agreements between affiliated companies which draw up consolidated accounts (as provided for by Article 90 of Law No 2190/1920).

In other countries, like France, the concept of ‘group’ originated from case-law to resolve the difficulties posed by the punishment of the offence of misuse of corporate assets in the case of groups of integrated companies, some of which may decide to use the assets belonging to the others.

In the Rozenblum judgment, delivered on 4 February 1985 by the Criminal Chamber of the French Court of Cassation, the Court held that the advances and guarantees made by various companies were not justified within a group and that they therefore constituted a misuse of corporate assets on the grounds that there was no actual link between the various companies or a legal structure that could establish the existence of a group.

On that occasion, the Court gave a comprehensive definition of ‘group’ comprising three cumulative criteria, in the absence of which the justification principle cannot be recognised:

- the companies must belong to the same group (the existence of a structure, a common interest and a group strategy);
- sacrifices must not be imposed on one or more companies without a quid pro quo;
- these obligations must not exceed the financial possibilities of the company incurring them and must be justified by economic imperatives.

In Belgium, granting guarantees between related companies is authorised if the following conditions are met (which must be assessed on a case by case basis, with marginal scrutiny by the courts):

- the parties are fully integrated within the group;
- the transaction meets the corporate objective of the guarantor;
- the transaction is in line with ‘corporate benefit’; in other words (i) the guarantor derives benefit from the granting of the guarantees, and (ii) the amount guaranteed is not disproportionate to the financial resources at the disposal of the guarantor or the benefit the guarantor will derive from the transaction.

It is true that, under Belgian law, the concept of ‘group’ is inconsistent or poorly defined. Nevertheless, despite the principal requirement that each company (of a group) always acts in its own corporate interest, legal doctrine and case-law have, over time, accepted that a group...
interest, defined as ‘the collective interest of the joint undertakings comprising the group’, may, under certain conditions, replace the specific interest of a company belonging to the group.

For example, a Belgian company may not, as a general rule, encumber its assets or bind itself in order to increase the income of its parent company. Although case-law is limited to up-front guarantees, security rights were confirmed under certain conditions (see below).

Furthermore, specific rules were provided for in the context of (i) the balance of intra-group interests, and (ii) financial aid. Insofar as a parent company appears to have been appointed as the managing director of its subsidiary, this parent company must make a relevant disclosure to the subsidiary’s other directors if it has a proprietary interest which is in conflict with a decision or if a transaction must be decided by the board of directors (Article 523 CBS).

Such a disclosure, as well as the disclosure of its grounds of justification, must be included in the minutes of the meeting of the board of directors.

In listed NV/SA companies, the director concerned is prevented from taking part in the deliberations and from voting at the board meeting on this decision or on the transaction decision. This conflict of interest procedure applies, for example, when the board of directors enters into an agreement with the parent company.

It should be noted that this procedure does not apply if (1) the decision of the board of directors relates to decisions or transactions between companies (a) one of which holds at least 95 % of the voting rights in the other, or (b) 95 % of the voting rights of which belong to another company, and/or if (2) the decision of the board of directors relates to a customary transaction, carried out under normal market conditions and benefiting from guarantees similar to those commonly in place for this type of transaction.

Recommendation 21: ENSURING THAT THE INTEREST OF THE GROUP TAKES PRIORITY OVER THAT OF ITS MEMBERS

The collective interest (which is understood to exist within a group of shareholders from the same company acting in concert) shared by several companies related by a link of control (or an ultra-majority equity interest of more than 95 %, for example) must take priority within a group having such a composition in the same way as corporate benefit does in a company.

- The formalisation of the ‘group’

So that the group interest can be viewed as a ‘reference’ (standard), the group itself would have to be a baseline, which presupposes that its formation and composition are established and known.

A group must therefore be willing to reveal itself, including through the company at its head. However, joint and several liability can be imposed on all its members (as it is within a group of parties acting in concert, which, moreover, is frequently presumed in the case of an integrated group of companies).

The High Level Group of Experts, which was convened in 2002, reached the same conclusion, finding that the responses to the public consultation showed that the need for an initiative was particularly felt in the area of transparency.
The consultation therefore confirmed that the current provisions of the 7th Company Law Directive did not take sufficient account of these concerns, with improvements to the information provided called for in several areas.

The Group therefore took the view that it was necessary to improve information regarding the structure and the relations of groups, with the provision of information being mandatory in certain areas.

That is why it made a number of recommendations relating to the ‘Transparency of the structures and relations of groups’:

‘The information provided on the structure and the relations of groups needs to be improved, and the parent company of each group should be required to provide consistent and accurate information. The Commission will need to re-examine the provisions of the 7th Company Law Directive in view of the need to strengthen enforcement of financial reporting requirements, and to assess whether these improvements can be made compatible with international accounting standards. As regards non-financial information, it will be necessary to ensure, in particular where listed companies are concerned, that the market and the public in general are able to get a clear picture of the governance structure of a group, especially in relation to cross shareholdings and shareholders’ agreements. Furthermore, companies could be forced to provide specific information when they join or leave a group’.

Similarly, the reflection group on the future of European company law also went into great detail on the issue of transparency in respect of groups. It may be useful at this point to refer to the paragraphs devoted to identifying important shareholders and the members of a group acting in concert, because the entities making up a group have the same characteristics.

In Hungary, all companies are required to draw up consolidated financial reports in accordance with the Accountancy Act (dominant member) and all partnerships limited by shares or public limited companies over which the dominant member effectively exercises a dominant influence within the meaning of the Accountancy Act (controlled company) can decide to conclude a commissioning contract for the purpose of joining forces in the pursuit of their common commercial interests and then continue to operate in the form of a recognised group.

The sanctions for failing to fulfill these obligations imposed could be similar to those already encountered in the identification of shareholders.

Under Polish law, a company in a dominant position cannot exercise its voting rights if it has failed to notify the dominance relationship (under certain circumstances) to the dependent company within two weeks of the day on which that relationship comes into existence. Such an omission results in the suspension of the voting rights attached to the shares held by the dominant company representing more than one third of the share capital of the dependent company (Article 6(1) of the Commercial Companies Code).

**Recommendation 22: FORCING GROUPS TO DECLARE THEMSELVES**

Like shareholders acting in concert, companies belonging to an integrated group must disclose its existence (its composition, its policy, etc.) to enable their group interest to be taken into account in the arbitration which can be carried out in respect of their obligations towards the other shareholders and the other companies of the group.
POSSIBLE OPTIONS

- Firstly, this could help to give a supranational dimension to certain key concepts of European company law, which could, therefore, apply within multinational groups irrespective of the nationality of the member companies. This would, of course, be without prejudice to the capacity of interpretation and adaptation reserved to the national courts having jurisdiction, which would be responsible for protecting the interests of minority shareholders (outside the group) and creditors.

- Next, this could raise the level of materiality of the information deemed to be ‘privileged’, thus requiring its immediate dissemination to the public. This would need to be done in a way that focuses less on price sensitive information at the level of such and such a listed entity (member of the group) and more on the really important information likely to have an impact on the long-term assessment of the value of the ‘group’.

- Finally, a (subsequent) stage could consist in recognising the concept of partner in a ‘group’ in respect of which a shareholder (present in the share capital of one of the entities of the group, for example the parent company if it owns close to 100 % of its subsidiaries) could assert his rights (to information, for example) but also – in the interests of reciprocity – agree to be recognised as a debtor of obligations.
GENERAL CONCLUSION

At the end of this study examining the rights and obligations of shareholders across the European Union, we have identified two areas in which European company law could develop in the future in order to unlock overall value in the company both for the shareholder (holder of these rights) and for the issuing company towards which the shareholder has obligations.

Our recommendations were made with a view to achieving a fair balance between the rights and obligations of shareholders in order to improve legal efficiency. They are structured around two major themes:

THE PRIMACY OF CORPORATE BENEFIT (Recommendations 1-10)

This would involve defining, at EU level, corporate benefit as the interest of the legal person itself through a binding EU instrument (directive), while allowing the different Member States to establish the precise scope of this concept, by statute or case-law, in accordance with their own legal traditions.

Once its primacy is unanimously recognised, it in fact matters little that there are differences from country to country in the definition of the scope of corporate benefit.

While it can be assessed with regard to the interests of all shareholders (‘current’ but also ‘future’) – thus reconciling the two aforementioned dimensions – what is most important is that, by definition, it encompasses (and therefore outweighs) the combination of individual interests of the various stakeholders.

THE POSSIBILITY OF ACTING IN A CONCERTED MANNER (Recommendations 11-20)

This would involve ensuring, through the same instrument, that European company law takes account of the collective dimension of groups of shareholders, not just by granting them rights once their number reaches certain percentages considered to be significant, but also by submitting them collectively to the same obligations, making all the members acting in concert jointly and severally liable in cases since their common interests are at stake.

Alongside these two major themes, the aforementioned legal instrument should also be integrate:

THE CONCEPT OF A GROUP OF COMPANIES (Recommendations 21-22)

As a result of combining the two aforementioned themes, the fact that some majority shareholders may also be companies should also be taken into account: these companies have their own corporate benefit, so a way needs to be found to classify the corporate benefit of each of them in terms of importance. Moreover, they are presumed to act in concert with the companies they control, which may result in their being jointly and severally liable towards minority shareholders.
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  - Middlenext

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39 Only companies who agree to disclose their name are included in this list. The interviews covered a wide range of companies (listed companies, unlisted companies, companies whose activities are regulated (banking, insurance), etc.
Rights and obligations of shareholders

ANNEX - RESPONSES TO THE QUESTIONNAIRE SENT TO MEMBER STATES ⁴⁰

⁴⁰ This annex can be obtained upon request from the Department C: Citizens' Rights and Constitutional Affairs of the European Parliament (poldep-citizens@europarl.europa.eu)
DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS

Role
Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas
- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents