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Virtual Shareholder Meetings and the European Shareholder Rights Directive – Challenges and Opportunities

Dirk Zetzsche[*]

Member States are required to adopt the European Directive on the Cross-border Exercise of Shareholders' Rights until [December 31st, 2009]. Based on a comparative analysis of the existing rules on the Internet-based exercise of shareholder rights within the European Community [hereinafter EC] and beyond, this paper assesses the impact of the new Directive on the corporate laws of EC Member States. Examining the corporate law regimes that govern shareholder meetings in Canada, France, Germany, the U.S. (DelGCL & RMBCA), the UK and Switzerland, this analysis reveals that the transition into the digital world is as yet incomplete. However, the Shareholder Rights Directive is unlikely to finalize the transition from the 'physical' into the 'Internet' world. More legislative steps will be necessary. While competition may further development within the EC Member States as far as most of the traditional functions of shareholder meetings are concerned, the identification and authentication of shareholders requires mandatory legislation at the European level. This paper suggests four measures that I deem most urgent in order to achieve a smooth digital exercise of shareholder rights in Europe.

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A. Introduction

Every year in late spring / early summer, thousands of public corporations all around the world send hundreds of thousand of pages of annual accounts, proxy materials, and proxy forms to millions of shareholders. Shareholders are expected to send their ballots / proxy forms back to the firm, but proportionately few, in fact, ever do so. This procedure imposes significant costs on corporations, intermediaries, and shareholders. While many papers elaborate on the *function* of shareholder voting, in theory, and its inherent weaknesses, there is – relatively speaking – little research that analyses the *process* of shareholder meetings. Thus, this paper seeks to fill a gap in current literature by assessing the impact of the European *Directive on the exercise of certain rights of shareholders in listed companies* (hereinafter *Shareholder Rights Directive* or the *Directive*)[1] on current laws of Member States regulating shareholder meetings.

Such a study is substantiated for three reasons:

First: To the same extent that the Internet has lost its fashionable aura[2] in the aftermath of the tech bubble in 1999/2000, academic interest in the convergence of traditional and new methods of exercising shareholder rights has lost its steam. Nowadays, few experts examine the topic systematically, and these experts primarily focus on domestic issues.[3] A

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[1] The text of the Directive as adopted by Parliament on February 15, 2007 and the Council on June 13, 2007 in its 2807th meeting is available at http://www.consilium.europa.eu/cms3_applications/applications/openDebates/openDebates-PREVIEW.ASP?id=349&lang=en&cmsID=1105 (June 26, 2007).

[2] As an example for the net-based enthusiasm, see e.g. Bernhard Grossfeld, "CyberCorporation Law - Comparative Legal Semiotics/Comparative Legal Logistics", 35 Int'l L. 1405 (2001).

[3] **Australia**: Richard Alcock & Andrew Daly, *Electronic Proxy Voting in Australia* (9/2003), available at http://www.aar.com.au/corpgov/pubs/pdf/onlinevoting.pdf; F. Bonolo, *Electronic Meetings*, 14 Australian Journal of Corporate Law 95 (2002); Elizabeth Boros, *Virtual Shareholder Meetings*, 2004 Duke l. & Tech. Rev. 8, available at http://www.law.duke.edu/journals/dltr/articles/2004dltr0008.html, and *Corporate Governance in Cyberspace: Who Stands to Gain What from the Virtual Meeting?,* 3 Journal of Corporate Law Studies 149, 150-55 (2003) (detailing UK, Australian and US

reforms), and *Corporations Online*, 19 Company & Securities Law Journal 492 (2001), and *Virtual Shareholder Meetings: Who decides How Companies Make Decisions?*, 28 Melbourne University Law Review 265 (2004); Stephen Bottomley, *From Contractualism to Constitutionalism: A Framework for Corporate Governance*, 19 Sydney Law Review 277 (1997), and *The Role of the Shareholder Meeting in Improving Corporate Governance* (Canberra, Centre for Commercial Law, ANU 2003); R. Simmonds, *Why Must we Meet? Thinking about why Shareholders' Meetings are Required*, 19 Company & Securities Law Journal 506 (2001); **Denmark**: Jesper Lau Hansen, *IT og selskabsretten*, Ugeskrift for Rettsvaesen 143 (2000), and *Focus: The listed companies and the electronic communication* Copenhagen Stock Exchange, Focus No. 62 (2003), available at http://www.cse.dk/kf/kf_pressemeddelelser?languageID=1&c=Page&cid=1034698850162& contentid=1062141824343; **France:** Association Nationale des Sociétés par Actions (ANSA), *Proxy Voting Reform in France: A Guide for Non-Residence Shareholders* (Paris, January 2003), available at <www.ansa.asso.fr/site/ACV_ANGLAIS_janvier2003.pdf>; **Germany**: Ulrich Noack, "Hauptversammlung und Internet: Information – Kommunikation – Entscheidung" (transl.: Shareholders' Meeting and the Internet: Information - Communication – Decision), CBC-RPS 0005 (12/2004), available at: http://ssrn.com/abstract=646723, and "Neue Entwicklungen im Aktienrecht und moderne Informationstechnologie 2003 – 2005", NEUE ZEITSCHRIFT FUER GESELLSCHAFTSRECHT 2004, 297-303, and **"**Zukunft der Hauptversammlung - Hauptversammlung der Zukunft" (transl.: Future of the shareholder meeting – shareholder meeting of the future?), in: Zetzsche (ed.), *Die virtuelle Hauptversammlung* ("The Virtual Shareholder Meeting"), 2002, pp. 13 et seq., "Modern communications methods and company law", European Business Law Review, March-April 1998, pp. 100-106, and, co-authored with Michael Beurskens "Internet-Influence on Corporate Governance", EBOR 2002, 129; Dirk Zetzsche, "Die Virtuelle Hauptversammlung – Momentaufnahme und Ausblick" (Transl.: "The Virtual Shareholder Meeting – Snapshot and Look Forward"), ZEITSCHRIFT FUER BANK- UND KAPITALMARKTRECHT 2003, 736, and Dirk Zetzsche (ed.), *Die Virtuelle Hauptversammlung* (Transl.: *The Virtual Shareholder Meeting*), Erich-Schmidt-Verlag, Berlin: 2002 [Zetzsche, *Virtual Shareholder Meeting*]; for further works in German language see http://www.jura.uni-duesseldorf.de/service/hv/; **Sweden:** Rolf Skog "The institution of the general meeting and new communication technology – a few considerations de lege lata and de lege ferenda" (2000), available at: http://www.jura.uni-duesseldorf.de/service/hv/, and in JT 1/1999-2000; **Switzerland**: Hans Caspar von der Crone, "Die Internet-Generalversammlung", in: Festschrift Forstmoser (2003), pp. 155-167 [Von der Crone, "Internet-Generalversammlung"]; **United Kingdom [UK]**: Verdun Edgtton, "Appointment of Proxies by Electronic Communication: Do Companies Have to Wait for Enabling Legislation?", 21 Company Lawyer 294, 298 (2000); Rebecca Strätling, "General Meetings: a dispensable tool for corporate governance of listed companies?" (2003) Corporate Governance – An International Review 11:1, 74; **United States [U.S.]**: Mentioned as side-issues of corporate law by e.g. Richard J. Agnich & Steven F. Goldstone, "What Business Will Look for in Corporate Law in the Twenty-First Century", 25 Del. J. Corp. L. 6, at 24 (2000); Robert Brown, Jr., "The Irrelevance of State Corporate Law in the Governance of Public Companies", 38 U. Rich. L. Rev. 317, at 328, 380 (2003-2004); M.D. Goldman & E.M. Filliben, "Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century" (2000) 25 Delaware J. of Corp. L. 683, 394. The few authors that focus on online-issues include Daniel Adam Birnhak, "Online Shareholder Meetings: Corporate Law Anomalies or the Future of Governance?", 29 Rutgers Computer & Tech. L.J. 423, 445-46 (2003); T. Burns, "Implications of Information Technology on Corporate Governance" (2001) 9 Int. J. of L. and Inf. Techn. 21; Douglas R. Cole, "E-Proxies for Sale--Corporate Vote-Buying in the Internet Age", 76 Wash. L. Rev. 793, at 797, 812 (2001); Howard M. Friedman, *Securities Regulation in Cyberspace* (New York, Bowne & Co Inc, 3rd edn: 2001), with supplements 2004 & 2005: Chapters 11, 12; George Ponds Kobler, "Shareholder Voting Over the Internet: A Proposal for Increasing Shareholder Participation in

cross-border approach might thus well be justified in order to overcome the relative isolation which academics experience in their national ivory towers.

Second: Shareholder meetings have long been the pariah in comparative corporate governance studies. Comparing the details of the rules on Virtual Shareholder Meetings might change this fact. Further, it might provide helpful insights that can constitute the foundation for the more general questions encountered by convergence theorists. In particular, those questions regarding the perennially repeated, but nevertheless doubtful[4] thesis by *La Porta, Lopez-De-Silanes, Shleifer* and *Vishny*[5] of weak shareholder rights as an explanation for higher ownership concentration, and a relatively lower market valuation of firms in jurisdictions other than those of the U.S. and the UK.

Corporate Governance", 49 Ala L. Rev. 673 (1997-1998); Mark Latham, "The Internet will drive corporate monitoring", Corporate Governance International 3, 4-11; Ronald O. Mueller & Stephanie Tsacoumis, "Proxy Solicitation and Stockholder Voting Using Electronic Media", and Gavin A. Beske, **"**Shareholder Meetings Online", in: John F. Olson & Carmen J. Lawrence (eds.), *Securities in the Electronic Age: A Practical Guide to the Law and Regulation*.

4 Re the legal assumptions, e.g. Markus Berndt, "Global Differences in Corporate Governance Systems", in Peter Behrens et al. (eds.), Ökonomische Analyse des Rechts (transl. Economic Analysis of Law) (2002), at 17-18. Sofie Cools, "The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers", Harvard John M. Olin Discussion Paper Series No. 490, Del. J. of Corp. Law (2005), online: www.law.harvard.edu/programs/olin_center/corporate_governance/papers/Cools_4901.pdf; Ronald J Gilson, "Complicating the Controlling Shareholder Taxonomy" (3/2003), online: www.uni-bocconi.it/doc_mime_view.php?doc_id=24692&doc_seg_id=1; Detlev Vagts, "Comparative company law – the new wave", in Festschrift für Jean Nicolas Druey (2002), at 600; Dirk A Zetzsche, "Explicit and Implicit System of Corporate Control – A Convergence Theory of Shareholder Rights", CBC-RPS 0001 (8/2004), online: http://ssrn.com/abstract=600722 [Zetzsche, "Explicit and Implicit System"], and "Shareholder Interaction Preceding Shareholder Meetings of Public Corporations – A Six Country Comparison", 2 ECFR 1, 105 (2005) [Zetzsche, "Shareholder Interaction"]). Re the methods, e.g. Mathias M Siems, *Numerical Comparative Law - Do we Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 Cardozo J. of Int'l & Comp. L. 521 (2005) and *What Does not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology*, Int'l Company. & Commercial L. R. 300 (2005).

5 Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, *Legal Determinants of External Finance* 52 J. of Finance 1131 (1997); *Law and Finance*, 106 J. of Polit. Econ. 1113 (1998); *Corporate Ownership Around the World*, 54 J. of Finance 471 (1999).

Third: All governments within the focus of this study have recently taken, or are actually considering, legislative action to alter the rules on shareholder meetings in general, and virtual shareholder meetings in particular.[6] Furthermore, the Shareholder Rights Directive is intended to harmonize shareholder rights across Europe and facilitate the cross-

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[6] **Canada**: CBCA amended by Bill S-11 (adopted 14 June 2001, assented to 24 November 2001); **France**: Act N 2001-420 Dated 15 May 2001 Relating to New Economic Controls modernised the French Code de Commerce (C.com); Decree dated March 23, 1967, as amended by the "NRE" decree n°2002-803 (May 3, 2002), implementing part III of the Act dated May 15, 2001 on New Economic Controls [Decree] regulates details by means of delegated legislature, see Association Nationale des Sociétés par Actions (ANSA), *Proxy Voting Reform in France: A Guide for Non-Residence Shareholders* (Paris, January 2003), online < www.ansa.asso.fr/site/ACV_ANGLAIS_janvier2003.pdf >; **Germany**: KontraG (1998), NaStraG (2001), TransPuG (2002); UMAG (2005), see Ulrich Noack & Dirk A Zetzsche, *Corporate Governance Reform in Germany: The Second Decade*, 15 (2005) EBLJ 5, 1033 [hereinafter Noack/Zetzsche, *Corporate Governance Reform in Germany*; **U.K.**: Step 1: S. 8 of the Electronic Communications Act 2000 with Companies Act 1985 (Electronic Communications) Order 2000, SI 2000/3373 and the best practice guidelines by the Institute of Company Secretaries and Administrators (ICSA), "Electronic Communications with Shareholders" (12/2000); Step 2: Part 12 of the *Companies Act* of 2006 (c. 46), having received Royal Assent on 8 November 2006 [*Companies Act 2006*]. The latter reform was based on the Final Report issued by the Company Law Steering Group, *Modern Company Law for a Competitive Economy* (London: DTI, 2001) [Steering Group, *Final Report*], and the Secretary of State and Industry's White Paper "Modernising Company Law – Draft Clauses" (July 2002), Cm 5553-I and II, Pt. 7, Chp. 3, and Pt. 8, available at < www.dti.gov.uk/ >; **U.S.**: Federal level: SEC releases permitting electronic delivery of proxy materials from corporations to shareholders, and from broker-dealers, transfer agents and investment advisers to their clients (cited by Mueller & Tsacoumis, *supra* note 3, at 7-11 et seq.), and the Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 106 Pub L No. 229; 114 Stat 464, effective October 1, 2000; SEC release "Internet availability of Proxy Materials" [Release nos. 34-55146; IC-27671; File No. S7-10-05], available at http://www.sec.gov/answers/proxydelivery.htm (11 April 2007); proposed SEC Release "Universal Internet Availability of Proxy Materials" [Release Nos. 34-55147; IC-27672; File No. S7-03-07], available at http://www.sec.gov/rules/proposed/2007/34-55147.pdf (11 April 2007); State level: Delaware, "AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW", Senate Bill No. 363/2000, effective July 1, 2000; for other state laws see Mueller & Tsacoumis, *supra* note 3, at 7-33 et seq.; **Switzerland**: Swiss Secretary of Justice und Police, *Vorentwurf zur Revision des Aktien- und Rechnungslegungsrechts im Obligationenrecht* (transl. *Draft for the reform of Corporate and Accounting law within the law of obligations*), December 5, 2005, with summary of related consultation of February 2007; this reform is prepared by Hans Caspar von der Crone, *Bericht zu einer Teilrevision des Aktienrechts vom 4. September 2002: Teil 2: Generalversammlung und Teil 4: Stimmrechtsvertretung / Dispoaktien* [*Report with respect to the Partial Revision of Corporate Law of September 4, 2002, Pt. 2: Shareholder Meetings and Pt. 4: Proxy Voting*] (2003); all available at < http://www.ejpd.admin.ch/ejpd/de/home/themen/wirtschaft/ref_gesetzgebung/ref_aktienrechtsrevision.html > (March 21, 2007).

border exercise of these rights.[7] Given that shareholder meetings belong to the everyday business of public corporations[8] and that more and more firms offer means of electronic participation in corporate decision-making,[9] it is particularly important to have a clear understanding of the different approaches of Internet-based shareholder participation across jurisdictions.

This analysis develops in three steps. In its first part (sub B.), this paper undertakes to analyze one aspect of the procedural rules - the use of the Internet in shareholder meetings for public corporations in Canada, France, Germany, the UK, the U.S. and Switzerland - from a comparative perspective. It views shareholder meetings as a process which evolves on three levels: On the first level, as a precondition for any shareholder activity, or management activity vis-à-vis shareholders, the shareholders need to be identified [Identification & Authentication]. The shareholder meeting itself provides the basis for the second level. The third level

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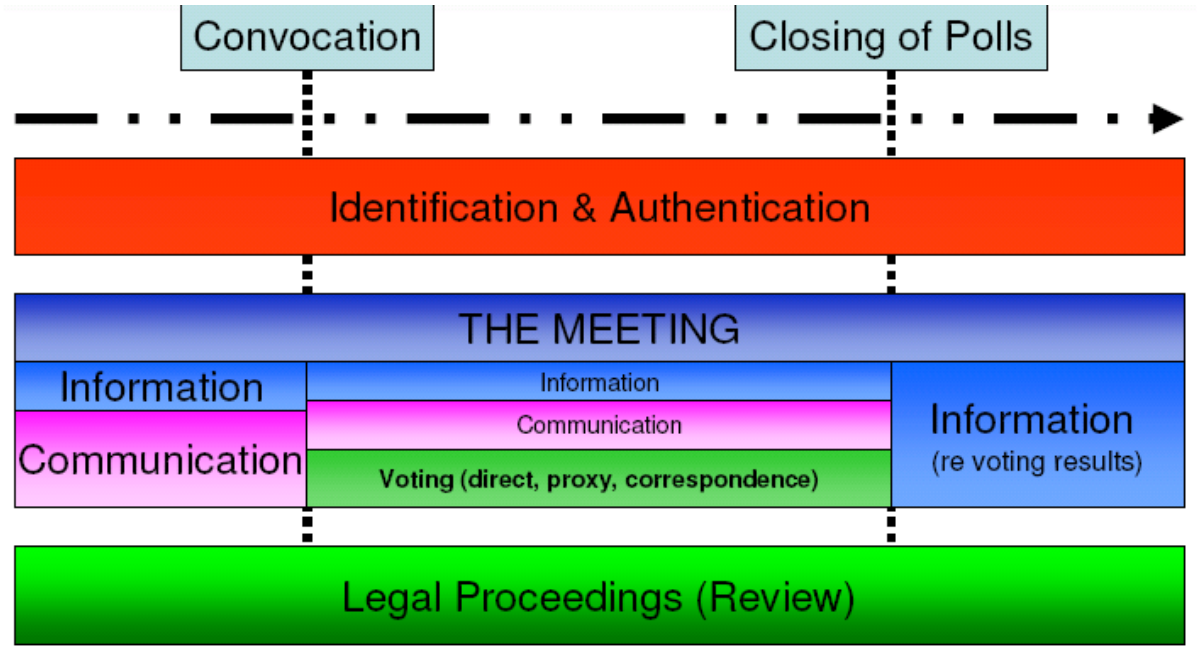
7 *Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC*, as adopted by Parliament on 15 February 2007 (Doc-ID: P6_TA(2007)0042), available at EUR-LEX. The Directive was prepared by the first and the second consultation undertaken by the Directorate General Internal Market of the European Commission, *Fostering an appropriate regime for shareholders' rights*, and the summary of the results of the first consultation, issued April 2005, available at europa.eu.int/comm/internal_market/company/shareholders/index_en.htm ; see on earlier drafts Mathias M. Siems, *The Case against Harmonisation of Shareholder Rights*, 6 EBOR 539 (2005).

8 See OECD, Principles of Corporate Governance 2004, Pt. II, available at www.oecd.org/dataoecd/32/18/31557724.pdf . With respect to the jurisdictions of this study, see ss. 132 et seq. Canadian Business Corporations Act [CBCA]; Section 3 of the French "Code de Commerce" (transl.: Commercial Code) [C.com]; s. 119 (1) German "Aktiengesetz" (transl.: Stock Corporation Act) [AktG]; Art. 698, 704 Swiss Obligationenrecht (transl.: Law of Obligations) [OR]; ss. 281 et seq. of the British *Companies Act* of 2006 (c. 46); ss. 211 et seq., Title 8, Delaware Code [Delaware General Corporation Law - DelGCL].

9 UK: CrestCo, Press Release 14 March 2005, online: http://www.crestco.co.uk/news/press_releases/press-04-05.pdf , for UK: more than one-third of issued capital voted electronically; in 2004 (2003) 88% of the FTSE 100, and 41% of the FTSE 250 issuers announced a total of 273 meetings for which electronic proxy-voting was offered. Germany: German Secretary of Justice, Report to the Federal Parliament, see Ulrich Seibert, *Die Stimmrechtsausübung in deutschen Aktiengesellschaften – ein Bericht an den Deutschen Bundestag* (transl.: Exercising voting rights in German corporations –a report to the German Federal Parliament), on file with author, summary published in DIE AKTIENGESELLSCHAFT 2004, 529.

entails the review which is often prompted by contentious issues that are subject to a shareholders' vote.

Figure 1: The three levels of a Shareholder Meeting



It asserts that the transition from the traditional shareholder meeting, which is based on physical attendance of shareholders, toward a virtual shareholder meeting that fits the needs of the digital age is still incomplete. Under the traditional doctrine, shareholder meetings fulfil three purposes: Dissemination of information; communication between shareholders and management and among shareholders; voting.[10] In addition, shareholder meetings often trigger a review of management's activities, exercised on behalf of shareholders through special investigations by auditors or the judiciary. As this study unveils, however, the current regimes of the Internet-based exercise of shareholder rights merely replicate some of the

[10] Eilis Ferran, *The Role of the Shareholder in Internal Corporate Governance: Enabling Shareholders to make better informed decisions*, EBOR 2003, 491; Ulrich Noack, *Information, Kommunikation, Entscheidung – Zur Corporate Governance der Hauptversammlung europäischer Aktiengesellschaften* (transl.: *Information, Communication, Decision – The Corporate Governance Function of Shareholder Meetings of Corporations in Europe*), Center of European Business Law (ed.), Bonn 2003; Strätling, *supra* note 3, at 74-75.

above functions of traditional shareholder meetings. Further, with respect to many of the jurisdictions considered in this paper, studies report deficiencies as to the identification and authentication of shareholders. Consequently, shareholders hesitate to rely exclusively on web-based exercise of shareholder rights for purposes of monitoring and advising management. At the same time, management has few incentives to offer efficient electronic means for the web-based exercise of shareholder rights.

The second part (sub C.) introduces the requirements imposed by the European Directive on Shareholder Rights. The Directive improves the situation as to communication, but does so to only a minor extent. Primarily, the Directive seeks to prevent Member States from race-to-the-bottom competition in the market for incorporations of public companies. While hindering apparently ruinous competition in the interest of more legally-advanced Member States became a more and more prominent goal in the legislative process, the key rationale of the Commission's 2005 Directive proposal, namely, the facilitation of cross-border voting in Europe, was lost from view. Thus, the Directive does not address the well-known and most pressing problem in cross-border voting, namely, setting / determining voting issues within a chain of intermediaries that are unwilling, and / or technically unfit, to further the exercise of cross-border voting in Europe. Further European legislation is necessary in order to address this pre-eminent issue before European shareholders are able to exercise their rights effectively.

In the third part of this paper (sub D.), this paper seeks to assess the impact of the Shareholder Rights Directive on the law and the practice of virtual shareholder rights in and across Europe, and to analyze the need for further legislative action on the European level. Given that the European legislature failed to mandate an efficient regime governing the identification and authorization of shareholders who hold their shares within a chain of intermediaries, I am skeptical that the Shareholder Rights Directive will raise voting turnouts. However, the Directive is likely to prompt three side-effects which may be beneficial for cross-border

shareholder voting: (1) raising the public awareness for `voting`, which was long in the shadow of the ´exit`- right; (2) providing a minimum level of shareholder rights that hinder a race-to-the-bottom competition style, which – metaphorically speaking – functions as a 'floor' in the developing market for incorporations of public companies, while avoiding to simultaneously create a 'ceiling' for the use of advanced legal models of electronic shareholder participation, and (3) setting up Electronic Proxy Voting (EPV) as a minimum standard of exercising shareholder rights across Europe. In particular, the latter may have a wider impact on shareholder voting than many addressees of the Directive have expected to date.

This paper concludes that further legislative action as to the traditional functions of shareholder meetings (information, communication and voting) and with respect to the review that is often triggered by shareholder meetings is not necessary. Competition and standardization among EC Member States can achieve efficient results. However, with respect to the identification and authentication of shareholders, it is suggested here that four basic principles be mandated on an EU-wide basis: (1) Depositories must be required to assist investors to exercise their rights in shareholder meetings; (2) Depositories must be banned from charging investors fees for the exercise of voting rights; and (3) companies and depositories must be mandated to enter into collective bargaining with respect to a) the fees charged to the corporation for the identification and authentication of its shareholders and other support for the exercise of shareholder rights, as well as b) the technical standards used for data exchange with respect to shareholder certificates, proxy forms and other information exchange tools in the vicinity of shareholder meetings; and (4) clarify that the principles of proportionality and equality which clearly apply to the corporate relationship between the company and the shareholder also apply to the banking relationship of the investor and his/her Depository and the custodians within the chain, as well as to the company and the CSD.

B. Sleeping Beauty Awakening

After having been widely neglected for many years, three factors are primarily driving the recent renaissance of interest in shareholder meetings: *Globalization, Digitalization* and *Internationalization*.[11] While Globalization initiates changes in national laws, thereby allowing shareholders to exercise their participation rights in shareholder meetings worldwide, digitalization offers previously unavailable solutions for logistical and cost problems. Both aspects together culminate in the 2004 revision of the OECD principles of corporate governance that require companies to further cross-border voting through enabling electronic voting in absentia.[12] Like a Sleeping Beauty suddenly waking, shareholder meetings found their way back into the awareness of corporate scholarship.

However, both aspects were turned from an idle academic hobby to a necessity in every-day corporate governance by the third aspect, which is the Internationalization of corporate investors. Since 2005, foreign investors constitute the majority of shareholders in EC Member States, owning on average 33 percent of the total market capitalization in EC countries.[13] In seven EC countries, domestic investors own even less than 50% of the shares listed: Finland, Belgium, Estonia, Ireland, the Slovak Republic, The Netherlands and Hungary.

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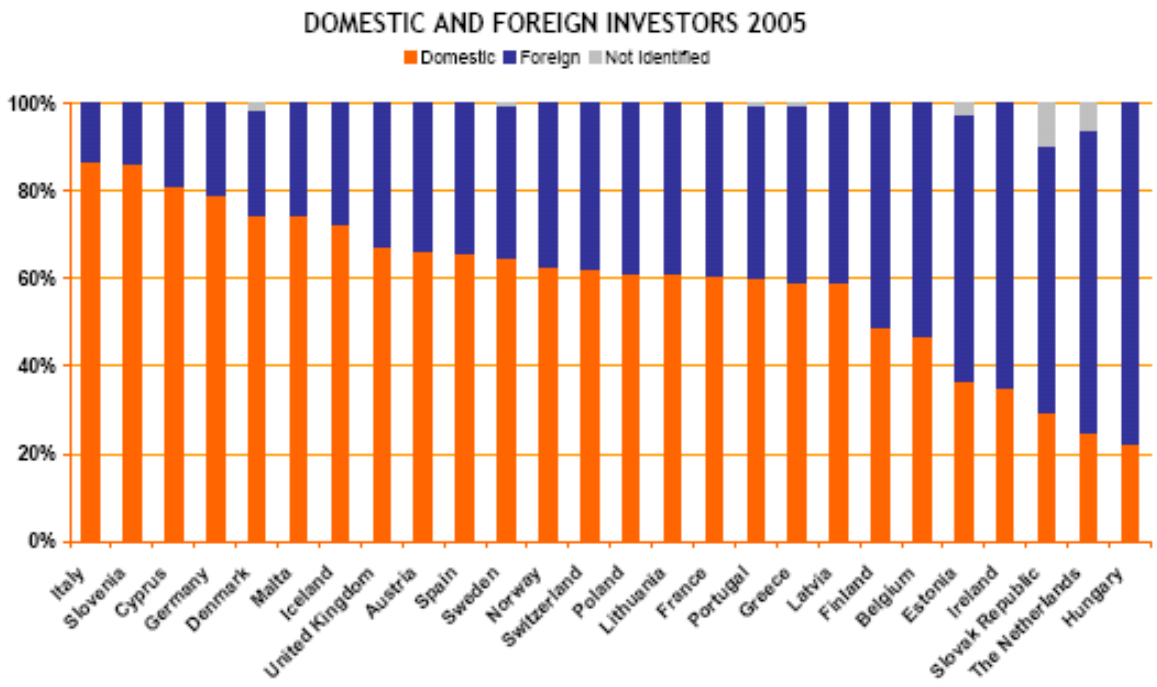
[11] Dirk A Zetzsche, *Die Virtuelle Hauptversammlung* (*The Virtual Shareholder Meeting*), ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT 2003, 736, 742 [Zetzsche, *Virtual Shareholder Meeting*].

[12] OECD *supra* note 8, at II.C.4.

[13] Federation of European Securities Exchanges, SHARE OWNERSHIP STRUCTURE IN EUROPE (February 2007), available at http://www.fese.eu/_lib/files/FESE%20Share%20Ownership%20Structure%20in%20Europe%202006.pdf (March 21, 2007). This is an increase of 4 percent from the previous study per the end of 2003. Therefore, the international shareholder base substitutes for the private financial enterprises which were previously prevailing within the shareholder base.

Figure 2: Domestic and Foreign Investors at the end of 2005[14]



Given the regularly short time frames in advance of shareholder meetings as well as the complications of the cross-border context, relying on old-fashioned methods of information (such as newspapers) and communication (e.g. mail) is not only impractical and costly, but – in many cases – these techniques would effectively deprive foreign investors of their rights. Consequently, within the last five years, the introduction of more timely technical solutions became the focus of legislative attention on a national[15] - as well as a supranational[16] - level.

[14] Source Ibid, at 9.

[15] Supra note 6.

[16] OECD *supra* note 8, Pt. II. as well as the Shareholder Rights Directive, *supra* note 7.

C. Incomplete transition – virtual exercise of shareholder rights from a comparative perspective

I. Scope

This study focuses on public corporations whose shares are traded on regulated markets, as defined by European law.[17] For these public corporations, the law of shareholder meetings remains confusing worldwide. Shareholder meetings are subject to provisions of federal and/or state corporate law, securities regulation, official and unofficial corporate governance codes and a plethora of listing rules issued by stock exchanges. Furthermore, in the European Union, the Transparency Directive[18] and the Shareholder Rights Directive[19] coexist with national laws.

Table 1: Regulatory Levels of the Codified Law on Shareholder Meetings

Legislation	Canada	France	Germany	UK	U.S.	Switzerland
Corporate Law Directive		Shareholder Rights Directive	Shareholder Rights Directive	Shareholder Rights Directive		
Corporate Law Statute	ss. 132 – 154 Canadian Business Corporations Act [*CBCA*]	Section 3 (Article L.225-96 - L.225-126) Code de Commerce [*FrCC.*]	ss. 118, 241 et seq. Stock Corporation Act [*SCA*]	ss. 281 – 361 Companies Act of 2006 [*CA 2006*]	ss. 211-233, Delaware General Corporation Law [*DelGCL]*; § 7.01 – 7.47 Revised Model Business Corporation Act [RMBCA]	ss. 691- 706b Law of Obligations [*OR*]
Corporate Law Regulation	ss. 43 – 69 Canadian Business Corporations Regulations [*CBCR*]	Pt. IV of the Decree dated March 23, 1967; "NRE" decree of n°2002-803, dated May 23, 2002				

[17] See Art. 4 (1) No. 14 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ("MiFiD").

[18] Directive 2004/09/EC of 15 Dec 2004, O.J. L 390/38 (31.12.2004).

[19] With regard to the harmonization of shareholder rights in Europe, see *supra* note 7.

Corporate Governance Code[20]		AFEP/MEDEF, The Corporate Governance of Listed Corporations, No. 5	Pt. 2, 6 of the German Corporate Governance Code [*GCGC*]	Section D & E of The Combined Code on Corporate Governance (June 2006)	Inofficial CG codes[21]	Pt. I of the Swiss Code of Best Practice on Corporate Governance
Securities Law Directive		Art.17 Transparency Directive [*TP*]	Art.17 TP	Art.17 TP		
Securities Law Statutes	ss. 84-88 Ontario Securities Act [*OSA*]		ss. 30a-30g Securities Trading Act [*WpHG*], s. 16 Takeover Act [*WpÜG*]		15 U.S.C. 2B, s. 78n (Securities Exchange Act of 1934)	
Other Securities Regulation	ss. 176-181 Ont. Reg. 1015/ NI 51-102/ NI 54-101/ NP 11-20			Financial Services Authority Listing Rules: ss. 9.3 & 9.6	Esp.: SEC Regulation 14A under the SEA 1934, 17 C.F.R. at § 240.14a [*Rule 14a-X*]	
Listing Requirements	TSX (Venture) Company Manual, f.e. s. 423.12, 455-469				f.e., ss. 401.00-2 NYSE's Listed Company Manual [*NYSE-M*], NASD Marketplace Rule 4350	ss. 1 – 8 Swiss Code of Best Practice on Corp.Gov,

This study willfully disregards these different regulatory levels in order to provide a coherent description of the law on shareholder meetings. Further, though there exists a variety of corporate laws in Canada and the United States, this paper concentrates on the most influential regimes within each jurisdiction: in Canada, the Canadian Business Corporations Act [CBCA] and in the U.S., the Delaware General Corporation Law [DelGCL], as well as the Revised Model Business Corporation Act [RMBCA]. Other state or provincial rules are not the subject of this study.

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[20] All Corporate Governance Codes are available online: www.ecgi.org .

[21] In the U.S., public companies must file a corporate governance statement. The content of this statement is predicated upon recommendations of private organizations, in particular The Business Roundtable, **"**Principles of Corporate Governance" (May 2002); Council of Institutional Investors, "Core Policies, General Principles, Positions & Explanatory Notes" (Mar 2002); American Law Institute, Principles of Corporate Governance: : Analysis & Recommendations (2002). Further, the listing requirements establish minimum standards: NYSE, Final NYSE Corporate Governance Rules (Nov 2003); NASDAQ, Frequently Asked Questions on Corporate Governance, available at http://www.nasdaq.com/about/FAQsCorpGov.stm (11 April 2007).

Furthermore, the study focuses on the minimum standards of shareholder rights, as provided by law. It does not take into account the difference between enabling and mandatory provisions. Hence, this paper disregards that under some provisions, management *can* act in a more shareholder-friendly fashion, though it is not obliged to do so. Another aspect that is willfully disregarded under this legal perspective is to what extent firms use opportunities which the law provides them with.[22]

II. Comparative analysis

Before investors may exercise their rights, companies need to identify these investors and investors which need to authenticate their shareholding vis-à-vis the corporation. As to shareholder rights themselves, traditional doctrine associates three functions with a shareholder meeting: shareholder information, communication of shareholders with management and among themselves, and shareholder voting.[23] Further, shareholder meetings often prompt reviews of whether the directors and officers – or in two-tier jurisdictions, the board of management and the supervisory board [*hereinafter* management][24] –, the controlling shareholders, or the shareholder meeting itself violated statutes, charters, bylaws, or other corporate rules in the conduct or the exercise of voting power at the meeting. This review is commonly exercised by auditors on behalf of shareholders, or the judiciary. I deem this categorization a good measurement of the degree to which the law on shareholder meetings has completed the transition into the digital age.

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[22] It is recognized that an empirical analysis would be particularly helpful, given the few empirical studies that are currently available. See, with respect to Australia, Stephen Bottomley, "The Role of Shareholders' Meetings in Improving Corporate Governance" (2003) Centre for Commercial Law – Faculty of Law – The Australian National University; on Belgium, see Christoph Van der Elst, "Attendance of Shareholders and the Impact of Regulatory Corporate Governance Reforms: An Empirical Assessment of the Situation in Belgium", (2004) EBOR 5: 472, 489; on Germany and the U.S., see Zetzsche, "Explicit and Implicit System", *supra* note 4; on the U.S. Jennifer E. Bethel & Stuart L. Gillan," The Impact of the Institutional and Regulatory Environment on Shareholder Voting" (2002) Financial Management 31, 29.

[23] Supra note 10.

[24] For reasons of simplicity, I generally refrain from distinguishing between directors and officers, and the board of management and the supervisory board, respectively.

1. Shareholder authentication

In the modern corporate world, securities are held and transferred in a paperless way. This is the consequence of either the custodian-driven *demobilization*, or a legislature-driven *dematerialization* of securities.[25] In both cases, securities are eventually held through a chain of intermediaries.

a) The Custodian Chain

On the one end of the chain, the company enters into a custodian agreement with a Central Securities Depository (CSD). Under this agreement, the CSD must administer the entitlements of all its customers on behalf of the corporation.[26] On the other end of the chain, shareholders enter into a depository agreement with their Depository Bank, or Broker-Dealer, respectively, which administers the shareholder's rights vis-à-vis the company on behalf of the shareholder (the Depository). In between the CSD and the Depository, there may be a direct link. However, more often than not, a multitude of other custodians link the CSD to the Depository. This is particularly true in a cross-border context, since only a few institutions are linked to CSDs across borders.

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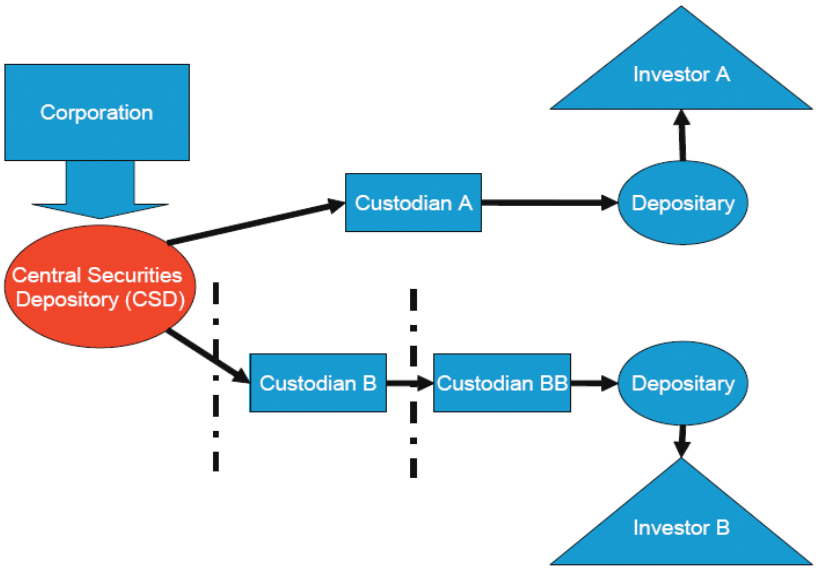
[25] See on the efforts of harmonization with respect to international private law The Hague Securities Convention (*Convention on the law applicable to certain rights in respect of Securities Held with an intermediary),* available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=72 (11 April 2007). Switzerland and the U.S.A. signed the convention on 5 July 2006. UNIDROIT, *Preliminary Draft Convention on Substantive Rules Regarding Intermediated Securities* , available at http://www.unidroit.org/english/publications/proceedings/2006/contents.htm (11 April 2007); UNIDROIT (ed.), ENHANCING LEGAL CERTAINTY OVER INVESTMENT SECURITIES HELD WITH AN INTERMEDIARY, Uniform Law Review, Vol. X, 2005-1/2; UNIDROIT (ed.), *Intermediated Securities* (Study LXXVIII, 2006). Article 8 of the American *Uniform Commercial Code* (U.C.C.), available at http://www.law.cornell.edu/ucc/8/ (11 April 2007) provides for a property rights regime which relies on entitlements by bank account holders vis-à-vis their intermediaries. The U.C.C. is a model law for the American states.

[26] In addition, in paper-based systems the company deposits a collective share certificate with the CSD that certifies the rights of all shareholders.

Figure 3: The Custodian Chain



In this demobilized, or dematerialized securities holding system, the corporation typically does not know who its investors are, **regardless of whether it has issued registered or bearer shares**:

b) Registered Shares

In a system based on registered shares, the person listed in the shareholders' register is deemed the shareholder. The information listed in the shareholder register is based on information provided by the investors' depositories. However, in paper-based times of data exchange, it was costly to follow up on frequent changes in the shareholder base following times of heavy trading volume. Further, since providing data to the shareholder register is costly, banks do not do so on their own efforts. Thus, in the absence of the law, the share register is unlikely to be current. Consequently, depositories are generally required to disclose their clients' data to the share registry. Two different models are established: Some jurisdictions, such as Germany,[27] require disclosure of shareholder data to the share registry on an ongoing basis. Whenever a trade takes place, the seller's and the purchaser's Depositories must sent the data of the trade

[27] S. 67 (4) AktG.

and the number of shares held by their clients to a trading platform which reconciles these data and sends a combined data stream to the share register. Other EC Member States, such as Italy and France, as well as the United States, require Depositories to disclose the data of shareholders to the corporation (or an intermediary acting on behalf of the corporation) at a specified date or during the proxy voting process, in advance of shareholder meetings. While this one-time disclosure obligation renders the share register inefficient for purposes of communication in the absence of shareholder meetings, it is less costly given that merely one data transfer per corporation and year is necessary.

However, with respect to the share registry, three types of inefficiencies are frequently observed. First, **clients frequently object to the transfer of their data**. This may be due to the investment strategy or the simple wish not to be bothered by corporate “investor relations” measures. Some laws deem these objections legitimate. For example, under German law, if the Depository’s client objects to the transfer of his/her data, the Depository must ask the registry to include its own (the Depository’s) data in the share register with a note indicating that it acts on behalf of another person.[28] In this case, the share register (merely) contains intermediary data. The intermediary in question is, formally speaking, the shareholder; however, it is not the investor (in U.S. terms: the beneficial owner).

Secondly, the **Depository may be beyond the jurisdiction** of the law of the issuer’s state of incorporation. Since the jurisdiction of any state is limited to its borders, foreign Depositories are not legally bound to disclose their client data to the corporation, regardless of whether the respective legislation requires one-time or permanent disclosure of shareholder data. Further, neither foreign national laws nor private international law requires intermediaries to disclose shareholder data to the share register and contractual schemes are inefficient given the lack of technical infrastructure, and thus costly processes, in a cross-border setting.

[28] S. 67 (4) sent. 2 AktG.

Consequently, if the Depository is based beyond the borders of the issuer's state of incorporation, it is only the last intermediary that is subject to the law of the issuer's state of incorporation that is obliged to disclose its client data. This intermediary, however, is – again – a mere nominee, as it refers to the CSD or any other custodian in the chain of intermediaries.

Thirdly, if the broker and the Depository are different legal entities, we observe certain hurdles preventing the smooth transfer of shareholder data to the share register. These are due to the fact that some **electronic systems for the inter-bank data transfer between broker and the Depository do not provide for pre-defined interface positions for the exchange of shareholder data**. Generally speaking, banks are connected to the national trading platforms through their brokerage arms. In fully integrated brokerage systems (as are generally used in Germany), selling and purchasing typically go hand-in-hand with the provision of shareholder data to the trading platform. However, many Depositories without direct links to the national trading platform (these are typically foreign banks) assign brokers that are licensed under the respective national law to trade on their behalf. Given that the brokers do not generate income by providing shareholder data to the share register, and given that Depositories are not interested in seeing their clients' voting (which would be burdensome for the Depository itself), systems that are used for the inter-bank data transfer between the broker and its customer (the Depository) frequently do not provide for pre-defined interface positions for shareholder data. Thus, Depositories may become technically unfit to transfer shareholder data to the respective trading system simply by relying on an intermediary.

In all of the above situations, the share register is deficient from the outset. The shareholder in form is not the shareholder in substance, namely, the investor. The registered shareholder is an intermediary that holds all the powers and privileges attaching to those shares vis-à-vis the issuer, while there is no legal relationship between the investor (the beneficial owner) and the issuer. Neither a distribution of information nor an issuance of

voting cards that is based on such a share register will reach the investors. Instead, a major share of data included in the share register belongs to nominees.[29] These are banks that hold the shares on behalf of their customers. These customers may, in turn, be custodians and hold shares in account for their customers, and so on. Eventually, the nominee bank frequently administers a mere book position for investors (in U.S. terms: beneficial owners; U.K.: beneficiary) that are unknown to the bank. If this is the case, any investor that is further up in the chain may (only) participate in the meeting as one of the nominee's proxies, or the proxy of the nominee's proxy, respectively. Therefore a proxy card (or form of proxy) must be sent from the nominee to the investor. Alternatively, the investor may instruct his/her Depository, which in turn instructs the custodian, or nominee, respectively, further down the chain.[30] At least in a cross-border setting,[31] both alternatives require the proxy card, or instructions, respectively, to be channeled through the intermediary chain – a costly and time-consuming process.

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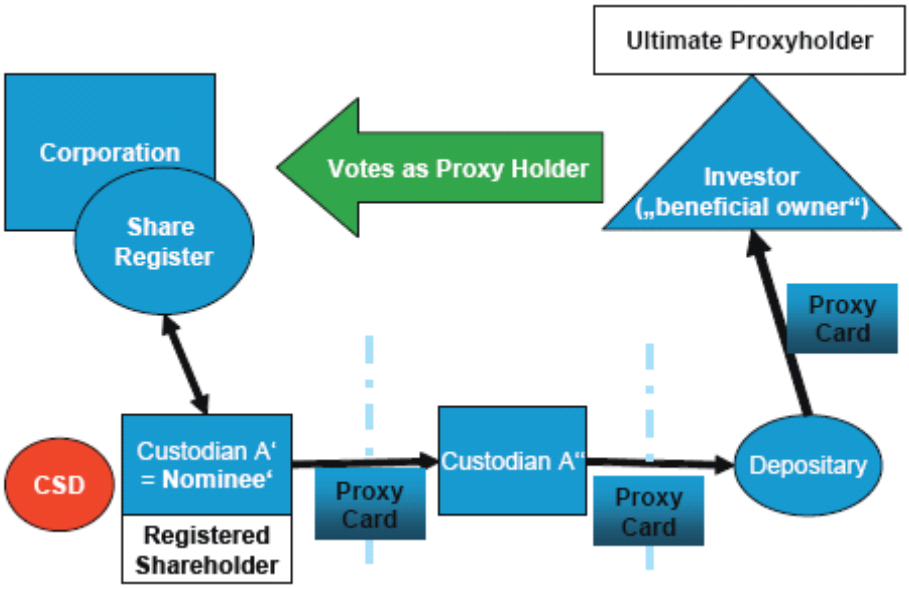
[29] In 2005, 75% of the share capital of Deutsche Börse AG and a third of the share capital of Deutsche Bank AG was held by nominees; for Switzerland, it is estimated that 30 through 50 % of the share capital is held in street name. See Uwe H. Schneider & Hans-Jürgen Müller-von-Pilchau, *Der nicht registrierte Namensaktionär* (*The non-registered owner of registered shares*), DIE AKTIENGESELLSCHAFT 2007, 181, 182.

[30] See, for the UK, Richard C. Nolan, *Shareholder Rights in Britain*, 7 EBOR 549, 570 et seq. (2006), advocating that this intermediary system would be a solution. However, it is, in fact, the source of the problem, given that it requires two layers of communication: 1. up, and 2. down the chain (regardless of whether proxy cards or instructions are sent through the chain).

[31] In the U.S., broker-dealers are required to disclose the investors' data to a service provider who in turn forwards information and issues proxy cards to the investors.

Figure 4: Shareholder Authentication for registered shares



c) Bearer Shares

The situation is slightly better with respect to bearer shares, given that legal doctrine facilitates the introduction of a system that entirely relies on 'book-entry'. Under such a system, a client of a Depository that is not a Depository itself is deemed the shareholder. This formal definition disregards any trusteeships outside of the securities holding system (such as 'private trusts', fund structures etc.) to the same extent as it disregards possible (but unlikely) errors in the accounting of the Depository itself. In such a system, the Depository determines who the shareholder is.

For example, the current German system for bearer shares relies on such a book-entry system of shareholder authentication.[32] Under s. 123 of the German Stock Corporation Act, the Depository must certify the shareholding of its client upon the client's request at a record date that is defined as the beginning of the 21st day in advance of the day of the meeting. This certificate may be sent to the shareholder who forwards the certificate to the corporation [**Investor Approach**], or the Depository may

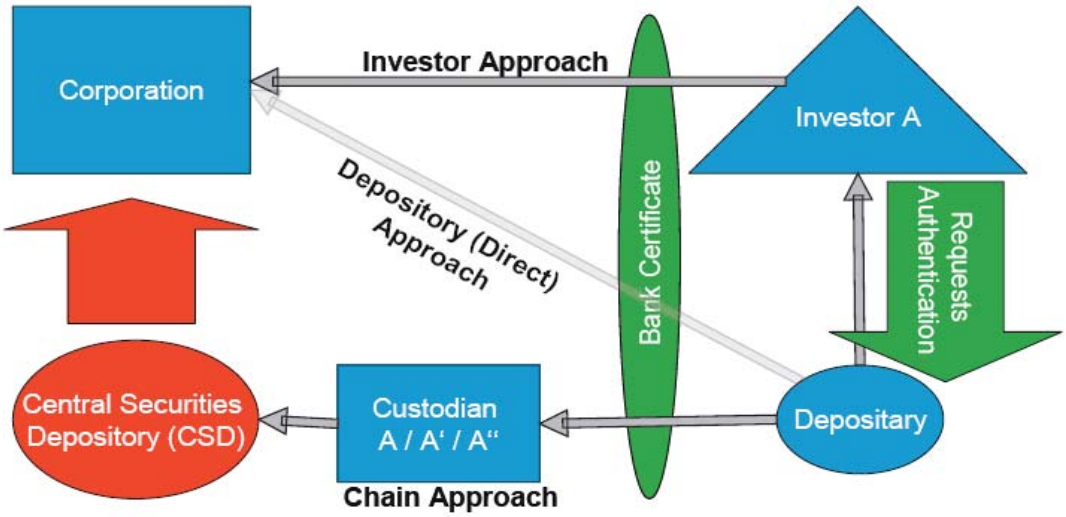
[32] S. 123 (3) AktG.

send its certificate directly to the corporation [**Depository (Direct) Approach**] through an electronic data exchange system for shareholder meetings. In both cases, special providers support the corporation in collecting and identifying shareholder data.[33]

Under both the Investor Approach and the Depository Approach, the Depository at the end of the chain is deemed a reliable issuer for the certification of shareholdings. This is based on the assumption that strict supervision by the financial services agencies across Europe as well as reputation incentives will prevent banks from negligence and fraud when issuing voting certificates. Some EC Member States, however, require the Depository's certificate to be forwarded through the entire chain of intermediaries down to the CSD. Under this scheme, the CSD bundles all of the incoming certificates and forwards them to the corporation [**Chain Approach**]. Under this Chain Approach, the co-operation of every intermediary in the chain is required before shareholders may receive a proxy card – a tedious process that is as burdensome and costly as sending a proxy card up the chain, as is the practice for registered shares (see above).

[33] In 2006, the first year after the introduction of a record date related book-entry system, the turnouts at shareholder meetings were 4 percent higher than in 2005, see http://www.dsw-info.de/Hauptversammlungspraesenzen.70.0.html (April 11, 2007) .

Figure 5: Shareholder Authentication in a book-entry based system



Under all of these three approaches, investors are unable to exercise their rights without their Depository's co-operation, and in case of the Chain Approach, the co-operation of every custodian in the chain. In this multiparty arrangement, the effectiveness of voting and the exercise of other shareholder rights depend on the support by, and the efficiency of the chain of intermediaries.

d) Adverse Incentives

However, as mentioned above, Depositories typically do not generate income by issuing voting certificates or proxy cards to their customers. Further, nominees and custodians along the chain typically do not have an economic stake in the shares.[34] Consequently, these intermediaries show no propensity to support the exercise of their customers' voting rights, and – while the company-level is widely digitalized – little money is invested in modernizing the technical infrastructure for voting at the intermediary level. Without a legal obligation, investors face many barriers (such as fees, lack of information, time-consuming processes etc.) to exercise their rights.

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[34] See Nolan, *supra* note 30, at 570.

Consequently, it is not a big surprise that we observe a manifold of obstacles already present in the national context. For the U.K. and the U.S., it is reported that, even where an intermediary is instructed by the investor to vote shares held for him, the instructions are often not executed.[35] Further, votes are frequently lost within the English chain of intermediaries.[36] U.S. corporate scholars deem voting results within the U.S. system that are closer than 5 percent of the overall votes counted at a poll to be unreliable.[37] The problem can be reasonably assumed to be even more significant in a cross-border setting where the particulars are beyond the reach of national legislators.

In recent years, state legislatures,[38] a European expert group commissioned by the Dutch Ministry of Justice, the European Commission and international organizations[39] sought to address the issues associated

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[35] *Report of the Committee of Enquiry into UK Vote Execution* (London, National Association of Pension Funds 1999) § 1.7.; S.M. Klein, *Rule 14b-2: Does it Actually Lead to the Prompt Forwarding of Communications to beneficial Owners of Securities?*, 23 Journal of Corporation Law 155 (1997). Rule 14b-2(b)(3) under the SEA 1934 requires nominees to grant, or effectively transfer, a proxy to the beneficiary, or else to solicit voting instructions from the beneficiary and then act on such instructions as are given.

[36] Paul Myners, *Review of the impediments to voting UK shares – report to the Shareholder Voting Working Group*, 14 et seq. (1/2004.

[37] Gil Sparks, cited from Marcel Kahan & Edward Rock, *The Hanging Chads of corporate voting*, U. Pa. L. Rev. 2007 (forthcoming). Kahan & Rock define seven pathologies of the American voting system.

[38] France, see Michel Storck, *Corporate Governance à la Francaise – Current Trends*, 1 ECFR 1, 37, 54 (2004) on the reforms of Artt. L228-1 et seq. C.com by Ordonnance nº 2004-604 (June 24, 2004), Official Gazette of June 26, 2004, Art. 24; Germany: s. 67, 123 AktG, reformed by NaStraG (2001) and UMAG (2005); UK: ss. 145 to 154 Companies Act 2006; Ferran, *supra* note 10, at 509; Paul Myners, *Review of the impediments to voting UK shares – report to the Shareholder Voting Working Group*, 14 et seq. (1/2004), available at http://www.manifest.co.uk/myners/myners.htm; Switzerland: von der Crone, *Bericht, Pt. 4*, *supra* note 6, at 12 et seq.

[39] Expert Group on Cross-Border Voting, REPORT ON CROSS-BORDER VOTING BY SHAREHOLDERS (2002), available at www.jura.uni-duesseldorf.de/dozenten/noack/texte/normen/amsterdam/ ; the report focuses on corporate law. Some securities law issues are discussed in the FIRST AND SECOND REPORT ON EU CROSS-BORDER CLEARING AND SETTLEMENT ARRANGEMENTS (2001) and (2003) (Giovaninni-Reports), commissioned on behalf of the European Commission, available at europa.eu.int/comm/economy_finance/giovannini/clearing_settlement_en.htm, and The Bank of New York (ed.), EUROPEAN CLEARING AND SETTLEMENT HANDBOOK, available at www.bankofny.com/htmlpages/ain_1056.htm . Further, the Unidroit- and

with shareholder authentication in an intermediary chain. The underlying complications cannot be described here in detail.[40] For the purposes of this paper, it is only important to note that the unsettling situation with respect to the authentication and identification of shareholders significantly hampers the efficacy of virtual shareholder meetings. This question will be revisited below.

2. Information

The company may provide information to shareholders via two different methods, which will be referred to as the "pull" and the "push" method.

a) Pull

First, a company may make information available to shareholders who may access the information at the pre-determined place ("pull" method). Traditionally, these places were the company headquarters or company registers. Shareholders could come to these places and take a look at the filed documents. Meanwhile, quoted companies are either required to disclose corporate information on their website or to send it to regulators, stock exchanges or commercial information providers for disclosure through specific storage and retrieval systems or official gazettes in

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The Hague-Initiatives seek to harmonize national laws with respect indirect securities depository systems, see Unidroit (ed.), ENHANCING LEGAL CERTAINTY OVER INVESTMENT SECURITIES HELD WITH AN INTERMEDIARY, Uniform Law Review - special edition 2005-1/2 (2005).

[40] Maria-Teresa Marchica & Roberta Mura, *Direct and Ultimate Ownership Structures in the UK: an intertemporal perspective over the last decade* 13:1 Corporate Governance: An International Review 26 (2005); Mueller & Tsacoumis, *supra* note 3, at 7-7 et seq.; Andreas Rahmatian, *The issue and transfer of shares under English and German law: an outline*, 23 The Company Lawyer, 252-260 (2002); Teo Tsu Min Cynthia, *The multi-tier contest – competing priorities in an indirect holding system* 21 Company & Securities Law Journal 168 (2003); Ulrich Noack, *Aktionärsrechte im EU-Kapitalbinnenmarkt* (Shareholder Rights within the EC Common Market), ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (ZIP) 325, 327 (2005); Ulrich Noack & Dirk Zetzsche, *Die Legitimation des Aktionärs* (*The Identification of Shareholders*), DIE AKTIENGESELLSCHAFT 651 (2002), and *Aktionärslegitimation bei sammelverwahrten Inhaberaktien* (*The Identification of Shareholders of Companies Issuing Bearer Shares hold in Custody of a Central Depository System*), WERTPAPIERMITTEILUNGEN 1 (2004).

electronic form that are sponsored by these entities.[41] This is also true with respect to meeting-related information, such as the annual report,[42] the notice of the meeting and the proxy materials,[43] shareholders' draft resolutions,[44] a web-cast of the meeting,[45] the voting results,[46] and a variety of other information.[47] Active investors who look for meeting-

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[41] The specific media for disclosure of company data differ. Across Europe, some harmonization resulted from the implementation of the Transparency Directive, *supra* note 18, and the reform of the First ("Disclosure") Corporate Law Directive. See e.g. with regard to Germany Ulrich Noack, *Digital Disclosure of Company Data in Germany and Europe - Regarding the Implementation of the Disclosure Directive (2003) and the Transparency Directive in Germany* (CBC-RPS 0002), and *Die neue Unternehmenspublizität nach EHUG und TUG* (*The 2007 reform of the German disclosure system for company data: A one-stop-shop system in the making?) (CBC-RPS 0027)*; both papers are available at http://www.ssrn.com/link/cbc-law.html (11 April 2007).

[42] E.g. Canada: National Instrument No. 51-102 "Continuous Disclosure Obligations" [NI 51-102], Pt. 4 –6, requiring disclosure on SEDAR (Ontario securities act); France: L225-115 & Art. 124 (1) Decree; Germany: s. 37v, w, x WpHG, No. 6.8 DCGK (corporate website, company register); Switzerland: Art. 697h (1) (if not send to any person requiring the company to do so); U.S.: SEC Regulation S-X, requiring disclosure on EDGAR, and S. 203.01A of the NYSE-M.

[43] Canada: s. 134 (3) CBCA & NI 51-102, Pt. 9; France: Art. L225-108 C.com & Art. 130 Decree; Germany: ss. 121, 25 sent. 1 AktG, s. 30b (1) WpHG (official electronic gazette) and No. 2.3.1 GCGC (corporate website); Switzerland: subject to the articles and listing requirements of the stock exchanges, see Anhang I des Rundschreibens Nr.1, issued by the SWX, online http://www.swx.com/download/admission/regulation/circulars/abcircular_001_de.pdf ; UK: s. 309 *Companies Act 2006*; U.S.: Rule 14a-6(e) and s. 401.01-02, 402.00-03 NYSE-M. The SEC has proposed amendments to its rules that would require issuers and other soliciting persons to furnish proxy materials to shareholders by posting them on an Internet Web site and providing shareholders with notice of the availability of the proxy materials. This is yet voluntary for proxy solicitors.

[44] In Canada, the UK, the U.S. and Switzerland, requisitions must not be filed after the notice of the meeting. Consequently, they are either disclosed in the management's circular or filed as proxy materials issued by the petitioner, see Zetzsche, "Shareholder Interaction", *supra* note 4, at III 2. In the other jurisdictions, petitions may be filed as response to a management proposal. France: L225-115 No. 3 & Art. 130 Decree; Germany: ss. 126 (1), 127 AktG.

[45] E.g. recommended by No. 2.3.4 GCGC, as permitted under s. 118 (3) AktG (if the articles so provide).

[46] E.g. Canada: NI 51-102, Pt. 11.3 (SEDAR); UK: s. 341 *Companies Act 2006* and D.2.2 Combined Code on Corporate Governance; Switzerland: Art. 702 (V) OR (Draft of 2005).

[47] German companies sometimes disclose a summary of the Question & Answer session of the shareholder meeting, see Zetzsche, "Explicit and Implicit System", *supra* note 4; further they must disclose amendments of the rights attached to shares under s. 30e WpHG.

related information will be able to find and download this information easily.

b) Push

Alternatively, a company may be obliged to send or supply information to the recipient ("push" method). The underlying rationale for utilizing such a method is that under the pull-method, *passive* shareholders will not receive any information, and are even less likely to exercise their rights than if they received some information and the proxy forms, as a "reminder" of their rights. Thus, corporate law requires the company to send (at least) the notice of the meeting with the proxy-related materials to their shareholders.[48] In previous times of paper-based distribution, push-information required major logistical efforts and imposed high process costs on companies. In the digital age, however, "push" may easily and inexpensively take place by forwarding the link to the relevant information disclosed on the company's website to the shareholder's email account.[49]

With regard to push-information, the transition is, however, still incomplete. In addition to the necessary identification requirement,[50] two kinds of

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[48] Canada: s. 135 (1), 253 CBCA; France: Art. L225.108 C.com and Art. 120-1, 124 (registered shares), 125 Decree; Germany: s. 125 (1), (2) AktG for shareholders of record, s. 128 (1) AktG for beneficial owners holding registered shares and shareholders holding bearer shares; Switzerland: Art. 696 (2) OR (registered shareholders); UK: ss. 308, 309 Companies Act 2006; U.S.: Rule 14a-3 for record shareholders; Rule 14b-1/2 and Rule 14a-13(c) for non-objecting and consenting beneficial owners (NOBO and COBO-lists); Rule 14a-13(d) for certain employee-shareholders; depositories are required to forward information to other shareholders according to Rules 14a-13(a) (preparation) and 14b-1(b) and 14b-2(b) (execution); ss. 222 (b), 229, 230 DelGCL; ss. § 7.05-06 RMBCA.

[49] Expressly stipulated in Canada: No. 7 (2) CBC Regulations; UK: s. 309 Companies Act 2006; U.S.: s. 232 (b) (3) DelGCL and SEC Final Rules: Internet Availability of Proxy Materilals, amending parts of Sec Rules 14a, 14b, 14c and related Schedules and Forms under the Securities Exchange Act of 1934, supra note 6. The proposed SEC Release "Universal Internet Availability of Proxy Materials" (supra note 6), would, if adopted, make the Internet-based delivery of proxy materials compulsory. For large issuers, this requirement would be effective for the 2008 proxy season, while other issuers would not be subject to these requirements until 2009.

[50] Article 17 (3) (b) of the Transparency Directive, *supra* note 18, for all Member States.

hurdles hamper the smooth transition towards digital exercise of shareholder rights.

First, under some laws, the **shareholders** of the company **must resolve** that the company must send documents or other information to members.[51] The reason for this requirement is unclear. The information is publicly available in digital form under the pull-provision. The method of how a shareholder prefers to receive corporate information thus merely concerns the individual shareholder. Furthermore, this requirement might hamper the efficient exercise of shareholder rights since one (let's say: local, controlling, institutional) shareholder group might utilize it in order to keep another (international, retail etc.) shareholder group from organizing itself efficiently. This can occur where postal delivery consumes precious time in the short period preceding the shareholder meeting.

Second, the regimes require the companies (or the intermediary between the company and the shareholder) **to obtain the prior consent of the addressees** before the company may send information by electronic means. Without the shareholder providing his email address or other communications means, the company cannot fulfil the sending-/delivery-requirement electronically. Thus, the shareholder's consent is a natural barrier which does not need any regulatory activity. Simple data storage requirements that document that the shareholder provided his electronic address to the company suffice. Many regimes nevertheless require that a shareholder must consent *in writing*,[52] and some set even more burdensome formal requirements as a precondition for the use of electronic communication facilities.

However, truly passive shareholders may not send back declarations of consent to the use of electronic communication methods, even if corporations provide free envelopes, or lure shareholders to send back the

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[51] Article 17 (3) of the Transparency Directive, *supra* note 18, imposes this requirement on all EC Member States.

[52] Article 17 (3) (b) of the Transparency Directive, *supra* note 18 (all EC Member States)

declarations with small gifts. While one can argue that active shareholders do the job for passive shareholders in controlling management, and hence shareholder passivity is not an issue, it is uncertain whether active shareholders, and in particular those groups which are called "activist shareholders", in fact, pursue the agenda of all rather than merely their own agenda.[53] Thus, scholars discuss options to lessen shareholder passivity and to make more shareholders vote on an informed basis.[54] A "Deemed Consent" provision may be utilized in order to lessen the effects of shareholder passivity, such as that provided by German law and the English *Companies Act 2006.* Pursuant to the latter, subject to a shareholders' resolution or a provision in the company's articles to that effect, a person is taken to have agreed that the company may send information to him / her electronically if

> (a) the person has been asked individually by the company to agree that the company may send or supply documents or information generally, or the documents or information in question, to him by means of a website, and
>
> (b) the company has not received a response within the period of 28 days beginning with the date on which the company's request was sent.[55]

Such a "deemed consent" provision may increase the level of participation in methods of electronic communications significantly and thereby reduce costs imposed on the company / all shareholders. At the same time, "deemed consent" provisions do not impose unjust requirements on technically insufficient, unskilled or unequipped shareholders, since (1)

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[53] For some recent studies on shareholder activism see e.g. Bratton, *Hedge Funds and Governance Targets*, ECGI Law Series 080/2007 (February 2007); Kahan & Rock, *Hedge Funds in Corporate Governance and Corporate Control,* ECGI Law Series 076/2006 (July 2006); Klein & Zur, *Hedge Fund Activism,* ECGI Finance Series 140/2006 (September 2006); Becht, Franks, Mayer & Rossi, *Returns to Shareholder Activism Evidence from a Clinical Study of the Hermes U.K. Focus Fund,* ECGI Finance Series 138/2006 (December 2006).

[54] See, for example, Mark Latham, Proxy Voting Brand Competition, 5:1 JOIM 79 (2008); Zetzsche, *Corporate Governance in Cyberspace – A Blueprint for Virtual Shareholder Meetings* (June 19, 2005). CBC-RPS No. 0011, available at SSRN.

[55] Schedule 5, Pt. 10 *Companies Act 2006.*

these shareholders either do not have an email account, and, hence, a company cannot fulfil its supply requirements vis-à-vis these shareholders electronically, or (2) if these shareholders have given their email account to the corporation, they may always revoke their consent to the electronic supply of corporate information. A "deemed consent" provision thus merely operates to deem consent to be given by "lazy", but technically proficient, shareholders.

Table 2: Requirements for "Push"-information by electronic means

Jurisdiction	Shareholder Resolution	Individual Shareholder's Consent	"Deemed / Implied Consent" provision
Canada[56]	- (unless by-laws / articles provide otherwise)	In writing	-
France[57]	Art. 17 (3) TP-D.	In writing, Art. 17 (3) TP-D.; if *shareholder* requires email communication, registered mail with return receipt	-
Germany[58]	Art. 17 (3) TP-D.	In writing, Art. 17 (3) TP-D.	S. 30b (3) No. 1 d) WpHG ('Securities Trading Law`)
Switzerland[59]	no regulation	Consent required	no regulation
UK	Art. 17 (3) TP-D.	In writing, Art. 17 (3) TP-D.	Schedule 5, No. 10 CA 2006
U.S.[60]	-	SEC: - RMBCA: no regulation; DelGCL: -, written notice for revocation	SEC: (for employee shareholders only) -

[56] Ss. 252.3 (2), 252.4 CBCA & No. 7 (1) CBC Regulations.

[57] Art. L225.108 C.com and Art. 120-1 Decree (referred to by Artt. 124 (2), 125 (1), 129 (1), 131 (1), 138 Decree).

[58] Ss. 125 (1), (2) and 128 AktG, No. 2.3.2 GCGC.

[59] Art. 700 (3) OR (Draft of 2005).

[60] SEC, "Use of Electronic Media for Delivery Purposes," Securities Act Release No. 33-7233, 60 Fed. Reg. 53, 458 (October 6, 1995), as clarified through "Use of Electronic Media," Securities Act Release No. 33-7856 (May 4, 2000) note 106; s. 232 (a)

c) Information sent to a company

Finally, some laws specify time periods during which shareholders may send information to the company by electronic means. These provisions concern shareholder requisitions and demands for polls and proxies. Generally speaking, the jurisdictions studied here impose some or all of the following requirements:

(1) the shareholder, proxy-holder or nominee confirms his identity and authenticates his shareholding, proxy or trusteeship, respectively;[61]

(2) the information is sent to the address and in that manner specified for that purpose by the company;[62]

(3) the company agrees that the document may be sent in this specific electronic form (e.g. filling in a form provided on website, email, electronic data transfer).[63] Only some laws mandate that companies receive information electronically.[64]

Requirements (1) and (2) are necessary in order to create certainty. The third requirement, however, is only justified with respect to the use *of the specific electronic form*. This is because a company must ensure that it

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DelGCL. Practice, in particularly during proxy fights, distinguishes between the proxy statements to which no deemed consent provision applies and other materials, such as additional information, see Mueller & Tsacoumis, *supra* note 3, at 7-24.

[61] E.g. Canada: s. 252.7 CBCA; France: Art. 131-3 No. 3, 132, 134, 136, 145-3 Decree; U.S.: s. 212 (c) DelGCL; UK: ss. 145 et seq., 324, 327 (2), 333 (3), 338 (4) *Companies Act 2006*.

[62] E.g. Canada: s. 252.3.(2) (b) CBCA; Germany; s. 123 (3) 3 AktG for authentications of shareholders issued by depository banks (bearer shares); s. 126 (1) for counter-proposals; UK: ss. 314 (4), 333 *Companies Act 2006*.

[63] E.g. Canada: s. 132 (4) CBCA (if company makes available ...) & s. 252.3.(2) (a) CBCA.

[64] The most extensive access-requirements are set up by the U.S. Federal "Electronic Signatures in Global and National Commerce Act [*E-Sign Act*]", 106 Pub L No 229; 114 Stat 464, but some questions as to its scope and consequences remain, see Mueller & Tsacoumis, *supra* note 3, at 7-27 et seq. For some, but not all, shareholder activities: France: Art. 128 Decree (pertaining to shareholder requisitions); Art. 131-1 (requesting ballot form); Germany: ss. 123 (3) 3, 126 (1) AktG.

processes all of the proxies, requisitions, poll demands etc. sent by – sometimes - hundreds of thousands of national and international investors.

Requiring the company's consent to the use of electronic media, *in general*, however, is anachronistic. Further, it is biased against shareholders abroad who will hardly be able to send their requisitions or proxies in a traditional way to the company within the narrow timeframe specified by some corporate laws. For example, while domestic investment is high as compared to other EC Member States,[65] foreign shareholders constitute more than 50% of the dispersed shareholdings in the largest German DAX30-companies.[66] Under these circumstances, denying foreign shareholders electronic access is analogous to doubling the value of local shareholder's votes. Due to this, it is submitted that *German* companies with a significant share of international shareholders must not deny electronic access in the period preceding the meeting.[67] The same fairness-principle on which this statement is founded is also relevant to the laws of other jurisdictions.[68]

3. Voting

The last statement leads to the topic of *electronic voting*. This may take place through a) Electronic Proxy Voting [EPV], b) Electronic Direct Voting [EDV], and in some jurisdictions, through c) Virtual Shareholder Meetings [VSM]. In all jurisdictions, all three models are always permitted subject to the shareholders' unanimous consent. The following section thus merely reviews shareholder meetings of companies in which the use of technology is a contentious issue among shareholders.

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[65] See Figure 2, supra note 13.

[66] Vgl. *Finanzinvestoren fühlen im Dax vor - Höherer Streubesitz öffnet die Türen*, (*institutional investors approach the DAX – higher dispersed shareholdings open the door*) BÖRSENZEITUNG, 6 August 2005, No. 150, at 1.

[67] Zetzsche, BKR 2003, 736 et seq.

[68] E.g. with respect to the U.S. in s. 7.08 (c) RMBCA, which states: "Any rules adopted for, and the conduct of, the meeting shall be fair to shareholders."

a) Electronic Proxy Voting [EPV]

EPV refers to the electronic *issuing*, *authentication* and *submission* of proxy appointments to the corporation. EPV is probably the least controversial of the Internet-based methods of exercising shareholder rights.[69] All jurisdictions within the purview of this study allow for some form of EPV. When EPV first became possible at the beginning of the 21st century, most jurisdictions merely changed the formal requirements of assigning proxies to a private or corporate-sponsored representative. Specifically, there was a move from requiring a proxy solely in writing to mandating some type of digital equivalent, such as email, fax, or even a proxy saved on disk in addition to the written proxy. Accompanying this switch, generic e-commerce issues[70] were widely discussed, such as the meaning of "signature", "authentication", "delivery" and "access"/"storage", in the context of web-based systems. Meanwhile, these issues have been settled, for the most part, with regulatory support.[71]

An advanced model of EPV combines modern methods of information dissemination (web-cast) with EPV. Under this model, which is, for example, common in Germany and specifically provided for under French law,[72] shareholders may direct their representative through the use of the Internet until the ballots are cast within the physical meeting. Under this model, the proxy's function is limited to that of a messenger.

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[69] *Elizabeth Boros*, "Virtual Shareholder Meetings", 2004 Duke L. & Tech. Rev. No. 8, at A.

[70] *Beske*, *supra* note 3, at 8-17; *Boros*, "Virtual Shareholder Meetings", *supra* note 3, at A.

[71] Canada: ss. 252.5-252.7 CBCA & CBC Regulations, No. 6 et seq.; France: Artt. 131-133 Decree; Germany: ss. 126a, 126b Bürgerliches Gesetzbuch (German Civil Code); Switzerland: Art. 14 OR; UK: Statutory Instrument 2000/3373 [The Companies Act 1985 (Electronic Communications) Order 2000] and best practice guidelines by the Institute of Company Secretaries and Administrators (ICSA), Electronic Communications with Shareholders (12_2000), ¶10.4; U.S.: E-Sign Act, *supra* note 64, for details see *Friedman*, *supra* note 3, ¶ 11.05; ss. 211 (b), 212 (c) (3) DelGCL; less specific § 7.22 (a) RMBCA.

[72] Artt. 145-2 – 145-4 Decree. According to Art. 689a of the future Swiss Obligationenrecht (Draft of 2005), the Board is entitled to decide upon the use of electronic proxies that are authenticated by digital signatures.

b) Electronic Direct Voting [EDV]

EDV systems enable shareholders to vote directly over the Internet, without a proxy connecting the "web-" and the "physical sphere". With regard to EPV, two different legal relationships exist: on the one hand, the relationship between the shareholder and his representative, a relationship that is primarily governed by agency law; on the other hand, the corporate law-based relationship between the shareholder and the corporation.[73] In contrast, no intermediary / representative is involved in EDV. Merely one legal relationship exists between the corporation and its shareholders. Similar to EPV, voting may take place in advance of the meeting, or simultaneously if the meeting is web-cast.

For public corporations, this advanced form of Internet-based shareholder participation has not yet achieved general acceptance across the jurisdictions, for two primary reasons. First, under German and Swiss law, formal mistakes or procedural failures in holding the meeting may affect the validity of the meeting decision itself. The two distinct legal relationships under the EPV-model (agency / corporate) may assist in reducing the risk that technical issues[74] affect the validity of the meeting decision.[75] Secondly, EDV stretches the meaning of the expression

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[73] If the shareholder's representative, however, is an agent, the management or a director of the corporation, corporate and securities laws regulate the mandatory content of information provided to the shareholder, as well as the content and design of the form of proxy, in order to mitigate potential conflicts of interests and the risk of fraud. On details, see *Zetzsche*, "Shareholder Interaction", *supra* note 4, at III 3, with further references. The Canada and the U.S. even impose extensive mandatory requirements on proxies solicited *by dissidents*, which is due to an extensive interpretation of the capital markets-oriented disclosure approach.

[74] The firms frequently fear hacker attacks.

[75] Whether this formal distinction, in fact, reduces the risk is subject to debate. See, for Germany, e.g. Pikò/Preissler, in Zetzsche, VIRTUAL SHAREHOLDER MEETING, *supra* note 3, No. 365 et seq.; Zetzsche, *supra* note 3, BKR 2003, 736, 740, for a distinction according to sphere of influence. For Switzerland: Hans-Peter Schaad, in: BASLER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT (BASLER COMMENTARY ON SWISS PRIVATE LAW), 2. Aufl. 2002, Art. 689b OR No. 23 (lower risk); Von der Crone, *supra* note 3, at 161 (no lower risk). The future Swiss law (Art. 701 c – f OR (Draft of 2005) introduces a broad understanding of the expression "meeting". It requires, however, that a meeting that cannot be held according to legal and statutory requirements needs to be convocated again (Art. 701 f. (Draft of 2005)).

"meeting" from a traditional physical understanding to an understanding that regards the Internet-attendant (who is physically an absentee) as "present" in the meeting. The prevailing opinion in Germany, the UK and Switzerland[76] suspects that this understanding is beyond the limits of the statutory definition of "meeting". A hint in the opposite direction, however, could be found in the British Department of Trade and Industry's statement in its Draft Bill from 2005 (which eventually became the *Companies Act 2006*) that there is no need for new regulation in this area, because market practice and case law would continue to evolve.[77]

Some jurisdictions, however, have mastered the methodological challenges provided by more dispersed forms of a "meeting". For example, the by-laws of a French SA may provide that

> shareholders participating in a meeting by video-conferencing or means of telecommunication that enable them to be identified […] shall be deemed to be present at the said meeting for the purposes of calculating the quorum and majority.[78]

It further contains provisions regarding the necessary technical features and procedural arrangements for such meetings.[79] The French law

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[76] Germany: e.g. Uwe Hüffer, AKTIENGESETZ (transl. STOCK CORPORATION ACT), 7th ed. (Beck, München: 2006), § 118 ¶17 [Hüffer]; UK: Boros, *CG in Cyberspace*, *supra* note 3, at 156-164 (her own opinion remains unclear); Nolan, *supra* note 30, at 556, 582, holds that English case law permits electronic meetings if the articles of incorporations make appropriate express provision. He refers to *McMillan v. Le Roi Mining Company Ltd.* [1906] 1 Ch. 331. In this case the High Court strucked down a postal ballot because the company could not hold postal ballots consistently with its articles. For Switzerland: Von der Crone, *Internet-Generalversammlung*, *supra* note 3, at 161.

[77] DTI, *White Paper* (March 2005), *supra* note 6, at 32.

[78] Art. L225-107 (II) C.com.

[79] Art. 145-2 Decree: "The video-conferencing means […] must satisfy technical features in order to guarantee the actual participation in the meeting, if the proceedings are continuously broadcast." Art. 145-3 Decree: "Shareholders exercising their votes during the meeting by electronic means in the manner provided for under Article 119 may access the site dedicated for such purpose only after providing identification, by means of a code issued prior to the meeting". Art. 145-4 Decree: "The minutes of meeting's proceedings referred to in Art. 149 [of the Decree] must report any occurrence of technical hitches in relation with video-conferencing or electronic communications in the case the occurrence disrupted the meeting."

nevertheless requires each shareholder to ask *in writing* that the company send him an absentee ballot. Then, the company may send the absentee ballot per email, if appropriate.[80] The Canadian approach is more liberal:

> Unless the by-laws otherwise provide, any person entitled to attend a meeting of shareholders may participate in the meeting, in accordance with the regulations, if any, by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the corporation makes available such a communication facility. A person participating in a meeting by such means is deemed for the purposes of this Act to be present at the meeting.[81]

Similarly, the DelGCL allows stockholder participation entirely by electronic means if so determined by the board of directors *in its sole discretion*. This discretion is subject to the requirement that the corporation implements (i) verification procedures, (ii) measures to ensure that all stockholders have an opportunity to participate in the meeting and vote, and (iii) means to record the votes of such stockholders:

> If authorized by the board of directors in its sole discretion […] stockholders and proxyholders not physically present at a meeting of stockholders may, by means of remote communication: a. Participate in a meeting of stockholders; and b. Be deemed present in person and vote at a meeting of stockholders, whether such meeting is to be held at a designated place or solely by means of remote communication.[82]

c) Virtual Shareholder Meetings [VSMs]

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[80] Storck, *supra* note 38, at 53.

[81] S. 132 (4) CBCA.

[82] S. 211 (a) (2) DelGCL, subject to the following requirements: (i) the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, (ii) the corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.

While both EPV and EDV are “add-ons” to a physical shareholder meeting, a virtual shareholder meeting does not take place at any physical place. Rather, it takes place in “the web” – wherever this is. Shareholders would not be able to attend the meeting physically. There are two types of virtual shareholder meetings.

Under the first type, which is common across the jurisdictions for *closed* corporations, shareholders may resolve on an issue without a physical meeting taking place. This type of decision-making assumes that shareholders in closed corporations will communicate independently among one and other and make decisions without management necessarily being involved in the decision-making process. This type of decision-making is often permitted by a statute declaring that written resolutions of shareholders may replace traditional shareholder meetings,[83] with the “written resolution” also being a resolution that documents shareholder consent by electronic means.[84] Only in Delaware can shareholders of *public corporations* substitute for meetings with written consent by the majority of *all shares entitled to vote on the meeting*. Even there, this possibility is usually waived in the certificate of incorporation. Interestingly, this waiver is due to concerns that such a provision may benefit insurgents in a control contest![85] Consequently, this alternative will not be considered in the following section.

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[83] The Delaware and the British does not require shareholders’ unanimity for a written resolution substituting for a shareholder meeting [s. 228 (a) DelGCL; ss. 288 et seq. *Companies Act 2006* (excluding resolutions removing directors and auditors)]; the other jurisdictions require either a written resolution signed by all the shareholders entitled to vote on that resolution [RMBCA § 7.04 (a), (c), but see (d); Canada: ss. 142 CBCA; UK: s. 366 A (1) CA 1985] or shareholders’ unanimity in written form [Germany: s. 121 (6) AktG, s. 48 (2) GmbHG].

[84] UK: S. 296 (2) *Companies Act 2006* and note 530 of the *Official Notes to the Companies Act 2006*; U.S.: s. 228 (d) DelGCL.

[85] David A. Drexler, Lewis S. Black, Jr. & A. Gilchrist Sparks, III, DEL. CORP. LAW AND PRACTICE § 31.01, at 2-31 (2003); Charles R. T. O`Kelley & Robert B. Thompson, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS (Aspen, 5th ed. 2006), at 151*.

Under the second model – the truly Virtual Shareholder Meeting [VSM] - the physical meeting is replaced by a web-based procedure. Shareholders and directors deliberate and communicate specifically and exclusively through the web. Some laws explicitly allow for these procedures with respect to *private* companies.[86] With respect to *quoted* corporations, VSMs are yet only permitted in Canada and the U.S. The CBCA states:

> If the directors or the shareholders of a corporation call a meeting of shareholders pursuant to this Act, those directors or shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, entirely by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the by-laws so provide.[87]

The DelGCL stipulates:

> If […] the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this section.[88]

Table 3: Electronic Voting

Jurisdiction	Electronic Proxy Voting	Electronic Direct Voting	Virtual Shareholder Meeting
Canada[89]	Permitted	Unless by-laws otherwise provide & if corporation makes available such a communication facility.	If the by-laws so provide
France[90]	Permitted	If the by-laws so provide	-

[86] U.K.: S. 281 (1) and 288 et seq. *Companies Act 2006*, as construed pursuant to note 530 of the *Official Notes to the Companies Act 2006*. See for Switzerland: Art. 701 d OR (Draft of 2005), requiring shareholders unanimity.

[87] S. 132 (5) CBCA.

[88] S. 211 (a) (1) sent. 2, Title 8 DelGCL.

[89] EPV: argumentum ex No. 54 (9) CBC Regulations; EDV: ss. 132 (4), (5) & 141 (3), (4) CBCA and No. 45 CBC Regulations.

Germany[91]	Vis-à-vis company: if the by-laws so provide or if shareholder uses qualified digital signature / Vis-à-vis intermediary: permitted	Not permitted (prevailing view)	-
Switzerland[92]	Written proxy or electronic proxy signed with a qualified digital signature; electronic directions to proxy subject to managerial discretion	Not permitted (prevailing view)	-
UK[93]	Permitted, if company provides for electronic address in instrument of proxy or invitation to appoint a proxy	Case law unclear; legislature passive	-
U.S.[94]	E-Sign Act: permitted (cont.); DelGCL: subject to managerial discretion; RMBCA: permitted	DelGCL: subject to managerial discretion; RMBCA: not permitted	DelGCL: if board is authorized to determine place of meeting: subject to managerial discretion; RMBCA: not permitted

4. Communication

The information methods described so far herein are one-way methods. *Efficient* information, in contrast, requires communication with regard to its content, hence the mutual exchange of ideas and facts in which both sides approach the "truth" in an act of togetherness. The famous Swiss corporate law scholar *Jean Nicolas Druey* compared this process with the

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[90] EPV: Art. 225.106 C.Com & Artt. 131 – 134 Decree; EDV: Art. L225.107 (II) C.com, and Art. 119 Decree & Artt. 131 – 134 Decree.

[91] EPV: Ss. 134 (3) 1, 135 (2) 3, (4) AktG and ss. 126 (3), 126a BGB; against EDV: prevailing opinion, e.g. Hüffer, *supra* note 76, § 118 Rn. 12; against VSM: argumentum ex ss. 118 (1), 121 (3), (5) AktG.

[92] Art. 689a OR and Art. 14 (2bis), in force since January 1st, 2005; Von der Crone, "Internet-Generalversammlung", *supra* note 3, at 160 et seq., holds that EPV is nevertheless legitimate.

[93] EPV: s. 333 (2) Companies Act 2006; EDV & VSM: see Boros, *CG in Cyberspace*, *supra* note 3, at 155 et seq.

[94] EPV: Ss. 212 (c) DelGCL; § 7.22 RMBCA; EDV & VSM: s. 211 (a), (e) DelGCL.

legendary Native-American way to deliberate, the *powwow*.[95] Few provisions undertake to achieve an online *powwow*.

a) Management as Addressee: Q & A

Besides shareholder meetings, the privilege to ask management questions personally is reserved for controlling and institutional shareholders. Only a few laws undertake to transfer the Q & A sessions into the web-forum.

Outside of analyst / investor and shareholder meetings, North-American corporations typically refrain from answering investors' questions, while European standards understand frequent contacts between management and shareholders in between the meetings to be part of good governance.[96] To justify this restrictive practice, U.S. corporations refer to capital market laws that require that equal information be given to all investors.[97] This does not, however, explain why corporations do not offer web-based question and answer sessions, e.g. through a moderated chat-board with management. Presumably, they refuse to hold such sessions because they would be an inconvenience to management and would not provide a significant benefit to the important investors – the controlling and institutional shareholders; the latter typically enjoy direct access to management.

Such an argument, however, does not explain why, with respect to **shareholder meetings**, efficient large-scale Q&A-sessions over the web

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[95] Jean Nicolas Druey, INFORMATION ALS GEGENSTAND DES RECHTS (transl. INFORMATION AS SUBSTANCE OF LAW) (Zürich, Baden-Baden: 1995), at 190.

[96] F.e. the *Swiss Code of Best Practice for Corporate Governance* (at I.8.) states: "The Board of Directors should inform shareholders on the progress of the company also during the course of the financial year. The Board of Directors should appoint a position for shareholders relations. In the dissemination of information, the statutory principle of equal treatment should be respected." Pursuant to the *British Combined Code on Corporate Governance* (at D.), "[t]here should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility that a satisfactory dialogue with shareholders takes place", including face-to-face contact of non-executive directors with major shareholders.

[97] F.e.: U.S.: Regulation Fair Disclosure (F-D).

have not been utilized. While we see the meeting itself being webcasted all around the world,[98] a procedure enabling shareholders to ask questions via webcam seems still unlikely for public corporations even though it is legally[99] and technically feasible. The few examples of web-based Q&A-sessions[100] are statistically irrelevant. Email question & answer tools do not seem to be widely accepted by shareholders, which is partly due to the fact that shareholders need a proxy who is willing to read the questions asked,[101] and partly due to the fact that it is unsatisfying to sit in front of the screen and wait for management to answer the one question that the shareholder asked. The boredom increases proportionately with the length of the meeting. In Germany, where shareholder meetings frequently take 6 hours or more, the aforementioned model is out of touch with the reality of shareholder meetings.

Thus, the German legislature adopted a provision which has the potential to increase the incentives to enter into a digital dialogue and mitigate the information problems of retail shareholders both inside and outside of shareholder meetings. Pursuant to this provision, information that is published on the corporate website may not be the subject of Q&A in the shareholder meeting.[102] On the one hand, this provision is intended to reduce the exposure of German companies to nuisance-claims based on failures to adequately answer shareholder questions within the strict

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[98] E.g., for the U.S. Friedman, *supra* note 3, at ¶11-40 et seq.

[99] E.g. ss. 132 (4) & 132 (5) CBCA require “adequate methods of electronic communication” to meeting participants as a precondition for the use of the internet which is commonly understood to be fulfilled if management enables shareholders to send emails to management that answers them by talking to the physically present audience, being transmitted to the virtually present shareholders. The same criterion stipulates the DelGCL, s. 211 (a) DelGCL. Under the proxy models typically used in Europe, the proxy is theoretically entitled to ask questions (some exceptions apply to the current British law), though he rarely does so.

[100] Friedman, *supra* note 3, at ¶11.41 et seq. (2004 supplement) summarizes the experiences of U.S. firms.

[101] See below.

[102] S. 131 (3) Nr. 7 AktG.

timeframe of shareholder meetings.[103] On the other hand, the proposal opens the gate for efficient, all-year long virtual Q&A-sessions. Given a well-organized Question & Answer catalogue on the corporate website (in addition to regular disclosure), supplemented by a corporate-sponsored chat-board, there will be few questions left to ask for during the shareholder meeting. This "permanent" investor / shareholder information suggests the future path of Internet-based exercise of shareholder rights.

b) Management as Information Intermediary

Some provisions utilize the corporation as both an information intermediary and as a respondent at the same time. Shareholder petitions are typically distributed through (at least) the corporation as an information intermediary that forwards the petition into the notice of the meeting (if shareholders request to put an item in the agenda) or the proxy statement, respectively (if shareholders table a draft resolution).[104] If this is the case, the Internet merely fulfills the function of a digital rather than postal messenger.

The information intermediation by the corporation, however, has some flaws from the shareholder perspective. This is because management learns about the requisition at the same time that the requisition is supplied to the corporation. In this very moment, management may consider its value, prepare an appropriate answer and begin lobbying for its own position. All these actions will be paid out of the corporation's pockets, hence, by the shareholders. Thus, management has a strategic advantage which may hamper the efficiency of shareholder activism in contentious situations.105 This situation is neither new, nor does it specifically arise from the use of the Internet. Even in the digital age, the

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[103] On details, see Noack/Zetzsche, "Corporate Governance Reform in Germany", *supra* note 8.

[104] On details, see Zetzsche, "Shareholder Interaction", *supra* note 4, at III 3. Exceptions apply to proxy fights with regard to director elections under North American laws.

[105] On details, see Zetzsche, "Shareholder Interaction", *supra* note 4, at III 3.

strategic advantage of management functioning as an information intermediary remains.

c) Management as opponent

The web has the potential, however, to facilitate direct shareholder-to-shareholder communication, hence communication independent from the management as an information intermediary. This type of communication may become crucial if management is opposed to a shareholder petition. For example, the North American proxy regulations rigidly limit shareholder communication that involves seeking the authority to exercise voting rights on behalf of other shareholders.[106] However, it clarifies that the definition of proxy solicitation does not extend to

> a public announcement […] by a shareholder of how the shareholder intends to vote and the reasons for that decision [that is made by] a press release, an opinion, a statement or an advertisement provided through a broadcast medium or by a telephonic, electronic or other communication facility, or appearing in a newspaper, a magazine or other publication generally available to the public.[107]

Under these provisions, shareholders can (1) discuss management proposals, (2) lobby for their own position with respect to certain polls moved at the meeting (in so called “vote no campaigns”), and (3) disclose how they intend to vote and their reasons, publicly on the Internet. However, if shareholders together holding 5% or more of the voting rights agree on a voting strategy they will run the risk of being deemed to be a group of shareholders for the purposes of s. 13d of the U.S. *Securities*

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[106] If a petitioner seeks to solicit proxies over the internet, s. 150 (1.2) CBCA & No. 69 CBC regulations set more burdensome requirements with respect to the content of the internet publication. The U.S. law [Rule 14a-3(f)] requires the filing of a definitive proxy statement before a petitioner lobbies for his position over the internet. Even then, he must not provide a form of proxy or means to execute the same in connection with the communication.

[107] Cited from S. 147 (b) (v) CBCA & No. 67 (b) CBC regulations. The U.S. federal regulations contains a similar exception in Rules 14a-1(l)(iv) (exclusion from the definition of “solicitation”) and 14a-2(b)(1).

Exchange Act.[108] If this is the case, a costly disclosure statement and filing requirement is triggered.[109]

The Canadian law is less cumbersome than the U.S. law,[110] in that it allows shareholders to pool shares with other shareholders to meet the minimum threshold required for certain minority rights.[111] Over the Internet, which is the most popular, most accessible and the least expensive mass media, the petitioner might indirectly gain significant support, without having to file a proxy statement. However, shareholders might experience problems in trying to find the websites of other shareholders who support shareholder activity. This is particularly difficult when the company is in the news on a regular basis and Internet-search engines and RSS feed deliver an excessive number of hits. Alternatively, shareholders may create advertisements urging shareholders to access the specific website.[112] However, due to the costs imposed on shareholders, this kind of behavior is rare outside the context of takeover battles.

The laws provide solutions to the problem of identifying fellow shareholders **in two different ways**. In the first, the law may grant online access to the shareholder list. Shareholders looking for support may be

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[108] Stating: "When two or more persons agree to act together for the purpose of … voting … of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership … as of the date of such agreement …" For details, see Friedman, *supra* note 3, at ¶12-09 et seq.

[109] In the absence of takeover attempts, the other jurisdictions in the purview of this study refrain from imposing disclosure duties on concerted shareholder actions if shareholders co-ordinate the exercise of voting rights in the absence of *a board control seeking proposal*. See, for example, with respect to the UK, see Simon P. Allport, Leon Ferera, "Shareholder Activism: Takeover Code Consequences" (7/2003), online: http://www1.jonesday.com/pubs/detail.asap?language= English&pubid=898 .

[110] While under Canadian law this pooling may take place over the internet, without constituting a "proxy solicitation", the U.S. case law with respect to inspection rights suggests a stricter approach, see *Studebaker Corp. vs. Gittlin*, 360 F.2d 692 (2d Cir. 1966).

[111] Canada gazette, Part I (Sept 8, 2001), at 3443; s. 147 (b) (vii) CBCA & No. 68 CBC regulations.

[112] For U.S. examples, see Friedman, *supra* note 3, at ¶12-05/6.

able to address fellow shareholders at lower costs electronically than they could under traditional methods of communication. This alternative choice is, for example, the Delaware legislature's in the case of a meeting of stockholders held without a physical location. However, under Delaware law the corporation is not required to include email addresses or other electronic contact information in the shareholder list, which hampers the efficiency of the method from the outset.[113] Furthermore, many shareholders will refuse to or will be disinclined to respond to shareholder activists' emails. Finally, regardless of the availability of digital communication, it is nevertheless costly to retrieve and administer the data for sending statements to many shareholders. The SEC Release on Internet Availability of Proxy Materials grants some relief:

> Beginning in July 2007, issuers and other soliciting persons can furnish proxy materials to shareholders by posting them on an Internet website (other than EDGAR) and providing shareholders with notice of its availability.
> …

Issuers and other soliciting persons choosing to follow this "notice and access" model must notify the shareholders who they want to address at least 40 calendar days prior to the shareholder meeting and request the shareholders consent. The proxy card cannot be sent with this notice. Based on this notice, the solicitors may send emails to the consenting shareholders including a link to a website on which further information is available. However, while the SEC's first proposal would have required an issuer to share all information about its shareholders regarding electronic delivery (including email addresses), under the final SEC Rules the issuer has generally the option to provide the list to soliciting persons or to send the shareholder's materials itself.[114] Consequently, management retains its advantageous positions vis-à-vis dissenting shareholders in times of trouble. Moreover, issuers are not required to collect the electronic access information (email addresses) of its shareholders. Thus, they can influence

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[113] S. 219 (a) DelGCL.

[114] SEC final rule, supra note 6, at 47.

the costs which opponents are to bear out of their pockets when soliciting proxies.

Alternatively, the law may determine an online address where shareholders can announce their wish to gather support for their activities, and fellow shareholders can join them. The German legislature chose this alternative by introducing a specific section for shareholder co-ordination in the Federal Electronic Bulletin.[115] For minority rights that are contingent on a threshold, a shareholder can send his issue and a contact address to the editor of the Federal Electronic Bulletin, which will in turn publish it in a specifically-designated section (at very low costs). Other shareholders can access the special section by electronic means free of cost. The exercise of this minority right is not contingent on the strict timeframe of traditional shareholder meetings. It may trigger all-year long shareholder communication and help to inspire shareholder activism.

The right of German shareholders to table draft resolutions against management's recommendations fulfills an equivalent function with regard to items that are already on the meeting's agenda.[116] Shareholders may mention to all shareholders their willingness to propose a different position with respect to an agenda item, and ask other shareholders for support. The right may be exercised up to 2 weeks before the meeting. Since 2002, management is required to publish the draft resolution on the corporate website within the section provided for shareholder meeting-related information at a place that shareholders can easily find. Corporate laws of other jurisdictions often require management to distribute draft resolutions to all shareholders, but usually with a less generous space- and timeframe as compared to the German law, or – as in the U.K. – it can require

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[115] S. 127a AktG, as introduced by UMAG, *supra* note 6, Art.1 No.6. On details, see Noack/Zetzsche, "Corporate Governance Reform in Germany", *supra* note 8, at III.2.a).

[116] Ss. 126, 127 AktG.

shareholders to reimburse the company for circulating a draft resolution in certain cases.[117]

5. Review

Finally, among the jurisdictions analyzed herein, only the German law deals with the review function of shareholder meetings. The scarcity of digital replications of the review function is probably due to the fact that review is generally considered to be an *in camera* act that should not take place in the public sphere that the Internet provides. The German legislature nevertheless utilizes the potential of the net by enabling shareholders to call for support in the aforementioned section of the Federal Electronic Bulletin,[118] with two effects. First; shareholders may assemble a quorum threshold which is necessary under German law for a special investigation by an auditor on behalf of the shareholders, for requiring the supervisory board to sue the board of management, and for certain derivative actions.[119] Second, shareholders willing to support the action may agree on sharing the litigation costs, which mitigates collective action problems. While in the U.S., the bundling-function that this website fulfills is typically exercised by lawyers chasing clients via commercials and web-advertisements, the use of the Internet may help to avoid the excesses that are commonly associated with lawyer-driven corporate monitoring.[120] The current proposal, however, prohibits shareholders from using the website section for assembling support for securities class actions and for contests of the shareholder meeting's decision, which is the type of shareholder actions that is most frequently used in Germany.

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[117] See, e.g., for the U.K. ss. 315, 316 *Companies Act 2006*, which impose costs on members that submit their statement after the end of the financial year preceding the annual general meeting or that submit their statement for special meetings. See also Zetzsche, "Shareholder interaction", *supra* note 4.

[118] Supra note 115.

[119] Ss. 142, 147, 148 AktG (UMAG).

[120] Roberta Romano, *The Shareholder Suit: Litigation without Foundation?* (1991) J.L. Econ. & Org. 7, 55, at 84 (1991); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits,* 58 Vand. L.R. 1747 (2004).

III. Conclusion

While all jurisdictions have undertaken some activities in order to support the Internet-based exercise of shareholder rights, none has completely replicated the functions of traditional shareholder meetings through web-based procedures. Further, the identification and authentication of shareholders has not become easier, despite the fact that more advanced technologies and a more pressing need would suggest legislative, or private, activities in this field. In other words: No jurisdiction has fully taken the step into the digital age.

D. The Shareholder Rights Directive

Is the Shareholder Rights Directive likely to complete the transition of traditional shareholder meetings into the digital age?

I. Objective

The Directive on the exercise of certain rights of shareholders in listed companies seeks to address two key policy objectives that were identified by the European Commission in its Communication to the Council and the European Parliament "Modernising Company Law and Enhancing Corporate Governance – A Plan to Move Forward" of May 21, 2003.[121] These key priorities include: a) **strengthening the rights of shareholders**, and b) **enabling cross-border voting**. In particular, the Commission held that

> … an effective regime for the protection of shareholders and their rights, protecting the savings and pensions of millions of people and strengthening the foundations of capital markets for the long term in a context of diversified shareholding within the EU, is essential if companies are to raise capital at the lowest cost. [122]

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[121] COM (2003) 284 final. In its Resolution of April 21, 2004, OJ C 104 E of April 30, 2004, p. 426, the European Parliament expressed its support for the Commission's intentions.

[122] Ibid, ¶ 2.1.

With respect to the strengthening of shareholder rights, in the Commission's view, [123] key issues included shareholders' (1) access to information, in particular through electronic facilities in advance of General Meetings, (2) rights to ask questions, (3) rights to table resolutions, (4) rights to vote in absentia, and (5) participation in general meetings via electronic means. Further, the Commission emphasized that

> .. specific problems relating to cross-border voting should be solved urgently. The Commission considers that the necessary framework should be developed in a Directive, since an effective exercise of these rights requires a number of legal difficulties to be solved. In view of the important benefits expected from such a framework, the Commission regards the relevant proposal as a priority for the short term. [124]

Through this means, the European Single Market was thought to become a "real shareholder democracy."[125]

In the same vein, the Shareholder Rights Directive emphasizes the idea of a cross-border constituency:

> Non-resident shareholders should be able to exercise their rights in relation to the general meeting as easily as shareholders who reside in the Member State in which the Company has its registered office. This requires that existing obstacles which hinder the access of non-resident shareholders to the information relevant to the general meeting and the exercise of voting rights without physically attending the general meeting be removed. The removal of these obstacles should also benefit resident shareholders who do not or cannot attend the general meeting.[126]

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[123] Ibid, ¶ 3.1.2

[124] Ibid, ¶ 2.1.

[125] Ibid, ¶ 2.1.

[126] Recital (5) of the Shareholder Rights Directive, *supra* note 7.

II. Minimum requirements

If the European legislature strives for a border-less corporate Europe as far as shareholder rights are concerned, does the Directive keep up with these far-reaching ambitions?

1. Shareholder Authentication

With respect to shareholder authentication, the Directive deals with the relationship of the shareholders to their company. However, as to the relationship of intermediaries to the company and the shareholders, it remains silent.

a) Investor vs. Company

With respect to the identification of shareholders within the corporate – investor relationship, the Directive contains three mandatory requirements: (1) the use of a record date-based shareholder authentication, (2) a ban of share blocking, and (3) the principle of proportionality.

(1) The Directive mandates Member States to introduce **a record date requirement** into their corporate laws for all firms that are not able to identify their shareholders from a current register of shareholders on the day of the general meeting.[127] Under a record date requirement, the rights of shareholders to exercise their rights in a general meeting are determined with respect to the shares held by that shareholder on a specified date prior to the general meeting. According to the Directive, this date must lie at least 8 days after the convocation, and it must not lie more than 30 days before the day of the general meeting. Both the 8 day interval and the 30 day limit should make sure that economic and formal entitlement with respect to the rights attached to the shares stays closely aligned. In particular, the eight-day period pays tribute to concerns that stock lending may cater to low voting turnouts and greaten the divide

[127] Article 7 (2) and (3) of the Shareholder Rights Directive, *supra* note 7.

between formally-entitled shareholders (which in the case of stock lending is the borrower) on the one side, and investors with an economic stake in the shares (the lender) on the other.[128] The thirty-day period should make sure that there are not too many who hold their shares at the record date, but not at the day of the meeting. Interestingly, the U.S. law takes an entirely different approach: The NYSE Listed Company Manual recommends a *minimum* interval of thirty days between record and meeting dates "so as to give ample time for the solicitation of proxies."[129]

While Member States may treat bearer shares differently than registered shares, a Member State must set a single record date for all issuers of each type of shares. This, however, may be impractical given that in some jurisdictions, such as Germany, a company may, in theory, issue bearer shares and registered shares simultaneously.

(2) Simultaneously, the Directive **prohibits share blocking** and any other measure that restricts shareholders to sell or otherwise transfer shares during the period between the record date and the general meeting.[130] Under a share blocking scheme, investors need to deposit their shares for a certain period in advance until the end of the meeting. Such techniques, which the laws of some Member States required either on the corporate or the intermediary level, constituted the frequently-used alternative to a record date system for shareholder authentication in Europe. It prevented, however, many institutional investors from exercising their voting rights,

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[128] Theoretically, if the record date is too close to the notice of the meeting, the investor is prevented from retrieving the shares lent (hence, that are transferred to another legal entity) to the date of record and thus effectively from voting. S. 401.02 of the NYSE Listed Company Manual requires a ten days period between the day of notice and the record date.

[129] S. 401.03 of the NYSE Listed Company Manual

[130] Article 7 (1) of the Directive.

because these investors want and / or are required to keep their stocks liquid in order to respond to market reactions.[131]

(3) Finally, the relationship between the company and its shareholders as to shareholder identification is now subject to the **principle of proportionality:**

> "Proof of qualification as a shareholder may be made subject only to such requirements as are necessary in order to ensure the identification of shareholders and only to the extent that they are proportionate to achieving that objective." [132]

It is foreseeable that that which exactly constitutes that which is proportionate to identify shareholders will be subject to an intense debate.

b) Chain of Intermediaries

While the Recitals[133] of the Directive recognize that it is important that custodians and the Depository facilitate the exercise of shareholder rights, the Directive itself does not contain any provisions that directly extend to the intermediaries within the chain. The Directive requires the European Commission to consider this issue in the context of a Recommendation, hence a non-binding legislative measure. This is due to the fact that the questions of who is the shareholder, the approach of which (Investor, Depository, Chain Approach) should be required for authentication, and who should bear the costs for the authentication procedure across borders were contentiously discussed. Representatives of the Member States could not find agreement as to these issues.

However, in a merely indirect way, the Directive also addresses some outer layers of the intermediary problem. Article 13 effectively extends the

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[131] Editorial: „Institutional Investors and Cross Border Voting", Corporate Governance: an International Review 11 (2003), S. 89.

[132] Article 7 (4) of the Directive.

[133] Recital 11 of the Shareholder Rights Directive, *supra* note 7.

principle of proportionality to the relationship between a nominee (hence, an intermediary who is formally deemed a shareholder) and the corporation. It does so by limiting which information the intermediary must disclose to the corporation as a prerequisite of exercising its client's voting rights on behalf of the client. The applicable law may only require * disclosure to the company of

- the client's identity and the number of his/her shares, and
- the content of voting instructions, to the extent necessary for the verification of the instructions purported by the intermediary.

Furthermore, the national laws must not preclude the intermediary from voting differently for each client or assigning a proxy to each client, respectively. These measures make sure that a nominee shareholder must fully fulfill his client's instructions as far as voting is concerned. With respect to other rights, such as the right to add agenda items, to table draft resolutions or the right to ask questions, the Directive remains silent.

2. Information

On a European level, the issue of shareholders' access to meeting-related information was first addressed by the Transparency Directive.[134] The Transparency Directive requires issuers to make available information on the place, time and agenda of meetings, the total number of shares and voting rights and the rights of holders to participate in meetings.[135] Article 5 of the Shareholder Rights Directive extends these requirements. In order to enable shareholders "to cast informed votes at, or in advance of, the general meeting, no matter where they reside,"[136] the Directive requires

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[134] DIRECTIVE 2004/109/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, O.J. L 390/38 (31.12.2004).

[135] Article 17 (2) (a) of the Transparency Directive, *supra* note 18.

[136] Recital 6 of the Shareholder Rights Directive, *supra* note 7.

timely notice and complete information as to the agenda items and as to the necessary procedures for exercising shareholder rights.

a) Pull

In order to provide sufficient “pull” information, companies have to post on their website not later than 21 days previous to the meeting the following information:[137]

- **Convocation**,[138] with specifics on the time, place and agenda of the meeting, the record date for shareholder identification, and a clear and precise description of the procedures necessary for exercising shareholder rights in the general meeting. The latter must include

  - the particularities (such as deadlines) on the rights to put an item onto the agenda and to table draft resolutions, if these rights can be exercised after the convocation, as well as the right to ask questions at, or in advance of, the meeting.
  - the proxy voting procedures, in particular proxy forms and the means **by which the company is prepared to accept electronic notifications of proxy appointments**; and
  - where applicable, the procedures for casting votes by correspondence (voting by mail) **or by electronic means ;**
  - the source for the documents (such as annual reports) and management’s draft resolutions to be submitted to the general meeting;
  - an Internet address with additional meeting-related information

- number of shares and voting rights (separate for each class, if applicable);

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[137] Article 5 (4) of the Shareholder Rights Directive, *supra* note 7.

[138] Article 5 (3) of the Shareholder Rights Directive, *supra* note 7.

- documents to be submitted to the general meeting, such as Annual Reports and Special Investigation Reports;
- draft resolutions and recommendations or comments, respectively, by the company's administrative, managerial or supervisory bodies;
- proxy forms and forms for voting by correspondence (vote by mail), unless these are directly sent to the shareholders. [139]

Within a period not exceeding 15 days after the general meeting, the company must disclose on its website the voting results.[140]

b) Push

With respect to pushed information, as a minimum standard, Member States must mandate that companies distribute the convocation notice through the same mechanism for the dissemination of information through which they have to distribute market relevant information under Article 21 (2) of the Transparency Directive [Intermediary-based Dissemination].[141] Companies with a current share register may be excluded from the Intermediary-based Dissemination if they are obliged to send the convocation to each of its registered shareholders.

In either case, the company may not charge any specific cost for issuing the convocation in the prescribed manner. Member States may require additional methods of information dissemination under their national laws.

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[139] Without specifically mentioning the corporate website, Article 17 (2) (b) of the Transparency Directive, *supra* note 18, requires that the issuers "make available a proxy form, on paper or, where applicable, by electronic means, *to each person entitled to vote* at a shareholders' meeting, together with the notice concerning the meeting or, on request, after an announcement of the meeting."

[140] Article 14 (2) of the Shareholder Rights Directive, *supra* note 7.

[141] See also the further specification in Article 12 of Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

The dissemination requirement pursuant to Article 21 (2) of the Transparency Directive was not part of the earlier drafts of the Shareholder Rights Directive. The Intermediary-based Dissemination requires companies to forward the respective information to an information intermediary which – in return – is free to decide whether it wishes to publish the information. The rushed-through legislative procedure which introduced the Intermediary-based Dissemination requirement for the convocation notice clearly led to a deficiency in the Directive, in four respects: First, information intermediaries are unlikely to deem convocation notices of regular shareholder meetings a matter that will be prominently reported. In this regard, the situation is different with respect to information that is relevant to the market. Secondly, in a world with RSS feed and self-functioning Internet search engines, requiring companies to forward news to *an intermediary* (who are likely to have modern information technologies) is an outdated and unnecessary costly burden upon companies. Third, Intermediary-based Dissemination does not address the issue of shareholder apathy which the *investor*-directed push-information counters more effectively. Consequently, advanced corporate laws require investor-directed push information.[142] The Shareholder Rights Directive, however, does not. Finally, Intermediary-based Dissemination does not provide equal access to meeting-related information in a cross-border context, as is required by Article 4 of the Directive. This is due to the fact that some intermediaries may charge costs for access to their data bases while others do not. Convocation notices of global players will typically be accessible through major free-of-charge websites. However, small corporations that are not in the focus of the press might be disregarded in the information flow of websites which create their income through advertising fees that depend on traffic. With respect to these companies, it may happen that merely fee-based websites provide access to meeting-related information.´

c) Transmission

[142] See *supra* at note 48.

Further, the Directive seeks to exploit "the possibilities which modern technologies offer to make information instantly accessible."[143] It does so, however, on a voluntary basis. Member States are required to abolish any legal requirements that prevent companies from offering to their shareholders the real-time transmission of the general meeting. [144]

3. Communication

a) Minimum communication rights

With respect to communication, the Directive requires that shareholders are entitled to exercise three types of minority rights: (1) the right to put items on the agenda, (2) the right to table draft resolutions for items that are already on the agenda, [145] and (3) the right of an individual shareholder to ask questions that are related to items on the agenda and the corresponding obligation of management to answer them.[146] With respect to the former two entitlements, the Directive establishes two "basic rules":[147]

- 5% of the company's share capital as a highest possible threshold;
- Final version of the agenda must be made available to all shareholders in sufficient time to prepare for the discussion and voting.

Member States may regulate the details as to these rights, with three exceptions: First, Member States must set deadlines for the exercise of these rights, "with reference to a specified number of days **prior** to the general meeting or the convocation." Second, if the exercise of these

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[143] Recital 6 of the Shareholder Rights Directive, *supra* note 7.

[144] Article 8 (1) (a) of the Shareholder Rights Directive, *supra* note 7.

[145] Art. 6 of the Shareholder Rights Directive, *supra* note 7.

[146] Art. 9 (1) of the Shareholder Rights Directive, *supra* note 7.

[147] Recital 7 of the Shareholder Rights Directive, *supra* note 7.

rights prompts amendments to the agenda, the revised agenda must be "made available" in the same manner as the previous agenda, before the record day.[148] This requirement reflects the Directive's rationale that "results of the voting reflect the intentions of the shareholders in all circumstances."[149] Consequently, the revised agenda must be posted on the Internet website according Article 5 (4) of the Directive.[150] Third, while Member States may require that the right to add an item to the agenda or to table draft resolutions to an agenda item be exercised "in writing," the Directive mandates that "writing" be understood as submission by post **or electronic means**. Consequently, **European law entitles shareholders to use electronic means for their submissions**. Yet, the laws of some Member States vest discretion in management as to whether shareholders may submit their proposals via electronic means.

With respect to the right to ask questions, other than the establishment of the general principle, the "rules on how and when questions are asked and answered should be left to be determined by Member States."[151]

b) Digital two-way communication

With respect to digital two-way communication, the Directive takes a liberal stance. Member States shall permit companies to offer to their shareholders methods of real-time two-way communication which enable shareholders to address the general meeting from a remote location. [152]

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[148] Article 6 (4) of the Shareholder Rights Directive, *supra* note 7.

[149] Recital 9 of the Shareholder Rights Directive, *supra* note 7.

[150] Whether the Directive requires dissemination pursuant to Article 5 (2) of the Directive or stricter distribution requirements under national laws is unclear. I hold, however, that dissemination / distribution is not required due to the fact that the words "make available" are exclusively used in Article 5 (4) of the Directive.

[151] Recital 8 of the Shareholder Rights Directive, *supra* note 7.

[152] Article 8 (1) (b) of the Shareholder Rights Directive, *supra* note 7.

4. Voting

The Recitals of the Directive state the legislature's objective in bold language:

> **Companies** should face **no legal obstacles** in offering to their shareholders any means of electronic participation in the general meeting. Voting without attending the general meeting in person, whether by correspondence or by electronic means, should not be subject to constraints other than those necessary for the **verification of identity** and the **security of communications**.[153]

Do the substantive provisions of the Directive keep up with this promise?

a) Electronic Proxy Voting [EPV]

With respect to EPV, the Directive continues from where the Transparency Directive leaves off. Pursuant to Article 17 (2) (sub b) of the Transparency Directive, issuers must make available proxy forms on paper or by electronic means to each person entitled to vote at shareholder meetings. However, neither does the Transparency Directive require that voting facilities and related information are available in all Member States – the home Member State suffices –, nor does it mandate issuers to offer to their shareholders electronic proxy voting.

Based on the assumption that "a smooth and effective process of proxy voting"[154] positively influences corporate governance, the Directive takes one step further. It mandates not only that shareholders are able to issue, or revoke, a proxy to the proxy-holder by written[155] electronic means (e.g. by email), it also requires companies to offer to their shareholders at least one effective method for giving notice to the company about the appointment, or the revocation, of the proxy by written electronic

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[153] Recital 9 of the Shareholder Rights Directive, *supra* note 7.

[154] Recital 10 of the Shareholder Rights Directive, *supra* note 7.

[155] Article 11 (2) of the Shareholder Rights Directive, *supra* note 7.

means.[156] In addition, the Directive seeks to abolish some existing limitations and constraints in the laws of the Member States which make proxy voting cumbersome and costly. In particular, Article 10 of the Directive establishes "an unfettered right"[157] of shareholders to appoint any legal entity as a proxy-holder who will enjoy the same rights at the meeting as the shareholder and who votes at the meeting according to the shareholder's directions, regardless of whether the proxy-holder simultaneously represents other shareholders.[158] Further, the Directive limits Member States' jurisdiction to measures with which they seek to address issues of proxy voting arising from potential conflict of interests as well as potential abuses of the proxy.[159]

The effect of Article 10 and 11 of the Directive on Member States is significant: **With the Directive's coming-into-force, all European public companies must offer some type of electronic proxy voting system to their shareholders, and, using the system, the shareholder is free to choose whether it wishes to grant its proxy to a corporate representative or any person that it so designates.** In order to enable shareholders to respond to "situations where new circumstances occur or are revealed after a shareholder has cast his/her vote by correspondence or by electronic means,"[160] the same principle applies to the revocation of the proxy. This is a significant step ahead of what corporations across

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[156] Article 11 (1) of the Shareholder Rights Directive, *supra* note 7. Pursuant to Article 11 (2), beyond the "writing" requirement, the appointment of a proxy-holder, the notification of the appointment to the company and the issuance of voting instructions, if any, to the proxy-holder may be made subject only to such formal requirements as are necessary to ensure the identification of the shareholder and of the proxy-holder, or to ensure the possibility of verifying the content of voting instructions, respectively, and only to the extent that they are proportionate to achieving those objectives [Proportionality Principle].

[157] Recital 10 of the Shareholder Rights Directive, *supra* note 7.

[158] This provision seeks to address restrictions in some Member States. For example, pursuant to some laws only attorneys, management or shareholders may be proxy-holders.

[159] Article 10 (3) of the Shareholder Rights Directive, *supra* note 7.

[160] Recital 9 of the Shareholder Rights Directive, *supra* note 7.

Europe offer to their shareholders today. However, the Directive clearly limits its scope to the corporate relationship between the shareholder and the company, since it does not impose any obligation on companies to verify that proxy-holders cast votes in accordance with the voting instructions of the appointing shareholders.

b) Electronic Direct Voting [EDV]

In contrast to the mandatory approach to electronic proxy voting, the Directive follows an *enabling approach* towards electronic direct voting:

> Member States shall permit *companies* to offer to their shareholders any form of participation in the general meeting by electronic means …[161]

The Directive mentions specifically the casting of votes without the need to appoint a proxy-holder who is physically present at the meeting.[162] Member States' jurisdiction is limited to legal constraints that are "necessary in order to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives."

c) Virtual Shareholder Meetings

Article 8 of the Directive relates to the participation in physical shareholder meetings. It does not make reference to entirely Virtual Shareholder Meetings. However, the Directive explicitly entitles Member States to further develop the rules on electronic participation in the corporate decision-making process.[163]

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[161] Article 8 (1) of the Shareholder Rights Directive, *supra* note 7.

[162] Article 8 (1) (c) of the Shareholder Rights Directive, *supra* note 7.

[163] Article 8 (2) (sub 2) of the Shareholder Rights Directive, *supra* note 7.

5. Review

The Directive explicitly refrains from discussing the legal consequences of a company's failure to meet its mandatory requirements.[164] Thus, the *effet utile* principle[165] that governs the implementation of European law mandates effective and strict enforcement. Fines and criminal sanctions will be deemed sufficient under this rationale, as these are the typical and – given their personal impact – most efficient sanctions of securities law. The alternative of providing grounds for the challenge of the shareholder meeting's decision cannot be presumed to be so effective, given the frequently-observed chance of shareholders colluding with management and the use of extortion by small, but highly professional shareholder groups.

III. Discretion as to the use of web technologies

Aside from these **minimum requirements**,[166] the Directive empowers Member States, the companies and shareholders to decide to what extent and how they want to facilitate the exercise of the shareholder rights to which the Directive refers.

1. Member States

As far as procedure is concerned, most legislative powers remain with the Member States:

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[164] Article 14 (3) of the Shareholder Rights Directive, *supra* note 7, with respect to the disclosure of voting results.

[165] European Court of Justice, Case C-465/93, Atlanta v. Bundesamt für Ernährung, 1995 E.C.R. I-*3761*; Case C-312/93, Peterbroeck, 1995 E.C.R. I-4599 ff., ¶ 12; Case C-6/99 and C-9/90, Francovich, 1991 E.C.R. I-5357, ¶ 43; Case C-217/88, Commission v. Bundesrepublik Deutschland, 1990 E.C.R. I-2879; Case 123/87 and 330/87, Jeunehomme, 1988 E.C.R. I-4517, ¶, 17.; Case 106/77, Simmenthal II, 1978 E.C.R. I-629, ¶ 14; Case 14/68, Walt Wilhelm, 1969 E.C.R. I- 14.

[166] EC Member States may facilitate the exercise of shareholder rights through other means, see Article 3 of the Shareholder Rights Directive, *supra* note 7.

- As “an important matter of corporate governance”, the Directive mentions the timing of **disclosure of votes cast in advance** of the general meeting electronically or by correspondence.[167]
- In contrast to the 21-day-convocation requirement for annual meetings, Member States may entitle a 2/3 majority of the shareholder meeting to introduce a 14-day notice requirement for extraordinary annual meetings **if the company offers the facility for shareholders to vote by electronic means** that are accessible to all shareholders.[168]
- Member States may limit the right to add an item to the agenda to annual general meetings, if shareholders are entitled to call extraordinary meetings with an agenda that includes at least all the items requested by those shareholders.
- With respect to individual information rights, Member States have jurisdiction over the details on how and when shareholder can ask and management must answer questions. This may include the **use of Internet-based technologies**. In particular, “Member States may provide that a response shall be deemed to be given if the relevant information is available on the company's Internet site in a question and answer format.”[169] Beyond this procedural decision, the jurisdiction of Member States is limited to measures that are necessary to ensure the identification of shareholders, the good order of the meeting, and the protection of confidentiality and business interests of companies.[170]
- With respect to **proxy voting,** Member States may

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[167] Recital 12 of the Shareholder Rights Directive, *supra* note 7.

[168] Article 5 (1) s. 2 of the Shareholder Rights Directive, *supra* note 7.

[169] Art. 9 (2) of the Shareholder Rights Directive, *supra* note 7.

[170] Art. 9 (2) of the Shareholder Rights Directive, *supra* note 7.

- limit the appointment of a proxy-holder to a single meeting, or to such meetings as may be held during a specified period;
- limit the number of persons whom a shareholder may appoint as proxy-holders in relation to any one general meeting, subject to the condition that shareholders can appoint one proxy-holder for each securities account in which shares of the company are held;
- require proxy-holders to keep a record of the voting instructions for a defined minimum period and to confirm on request that the voting instructions have been carried out,[171]
- impose preventive measures against, and sanctions for, fraudulent use of proxies collected; [172]
- impose preventive measures against possible abuse of proxies by persons who actively engage in the collection of proxies or who have in fact collected more than a certain significant number of proxies, notably to ensure an adequate degree of reliability and transparency. [173]

2. The Company

Regarding two significant questions, the Directive mandates that Member States empower the company to decide upon which way of exercising shareholder rights it deems most appropriate. These two important aspects include:

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[171] Article 10 (4) of the Shareholder Rights Directive, *supra* note 7.

[172] Recital 10 of the Shareholder Rights Directive, *supra* note 7.

[173] Recital 10 of the Shareholder Rights Directive, *supra* note 7.

- The question of whether a company wants to introduce voting by correspondence (vote by mail).[174] This type of voting *in absentia* is widely used e.g. in France.
- The electronic participation of shareholders in physically-held shareholder meetings, as discussed above. In particular, companies - rather than the legislature - are to decide whether they want to provide for real-time transmission, real-time two way communication and electronic direct voting.

E. Analysis

I. Incomplete solution for shareholder authentication

The Shareholder Rights Directive imposes Europe-wide rules on the relevant record date, including a proportionality requirement governing the relationship between the company and investors. However, it does not mandate the custodians' and Depositories' cooperation as to the exercise of shareholder rights. As has been shown above, one of the key hurdles that hampers effective cross-border voting in Europe lies in the passivity and unwillingness of the custodians and depository banks to be involved in the voting process. Consequently, the silence of the Directive with regard to intermediaries' participation is particularly unfortunate.

II. Electronic participation: Pandora's Box opened

Aside from mandating *a* method for electronic proxy voting, the Directive is likely to spur progress with respect to shareholder rights in another respect as well: It is important to note that Member States have no discretion with respect to the basic question of whether companies are entitled use methods of electronic participation. The Directive takes this decision out of the Member States' hands and either mandates the use of modern technology for all shareholders (e.g. information on the website, electronic

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[174] Article 12 of the Shareholder Rights Directive, *supra* note 7.

proxy voting), or vests discretion to the company. Consequently, while European law provides for the *groundfloor* of digital shareholder rights in Europe, Member States are prohibited from artificially creating *ceilings* that prevent companies from experimenting with new technologies. This regulatory technique gives rise to hopes that companies will soon begin to open Pandora's Box with respect to shareholder rights and engage in a fruitful competition for the most beneficial shareholder rights regime.

III. Proportionality and Equality of Shareholders: Pillars of European corporate law

While the provisions of the Directive are, in many respects, drafted in broad-language terms, and, thus, they vest significant discretion to Member States, the Directive establishes two key rationales which the legislature of the Member States and the European courts are likely to consider when testing the conformity of a national provision with the Shareholder Rights Directive. These are (1) the Principle of Proportionality, and (2) the Principle of Equal Treatment of Shareholders.

1. Principle of Proportionality

The Directive requires Proportionality in four respects:

- **Shareholder Identification** - Proof of qualification as a shareholder may be made subject only to such requirements as are *necessary* to ensure the identification of the shareholder and *only to the extent that they are proportionate to achieving that objective*.[175]
- **Proxy Voting** - Beyond the "in writing" requirement, the appointment of a proxy-holder, the notification of the appointment to the company and the issuance of voting instructions, if any, to the proxy-holder may be made subject only to such formal requirements as are *necessary* to ensure the identification of the shareholder and of the proxy-holder, or to ensure the possibility of

[175] Article 7 (4) of the Shareholder Rights Directive, *supra* note 7.

verifying the content of voting instructions, respectively, and *only to the extent that they are proportionate to achieving those objectives*.[176]

- **Electronic Participation** - Electronic participation in the general meeting may be provided for subject only to such requirements and constraints as are *necessary* to ensure the identification of shareholders and the security of electronic communications, and *only to the extent that this is proportionate to achieving those objectives*.[177]
- **Vote by Mail** - Voting by correspondence may be made subject only to such requirements and constraints as are *necessary* to ensure the identification of shareholders and *only to the extent that these are proportionate to achieving that objective*.

These four dimensions of Proportionality reflect the key objective of the Shareholder Rights Directive which is to ensure that shareholders can obtain access **under the least burdensome, hence least costly conditions**. Under the Directive, this key rationale governs the overall relationship between Member States and companies, on the one side, and shareholders, on the other side. The proportionality-requirement as an overarching principle also governs these relationship where it is not explicitly stated, for example with respect to information of shareholders. Consequently, this proportionality requirement requires companies and Member States to create a legal environment in which information is disseminated and distributed to shareholders as inexpensively and practically as possible. Other requirements violate European law.

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[176] Article 11 (2) sent. 2 of the Shareholder Rights Directive, *supra* note 7.

[177] Article 8 (2) of the Shareholder Rights Directive, *supra* note 7.

2. Equal treatment of shareholders

With respect to rights related to financial participation in the company's profits,[178] take-over attempts[179] and information that is relevant for the buy- and sell-decision,[180] European law has previously required the company to treat all shareholders within the same position equally. The Shareholder Rights Directive extends the equality-principle to situations with regard to the participation and the exercise of voting rights in the general meeting.[181] As the equality principle is a typical minority right, Article 4 of the Directive limits the management's and the general meeting's power with respect to the **individual shareholders** significantly. A few examples may demonstrate its effect:

- As to information: If the company discloses the numbers of votes cast in advance of the meeting to one shareholder, it has to make these figures available (e.g. on its website) to all shareholders that hold voting rights.
- As to communication: If the company provides for methods of real-time two-way communication between a shareholder and the general meeting, it has to offer the same possibility of electronic participation to any other shareholder who is in the same position. I hold that the characteristics which specify "the same position" may be specified in the Articles of Association, subject to the

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[178] Article 42 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (hereinafter Capital Directive).

[179] Article 3 (1) (a) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids.

[180] Article 17 (1) of the Transparency Directive, *supra* note 18. Though less clear than in Article 17 (1), the same principle could be tracked down to the predecessors of the Transparency Directive, see Dirk Zetzsche, AKTIONÄRSINFORMATION IN DER BÖRSENNOTIERTEN AKTIENGESELLSCHAFT (Heymann, Köln 2006), at 283.

[181] Article 4 of the Shareholder Rights Directive, *supra* note 7.

overarching Principle of Proportionality, as mentioned above. In this regard, the size of shareholdings, the distance to the place of the shareholder meeting[182] as well as language[183] may be acceptable criteria. Distinguishing according to the shareholders' home Member State, however, would constitute a violation of European law.

- As to voting: If the company provides for electronic voting facilities, it has to do so for all shareholders in the same position (for details, see above).

IV. Policy Considerations

1. Regulatory Competition

As to the shareholder meeting itself, two deficiencies of the Directive were identified: (1) With respect to push-information, I criticized that under the Directive regime, active investors will find the information necessary on the corporate website, while investors that are passive but willing to vote when voting is easy are left out in the cold. (2) With respect to communication, I criticized that the Directive does not mandate Member States to further inter-shareholder communication, e.g. by providing a platform on a private (e.g. the corporate) website, or an official website, respectively (like Germany's digital Federal Bulletin). Further, the Directive remains silent as to the review function, where the legislature could help reduce collective action problems. Means similar to those helpful for communication could further the efficiency of shareholder coordination. However, the Directive is merely thought to provide a floor, a minimum standard for the use of electronic means, and encourages EC Member States to find the ideal ceiling (a maximum standard) for the use of the Internet. Consequently, it effectively hampers a race to the bottom competition while enabling a race

[182] E.g. all shareholders whose home or registered seat is located more than 100 km from the place of the meeting.

[183] Example: A distinction between shareholders who can speak and understand German, French, Slovak etc, hence who can benefit from a real-time translation, and others who may follow the discussion in the original language may be justified.

to the top approach with regard to shareholder rights. In light of this lopsided legislative approach, further legislative action requires careful reasoning. While it is unlikely that these relatively-minor aspects of the overall corporate legislation which I pointed out above may affect investor decisions of where to incorporate, and where to invest, EC Member States may enter into experiments in order to demonstrate to investors that they are willing and able to adapt to new technological challenges. This, for example, was the path which Germany followed since 2000. Thus, given the low risks for investors and the potential for a marketing-based set of corporate law reforms, we may assume that the legislature will, in fact, use their discretion to look out for the optimal level of digital involvement of shareholders in the decision making process. Consequently, a passive approach by the European legislature is generally advisable for the years to come.

2. Shareholder Identification: The need for legislative action

However, there remains one field in which national legislatures are unlikely to be successful: the chain of intermediaries in a cross-border setting. In this regard, one may likely assume that we have two alternative shareholder constituencies that are yet unable to effectively exercise their voting rights: Group A is unwilling to vote or deems voting unimportant, regardless of whether they vote in favour or against management. These shareholders may remain passive, regardless of what a legislature does. However, Group B is willing to vote under the right conditions, but these investors did not succeed in efficiently organizing themselves to achieve a convenient participation scheme for themselves. Some of these shareholders can be deemed the active long-term shareholders that the prevailing corporate governance view (including the European Commission) holds to constitute the ideal investor constituency. The greater the barriers for Group B are, the greater is the influence of other shareholders that would not fit in the Group B scheme. In particular, an efficient voting regime can amply be assumed to reduce the influence of small, but well-organized minority groups (such as hedge funds), as well

as the influence of local incumbents who benefit from the relatively-speaking high hurdles imposed upon foreign investors to exercise their influence. This is due to the fact that the company can put important matters to a shareholder vote in order to avoid undue shareholder pressure, and there is reasonable hope that the voting result reflects shareholders' expectations.

Who should solve the problem? Given that the markets had plenty of time to come up with solutions, and did not do so, the time is ripe to enter into legislative action. In the absence of supra-national treaties, the EC Member States simply lack the jurisdiction for regulating the obligations and entitlements of intermediaries that are subject to the laws of other Member States.[184] Is mandatory action necessary? The Directive indicates that the Commission seeks to propose a recommendation to address the issues within the chain of intermediaries. A Commission-brokered recommendation is, however, insufficient for the very reason that it is non-binding upon the EC Member States. Under a recommendation, some Member States could lure locals to vote for incumbent regimes to the procedural detriment of non-Member State investors.[185] Thus, precautions are necessary.

3. What needs to be done

While the specific steps to be taken require further consideration, at a glance, there is a strong argument in favor of mandatory regulation. In particular, Depositories and other intermediaries must be required to assist investors to exercise their rights in shareholder meetings. While mandatory law requires specific justification in light of the Anglo-Saxon enabling approach, the chain of intermediaries provides strong arguments in favor of mandatory law. One may consider that investors can sort out voting

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[184] This may change if all companies were incorporated in one Member State. Given the current situation, this end would presuppose years of passivity by Member States loosing their share in the market for incorporations – a yet unlikely setting.

[185] The Endesa-case in Spain revealed the nationalistic tendencies of some Member States.

issues by contract. However, (at least retail) investors cannot effectively negotiate vis-à-vis their bank, due to collective action problems and the bundling problem: Voting is just one minor aspect of many services provided by the bank to their clients; other services include stock lending, financing, asset management. Further, investors have merely contractual relationships with their respective Depository, and typically, neither the investors nor the Depositories know who the intermediaries down the particular custodian chain are through which the investors' shares are held. Consequently, it is virtually impossible for investors to negotiate contracts with all intermediaries in the chain.[186] This is a particularly dire situation, given that the reluctance of one intermediary to provide voting support renders all other agreements useless, and the voting chain dysfunctional.

What, specifically, must be the content of such mandatory provisions? I hold that four measures on the intermediary level are particularly important: The first aspect pertains to **giving investors the chance to exercise their rights**. With respect to bearer shares, this includes Depositories' obligation to certify the investors' shareholding; with respect to registered shares, Depositories must make sure that the investor receives a proxy card which entitles the investor to exercise the rights on behalf of the respective nominee. The alternative solution – mandating intermediaries to solicit proxies – is less efficient, given that it doubles the necessary communication: communication must flow up the chain (for the intermediary's solicitation), and down again (for the investor's instruction). As the American example demonstrates, many issues may result from such a two-way communication in the short time-frame preceding shareholder meetings.[187] While an "active investors only" approach would

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[186] See Jaap Winter, *The shareholders' rights directive and cross-border voting*, Memorandum prepared for European Corporate Governance Forum (June 2006), at 4; Annex to the recommendation of 24 July 2006, online: http://ec.europa.eu/internal_market/company/ecgforum/index_de.htm (March 24, 2007).

[187] Kahan & Rock, *The Hanging Chads of Corporate Voting*, U. Pa. L.Rev. 2007 (forthcoming).

require Depositories to act only upon request, an approach considering less active investors a valuable factor for corporate stability may require Depositories to issue the above certificates, or cards, and distribute them to investors for every shareholder meeting. In this respect, European corporate governance is facing the Great Divide; which way should be taken must carefully be considered.

Secondly, **prohibit Depositories and banks to charge *investors* fees** for voting support. As I pointed out above, many investors will not be able to negotiate a market-adequate fee structure. In the absence of such a ban, cost considerations will prevent shareholders from exercising their rights.

Thirdly, **companies and Depositories must be required to negotiate a flat fee for shareholder identification and authentication and standards for data exchange and reimbursement on a regularly basis**. Assuming that all shareholders vote and that the companies' expenses are eventually paid out of the shareholders' pockets, from a theoretical point of view it does not matter who reimburses the banks for their voting support. However, only some shareholders vote. Thus, under the scheme proposed herein, passive shareholders subsidize active shareholders for taking on the burden to vote. Given the lackluster sentiment as to voting, in general, this can only improve voting turnouts. Further, both Companies and Depositories are well-organized lobbyist groups. Examples in Germany have demonstrated that government-brokered negotiations eventually lead to acceptable results with respect to standards as well as the costs for voting support by banks. Further, a European-wide flat fee would adhere to European law which generally prohibits price discrimination of investors that is entirely based on the investors' origin. In this regard, the proposal for a Directive on Payment

Services (PSD)[188] leads the way. A single Euro voting area would be the logical consequence of the SEPA ("Single Euro Payment Area").

Fourthly, **extend the principles of proportionality and equality from the corporate relationship** between the shareholder and the company **to the banking relationship** between the investor and his/her Depository and the custodians in the chain, as well as the depository relationship between the issuer and the CSD. Similarly to the Shareholder Rights Directive, these principles will likely function as a floor to excesses upon which the bargaining parties may agree in order to avoid strong shareholder influence, or a voting-friendly environment for bank clients. This is necessary since both management and banks are not keen on giving shareholders lenient ways to vote. The said principles provide shareholders with a legal perspective for taking action against their banks, or the companies, respectively.

If European law erects these pillars, the details of the voting chain can be worked out by the banks and the companies. In particular, it is not necessary in which way proxy cards and shareholder certificates find their way to the investor, and back to the company. The simplest way (the direct approach introduced above) may work just fine. Let market forces develop their pro-innovative effects!

F. Conclusion

The transition from the traditional shareholder meeting that is based on the physical attendance of shareholders towards a truly virtual shareholder meeting is incomplete. While some jurisdictions have advanced to the next

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[188] See Proposal for a Directive of the European Parliament and the Council on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC, presented by the Commission, SEC(2005) 1535, COM(2005)603 final, 1 December 2005. The proposal extends the regime governed by Regulation (EC) No 2560/2001 on cross-border transfers. On 21 March 2007 the Permanent Representatives Committee agreed provisionally by qualified majority to the Presidency compromise text set out in document 7665/07 EF. Further information is available at http://www.consilium.europa.eu/cms3_applications/applications/openDebates/openDebates-PREVIEW.ASP?id=289&lang=en&details=YES&cmsID=1105 (June 26, 2007).

level of Internet-based shareholder participation more progressively than others, none of the jurisdictions observed in this study has transformed all traditional functions of shareholder meetings into the digital world. Further, the identification and authentication of shareholders functions unsatisfactorily. This is particularly true in a cross-border context.

The European Shareholder Rights Directive does not force a kick-start of EC Member States into the digital age. However, it requires a significant step forward: As to **information**, the company's website will become the informational focus-point for investors. As to **communication**, European shareholders will be entitled to exercise minority rights by electronic means. As to **voting**, companies must provide for one method of Electronic Proxy Voting and enable the choice of proxy; while EC Member States must enable electronic participation of shareholders in shareholder meetings (Electronic Direct Voting), companies may enter into experiments as to the further use of electronic means. Thus, the Directive provides a floor, a minimum standard for the use of electronic means, and encourages companies to find the ideal ceiling (a maximum standard) for the use of the Internet. This one-dimensional mandatory approach effectively hampers a race to the bottom competition while enabling a race to the top approach.

However, more is necessary to replicate the functions of shareholder meetings in the digital age. While competition may spur innovation regarding methods of informing shareholders, communication among shareholders and with management, and review by accountants or courts, the identification and authentication of shareholders requires mandatory steps on the European level.