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## **Shareholders' right to put items on the agenda of the general meeting: colliding perspectives on a core right of shareholders**

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### **Citation**

Dijkhuizen, T. C. A., & Nijland, J. (2016). Shareholders' right to put items on the agenda of the general meeting: colliding perspectives on a core right of shareholders. In C. G. Breedveld, A. G. Castermans, M. W. Knigge, T. van der Linden, & H. A. ten Oever (Eds.), *BW Krant Jaarboek* (pp. 211-224). Deventer: Wolters Kluwer. Retrieved from <https://hdl.handle.net/1887/41226>

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**Note:** To cite this publication please use the final published version (if applicable).

9 | Shareholders' right to put items on the  
agenda of the general meeting  
Colliding perspectives on a core right of share-  
holders <sup>▪</sup>

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1 INTRODUCTION

The role and position of shareholders within a listed public company has been a subject of debate on both the national and the international level for decades. This debate focuses primarily on the rights that are, or perhaps, should be conferred upon shareholders in such a company and, consequently, on the active or effective exercise of those rights by the same shareholders. In this contribution, we focus on one particular core concept, namely the right that is conferred upon shareholders to put items on the agenda of the general meeting. The right of shareholders to secure influence in the company through a dialogue with the board can be considered as a core instrument within company law that ensures the possibility of checks and balances within the company. Whether under the shareholders' or the stakeholders' model, this core concept is paramount for the legal structure of companies. Since the general meeting is considered to be the traditional means through which shareholders can exert influence in the investee company,<sup>1</sup> the right to put items on the agenda or to table resolutions for such a meeting can be considered to be a *core right* for shareholders since this is one of the few legal possibilities through which they can exert influence if they so desire. The exercise of this right enables shareholders to debate with the management of the company they have invested in, but also with each other about all matters

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- This article draws and elaborates on forthcoming publications from the first-mentioned author on the specific topic of shareholders' right to put items on the agenda of the general meeting.
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- 1 The High-Level Group of Company Law Experts, *Report of the High-Level Group of Company Law Experts on a modern Regulatory Framework for Company Law in Europe*, Brussels, 4 Nov. 2002, available at <[http://ec.europa.eu/internal\\_market/company/docs/modern/report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf)>, p. 49.

that they deem to be of interest to their investments.<sup>2</sup> This specific shareholders' right has been under scrutiny in the last two decades because of two conflicting developments. On the one hand, the right has been introduced in order to strengthen the position of shareholders within the public limited company; firstly when it was formulated in the form of *soft law* and later when it was codified on a national and European level. On the other hand, certain parties have been looking for a way to diminish the shareholders' influence by counteracting the shareholders' right to put an item on the agenda because the corresponding *shareholder activism* led to alarm in certain sectors in society.<sup>3</sup>

In this contribution, we will focus on the development of this core right for shareholders in the Netherlands, as codified in Book 2, Article 114(a) Dutch Civil Code (hereafter: DCC), under the influence of both domestic and European legislative developments, which might be conflicting with each other. We will put this specific development also within its broader context, namely within the debate about the role and the position of shareholders in a public company.

This contribution is structured as follows. After this introduction, the contribution will firstly address how the right to have items put on the agenda was introduced in the Netherlands in the form of self-regulation. Subsequently, the third section will focus on the codification of this right in the Netherlands and the fourth section will provide an overview of the developments at EU level that have an influence on the (wording of the) provision comprising the right to put items on the agenda, whilst the fifth section will deal with the domestic legislative developments regarding this Article as a response to shareholder activism in the Netherlands. The final section will make some concluding remarks about the influences of both developments on shareholders' right to put items on the agenda.

## 2 THE INCREASING ATTENTION FOR THE ROLE AND POSITION OF SHAREHOLDERS

As has been pointed out earlier, the shareholders' right to (have the board) put items on the agenda of the general meeting forms part and parcel of the debate on the role and position of shareholders in listed public limited companies (*NV's*) in the Netherlands. Peters and Eikelboom even state that 'the right of listed companies to place items on the agenda appears to act in the Netherlands as the point at which shareholders' power and managing authority

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2 The High-Level Group of Company Law Experts 2002, p. 49.

3 F.M. Peters & F. Eikelboom, *Memorandum: the shareholders' right to put items to the agenda and the risk for the Dutch state of being liable due to breaches of EU law*, May 2015, available at <<http://bureaubrandeis.com/wp-content/uploads/2014/08/Artikel-Ingelse-veralgemener-seerd.pdf?1d13cc>>, p. 6.

are balancing'.<sup>4</sup> From the late 1980s and 1990s, the attention in the Netherlands for this pivotal role has increased rapidly due to a growing awareness that the role of shareholders and the general meeting in the corporate governance of Dutch listed companies were marginalized as a consequence of the introduction of the special two-tier board regime (*de structuurregeling*) for certain 'big' companies. As a result, the balance of power, or rather, the system of checks and balances within Dutch listed companies was lost according to some.<sup>5</sup> The debate concerning the position of shareholders within listed companies was part of a bigger corporate governance debate that took place in Dutch society at that time. This debate was primarily focused on the viability of the corporate governance structures of Dutch listed companies in light of the growing internationalization of the Dutch economy and the increasing international attention for the (marginalized) position of shareholders in listed public companies. As a result of this wider debate, a so-called Corporate Governance Committee was installed in April 1996.<sup>6</sup>

This committee – commonly referred to as the Peters Committee, after its chairman – was asked to examine the viability of the then existing corporate governance structures against the background of the continuing internationalization of the Dutch economy and the increased international attention for the role, position and influence of shareholders within listed companies.<sup>7</sup> The Committee notes, in its first interim report, that within Dutch listed companies a great diversity of arrangements and structures exists that limits the influence of shareholders within these companies.<sup>8</sup> The Committee also specifies some subjects ('*toetspunten*'), including the company's strategic policy, upon which shareholders should, in the opinion of the Committee, be able to exert their influence.<sup>9</sup> The committee draws the conclusion that, in the context of the desired dialogue and the accountability required from the board, it is pivotal that shareholders can exert influence on the composition of the agenda of the

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4 F.M. Peters & F. Eikelboom, *The conflict between Boskalis and Fugro concerning the right to place items on the agenda*, available at <<http://bureaubrandeis.com/wp-content/uploads/2014/08/19-05-15-Bureau-Brandeis-Engelse-vertaling-De-strijd-over-het-agenderingsrecht-tussen-Boskalis-en-Fugro-DEF.pdf?1d13cc>>, 2; F.M. Peters & F. Eikelboom, 'De strijd over het agenderingsrecht tussen Boskalis en Fugro', *WPNR* 2015, 7061, p. 407.

5 B.F. Assink, 'Facetten van verantwoordelijkheid in hedendaags ondernemingsbestuur', in B.F. Assink & D.A.M.H.W. Strik, *Ondernemingsbestuur en risicobeheersing op de drempel van een nieuw decennium: een ondernemingsrechtelijke analyse*, preadvies van de Vereniging 'Handelsrecht' 2009, Deventer: Kluwer 2009, p. 20.

6 The Corporate Governance Committee was specifically set up as a result of an agreement between the Association of Securities-Issuing Companies (*de Vereniging Effecten Uitgevende Ondernemingen*) and the Amsterdam Stock Exchange Association (*de Vereniging voor de Effectenhandel*). See *Kamerstukken II 1997/98*, 25 732, no. 5, p. 2.

7 The Corporate Governance Committee, *Corporate Governance in Nederland. Een aanzet tot verandering en een uitnodiging tot discussie*, Amsterdam: Secretariaat Corporate Governance 1996, p. 9; Assink 2009, p. 20.

8 The Corporate Governance Committee 1996, p. 21

9 The Corporate Governance Committee 1996, p. 22.

general meeting. The committee also emphasizes that although only some companies have granted the right to put items on the agenda of the general meeting to shareholders and holders of depository receipts in their articles of association, management boards of listed companies should in principle honour a timely request to put an item on the agenda of the general meeting, unless compelling circumstances dictate otherwise.<sup>10</sup> In its final report, the Committee formulates 40 recommendations, including a specific recommendation regarding the right of shareholders to put items on the agenda of the general meeting. This recommendation implies that requests of investors – either shareholders and/or holders of depository receipts, who solely or jointly represent one per cent of the issued capital or whose shares on the date of convening the meeting have a market value of at least f500,000 to place items on the agenda of the general meeting should be honoured by the board or the chairman of the supervisory board if they are submitted at least thirty days before the date of the meeting, unless, in the opinion of the management or supervisory board, the request conflicts with substantial interests of the company.<sup>11</sup> Moreover, the Committee also recommends that if the board refuses such a request, this notification shall be made explicit at the beginning of the meeting. The board should also justify why it has refused to include the item in drawing up the agenda.<sup>12</sup> The committee explicitly chooses not to submit proposals to amend existing legislation, because it argues that the implementation of the recommendations, in addition to existing legislation, can reinforce the corporate governance structures of Dutch listed companies sufficiently.<sup>13</sup> The committee also assumes that the listed companies will voluntarily implement the recommendations.<sup>14</sup> In short, the right or power for shareholders and holders of depository receipts to put an item on the agenda of the general meeting should, if it is not provided for in the articles of association, be ensured through self-regulation.

### 3 THE (PRELUDE TO THE) CODIFICATION OF THE SHAREHOLDERS' RIGHT TO PUT ITEMS ON THE AGENDA OF THE GENERAL MEETING

After the publication of the final report of the Peters Committee, a Monitoring Committee was installed with the responsibility to examine to what extent

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10 The Corporate Governance Committee 1996, p. 26. The committee defines abuse of rights or a legitimate expectation that the request will only disrupt the orderly conduct of the general meeting as such compelling circumstances.

11 Recommendation 30. See The Corporate Governance Committee, *Corporate Governance in Nederland. De Veertig Aanbevelingen*, 25 juni 1997, <<http://commissiecorporategovernance.nl/commissie-peters>>, pp. 29 and 36.

12 The Corporate Governance Committee 1997, p. 29.

13 The Corporate Governance Committee 1997, p. 4.

14 The Corporate Governance Committee 1997, p. 4.

the recommendations were implemented. The committee concluded, regarding the functioning of the general meeting and the role of the investors, that in this domain the gap between ambition and reality was significant and that the slight movement regarding the (re)valuation of the position of investors in listed companies was in contrast with international developments.<sup>15</sup> The Dutch government soon responded to the publication by stating that boards of listed companies should honour reasonable requests by shareholders or holders of depository receipts to put items on the agenda of the general meetings and, moreover, indicated that a legislative reform on this specific subject was under way. The right or power to put items on the agenda for shareholders will, in the opinion of the government, enhance an open and balanced communication between the directors and the capital, which is necessary for proper accountability by the board towards the investors.<sup>16</sup>

The continued attention for and discussion about the corporate governance structure of Dutch (listed) companies has also prompted the government to request the Social and Economic Council (*Sociaal-Economische Raad*, hereafter: SER) to review and advise on the viability of the two-tier board regime (*de structuurregeling*).<sup>17</sup> Although the shareholders' right to put items on the agenda of the general meeting, strictly speaking, was not part of the request for advice, the SER also discussed the position of shareholders in this two-tier board regime and, consequently, also the right to put items on the agenda. In its advisory report,<sup>18</sup> the SER called for a revaluation of the position of investors in two-tier companies, especially against the background of developments on the international securities markets. In the opinion of the SER, these developments required a proper corporate governance system in the sense that this system creates balanced relations between investors on the one hand and the management and supervisory board on the other.<sup>19</sup> The SER believed that this desirable revaluation could in principle be realised in two ways, namely (i) through legislative amendments which reinstate certain powers of shareholders that were taken away by the introduction of the two-tier board regime; and (ii) by introducing measures that enhance the position of investors within listed companies. As part of the latter, the SER argued that the management and supervisory boards should be required to honour a request from

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15 Monitoring Committee Corporate Governance, *Monitoring Corporate Governance in Nederland: bericht van de Monitoring Commissie Corporate Governance en de uitkomsten van het onderzoek verricht door het Economisch Instituut Tilburg (EIT), verbonden aan de Katholieke Universiteit Brabant*, Deventer: Kluwer 1998, p. 7 and 10.

16 *Kamerstukken II 1998/99*, 25 732, no. 8, pp. 13 and 16.

17 *Kamerstukken II 2001/02*, 28 179, no. 3, p. 1 (MvT). Incidentally, the Dutch Lower Chamber (*de Tweede Kamer*) also sought advice from the SER concerning this topic. Zie *Kamerstukken II 1999/2000*, 25 372, no. 13.

18 The Social and Economic Council, *Advies over het functioneren en de toekomst van de structuurregeling* (advies van 19 January 2001, SER 01/02), Den Haag: Sociaal-Economische Raad 2001; *Kamerstukken II 2001/02*, 25 732, no. 17.

19 The Social and Economic Council 2001, p. 79.

shareholders and/or holders of depositary receipts, who solely or jointly represent at least one per cent of the issued share capital, to have an item put on the agenda of the general meeting, unless this request conflicts with substantial interests of the company.<sup>20</sup>

The government responded quickly to the advisory report of the SER by stating that it would undertake legislative action in order to adapt the two-tier board regime in accordance with the aforementioned report.<sup>21</sup> The government also indicated that it would undertake an initiative to codify the shareholders' right to put items on the agenda of the general meeting. On 8 January 2002, the government, in accordance with earlier statements, introduced a legislative proposal that aimed to adapt the two-tier board regime and to enhance the role of the general meeting as a platform for exchange of information.<sup>22</sup> The government also introduced this proposal in order to fulfil the then felt need to improve the relationship between the investors and the management board of investee companies. In accordance with the Peters Committee and the SER, the proposal introduces *inter alia* a right to have an item put on the agenda of the general meeting for one or more shareholders who solely or jointly represent one per cent of the issued capital. Unlike the Peters Committee, which introduces a market value criterion representing f 500,000, the Cabinet suggests a market value criterion of € 50 million.<sup>23</sup> Companies can lower these alternative<sup>24</sup> criteria in their articles of association.<sup>25</sup> The right to put items on the agenda is also granted to holders of depositary receipts for shares issued with the company's cooperation.<sup>26</sup> In addition to these eligibility thresholds, the legislative proposal introduces some formal requirements regarding the request to put an item on the agenda. Firstly, this request must be submitted in writing. Moreover, the request must be filed at least 60 days prior to the general meeting.<sup>27</sup> The deadline for lodging the request can be shortened in the articles of association.<sup>28</sup> If the request is made by one or more shareholders

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20 The Social and Economic Council 2001, p. 84.

21 *Kamerstukken II* 2000/01, 25 732, no. 18.

22 Wetsvoorstel wijziging van boek 2 van het Burgerlijk Wetboek in verband met aanpassing van de structuurregeling, *Kamerstukken II* 2001/02, 28 179, no. 2.

23 The government justifies this market value criterion by stating that a shareholder shows engagement with the investee company through the investment of such an amount, regardless of the corresponding percentage of the share capital. *Kamerstukken II* 2001/02, 28 179, no. 3, p. 22.

24 F.J. Oranje, 'Convocatie- en agenderingsrecht van aandeelhouders. Toegevoegde waarde in het systeem van checks and balances tussen bestuur en aandeelhouders', in: P.J. van der Kost, R. Abma & G.T.M.J. Raaijmakers (eds.), *Handboek onderneming en aandeelhouder, Serie Onderneming en Recht, deel 69*, Deventer: Kluwer 2012, pp. 275-305, p. 284.

25 Article 2:114a (3) DCC.

26 Article 2:114a (4) DCC.

27 Article 2:114a (1) DCC.

28 Article 2:114a (3) DCC.

who have a sufficient interest in the company and the formal requirements are satisfied, the request must in principle be honoured. This does not apply if the request conflicts with a substantial interest of the company.<sup>29</sup> A refusal on this ground is conceivable, as follows from the explanatory memorandum (*de memorie van toelichting*), if the sole aim of the series of items to be put on the agenda is to seriously disrupt the order of the meeting.<sup>30</sup> From the memorandum of reply (*de nota naar aanleiding van het verslag*) it follows that a refusal is also justified in case the request comprises of an extreme series of items.<sup>31</sup> Moreover, the general standards of reasonableness and fairness and abuse of rights can also be seen as 'lower limits', but the concrete interpretation of these statutory provisions regarding the exercise of the shareholders' right to put items on the agenda of the general meeting remains unclear.<sup>32</sup> After the legislative proposal was accepted, the shareholders' right to put items on the agenda was embedded in law with the introduction of the Act to amend Book 2 of the Dutch Civil Code in connection with the adaptation of the two-tier board structure regime,<sup>33</sup> which entered into force on October 1, 2004.<sup>34</sup> The exercise of this right can be refused if substantial interests of the company conflict with the exercise of the right or if such exercise is in conflict with general standards of reasonableness and fairness and is tantamount to abuse of law. The management and/or supervisory board do not have the right of a substantive assessment of the issues that investors – shareholders or holders of depositary receipts – request to be put on the agenda. Consequently, the investors could vote and/or decide on topics regarding which the general meeting is not formally authorized to make decisions, such as the strategy of the company, which is formally reserved for the management board. However, if the general meeting has decided on such a topic, this is to be seen as a decision (*beslissing*), but not as a resolution (*besluit*). Consequently, the outcome of such a vote is not binding and can be brushed aside by the management board.<sup>35</sup>

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29 Article 2:114a (3) DCC. See also F.G.K. Overkleef, 'Het agenderingsrecht voor aandeelhouders in beursvennootschappen: een aanzet tot (her)bezinning', *Ondernemingsrecht* 2009, 167, pp. 714-723, p. 715.

30 *Kamerstukken II* 2001/02, 28 179, no. 3, p. 21. See also Overkleef 2009, p. 715.

31 *Kamerstukken II* 2001/02, 28 179, no. 5, p. 24. See also Overkleef 2009, p. 715.

32 Overkleef 2009, p. 715.

33 Wet van 9 juli 2004 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met aanpassing van de structuurregeling, *Stb.* 2004, 370.

34 *Stb.* 2004, 405.

35 Overkleef 2009, p. 717.

4 SHAREHOLDERS' RIGHTS *IN MOTION*: THE IMPLEMENTATION OF THE SHAREHOLDERS RIGHTS' DIRECTIVE

At European level, the attention for the role and position of shareholders in listed companies also increased, especially after corporate scandals involving companies such as Enron and WorldCom in the US and Parmalat, Vivendi and Mannesmann in Europe. The idea was that in a proper corporate governance system, those types of scandals would not take place. In reaction to the corporate scandals, the European Commission extended the mandate of a so-called High-Level Group of Company Law Experts (hereafter: the High-Level Group), chaired by Jaap Winter, to address a number of issues related to best practices in corporate governance and auditing.<sup>36</sup> The focus of the group is on strengthening the – cross-border – exercise of shareholders' rights and solving the problems associated with cross-border voting. In its report, the High Level Group focused *inter alia* on the position of shareholders within European listed companies. The group argued that 'in a proper system of corporate governance, shareholders should have effective means to actively exercise influence over the company'.<sup>37</sup> In their perspective, the shareholders – as the residual claimholders – needed to be able to ensure that management pursues – and remains accountable to – their interests. The traditional means for shareholders to exercise this influence is, in the opinion of the High Level Group, through the general meeting, as this is the forum where shareholders can debate with the management board and each other, and vote on resolutions put forward to them.<sup>38</sup> Moreover, the group also stated that 'the right for shareholders to submit proposals for general meeting decisions plays an important role in the corporate context'.<sup>39</sup> However, in the opinion of the High Level Group, the legal requirements or restrictions with respect to those rights often prevent small shareholders from being active.<sup>40</sup> Therefore, the group asked, in its consultative document, whether there was a need, at EU level, to provide for minimum standards regarding the right for shareholders to ask questions and submit proposals for decision-making at the general meeting. The respondents saw no ground for doing so, however, and for that reason the group concluded by recommending that the threshold for the right to put items on the agenda of the general meeting should not exceed 5% of the issued capital and that the European Union should consider imposing this

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36 The High-Level Group of Company Law Experts 2002, p. 1. Until then, the High-Level Group was requested to make recommendations on a modern regulatory framework in the EU for company law and this group dealt in particular with issues related to the Takeover Bids Directive.

37 The High-Level Group of Company Law Experts 2002, p. 48.

38 The High-Level Group of Company Law Experts 2002, p. 49.

39 The High-Level Group of Company Law Experts 2002, p. 51.

40 The High-Level Group of Company Law Experts 2002, p. 51.

as a minimum rule on Member States.<sup>41</sup> Furthermore, listed companies should be required to explicitly disclose to their shareholders how they can ask questions, how and to what extent the company intends to answer questions, and how and under what conditions they can submit proposals to the shareholders' meeting. This should, in the opinion of the group, be an element of the mandatory annual corporate governance statement of listed companies.<sup>42</sup>

The European Commission responded quickly to the findings of the High-Level Group and in May 2003 published its 'Action Plan for Modernisation of the corporate law and enhancement of corporate governance in the European Union'.<sup>43</sup> In this action plan, the Commission stated that 'recent financial scandals have prompted a new, active debate on corporate governance, and the restoration of confidence is one more reason for new initiatives at EU level. Investors, large and small, are demanding more transparency and better information on companies, and are seeking to gain more influence on the way the public companies they own operate.'<sup>44</sup> Consequently, there is a need 'for enhancing the exercise of a series of shareholders' rights in listed companies'.<sup>45</sup> Therefore, the Commission concluded 'that some new tailored initiatives should be taken with a view to enhancing shareholder rights'.<sup>46</sup> These initiatives resulted, finally, in the adoption of the Directive on the exercise of certain rights of shareholders in listed companies (hereafter: the Shareholders' Rights Directive (SRD)), which was published on July 11, 2007.<sup>47</sup> This Directive, as expected, was aimed at strengthening the – cross-border – exercise of shareholders' rights and solving the problems associated with cross-border voting. The objective of the Directive was the effective exercise of the (voting) rights throughout the European Community,<sup>48</sup> as (i) effective shareholder control is a prerequisite to sound corporate governance; and (ii) these rights are reflected in the price to be paid at the acquisition of the shares.<sup>49</sup> Therefore, as follows from the same preamble, 'certain minimum standards should be

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41 The High-Level Group of Company Law Experts 2002, p. 52.

42 The High-Level Group of Company Law Experts 2002, p. 74.

43 The European Commission. *Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*. COM (2003), 284 final.

44 The European Commission 2003, p. 7.

45 The European Commission 2003, p. 14.

46 The European Commission 2003, p. 8.

47 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., L 184/17.

48 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., L 184/17, recital no. 14, p. 19.

49 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., L 184/17, recital no. 3, p. 17.

introduced with a view to protecting investors and promoting the smooth and effective exercise of shareholder rights attaching to voting shares'.<sup>50</sup>

The Directive also paid particular attention to the right to put items on the agenda of the general meeting. According to the preamble, shareholders should in principle have the opportunity to put items on the agenda of the general meeting and to table draft resolutions for items on the agenda.<sup>51</sup> The exercise of this right should, as follows from the preamble, be made subject to two basic rules, namely (i) that any threshold required for the exercise of those rights should not exceed 5% of the company's share capital; and (ii) that all shareholders should in every case receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda.<sup>52</sup> The shareholders' right to put items on the agenda as such is laid down in Section 6 of the Directive. This article requires Member States to ensure that shareholders, acting individually or collectively, have the right to put items on the agenda, provided that each such item is accompanied by a justification or by a draft resolution to be adopted in the general meeting.<sup>53</sup> Shareholders also have the right to table draft resolutions for items included or to be included on the agenda of the general meeting.<sup>54</sup> The requesting shareholder should, however, hold a minimum stake in the company<sup>55</sup> and the request must be lodged within the time limit laid down in national legislation.<sup>56</sup>

The implementation of this Directive into national legislation had the effect that the then existing Article 2:114a DCC needed to be amended. Before the implementation, this Article granted the possibility for the management and/or supervisory board to refuse the request for inclusion of items on the agenda on the ground that the request conflicted with substantial interests of the company. This ground for refusal, with the entry into force of the Shareholders' Rights Act<sup>57</sup> on July 1, 2010,<sup>58</sup> was deleted as the Directive did not contain

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50 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., L 184/17, recital no. 4, p. 17.

51 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., L 184/17, recital no. 7, p. 18.

52 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., L 184/17, recital no. 7, p. 18.

53 Section 6 (1)(a) SRD.

54 Section 6 (1)(b) SRD.

55 Section 6 (2) SRD. It is up to the national legislator to decide upon the minimum stake a shareholder has to hold in a company in order to be eligible to exercise the right, but such minimum stake, as laid down in national legislation, shall, in accordance with the recommendations of the High-Level Group, not exceed 5% of the share capital.

56 Section 6 (3) SRD.

57 Wet van 30 juni 2010 tot wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen, *Stb.* 2010, 257.

58 *Stb.* 2010, 258.

any explicit ground to refuse a request.<sup>59</sup> In addition, the requirement to have the request accompanied by a justification or by a draft resolution to be adopted in the general meeting was added, in accordance with Section 6 (1)(a) SRD. The new Article 2:114a DCC also provides for the shareholders' right to table draft resolutions for items included or to be included on the agenda of the general meeting. Consequently, the management board and/or supervisory board can no longer refuse a request by invoking the aforementioned ground for refusal. The board may, however, still refuse a request where the exercise of the right to put items on the agenda is in conflict with the standards of reasonableness and fairness or where there is abuse of rights.<sup>60</sup>

#### 5 SHAREHOLDERS' RIGHTS *IN MOTION*: THE RIGHT TO PUT ITEMS ON THE AGENDA UNDER (DOMESTIC) SCRUTINY AFTER SHAREHOLDER ACTIVISM

Next to the developments at the European level as described above, there were also developments at the national level that put the exercise of shareholders' rights under scrutiny. In particular, increased shareholder activism and infamous conflicts within Dutch listed companies between the board and shareholders about the strategy of the company were reasons for the Corporate Governance Code Monitoring Committee<sup>61</sup> to reevaluate the relationship between the company and its shareholders in the Dutch corporate governance model, including an evaluation of the exercise of the right to put items on the agenda by shareholders.<sup>62</sup> In December 2006, the Monitoring Committee published a document for consultation containing several proposals regarding the relationship between the company and its shareholders. The reactions to this consultation indicated broad support for the Committee's initial proposals. Consequently, the Committee advised the government to lay down further *rules of play* concerning the relationship between the company and its share-

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59 F.M. Peters & F. Eikelboom 2015a, p. 4. These authors refer to the reply of the Minister of Justice in the memorandum of reply (*de nota naar aanleiding van het verslag*), *Kamerstukken II* 2008/09, 31 746, no. 7, p. 5.

60 In *Stork*, however, the Enterprise Division of the Amsterdam Court of Appeal ruled, by way of injunctive relief, that the general meeting could not vote on an item put forward by shareholders, i.e. the removal of the supervisory board, because this was in conflict with standards of reasonableness and fairness. One could argue that the ground for refusal in this case is also that the removal of the supervisory board conflicted with – in short – substantial interests of the company and, consequently, the item was in conflict with standards of reasonableness and fairness. See Court of Appeal Amsterdam (Enterprise Division) 17 January 2007, ECLI:NL:GHAMS:2007:AZ6440, *JOR* 2007, 42 with commentary from J.M. Blanco Fernández (*Stork*).

61 This Committee was originally installed to monitor the implementation of the first Dutch Corporate Governance Code.

62 Corporate Governance Code Monitoring Committee, Advisory report on the company-shareholder relationship and on the scope of the Code, available at <<http://www.corpgov.nl/advies-kabinet-2007>>, p. 8.

holders through an elaboration of the then existing Dutch Corporate Governance Code, commonly referred to as the Code Tabaksblat, after the chairman of the committee that drafted the Dutch Code, and also puts forth some recommendations regarding legislative action.<sup>63</sup> Two of the proposed *rules of play* pertain to the shareholders' right to put items on the agenda of the general meeting. One should, however, keep in mind that the provisions of the Dutch Corporate Governance Code are not binding and, moreover, are predominantly addressed to the listed company.

First, the Committee introduced a so-called response time for the management board. The Committee considers that it is good practice for shareholders to exercise the right to put an item on the agenda only after they have raised it with the management board of the company in case the proposed item could lead to a change in the strategy of the company, such as the dismissal of the management board members and/or supervisory board members.<sup>64</sup> In such an instance, the board has to be given the opportunity to formulate a reaction during a reasonable period of time. The Committee proposes a response time of a maximum of 180 days, since this period should suffice for the board to have further deliberation and constructive consultation with (other) shareholders and to form an opinion on the view of the investor and possible alternatives.<sup>65</sup> The proposal regarding the response period was included as best-practice provision IV.4.4 in the revised Code Tabaksblat, which was commonly referred to as the Code Frijns, after the chair of the Monitoring Committee.<sup>66</sup> A shareholder shall, in accordance with this best-practice provision, exercise the right to put an item on the agenda only after he has consulted the management board about this. If one or more shareholders intend to request that an item be put on the agenda that may result in a change in the company's strategy, the management board shall be given the opportunity to stipulate a reasonable period in which to respond (the response time). This shall also apply to an intention as referred to above for judicial leave to convene a general meeting pursuant to Article 2:110 DCC. Moreover, the shareholder shall respect the response time stipulated by the management board within the meaning of best-practice provision II.1.9.<sup>67</sup> Although the provision is in principle addressed to the listed company,<sup>68</sup> it limits the exercise of the

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63 Corporate Governance Code Monitoring Committee, 2007, p. 3. The Committee considers that such further rules 'are necessary to regulate the company-shareholder relationship in order to ensure that the processes involving the management board, supervisory board and shareholders (i.e. the general meeting of shareholders) pass off smoothly and that the best possible balance is struck between the various interests'.

64 Monitoring Committee Corporate Governance Code 2007, p. 6.

65 Monitoring Committee Corporate Governance Code 2007, pp. 15 & 16.

66 Monitoring Committee Corporate Governance Code, *De Nederlandse corporate governance code. Beginselen van deugdelijk ondernemingsbestuur en best practice bepalingen*, 10 december 2008, <http://commissiecorporategovernance.nl/download/?id=609>.

67 Oranje 2012, p. 292; Overkleeft 2009, p. 721.

68 Overkleeft 2009, p. 721, under cit. 58.

shareholders' right to put items on the agenda since it only allows them to exercise this right after a consultation with the board and after respecting a possible response time the board could invoke.

The Committee's second recommendation with regard to the right to put items on the agenda is directed to the legislator. Although the right to put an item on the agenda was not covered by the consultation document itself, it became apparent from the reactions to the consultation document that there was a need for raising the admissibility barrier. The Committee therefore recommended to the legislator that the position with regard to the right to put items on the agenda should be brought into line with international practice and that the threshold should be raised to 3%.<sup>69</sup> The Committee is of the opinion that the market value criterion of € 50 million could be abolished.<sup>70</sup> In reaction to the advisory report of the Committee, the Minister of Finance readily accepted this specific recommendation and proceeded to an adjustment of the then current rules accordingly. The Minister also acknowledged that raising the threshold would mean a limitation of the shareholders' right on the one hand, but stressed on the other hand that without it, activist shareholders, who represent a relatively small percentage of the voting rights, would be able to have a significant impact on the general meeting.<sup>71</sup> This would put such a strain on the balance of power in the Dutch corporate governance system<sup>72</sup> that raising the threshold to 3 per cent and abolishing the market value criterion were desirable.<sup>73</sup> The government on 3 January 2008<sup>74</sup> published a draft for an Act implementing these rules, also referred to as 'the Act Frijns', which was passed on 24 July 2009.<sup>75</sup> Article 2:114a DCC has been adjusted accordingly by the entering into force of the Act Frijns.<sup>76</sup> The new provision entered into force on 1 July 2013.<sup>77</sup> The introduction of this Act puts a further restriction on the shareholders' right to put items on the agenda of the general meeting as only shareholders and holders of depository receipts that solely or jointly represent three per cent of the issued capital have this right as opposed to the situation prior to the Act Frijns.

However, these domestic regulatory developments seem to be in conflict with the objective of the European Directive, namely the effective exercise of

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69 Furthermore, this 3% threshold is also in keeping with the threshold proposed by the Monitoring Committee for control disclosure. See Monitoring Committee Corporate Governance Code 2007, p. 22.

70 Monitoring Committee Corporate Governance Code 2007, p. 20.

71 *Kamerstukken II 2006/07*, 31 083, no. 1, p. 7.

72 *Kamerstukken II 2006/07*, 31 083, no. 1, p. 2.

73 *Kamerstukken II 2006/07*, 31 083, no. 1, p. 7.

74 *Zie Overkleef 2009*, p. 721.

75 *Kamerstukken II 2008/09*, 32 014, no. 2.

76 Wet van 15 november 2012 tot wijziging van de Wet op het financieel toezicht, de Wet giraal effectenverkeer en het Burgerlijk Wetboek naar aanleiding van het advies van de Monitoring Commissie Corporate Governance Code van 30 mei 2007, *Stb.* 2012, 588.

77 *Stb.* 2012, 693.

shareholders' rights throughout the European Community. If the board invokes the response time, shareholders are obliged to respect this response time and, consequently, have to wait for at most 180 days before the issue forwarded by them is discussed in the general meeting. One could argue that this response time delays and therefore hinders the effective exercise of the right to put items on the agenda. Subsequently, the increase of the threshold to 3% can also be seen as a further limitation of (the exercise) of shareholders' right to put items on the agenda. The new Article 2:114a DCC, however, is in conformity with the Directive, as the threshold does not exceed the maximum threshold of 5%. In short, the rules are in conformity with European legislation, but one may doubt if the rules, and the response time in particular, are fully in line with the underlying objective of the Directive. Although shareholders must realize that differentiations in national approaches of member states in the EU with regard to shareholders' rights that are in conformity with the Directive are allowed, (foreign) shareholders might be surprised by such 'local arrangements' to the core concept of the shareholders' right to put items on the agenda.

## 6 CONCLUDING REMARKS

The regulatory developments on a national and European level regarding the role and position of shareholders within a listed public company as illustrated with regard to the core right for shareholders in a listed company to put items on the agenda of the general meeting, seem to be moving in opposite directions. On a national level, the Dutch legislator is endeavouring to counteract shareholder activism by limiting shareholders' right to put an item on the agenda by introducing a response period for the board in the Dutch Corporate Governance Code during which shareholders cannot exercise this right and by raising the threshold from 1% to 3% of the issued share capital in a listed company. On the EU level, the role of shareholders as a "watchdog" not only on their own behalf, but also on behalf of other stakeholders, is emphasized in the current debate on corporate governance. Effective shareholder control is a prerequisite to sound corporate governance and as such, a proper system of corporate governance should ensure the effective exercise of the right for shareholders to put items on the agenda of the general meeting in order to have the means to actively exercise influence upon the company. The Dutch Civil Code and accompanying legislation as discussed fall within these norms and are in conformity with the Directive. However, since the objective of the Directive is to allow shareholders to make effective use of their rights throughout the Community, one may wonder whether the rules introduced are in conformity with the objectives of the Directive.