SETTLEMENTS WITH ACTIVIST HEDGE FUNDS: A EUROPEAN PERSPECTIVE ON AN AMERICAN PHENOMENON

ANA TALESKA*

ABSTRACT

A number of recent activist campaigns at European listed companies have ended with a settlement. This article analyzes the main features of eight recent settlements involving European targets, as they compare with settlement agreements reached between hedge fund activists and American corporate boards. It finds that settlements between activist hedge funds and European corporate boards exhibit similar characteristics to settlements at U.S. firms reported in a recent paper by Bebchuk, Brav, Jiang and Keusch. For example, all European settlements include board changes with the addition of at least one new director to the target board and a standstill of the activist campaign.

Further, it addresses the three common criticisms of settlements as instruments for short-termism/rent-extraction, director entrenchment and shareholder disenfranchisement.

First, it finds that selective share buy-backs under European Union laws - and also under the national Dutch, German, French, Swedish and British share repurchase rules - require prior shareholder approval, and price and volume restrictions apply for selective share buy-backs (if at all allowed under the national share repurchase rules), making the pursuit of short-term goals by activist funds via board-approved selective share buy-backs at above-market prices an unlikely scenario in the European context.

Second, ownership caps introduced by corporate boards vis-à-vis activist investors in European settlements can qualify as pre-bid defenses under European takeover law and may create agency costs when introduced at incumbent directors' discretion in privately negotiated settlements with activists. To control for director entrenchment, ownership caps in European settlement agreements should either be (ex-post) approved by shareholders, or reviewed against a separate judicial standard for assessing the legality of directors' defensive tactics adopted to fend off hostile bidders or hedge fund activists demanding change of strategy and/or contested director elections.

Third, it surveys the scope of European directors' duties relevant for granting board-related concessions to hedge fund activists and finds that shareholder disenfranchisement via settlements is less likely to occur at

European compared to American publicly-owned firms, as European boards typically cannot add new directorships without shareholder approval (with the exception of the United Kingdom), and the board can directly fill-in vacancies in only some European jurisdictions. As a result, Continental European settlements ordinarily resolve on the nomination of an activist-affiliated or an independent director as part of the board-sponsored slate, and not on direct director appointment immediately after the settlement is reached.

TABLE OF CONTENTS

I. INTRODUCTION

In March 2016, Rolls-Royce, a British aircraft-engine manufacturer, entered into a relationship agreement with California-based hedge fund ValueAct Capital, providing that ValueAct Capital's Partner, Mr. Bradley Singer, would join Rolls-Royce's board of directors immediately.[1] This was reported as the first example of a British listed firm reaching a settlement with an activist investor ending in a standstill between the activist's campaign and board representation of the activist investor.[2] In the years that followed, U.S.-based hedge funds, such as Elliott Advisors and Paulson & Co, continued re-shaping the British boardrooms at property developer Hammerson and the producer of Mr. Kipling-cakes, Premier Foods, respectively, by adding directors that are affiliated with the activists and/or independent directors.[3]

The rise of settlements with activist investors is not just a British phenomenon, but also a European one.[4] Hedge funds have recently targeted and reached settlements with Dutch, Swedish and Irish headquartered companies, adding at least one new director in each case.[5] In the United States, the likelihood that an activist intervention will end with a settlement has increased from three percent in 2000 to twenty-one percent in 2013.[6] Globally, board seats acquired by activists via settlements increased from seventy-eight percent in 2018 to eighty-four percent in 2019, with the remaining sixteen percent of directorships in

---

* Research Fellow & Ph.D. Candidate, Ghent University (Belgium). LL.M. Harvard Law School (2014). LL.M. Vrije Universiteit Amsterdam (2006). I am deeply grateful to Hans de Wulf for his valuable comments to an earlier draft of this article and to Jesse Fried, Randall Thomas, Christoph van der Elst, Diederik Briloot and Pierre-Henri Conac for helpful discussions and comments. I benefited greatly from the thoughtful edits of the editors of the *Delaware Journal of Corporate Law*. Financial support was provided by the Ghent University Special Research Fund. All errors are my own. Comments are welcome at ana.taleska@ugent.be.

[1] Press Release, *Rolls Royce Appoints Bradley Singer as a Non-Executive Director* (Mar. 2, 2016), https://www.rolls-royce.com/media/press-releases/2016/pr-2016-03-02-rolls-royce-appoints-bradley-singer-as-a-non-executive-director.aspx.

[2] Peggy Hollinger, *Rolls-Royce Agrees ValueAct Board Deal*, FIN. TIMES (Mar. 2, 2016), https://www.ft.com/content/3809a222-e04b-11e5-9217-6ae3733a2cd1.

[3] *See infra* Part I.

[4] *See infra* Part I.

[5] *See infra* Part I.

[6] Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. FIN. ECON. 1, 2 (2020) [hereinafter Bebchuk et al.].

2019 being elected at a contested director election, otherwise known as a proxy contest.[7]

Against this background and given that the dynamics of European settlements have not been in the focus of legal scholarship thus far, this article looks at eight recent activist interventions involving European firms that have ended with a settlement agreement, oftentimes called a relationship agreement, and aims at providing anecdotal evidence of the terms of these settlement agreements, in particular as they compare with some of the findings reported by Lucan Bebchuk, Alon Brav, Wei Jiang and Thomas Keusch in their recently published paper on U.S. settlements, *Dancing with Activists*.[8]

It shows that in all eight settlements, European boards and activist investors have contracted on board composition changes, involving the addition or nomination of activist-affiliated, activist-desired or independent directors.[9] These directors were added to the board with immediate effect in five settlements, whereas the directors in the remaining three cases were nominated for election at the next general meeting as board-sponsored candidates.[10] These differences in the director appointment process, i.e. direct appointment with immediate effect versus nomination at a subsequent election as a board-sponsored director candidate, are consistent with the fact that the national company laws, and the underlying articles of association of target firms, vary from one European jurisdiction to another and as a result, boards may not have the prerogative under the national company laws to expand the size of the board and add new directorships with immediate effect without a shareholder vote at a general meeting.[11] Further, in all eight settlements, incumbent directors conceded board representation rights to the activist investor outside of the proxy process, i.e. without a formal list of a competing activist-sponsored director slate being submitted for consideration and vote at a general meeting.[12]

---

[7]Lazard's Shareholder Advisory Group, *2019 Review of Shareholder Activism*, LAZARD 1, 15 (Jan. 2020), https://www.lazard.com/perspective/lazards-2019-annual-review-of-shareholder-activism/.

[8]Bebchuk et al., *supra* note 6, at 2.

[9]*Id.* at 4. Activist-affiliated are directors that are favored and affiliated with the activist; activist-desired are directors that are favored but unaffiliated with the activist; independents are directors who are neither activist-desired nor activist-affiliated.

[10]*See infra* Table 2.

[11]*See infra* Part III, A-E.

[12]*See* Nivedita Balu & Svea Herbst-Bayliss, *Avon Calls Truce with Barington, Nominates CEO Mitarotonda to Board*, REUTERS (Mar. 27, 2018), https://www.reuters.com/article/us-avon-prdcts-baringtoncapital/avon-calls-truce-with-barington-nominates-ceo-mitarotonda-to-board-idUSKBN1H232J (Barington Capital,

A direct strategic and capital structure change, in addition to board changes, was agreed in only one settlement (i.e., a sale of a divested unit and dividend distribution), and was part of the incumbent board's strategy adopted independently and in contravention to the demands made as part of the activist intervention.[13] In another settlement, steps were taken to intensify the implementation of a strategy already adopted by the board prior to the activist intervention.[14] In three settlements, no direct strategic, operational or leadership changes were agreed upon, but a review of target firm's strategy,[15] remuneration policy,[16] and the already pending investment and asset disposal program[17] was initiated under the terms of settlement. These findings are consistent with the U.S. evidence that shows generally, the absence of direct operational and leadership changes agreed upon under settlement agreements.[18]

Settlement agreements have been subject to a number of criticisms.[19] An activist campaign that ends with a settlement may be in the best long-term interests of the corporation, as it avoids the unnecessary extension of corporate resources on a proxy fight and gives the activist director an opportunity to use his or her skills and knowledge in a decision-making role as a board member.[20] Yet, quick settlements between incumbent

---

however, had informed Avon Products ten days prior to the settlement that it intended to submit a director slate at the forthcoming annual meeting).

[13]*See* Press Release, AkzoNobel, *AkzoNobel Confirms Focus on Its Own Strategy to Accelerate Growth and Value Creation* (May 8, 2017), https://www.akzonobel.com/en/for-media/media-releases-and-features/akzonobel-confirms-focus-its-own-strategy-accelerate-growth (In Elliott's intervention at AkzoNobel, Elliott advocated that AkzoNobel accepts the takeover bid launched by PPG Industries, whereas Akzo's board rejected the bid and on April 19, 2017 announced the adoption of its own strategy to separate the business in two parts (Paintings and Coatings and Specialty Chemicals), to sell the Specialty Chemicals business, and to distribute proceeds to the shareholders. Elliott fought this strategy in the subsequent months and after several setbacks (including an unsuccessful litigation against Akzo's board), settled with Akzo in August 2017 and supported its strategy)).

[14]*See* Press Release, Hammerson, *Hammerson Disposes of Retail Parks Portfolio* (Feb. 21, 2020), https://www.hammerson.com/media/press-releases/hammerson-disposes-of-retail-parks-portfolio/ (For example, Hammerson had announced a £1.1 billion asset sales strategy in July 2018 (ahead of its April 2019-settlement with Elliott Advisors) in order to dispose of its retail park property and focus on strategic assets. During the course of the campaign, Elliott demanded a more aggressive sales plan, and an investment and disposals committee was set up pursuant to the settlement agreement to oversee the asset disposal process).

[15]*See infra* Table 4 (reviewing the settlement between Premier Foods and Paulson & Co / Oasis Management).

[16]*See infra* Table 4 (reviewing the settlement between AMG and RWC Capital).

[17]*See infra* Table 4 (reviewing the settlement between Hammerson and Elliott Advisors).

[18]*See infra* Part II Section B.

[19]*See infra* Part II and Part III.

[20]*See infra* Part II.

directors and activists may lead to short-termism, director entrenchment and shareholder disenfranchisement.[21]

I examine the short-termism/rent-extraction claim in the European context using the criteria developed in the Bebchuk et al. paper to show that either (1) activists that have entered into settlements are either still engaged with the target European firm (and have held shares for at least two years in each case)[22] and to the extent granted board representation, have their representatives on the board and hold the minimum share ownership requirement that is a condition for their board representation rights under the settlement terms; or (2) activist hedge funds have reduced their share ownership below the statutory ownership reporting threshold or — if granted board representation — their representatives have resigned from the board after an engagement period ranging from seventeen months to roughly fifty-two months (depending on the intervention), with an average duration of thirty-seven months.[23]

The activist directors at the European firms listed on a European stock exchange and elected at general meetings in the period from the date of settlement up to, and including, the 2019 proxy season, however, received less than the average number of votes cast for re-elected incumbent directors (at Rolls-Royce for the 2016 through 2019 AGMs and at the 2015 AGM of AMG Advance Metallurgical Group) or received slightly higher (by 0.1%) than the average number of votes in favor of their election, but at the same time, higher than the average number of withheld votes compared to re-elected incumbent directors (at the 2019 AGM of Premier Foods).[24] This is not the case, however, with the European-headquartered firms listed on the New York Stock Exchange ("NYSE"), where, consistent with the results reported by Bebchuk et al., activist-affiliated directors receive higher than the average number of shareholder votes cast in favor of re-elected incumbent directors.[25] This difference may be attributed to the more international (primarily U.S.-based) investor base that European firms with a U.S.-listing have (compared to firms listed on a European stock exchange) and generally, the higher exposure and better familiarity of American investors with the role played by board-represented activist investors in triggering leadership and strategic changes at targeted firms.[26] Lastly, the rent-extraction scenario via greenmail payments seems unlikely, given the legal restrictions in many

[21] *See infra* Part II and Part III.
[22] *See infra* note 156 and accompanying text.
[23] *See infra* Part II Section A.1.
[24] *See infra* Part II Section A.3.
[25] *See infra* Part II Section A.3.
[26] *See infra* Part II Section A.3.

European jurisdictions on selective share buy-backs at above-market prices.[27]

Settlements often include ownership caps, limiting the amount of shares activist investors can acquire for the duration of the settlement agreement.[28] These caps are primarily intended to lock-in activist investors' influence and to prevent change-of-control situations.[29] Ownership caps are traditionally featured in a number of European jurisdictions and are typically introduced via shareholder-approved articles of association.[30] They also qualify as a pre-bid takeover defense, and if introduced at the incumbent directors' discretion (as part of a bilateral agreement with an activist investor, or otherwise), they may be driven by entrenchment motives.[31] Therefore, I argue that shareholder approval of board-introduced ownership caps should either be a statutory requirement (given that EU takeover rules currently do not envisage a shareholder vote on pre-bid defenses in the absence of a pending takeover bid[32]), or should be taken up in the institutional investors' agenda and proxy advisors' guidelines, as a matter of good corporate governance standards.[33] Alternatively, the legality of pre-bid defenses adopted by incumbent management without shareholder approval should be assessed against a judicially-developed standard of review, such as the *Unocal*-standard in the U.S. State of Delaware or the *Rodamco North America* (*RNA*)-standard adopted by the Dutch courts, that checks for reasonableness (adequacy) and proportionality of directors' defensive tactics against hostile bidders and hedge fund activists.[34]

Probably the most serious deficiency from a corporate governance standpoint that settlement agreements have brought to light is the systematic lack of transparency in the board-sponsored director nomination process in European publicly-held firms.[35] The review of director nomination rules in the Netherlands, Germany, France and the United Kingdom in this article shows that European nomination

---

[27] *See infra* Part II Section A.2.

[28] *See infra* Part II Section B.

[29] *See infra* Part II Section B.

[30] *See infra* Part II Section B.

[31] *See infra* Part II Section B.

[32] *See infra* Part II Section B.

[33] *See infra* Part II Section B.

[34] *See infra* Part II Section B. For a comprehensive analysis of the standards of review developed by the Delaware courts, including the intermediary or "enhanced scrutiny" standard of review, and its link to the business judgement and entire fairness standards of review. *See generally* William T. Allen, Jack B. Jacobs & Leo E. Strine Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1309-11 (Aug. 2001).

[35] *See infra* Part III.

committees operate without providing any insight into the search, evaluation and selection process of board-sponsored director nominees.[36] As a result, the integrity of the European director nomination process defined in these terms can be justifiably called into question whenever the criteria for the decision-making processes of nomination committees are unknown to public investors, and the board bargains with its director nomination prerogatives in settlement negotiations with activist investors that threaten a proxy contest.[37] To be sure, activist directors may be the right choice for the target firm's board at the time of their nomination, but this may also be the case with other potential director candidates.[38] Therefore, until the search and selection processes of European nomination committees are made transparent and effective, shareholder engagement is encouraged because privately-negotiated director nominations between incumbent directors and activist investors may be perceived as self-serving—pursuing the agenda of conflicted directors and short-term investors at the expense of long-term investors.[39] For this reason, I argue that a regulatory initiative at the EU level aimed at increasing transparency and shareholder engagement with nomination committees should be considered.[40]

This article is structured as follows. In Part I, I begin by discussing the deficiencies in the current disclosure practices of European firms as they relate to settlement agreements reached with activist investors.[41] I then present hand-collected data of eight recent settlements and provide an analysis of the main terms of the settlements, as well as post-settlement operational and leadership changes.[42] Part II discusses the different agency costs that settlement agreements may create for long-term investors,

---

[36] *See infra* Part III. This may be less of an issue in European firms with concentrated ownership where major/controlling shareholders have informal ways of influencing the director selection process, in addition to using their voting rights to block the election of an undesirable candidate at the general meeting. However, such informal ways of engagement may make the entire director selection process biased and accommodating to the preferences of a major shareholder, creating majority-minority agency costs. *See* Benjamin Mojuyé, *French Corporate Governance in the New Millennium: Who Watches the Board in Corporate France?*, 6 COLUM. J. EUR. L. 73, 87 (2000) (listing the most influential families owning corporate France and describing their role in the director selection process as follows: "in general, these individuals preside over their corporations as rulers over their empires. As both owners and managers, they wear many hats: they hire the board, mostly composed of family members and friends, and have the power to fire them.").

[37] *See infra* Part III.

[38] *See infra* Part III Section F.

[39] *See infra* Part III Section F.

[40] *See infra* Part III Section F.

[41] *See infra* Part I Section A.

[42] *See infra* Part I Section B.

including short-termism, rent-extraction and director entrenchment.[43] Part III focuses on the shareholder disenfranchisement argument raised in response to the uptick in settlement agreements and starts with a comparative analysis of director nomination rules and practices in the Netherlands, Germany, France, Sweden and the United Kingdom.[44] This country-specific analysis explores the various avenues for director nominations set out under the different national laws including: board-sponsored director nominations, shareholder-sponsored director nominations (including appointment rights of majority shareholders), and employee board representation (co-determination) as a preview for the analysis of shareholder involvement in the board-sponsored director nomination process at European firms.[45]

II. EUROPEAN ACTIVISM AND SETTLEMENT AGREEMENTS

Shareholder activism has taken root in Europe. In 2019, forty-seven new campaigns were launched against European targets in line with the historic five-year average, and over $9 billion capital was deployed.[46] Activism at British firms, which typically accounts for more than half of all European activist campaigns, slowed down in 2019 and as a result, the proportion of hedge fund activism at German, French and Swiss targets (combined) increased by fifty-six percent, compared to 2017-18 levels.[47] Interestingly, while shareholder activism has traditionally been associated with hedge funds, lately, traditional institutional investors and a number of occasional activists have also taken up the activist role in European corporate governance.[48] Further, the conglomerate structure of a significant proportion of large European businesses, combined with underperforming operations, seems to have provided investors with ample opportunity to demand strategic changes in the way European firms are

---

[43] *See infra* Part II.

[44] *See infra* Part III.

[45] *See infra* Part III.

[46] Lazard's Shareholder Advisory Group, *supra* note 7, at 7.

[47] *Id.* at 10.

[48] *See Proposed Complementary Resolutions Submitted by Shareholders for Inclusion on the Agenda of the May 16, 2019 General Meeting*, ESSILOR LUXOTICA (Apr. 19, 2019), https://www.essilorluxottica.com/sites/default/files/PressRelease_Complementary_Resolutions_EN.pdf.

A group of institutional investors (including Fidelity International, Baillie Gifford, Comgest, Edmond de Rothschild Asset Management, Guardcap, Phitrust and Sycomore Asset Management) submitted a partial independent-director slate at the 2019 general meeting of the French-Italian eyewear and eye products conglomerate EssilorLuxotica, which is a currently ongoing governance crisis.

run, mainly through divestitures of parts of target firms' operations[49] or sale of the entire target firm.[50]

Importantly, European activism is not always, or even predominantly, adversarial. In fact, European corporate culture is more receptive to the "behind-the-scenes" type of engagements, and empirical evidence based on proprietary data of five major European activist funds shows that a significant portion of European activism is private and activist involvement at European firms may go entirely unnoticed by public capital markets from early engagement through the realization of activists' objectives and exits from the firm (provided no regulatory ownership disclosure threshold is reached and/or exceeded at entry/exit).[51]

The possibility to carry out activist interventions entirely in private is reported to be critical for the success of activist interventions at European firms with concentrated ownership.[52] Major shareholders may have reputational concerns relating to their managerial abilities of closely-held listed firms, and would refuse to engage in confrontational activist interventions that would be damaging to their professional or social standing. At the same time, they hold sizable economic interest in the target firm and would benefit from improvements in operational performance. After all, addressing underperforming areas of operation is a common objective for all shareholders and hedge funds can drive important changes producing high returns shared pro rata by all shareholders.[53]

---

[49]For example, in a recent campaign at the German classfields firm Scout24, London-based Pelham Capital and Elliott Advisers called for a strategic change of the firm's operation and a share buy-back. In a follow-up to activists' demands, Scout24 announced in August 2019 that it shall explore a sale of its used car-selling website (AutoScout24) and increase leverage in order to engage in a share repurchase program. Michael Dalder, *Hedgefunds setzen Zeichen im Machtkampf um Scout24,* REUTERS, (Ger.) (Aug. 30, 2019), https://www.reuters.com/article/deutschland-scout24-aufsichtsrat-idDEKCN1VK1VZ.

[50]*See infra* Table 4 (providing details on Avon Product's sale to Brazil-based Natura & Co in May 2019 advocated by activist Barington Capital); *see also* David Benoit, *Activists to Press Avon to Explore a Sale*, WALL ST. J., (Jan. 28, 2018), https://www.wsj.com/articles/activists-to-press-avon-to-explore-a-sale-1517179399 .

[51]Marco Becht, Julian Franks & Jeremy Grant, *Hedge Fund Activism in Europe: Does Privacy Matter?*, RESEARCH HANDBOOK ON SHAREHOLDER POWER 116 (Jennifer G. Hill & Randall S. Thomas eds., 2015) (noting that forty-four percent of all 131 European campaigns in their sample were not made public, during or after the campaign); *see generally* Alexandros Seretakis, *Hedge Fund Activism Coming to Europe: Lessons from the American Experience*, 8 BROOK. J. CORP. FIN. & COM. L. 438, 460-63 (2014) (arguing that a more restrictive ownership disclosure obligations have recently been adopted in Europe in response to hedge fund activism).

[52]BECHT, FRANKS, & GRANT, *supra* note 51, at 116 (arguing that the target firm had a blockholder in thirty-three out of fifty-seven private engagements).

[53]*See generally* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance and Firm Performance*, 63 J. FIN. 1729, 1730 (2008)

1. Table 1 Overview of Ownership Disclosure Duties in Selected European Jurisdictions

Investor Ownership Disclosure Duties per Jurisdiction	The Netherlands	Germany	France	United Kingdom	Sweden
Ownership Disclosure Threshold	3%[54]	3%[55]	5%[56]	3%[57]	5%[58]
Deadline for Notification (in trading days)	Without delay[59]	4 days[60]	4 days[61]	4 days[62]	3 days[63]

(providing empirical evidence that firms targeted by hedge funds experience increased payouts, operating performance and higher CEO turnover in the aftermath of the activist intervention).

[54]Art. 5:38 para. 1-2 WET FT.

[55]*Practical Guide: National Rules on Notification of Major Holdings under the Transparency Directive*, at 30, ESMA31-67-535 (Jul. 31, 2019).

[56]*Id.* at 27.

[57]*Id.* at 77.

[58]*Id.* at 74.

[59]Art. 5:38 WET FT. *See also* Council Directive 2004/109/, Art. 2, 2004 O.J. (L 390) 38 (EC) (setting forth minimum harmonization rules on ownership disclosure requirements across EU Member States and providing that the notification of qualified ownership to the issuer "shall be effected as soon as possible, but not later than four trading days" from the date on which the shareholders learns of the acquisition, disposal or the possibility to exercise voting rights). *See also Practical Guide: National Rules on Notification of Major Holdings under the Transparency Directive* 54-55, ESMA31-67-535 (Jul. 31, 2019),

https://www.esma.europa.eu/sites/default/files/library/practical_guide_major_holdings_notifications_under_transparency_directive.pdf (discussing the implementation of the Council Directive 2004/109/EC in the Netherlands).

[60]*Practical Guide: National Rules on Notification of Major Holdings under the Transparency Directive*, at 30, ESMA31-67-535 (Jul. 31, 2019).

[61]*Id.* at 27.

[62]*Id.* at 77.

[63]*Id.* at 75.

Disclosure of Intent in Ownership Notification	No[64]	Yes[65]	Yes	No[66]	No

Recently, the cooperative side of European investor activism has taken a new course, with the adoption of settlements between corporate boards and activist investors, ending (i.e., putting in standstill) public activist campaigns in return for implementing board changes and in some instances, operational, strategic or governance changes.[67] These settlement agreements are essentially bilateral contracts between the target firm and activist investors,[68] typically negotiated and executed by the board of directors without (formal or informal) institutional investor involvement.[69] As such, they are largely a function (from a purely legal perspective) of the extent to which directors can grant concessions to activist investors without shareholder approval—a characteristic that is particularly relevant for the analysis of settlements in the shareholder-centered European system of corporate governance.[70] To better illustrate the dynamics leading up to, and subsequent to European settlements, I take the example of two recent campaigns launched by U.S.-based hedge funds—ValueAct Capital and Elliott Advisors—each targeting a European firm, the British aircraft engine manufacturer Rolls-Royce and the Dutch paints and coatings firm Akzo Nobel, respectively.

[64]Art. 5:38 para. 1-5 WET FT.

[65]WERTPAPIERHANDELSGESETZ [WPHG] [SECURITIES TRADING ACT] Sept. 9, 1998, BGBL I at 2708, last amended by Gesetz [G], Mar. 27, 2020 BGBL I at 543, art. 43 (Ger.), http://www.gesetze-im-internet.de/wphg/WpHG.pdf (providing that the obligation to disclose the objectives of the acquiring investor applies once the threshold of 10% is reached or exceeded).

[66]The UK Financial Conduct Authority's Disclosure and Transparency Rules 2015, SI 2015/5, art. 5, ¶5.3.5 (Eng.) (no requirement for notification of intentions is set out). *But see,* The Companies Act 2006, c. 46, §73 (Eng.), https://www.legislation.gov.uk/ukpga/2006/46/contents (the company may send a notice to persons interested in company's shares (presently, or in the past three years), to give details to the company - as may be required by the notice - about their interest in the company's shares).

[67]*See infra* Part I Section B (providing a detailed analysis of eight recent settlement campaigns).

[68]*See, e.g.,* Autoliv and Cevian Capital, *Cooperation Agreement* (Exhibit 99.2) (May 24, 2018), https://www.sec.gov/Archives/edgar/data/1034670/000119312518173487/d588574dex992.htm.

[69]*Id.*

[70]*See* Sofie Cools, *The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697, 704 (2005) (arguing that "[i]n the United States, the board can act relatively independent from shareholders", whereas "[i]n Continental Europe, the board needs the permission of the shareholders for a range of decisions").

ValueAct Capital crossed the five percent threshold on July 29, 2015, after three profit warnings for Rolls-Royce in less than a year.[71] Earlier in April 2015, the troubled air-engine manufacturer had announced the appointment of a new CEO and subsequently implemented wider changes in its senior management structure in December 2015.[72] ValueAct advocated for a split-up and sale of the marine-engine business in order to allow Rolls-Royce to focus on the air-engine business.[73] On March 2, 2016, Rolls-Royce and ValueAct entered into a relationship agreement for a period of two years, and ValueAct's partner (Mr. Bradley Singer) was appointed to Rolls-Royce's board on the same day.[74] A shareholder approval of Mr. Singer's appointment to the board took place at the general meeting on May 5, 2016.[75]

On May 3, 2018 (i.e., the date of the 2018 annual general meeting, when the (first) two-year settlement agreement from March 2, 2016 expired), ValueAct and the board of Rolls-Royce entered into another relationship/confidentiality agreement, again appointing Mr. Bradley Singer to Rolls-Royce's board with immediate effect.[76] On April 1, 2018, ValueAct was released from its obligation under the settlement agreement, not to publicly advocate for specific strategic changes (*e.g.*, the break-up of the company), and subsequently, Rolls-Royce sold its commercial marine engine business to a Norwegian strategic buyer (Kongsberg) on July 6, 2018.[77] ValueAct sold 1.5% of Rolls-Royce's shares on March 25, 2019, which was followed by a 1.6% decrease in Rolls-Royce share value, and continued to hold 9.48% until one year later, when it cut its position to 4.50% (on March 31, 2020).[78] In the meantime, Mr. Bradley Singer resigned from Rolls-Royce's board on December 10, 2019 during the

---

[71]Robert Wall, *ValueAct Takes More Than 5% Stake in Rolls-Royce*, WALL ST. J. (Jul. 31, 2015), https://www.wsj.com/articles/valueact-takes-more-than-5-stake-in-rolls-royce-1438358227.

[72]*Id.*

[73]John Collingridge, *Rolls-Royce lets Board activist ValueAct off the leash*, THE TIMES (Apr. 1, 2018), https://www.thetimes.co.uk/article/rolls-royce-lets-board-activist-valueact-off-the-leash-vjhcprz7q.

[74]*Id.*

[75]*Id.*

[76]*See* Rolls-Royce Press Release, *Summary of Key Terms in Relationship / Confidentiality Agreement between Rolls-Royce Holdings plc, The ValueAct Group and Bradley Singer* (May 3, 2018), https://www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/about/Key-Terms-of-Relationship-Agreement-with-ValueAct.pdf.

[77]*See* Collingridge, *supra* note 73.

[78]Oliver Griffin, *Rolls-Royce shares fall as ValueAct cuts stake*, MARKETWATCH (Mar. 25, 2019), https://www.marketwatch.com/story/rolls-royce-shares-fall-as-valueact-cuts-stake-2019-03-25; *see* Peggy Hollinger & Billy Nauman, *ValueAct sells entire stake in Rolls-Royce*, FIN. TIMES (Aug. 7, 2020), https://www.ft.com/content/e7dd1939-dadb-43d0-9444-4622bb0f1b88.

middle of his ongoing director term, which led to a four percent plunge in Rolls-Royce's share price.[79]

Elliott Advisers was reported in the media to have first acquired Akzo Nobel's shares in 2016, below the statutory reporting ownership threshold.[80] It then reported crossing the three percent statutory ownership reporting threshold in March 2017 and further increased its holdings to five percent in June 2017.[81] Elliott demanded that Akzo Nobel accept the proposed tender offer of $29 billion USD by the U.S.-based strategic bidder (PPG Industries), and agitated for the removal of Akzo Nobel's chairman, who opposed the deal.[82]

Akzo Nobel appointed a new CEO in July 2017 and a standstill agreement was entered into on August 16, 2017, one week after Elliott lost in court proceedings that it had initiated for the purpose of calling a general meeting and ousting the Akzo's chairman.[83] The settlement provided that Elliott shall support Akzo Nobel's plan to split itself into two separate entities, sell off its specialty chemicals unit, focus on paints and coatings and support the recent CEO appointment.[84] In return, three new directors were nominated to Akzo Nobel's board at the next general meeting: two independent directors and a third director nominated with input from shareholders, including Elliott.[85] A three-month standstill with respect to all pending litigation was also agreed upon under the settlement, and a special cash dividend of €1 billion EUR (proceeds from the prospective sale of Akzo Nobel's chemicals unit).[86] At the extraordinary general meeting held on November 30, 2017, the three additional members of the supervisory board, agreed as part of the settlement, were elected and the

---

[79]Sarah Young, *Rolls-Royce says ValueAct Executive Leaves Board, Shares Fall*, REUTERS (Dec. 10, 2019), https://www.reuters.com/article/us-rolls-royce-hldg-moves/rolls-royce-says-valueact-executive-leaves-board-shares-fall-idUSKBN1YE0P5.

[80]Dana Mattioli & David Benoit, *Elliott Management Owns Stake in Akzo Nobel, Pushes for Talks with Suitor PPG*, WALL ST. J. (Mar. 17, 2017), https://www.wsj.com/articles/elliott-management-owns-stake-in-akzo-nobel-pushes-for-talks-with-suitor-ppg-1489782412.

[81]Michael Pooler, Arash Massoudi & Miles Johnson, *Akzo Nobel accuses Elliott of improper conduct in €22bn battle*, FIN. TIMES (Apr. 12, 2017), https://www.ft.com/content/f0fe80e2-1f54-11e7-b7d3-163f5a7f229c.

[82]Toby Sterling, *PPG raises offer for Akzo Nobel to $29 billion*, REUTERS (Apr. 24, 2017), https://www.reuters.com/article/us-akzo-nobel-m-a-ppg-inds-idUSKBN17Q1EL.

[83]Toby Sterling, *U.S. activist investor ends feud with Dutch paintmaker Akzo Nobel*, REUTERS (Aug. 16, 2017), https://www.reuters.com/article/us-akzo-nobel-shareholders-idUSKCN1AW0D3.

[84]*Id.*

[85]*Id.*

[86]*See* Akzo Nobel Press Release*, AkzoNobel declares special cash dividend of €4.50 per share, to be paid on February 25, 2019* (Feb. 13, 2019), https://www.akzonobel.com/en/for-media/media-releases-and-features/akzonobel-declares-special-cash-dividend-%E2%82%AC450-share-be-paid.

separation of Akzo's chemicals unit was approved.[87] The chemical business was sold on March 27, 2018 to the Carlyle Group and €6.5 billion EUR proceeds from the sale were distributed to shareholders via dividends and share buy-backs.[88] Elliott reduced its holding in Akzo Nobel below the three percent statutory beneficial ownership reporting threshold (to 2.88%) on July 25, 2019.[89]

The settlements at Rolls-Royce and Akzo Nobel are two out of eight recent settlements involving European targets, analyzed in detail later in this paper. This section continues with an analysis of the legal framework governing the disclosure of material non-public information by listed firms, including settlement agreements, and finds that settlements are not only reached in the privity of target directors and activists, but that the terms of European settlements are also not disclosed in their entirety by target firms, due to inconsistencies in the application of EU mandatory disclosure rules.[90] The main terms of European settlements, as reported in the financial media and in summaries disclosed by target firms in lieu of the actual settlement agreement, are discussed below.[91] I also outline the strategic, operational and governance changes at European target firms occurring after settlement was reached.[92]

A. *THE DISCLOSURE PROBLEM WITH EUROPEAN SETTLEMENT AGREEMENTS*

European listed firms have a continuous obligation to make a prompt disclosure of precise, non-public information having significant effect on—and directly relating to—the firm's shares.[93] Entering into an agreement with an activist that has waged a public activist campaign and called for major operational and/or governance changes would easily qualify as material information that the investing public ought to be informed about, in particular given that settlement agreements typically

---

[87]*See* Akzo Nobel Press Release, *AkzoNobel shareholders support separation of Specialty Chemicals business* (Nov. 30, 2017), https://www.akzonobel.com/en/for-media/media-releases-and-features/akzonobel-shareholders-support-separation-specialty-chemicals.

[88]*See* Akzo Nobel Press Release, *AkzoNobel to sell Specialty Chemicals to The Carlyle Group and GIC for €10.1 billion* (Mar. 27, 2018), https://www.akzonobel.com/en/for-media/media-releases-and-features/akzonobel-sell-specialty-chemicals-carlyle-group-and-gic-eu101; *see also* Akzo Nobel Press Release, *supra* note 87.

[89]*Activist investor Elliott's top European holdings*, REUTERS (Sept. 12, 2019), https://www.euronews.com/2019/06/27/activist-investor-elliotts-top-european-holdings.

[90]*See infra* Part I Section A.

[91]*See infra* Part I Section B.

[92]*See infra* Part I Section C.

[93]Council Regulation 596/2014, art. 17, 2014 O.J. (L 173) (EU).

set out board composition changes and possibly, envisage operational restructurings within the firm.[94] These are complex agreements containing a plethora of reciprocal rights and obligations for the contracting parties.[95] For example, settlement agreements can envisage board representation for the activist investor. If activist board membership is part of the settlement deal, it is usually contingent upon a specific minimum ownership threshold of up to ten percent that the activist must hold as long as its representative has a seat on the board. Settlement agreements also provide for a standstill of the pending activist campaign (including with respect to ongoing litigation), non-disparagement covenants, expense reimbursement and confidentiality restrictions for information shared between an activist-affiliated director and the nominating activist investor.

However, EU insider trading regulations (as the primary, directly applicable source of insider trading rules across the EU Member States[96]) provide no guidance on the level of detail that disclosing firms should conform to when making public disclosures of qualifying inside information.[97] In the absence of a harmonized instruction and reporting format, European reporting firms have ample discretion when interpreting and deciding the scope of disclosure they are willing to pursue when complying with their continuous disclosure obligations of inside information. In contrast, the U.S. Securities and Exchange Commission ("SEC") has adopted forms with pre-set content and explanatory notes (*e.g.*, Form 8-k[98]) that reporting firms have to use when complying with their regular (quarterly, semi-annual, annual) and ad hoc reporting obligations. Furthermore, the fact that there is limited guidance at the European level with respect to the application of the three key criteria for assessing if certain information qualifies as inside information under the EU Market Abuse Regulation (precise, price-sensitive and non-material information), further exacerbates the disclosure problem.[99]

---

[94]*Id.*

[95]*Id.*

[96]*Id. See also MAR Guidance on the Delay in the Disclosure of Insider Information*, at 47, ESMA/2016/1478 EN (Oct. 20, 2016), https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf; *see also* Commission Regulation 2016/1055, art. 2, 2016 O.J. (L 173) (EU).

[97]Commission Regulation 2016/1055, art. 3, 2016 O.J. (L 173) (EU).

[98]Current Report (Form 8-K). SEC Form 8-k is used by firms when making ad hoc announcement about entering into a material agreement (i.e., a settlement with an activist investor), pursuant to Item 1.01 of Form 8-K.

[99]*See* Committee of European Securities Regulators, *Market Abuse Directive, Level 3 – Second Set of CESR Guidance and Information on the Common Operation of the Directive to the Market,* at 4, CESR/06-562b (July 2007), https://www.esma.europa.eu/sites/default/files/library/2015/11/06_562b.pdf (providing limited

The lack of uniform application and disclosure standards has a direct effect on the scope and quality of issuers' disclosures that is also reflected in the information firms publicly disclose upon entering into a settlement agreement with an activist. For example, when Rolls-Royce entered into a relationship/confidentiality agreement with ValueAct in March 2016, and subsequently in May 2018, it disclosed a very short summary of the agreement that only included information that Mr. Bradley Singer shall join Rolls-Royce's board, the board committees he will be a member of, and his confidentiality obligations vis-à-vis the firm and ValueAct.[100] However, information about the minimum ownership threshold that was a condition for ValueAct's continued board membership, the ownership cap (reported by the media at 12.5%), the standstill of the campaign, the duration of the agreement and any other information part of the settlement agreement, were not disclosed in the media and may have, nonetheless, been relevant for the wider investment community to better understand the current and prospective dynamic between the Rolls-Royce and ValueAct under the settlement, were never disclosed by Rolls-Royce.

A more detailed account of the settlement terms was provided by the Dutch manufacturer Advanced Metallurgical Group N.V. ("AMG") upon entering into a relationship agreement with the London-based hedge fund RWC Capital in March 2015.[101] In the publicly available *summary* of the terms of the settlement, AMG disclosed the ten percent minimum

---

guidance that has been agreed between the European securities market regulators on the interpretation and application of key concepts of the EU insider trading rules, including on the three elements of the "inside information"-definition); *see* Case C-391/04, Ypourgos Oikonomikon and Proïstamenos DOY Amfissas v. Charilaos Georgakis, 2007 E.C.R. I-3741*; see* Case C-45/08, Spector Photo Grp. NV & Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA), 2009 E.C.R. I-12073 (discussing when a person "uses/possesses" inside information within the meaning of the Council Directive 2003/6, 2003 O.J. (L 96) 16 (EC) and its predecessor, Council Directive 89/592 1989 O.J. (L 334) 30 (EC)); *see* Case C-19/11 Geltl v. Daimler, 2012 E.C.R.; see Case C-628/13 Lafonta v. Autorité des marches financiers, 2015 E.C.R. (discussing when information qualifies as "precise information" within the meaning of the Directive 2003/6, 2003 O.J. (L 96) 16 (EC)); *see also* RÜDIGER VEIL, EUROPEAN CAPITAL MARKETS LAW, 195-209 (Rüdiger Veil, 2nd ed., 2017) (summarizing the interpretation of different aspects of the definition on "inside information" from the perspective of various EU and national legal sources).

[100] *See Summary of Key Terms in Relationship/Confidentiality Agreement between Rolls-Royce Holdings plc, the ValueAct Group and Bradley Singer*, ROLLS-ROYCE.COM, (May 3, 2018), https://www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/about/summary-of-key-terms-in-relationship-confidentiality-agreement.pdf.

[101] *See* AMG Press Release, *AMG Signs Relationship Agreement with its Largest Shareholder RWC European Focus Master Inc*., AMG-NV.COM, (Mar. 9, 2015), https://amg-nv.com/feed-posts/amg-signs-relationship-agreement-with-its-largest-shareholder-rwc-european-focus-master-inc/.

ownership requirement for RWC Capital to have its managing director on AMG's supervisory board, the contract duration of one-to-two years, and governance and strategy-related matters agreed upon by the parties.[102] Yet, even in this case and without disclosure of the full text of the relationship agreement, it is difficult to know whether these terms represent the entirety of the rights and duties agreed upon by the parties under the settlement agreement. Importantly, of the eight recent settlements included in this paper, only the three European firms whose securities are listed on the NYSE, and thereby have reporting obligations under the U.S. Securities and Exchange Act of 1934 (i.e., Autoliv, Adient and Avon Products), have disclosed their respective settlement agreements in their entirety as part of a Form 8-K filing to the SEC.[103]

Against this regulatory background, I have collected information about the eight recent settlements listed in Table 2 *infra* as follows. For the five firms listed on European stock exchanges, I analyzed the information disclosed in the summaries that target firms made publicly available upon executing the settlement agreement (as part of their reporting obligations under the EU Market Abuse Regulation), as well as from publicly available regulatory filings by target firms with the national securities authorities,[104] in compliance with the national laws implementing the EU Transparency Directive.[105] For the three European-headquartered firms listed on the NYSE, I collected data from the SEC EDGAR database. Then, for all eight settlements I cross-checked and

---

[102] *Id.*

[103] *See* Autoliv & Cevian Capital, *supra* note 68; Adient, plc & Blue Harbour Grp., *Agreement* (Exhibit 10.1) (May 18, 2018), https://www.sec.gov/Archives/edgar/data/1670541/000119312518168139/d581860dex101.htm; Avon Prod., Inc. & Barington Grp., *Nomination Agreement* (Exhibit 10.1) (Mar. 26, 2018), https://www.sec.gov/Archives/edgar/data/8868/000095015718000348/ex10-1.htm.

[104] *National Storage Mechanism*, https://www.fca.org.uk/markets/primary-markets/regulatory-disclosures/national-storage-mechanism (last visited Feb. 6, 2020). Information made publicly available pursuant to issuers' regulatory reporting obligations was hand-collected from the UK Financial Conduct Authority's National Storage Mechanism. *Dutch Authority for the Financial Markets' Register on Substantial Holdings and Gross Short Positions,* AFM.NL https://www.afm.nl/en/professionals/registers/meldingenregisters/substantiele-deelnemingen?KeyWords=amg&DateFrom=&DateTill=#results (last visited Feb. 6, 2020). *Register Publication on Inside Information*, AFM.NL (last visited May 28, 2020) openbaarmaking voorwetenschap

https://www.afm.nl/en/professionals/registers/meldingenregisters/openbaarmaking-voorwetenschap; *German Federal Financial Supervisory Authority's, Major Holdings of Voting Rights Pursuant to §33, §38 and § 39 of the German Securities Trading Act,* BAFIN.DE (last visited Feb. 6, 2020),

https://www.bafin.de/EN/PublikationenDaten/Datenbanken/Stimmrechte/stimmrechte_node_en.html;jsessionid=D9B41B91F6C50A312DAB1E08DE9B9BAB.1_cid298.

[105] *See* 2004 O.J. (L 390) 38; *see* 2013 *O.J. (L 294) 13.*

complemented data from investors' and target firms' web-sites and news search results.

I followed activist interventions that have ended with a settlement from the date of first beneficial ownership disclosure of the activist hedge fund up to May 31, 2020. For interventions that have ended before May 31, 2020 (and in order to calculate the engagement period for each such intervention), I followed the activist's engagement from the date of first beneficial ownership disclosure or the date when the first share acquisition (that never crossed the ownership disclosure threshold) was reported in the media (e.g., Barington's stake at Avon Products never reached the five percent disclosure threshold) up to the date when the activist investor with board representation resigned from the board or the date when the activist investor decreased its holdings and reported share ownership below the notifiable statutory ownership threshold (for activist investors without board representation).

1. TABLE 2 LIST OF RECENT SETTLEMENTS REACHED BETWEEN EUROPEAN(-HEADQUARTERED) TARGET FIRMS AND ACTIVIST INVESTORS

Company (Headquarters/ Stock Exchange Listing)	Market Cap[106]	Activist	Date of Settlement	Directors Directly *Added* to the Board, or *Nominated* for Election at the Next General Meeting, as Part of the Settlement	Settlement Agreement Disclosed (as Part of Reporting Obligation)
Rolls-Royce (United Kingdom / London Stock Exchange)	**€17,410**	Value Act Capital	March 2016; May 2018 (extended)	One new activist-affiliated director *added* to the board.	No
Akzo Nobel (The Netherlands	**€17,016**	Elliott Advisors	August 2017	Three new directors *nominated* for	No

[106] *See* BLOOMBERG (Sept. 17, 2019), https://www.bloomberg.com/quote/RR/:LN.

/ Euronext Amsterdam)				election at the 2017 EGM, two independent and one in consultation with Elliott and other shareholders.	
AMG (The Netherlands / Euronext Amsterdam)	**€689**	RWC Capital Partners	March 2015	Two new directors *nominated* for election at the 2015 AGM, one affiliated with the activist and one independent.	No
Hammerson (United Kingdom / London Stock Exchange)	**€2,057**	Elliott Advisors	February 2019	Two new independent directors *added* to the board, in consultation with Elliott.	No
Premier Foods (United Kingdom / London Stock Exchange)	**€270**	Oasis Management / Paulson & Co	February 2019	Two new activists-affiliated directors (one director for each fund) *added* to the board. Two directors resigned to allow for these board additions.	No

European (-Headquartered) Firms Listed on the New York Stock Exchange					
Autoliv (Sweden / New York Stock Exchange)	**€6,927**	Cevian Capital	May 2018 (settlement re Veoneer Spin-Co). March 2019 (settlement re Autoliv)	One new activist-affiliated director *added* to Veoneer Spin-Co (May 2018-settlement). One new activist-affiliated director nominated for election at 2019 AGM (Mar. 2019-settlement).	Yes
Adient (Ireland / New York Stock Exchange)	**€2,267**	Blue Harbour	May 2018	One new activist-affiliated director *added* to the board.	Yes
Avon Products (United Kingdom / New York Stock Exchange)	**€1,844**	Baringto n Capital	March 2018	One new activist-affiliated director *nominated* for election at the 2018 AGM.	Yes

B. *THE MAIN FEATURES OF EUROPEAN SETTLEMENTS*

Empirical evidence of American settlements shows that the terms of settlement agreements between activist investors and target firms generally revolve around board seat changes, leading in particular to an increase in the number of activist-affiliated, activist-desired and well-

connected directors.[107] Board-related changes occur significantly more often than direct operational and/or leadership changes, even though every activist campaign has an operational and/or leadership goal.[108] In fact, board-related changes have been shown to be an intermediary step towards the attainment of strategic, operational and leadership changes, typically occurring in the aftermath of a settlement.[109]

The eight recent European settlements surveyed in this article seem to exhibit similar characteristics.[110] Every campaign has ended with the addition of one or more directors to the board, with the majority of newly added directors being affiliated with the activists, whereas the remaining directors added through the settlement process were independent.[111] Board representation rights of activist investors in European settlements are usually conditional upon maintaining a specific minimum share ownership that activists are expected to hold throughout their representatives' tenure.[112] The announcement of an activist-affiliated director joining the board was associated with positive, abnormal stock returns (3.6% for Premier Foods's shares[113]), as was the disclosure of an activist's acquisition of a beneficial share ownership (3.4% for Autoliv's shares[114]), whereas negative abnormal stock return (of 4%) was reported after ValueAct's partner unexpectedly resigned from Rolls-Royce's board in December of 2019 in the midst of its director tenure.[115]

Agreeing on operational and leadership changes also seems to be part of the narrative in some European settlements, even though the extent to which provisions on operational and leadership changes are included in the actual settlement agreements is uncertain, given the lack of public disclosure of the full text of European settlement agreements. Nonetheless,

---

[107]*See* Bebchuk et al., *supra* note 6, at 3, 21-22 (finding a decrease in the number of old and long-tenured directors).

[108]*See id.* at 27.

[109]*See id*. at 3.

[110]*See* Lazard's Shareholder Advisory Group, *supra* note 7, at 15 (presenting data on the distribution of board seats won by activists via settlements and proxy contests).

[111]*See id.*

[112]*See* Bebchuk et al., *supra* note 6, at 2.

[113]Myles McCormick, *Premier Foods Unveils Strategic Review and Put Activists on Board: Shake-up Opens Possibility Foodmaker Could sell Parts or All of Whole Business*, FIN. TIMES (Feb. 27, 2019), https://www.ft.com/content/39ba1d34-3a9a-11e9-b856-5404d3811663.

[114]*See* Johannes Hellstrom, *Autoliv Shares Boosted as Activist Cevian Buys Stake*, REUTERS, (Mar. 2, 2018), https://www.reuters.com/article/autoliv-cevian-idUSL8N1QK2JX.

[115]*See* Sarah Young, *Rolls-Royce Says ValueAct Executive Leaves Board, Shares Fall*, REUTERS, (Dec. 10, 2019), https://www.reuters.com/article/us-rolls-royce-hldg-moves-idUSKBN1YE0P5; *see also* Alan Tovey, *Rolls-Royce Share Fall as Activist Investors Gives up Board Seat*, THE TELEGRAPH, (Dec. 10, 2019), https://www.telegraph.co.uk/business/2019/12/10/rolls-royce-share-fall-activist-investor-gives-board-seat/.

the publicly disclosed *summaries* of European settlement agreements and financial media reports relating to these settlements make clear that a spin-off of a company's assets, a dividend payout (both at Akzo Nobel), a strategic review of the company (at Premier Foods), a review of the remuneration policy (at AMG), and the formation of investment and disposals board committees (at Hammerson) were also part of the terms agreed between the settlement parties, in addition to board changes. Yet, these operational, strategic and capital structure-changes were largely adopted independently by incumbent boards (in some cases even prior to the launch of the activist intervention[116]), and can be best seen as concessions given by activist investors as part of the settlement or as activist investors acquiring position in a European target in support of recently adopted strategic changes (e.g., Cevian's acquisition at Autoliv), rather than as an example of target directors giving in to activist demands and changing course from their long-term strategy at the time of conclusion of the settlement agreement. Interestingly, and consistent with the findings in the Bebchuk et al. paper, European-headquartered firms listed on the NYSE that have filed their settlement agreements with the SEC do not explicitly contract on operational and/or leadership changes, nor are such changes mentioned/discussed in the media reporting on these settlements at the time they are reached.[117] This may imply that the legal and regulatory environment in which settlements are negotiated and reported, as well as investor expectations and board members' fiduciary duties, influence settlement outcomes.

The absence of direct contracting on strategic and operational changes, as part of U.S. settlement agreements, has been explained either by reference to the incomplete contracting theory[118] or to directors' fiduciary duties under U.S. state corporate law, which largely prevents directors from entering into contracts that restrict their discretion by committing to vote in a particular manner in the future (e.g., in favor of a buybacks or dividend distribution).[119]

Fiduciary duties may also stand in the way of European directors agreeing on specific outcomes in settlement negotiations with activists.[120]

---

[116]*See supra* notes 12-13 and accompanying text.

[117]*See generally* Bebchuk et al., *supra* note 6.

[118]*See id.* at 12-13.

[119]*See* John C. Coffee Jr., Robert J. Jackson Jr., Joshua R. Mitts & Robert E. Bishop, *Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board?*, 104 CORNELL L. REV. 381, 397 (2019) (arguing that "directors, as fiduciaries, cannot contract away their discretion").

[120]*See* Stephon Kenyon-Slade, *Improper Fettering of Directors' Discretion, or Holding Them to Their Word?*, 52(2) CAMBRIDGE L. J. 218, 220 (1993).

For example, under the British non-fettering rule, directors cannot enter into contracts binding directors on how to vote at board meetings.[121] However, in the context of pure commercial contractual commitments entered on behalf of the company, directors would be deemed to have already exercised their discretion at the time of entering into the commercial agreement and would not be allowed to avoid complying with their contractual obligations by invoking the non-fettering rule.[122] This judicially-developed interpretation was also taken up in the 2006 Companies Act, which provides that a director's duty to exercise independent judgment is not infringed if the director is acting in accordance with an agreement that is duly entered into by the company and that restricts the future exercise of discretion by its directors.[123]

However, British courts have held that directors that have committed to use best efforts to secure shareholder approval for a specific transaction they have entered into (e.g., involving an asset sale or a tender offer) may violate their fiduciary duties if, at the time of the shareholder vote, they recommend approval of the transaction to shareholders even though the circumstances have materially changed and/or a rival offer is more beneficial to the shareholders.[124] The rationale here is that shareholders are deemed dependent on directors' advice in deciding how to formulate their voting decisions, and board members must make "full and honest disclosure to shareholders" and be free to advise in the best interest of the shareholders at the time of recommending approval of the transaction.[125]

---

[121] *See id.* (arguing that "covenants which purport to restrict directors' discretion in the exercise of directorial voting powers are manifestly invalid").

[122] *See Thorby v. Goldberg* (1964) 112 CLR 597, 605-06 (Austl.) (arguing "there are many kinds of transactions in which the proper time for the exercise of the directors' discretion is the time of the negotiation of a contract, and not the time at which the contract is to be performed"); *see generally* Fulham Football Club Ltd v. Cabra Estates plc [1992] B.C.C 863 (Eng.); *see* Brenda Hannigan, Company Law 255-56 (4th ed. 2015); *see* Kenyon-Slade, *supra* note 120, at 218.

[123] *See* Companies Act 2006, c.46, § 173(2)(a) (Eng.), https://www.legislation.gov.uk/ukpga/2006/46/section/173.; *see* 11 Jul. 2008, Parl Deb HL (2006) col. 598 (UK).

[124] *See generally* John Crowther Group v. Carpets International [1990] BCLC 460 (Eng.); *see* Rackham v. Peek Foods [1990] BCLC 895 (Eng.) (under the facts of both cases the directors had committed to use best efforts to secure shareholder approval, which was required for the consummation of the transaction); *see also* Paul L. Davis, GOWER AND DAVIES PRINCIPLES OF MODERN COMPANY LAW 528 (8th ed., 2008).

[125] *See* John Crowther Group v. Carpets International [1990] BCLC 460, 465 (Eng.); *See also* Stephen Kenyon-Slade, *supra* note 120, at 219-20; *see also* Davis, *supra* note 124, at 528. Note that the strategic and operational changes agreed under the European settlements analyzed in this paper seem to include terms consistent with this interpretation of the non-fettering rule. For example, AMG and RWC agreed on initiating a review of the firm's remuneration policy,

The (Continental) European two-tier boards can add additional layers of complexity for activist investors and target firms negotiating specific outcomes under the terms of a settlement, given that two-tier board structures can serve as a structural impediment to activism.[126] For example, activists may enter into settlements and place activist-affiliated directors on the supervisory board of German stock corporations, even though the management of German stock corporations is performed entirely by the executive board.[127] From this perspective, an activist with a minority board representation on a German supervisory board would have only limited influence, when compared to Anglo-Saxon one-tier boards, given that the executive board of German stock corporations has an exclusive right and full responsibility in governing the corporation without interference from the supervisory or (activist) shareholders.[128] Further, all matters that are within the competence of the executive board cannot be transferred to the supervisory board,[129] and activist shareholders are prevented from tabling resolutions at the general meeting that are within the competence of the executive board.[130]

whereas Hammerson and Elliott Advisors agreed on forming an investment and disposal committee on which the activist-supported directors would have a seat, in order to oversee the already pending and future asset sales. Thus, the strategic matters agreed under these two settlements were of a general nature without commitments to any specific outcomes or director actions.

[126]Andreas Engert, *Shareholder Activism in Germany* (ECGI Working Paper 470/2019), 20-21 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433337.

[127]*Id.* at 21.

[128]Aktiengesetz [AktG] [Stock Corporation Act], BGBL I at 1089, art. 76(1), (Sept. 6, 1965), http://www.gesetze-im-internet.de/aktg/AktG.pdf (last amended by Gestez on Dec. 12, 2019 BGBL at 2637); *see also* Regierungs Kommission, Deutscher Corporate Governance Kodex [German Corporate Governance Code], (Dec. 16, 2019), https://www.dcgk.de/en/code/gcgc-2020.html (providing that "the Management Board assumes full responsibility for managing the company in the best interests of the company, meaning that it considers the needs of the shareholders, the employees and other stakeholders, with the objective of sustainable value creation"); *see also* Engert, *supra* note 126 at 21, 28-34.

[129]AktG, art. 113(4) (the by-laws may provide, however, that certain actions management can take only upon securing supervisory board's consent).

[130]AktG, art. 119(2).

2. Table 3 Main Terms of Settlements Reached between European Target Firms and Activist Investors

Target Firm	Minimum Ownership for Board Representation	Share Ownership Standstill (Ownership Ceiling) | Corporate Governance Standstill	Non-disparagement	Restriction on disclosure of confidential/ inside information
Rolls-Royce | ValueAct Capital	7.5%	Capped at 12.5% | Activist not to engage in publicly advocating a break-up of the firm.	Not Reported	Activist-affiliated director may disclose confidential info to activist; disclosure of price-sensitive information is subject to board approval.
Akzo Nobel | Elliott Advisors	Not Reported[131]	Not Reported | Activist to support incumbent CEO and 3-month suspension of all litigation was agreed.	Not Reported	Not Reported
AMG | RWC Capital Partners	10%	Not Reported | Activist to support AMG's strategy and the re-election of the incumbent CEO and Chairman of the board.	Not Reported	Not Reported
Hammerson | Elliott Advisors	Not Reported (only independent directors added to the board).	Capped at 10% (share ownership), 15% (voting rights) | Activist shall support Hammerson's asset-sale plans.	Not Reported	Not Reported

[131] "Not Reported" is a reference to information not being reported in the regulatory filings of listed firms made pursuant to the continuous obligation for disclosure of inside information or in the financial media.

Premier Foods | Paulson& Co | Oasis Mgt.	10%	Not Reported | Activist shall not file shareholder resolutions or engage in a proxy fight.	Yes	Yes
Autoliv (Veoneer (spin-co)) | Cevian Capital	8%	Capped at 19.9% of outstanding shares | Cevian bought in and supported Autoliv's spin-off strategy.	Yes	Yes
Adient | Blue Harbour Group	4%	Capped at 15% of the outstanding shares | No proxy solicitation, submission of shareholder proposals, proxy contest.	Yes	Yes
Avon Products | Barington Group	Approx. 0.6% (2,634,226 shares).	No proxy solicitation, submission of shareholder proposals.	Yes	Yes

C. *POST-SETTLEMENT OPERATIONAL AND LEADERSHIP CHANGES*

In the aftermath of settlements, target firms either implemented operational, capital structure or governance-related covenants agreed upon under the settlement (Akzo Nobel, AMG, Hammerson) or pursued changes advocated by the activist from the outset of the activist campaign.[132] The latter occurred, for example, at Rolls-Royce, where the activist's demands for a spin-off and sale of the commercial marine engine operations were not part of the March 2016-settlement (or its May-2018 extension), but ensued subsequently in July 2018.[133] Similarly, in the February 2019-settlements between the British food produced Premier Foods, on one side, and the New York-based hedge fund Paulson & Co and the Hong Kong-based hedge fund Oasis Management, respectively on the other side, a strategic review of Premier Foods' strategy was agreed, which later led, *inter alia*, to the appointment of new leadership (CEO and Chairman) in August 2019.[134]

[132] *See infra* Table 4.
[133] *See infra* Table 4.
[134] *See infra* Table 4.

3. Table 4 Other Relevant Pre-and-Post Settlement Factors

Pre-and-Post Settlement Developments	Rolls-Royce | Value Act Capital	Akzo Nobel | Elliot Advisors	AMG | RWC Capital Partners	Hammerson | Elliott Advisors	Premier Foods | Paulson & Co | Oasis Mgmt.	Autoliv | Cevian Capital	Adient | Blue Harbour Group	Avon Products | Barington Group
Settlement Reached Outside of Proxy Contest	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
Settlement Reached Close to AGM	Yes.	Yes.	Yes.	Yes.	No.	Yes.	No.	Yes.
Operational, Leadership, Governance Changes Are Part of the Settlement	Not Reported	Yes, spin-off of Akzo Nobel's chemicals unit and €1.6bn dividend payout.	Yes, review of AMG's remuneration policy.	Yes, Investment and Disposal Committee formed to oversee pending and future asset sales.	Yes, strategic review launched.	No.	No.	No.

Operational/ Leadership Changes Occurring After Settlement (Not Part of the Settlement)	Yes, company break-up and sale of commercial marine engine business (in July 2018) as demanded by activist.	No, but Specialty Chemical Unit was sold and €6.5 billion dividends distributed and shares repurchased in 2017, 2018 and 2019.	In Aug. 2015, the supervisory board adopted a change in dividend policy, allowing dividend distributions to shareholders (dividends distributed in 2015, 2016 & 2017). CFO turnover (Jan. 2016).	No.	Yes, CEO and Chairman turnover; new leadership appointed on 30 Aug. 2019. Profits and revenues increased in 2019.	No, Veoneer's spin-off was already decided by management before Cevian bought in shares in Autoliv.	No significant changes reported, but strong performance at the start of 2020.	Yes, Avon Products was sold to Brazil-based Natura & Co in May 2019.
Activist-Affiliated Directors Receive Lower than Average (Mean) Support at AGMs (date of settlement up to the 2019 proxy season).	Yes[a].	Yes[b].	Yes[c].	In course of 2019, no GM was held since the appointment of the two independent directors on July 22 & Dec. 1, 2019, respectively.	Yes[d].	No[e].	No[f].	No[g].

[a] At the 2016 AGM, the activist-affiliated director had the lowest number of votes in favor of his election compared to all other directors standing for election (newly added and re-elected incumbent directors). At the 2017, 2018 and 2019 AGM, the activist-affiliated director had lower than average shareholder support relative to all directors standing for election, as well as relative to incumbent re-elected directors only (full slate elected, annual elections). New directors (unrelated to the settlement) were nominated at the 2016, 2017 and 2019 AGM and they had higher support compared to the activist-affiliated directors added as part of a settlement. The activist-affiliated director resigned in Dec. 2019.

[b] At the 2017 EGM, the independent director appointed to the supervisory board in consultation with the activist received four percent and six percent lower support compared to the other two independent directors proposed by the target firm as part of the settlement, respectively (partial slate, no directors other than the directors agreed under the settlement were elected). All three directors were elected in 2017 for a 4-year term and are due for re-election at the 2021 AGMs.

[c] At the 2015 AGM, the activist-affiliated director received close to 0.2% less votes than the independent director proposed under the settlement, and 0.6% less than the re-elected incumbent director (partial slate elected). The activist-affiliated director was appointed for a four-year term but stepped down at the 2017 AGM (i.e., at the expiration of the two-year relationship agreement with AMG).

[d] At the 2019 AGM, the activist-affiliated directors had lower than average support relative to all directors standing for election, and slightly higher than average shareholder support (by 0.1%) and higher than average number of withhold votes relative to re-elected incumbent directors. The one newly-elected director to the board (not agreed under the settlement), had significantly higher support (1.7%) compared to the activist-affiliated directors (full slate elected).

[e] At the 2019 AGM, the activist-affiliated director received the highest number of support votes (compared to re-elected incumbent and newly elected directors) (full slate elected).

[f] At 2019 AGM the activist-affiliated director received higher than average shareholder support relative to all directors standing for election, and higher support than the re-elected incumbent directors but lower support than the one newly added director (full slate elected).

[g] At the 2018 and 2019 AGM activist-affiliated director received higher than average shareholder support relative to all directors standing for election, and higher support than the re-elected incumbent directors (full slate elected). Two new directors were added at the 2018 AGM and both received higher support than the activist-affiliated directors.

III. THE AGENCY COSTS OF SETTLEMENT AGREEMENTS

Ownership concentration and legal rights afforded to specific shareowners are the two determinants that largely predict the course and possible outcomes of an activist intervention, including whether an activist

campaign will be launched in the first place.[135] The success of hostile strategies can depend on whether the activist would gain majority support at a general meeting on key governance and operational issues.[136] In a controlled-firm, activists have little chance of winning the shareholder vote at a general meeting and reputational costs to a controlling shareholder would yield little bargaining power to activist investors in the absence of legally-prescribed minority shareholder rights.[137] In contrast, a dispersed ownership structure with a large segment of institutional share-ownership coupled with strong minority shareholder rights (e.g., right to call a general meeting and to table shareholder proposals, such as activist-sponsored director slate) substantially increases the prospects that a successful campaign against target firms' management can be implemented.[138]

The outcome of adversarial campaigns reaching the proxy contest stage, however, can be highly uncertain for both activists and target management. In particular, different proxy advisors giving different voting recommendations on the same voting item.[139] As a result, over eighty percent of board seats obtained by activists in the last five years (globally), were as a result of a settlement (as opposed to a proxy contest), and over fifty percent of directorships in 2019 won by activists were gained entirely outside of the proxy contest (i.e., without a proxy fight even being initiated and a dissident director slate submitted).[140] This trend shows that activists and boards alike, settle in the shadow of a proxy contest, and the likelihood that a proxy contest will occur is directly related to the activists' rights as shareholders to organize a proxy contest and to solicit support for their dissident director slate at a minimum cost and regulatory risk.[141] In this respect, European corporate laws are generally perceived as more shareholder-friendly, thereby increasing (at least theoretically) the

---

[135]Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies,* 1 COLUM. BUS. L. REV. 60, 68-69, 84 (2016).

[136]*Id.* at 64.

[137]*Id.* at 111 (arguing that reputational costs are hardly a substitute for formal bargaining mechanisms for activists launching campaigns at controlled firms, and that the success of achieving at least one outcome of the activist campaign is close to forty percent lower if no formal bargaining mechanism is available to the activist).

[138]*See* Nouha Ben Arfa, Majdi Karmani & Daniel Labaronne, *Antecedents of Hedge Fund Activism in French Listed Target Firms*, 42 RES. IN INT'L BUS. FIN. 1315, 1317, 1322 (2017) (conducting an empirical study of thirty-six French listed firms targeted by hedge fund activists in the period between 1998 and 2013 and finding that the likelihood of activist increases with the proportion of institutional investors holding shares at a target firm).

[139]Lazard's Shareholder Advisory Group, *supra* note 7, at 15.

[140]*Id.* (ranging from sixteen percent in 2015 and 2019, to twenty-two percent in 2018).

[141]*Id.*

bargaining power of activist investors vis-à-vis incumbent directors in settlement negotiations.[142]

Provided the threat of a close-call proxy contest for one or more directorships is real, both sides have an incentive to enter into a settlement.[143] Incumbent directors may not only lose one or more board seats, but they also face significant reputational damages as proxy fights unravel in their typical highly confrontational style.[144] For this reason, directors decide to settle (sometimes very quickly upon the launch of an activist campaign[145]) and thereby put an end to the activist campaign, at least temporarily.[146] Activists, on the other hand, settle because they gain board representation and even though this may not be their ultimate goal, empirical evidence shows that it is only a first in a number of operational and leadership changes for which activist-nominated directors continue to press once appointed and/or elected to the board.[147]

In reference to the eight activist settlements analyzed in this article, both reputational concerns and high probability that the activist may gain significant shareholder support at a proxy contest seem to have played a role in reaching the settlement. In contrast to the classical activist scenario, where activists challenge entrenched boards and management that have been at the helm of the target for a fair amount of time, in three of the eight European campaigns reviewed herein (Rolls-Royce, Akzo Nobel and Premier Foods), a new CEO had been appointed one to three months before (or after) the activist investor first acquired (or ramped up its existing) shareholding in the target firm, and a settlement was reached within a period of one to seven months thereafter. Reputational concerns may have, therefore, induced newly-appointed management at

---

[142] *See generally* Christoph Van der Elst, *Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders* (ECGI Law Working Paper 188/2012, 2012) (providing a comprehensive overview of shareholder rights at general meetings in Belgium, The Netherlands, France, Germany and the UK); *see also generally* Engert, *supra* note 126 (reviewing the legal framework relevant for activist interventions in Germany); *see also* Carine Girard, *Success of Shareholder Activism: The French Case*, 115 BANKERS MKT. & INV. 26, 28 (2011) (reviewing recent legislative reforms relevant in the context of shareholder rights); *see also* Peter Cziraki, Luc Renneboog & Peter G. Szilagyi, *Shareholder Activist through Proxy Proposals: The European Perspective*, 16(5) EUR. FIN. MGMT. 738, 739-40 (2010) (providing empirical analysis of shareholder proposals and briefly reviewing shareholder rights at general meetings in nine European jurisdictions).

[143] *See Protecting Long-Term Shareholder Interests in Activist Engagements,* STATE STREET GLOBAL ADVISORS (Oct. 10, 2016), https://www.faegredrinker.com/webfiles/4%20State%20Street%20Policy%20on%20Activist%20Engagements.pdf.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Bebchuk et al., *supra* note 6, at 26-30.

underperforming firms to portray themselves in a light friendly to investors, by ending the ongoing feud with activist shareholders and bringing activist-nominated/supported directors to the corporate board in order to benefit from their viewpoint and expertise in the process of restructuring the business.

Further, all eight settlements were reached outside the proxy contest, i.e., with no activist-sponsored director slate being proposed or an extraordinary general meeting for their election called, with the exception of Elliott Advisors, whose request for calling an EGM to displace the Chairman and CEO of Akzo Nobel was temporarily rejected by the court, and arguably increased Elliott's incentives to enter into a settlement with Akzo Nobel shortly thereafter.[148] Further, and as Table 4 *supra* illustrates, six out of eight settlements were reached close to the annual general meeting, indicating that a potential threat of contested election might have been another catalyst for the settlement.[149]

Activist settlements may, however, impose agency costs on long-term shareholders in two ways.[150] First, hedge funds may use board membership agreed as part of the settlement to continue advocating a short-term agenda and extract rents, for example, in the form of selective share buy-backs at the expense of all other (long-term) shareholders.[151] Second, directors may use settlements as an insulation and entrenchment device in order to eliminate (even if temporarily) the threat of being removed from office via contested director elections or change of target firms' control.[152] These two types of agency costs are analyzed in more detail in Section A and B *infra*, respectively.

A. *SHORT-TERMISM AND RENT-EXTRACTION*

Long-term institutional investors have voiced concerns over settlement agreements arguing that directors have failed to ensure that activists with board representation rights have a long-term interest in the target firm by, for example, requiring activists under the terms of the settlement to hold shares in the target firm for an extended period of time, and as a result, may pursue self-serving short-term agendas (e.g., demanding asset sales, dividend payouts or share repurchases at above-

[148] *See supra* Table 4.
[149] *See supra* Table 4.
[150] Bebchuk et al., *supra* note 6.
[151] *Id.* at 5.
[152] *Id.*at 17.

market prices).[153] Bebchuk et al. addresses these claims by showing that: (i) activist campaigns where settlements were reached are of a longer duration (979 days on average) compared to campaigns that have not ended with a settlement (660 days on average), (ii) firms rarely repurchase activists' shares and when they do, share buy-backs are done at market prices (i.e., no greenmail payments were made), and (iii) activist-affiliated directors do not receive less shareholder support at the subsequent annual meeting[154]. As activist settlements in Europe tend to exhibit many similarities with American settlements, and often involve a U.S.-based hedge fund activist, I analyze the short-termism and rent-extraction arguments along these three lines, but from a European perspective.

1. Duration of Activist Engagements

The short-termism claim is largely based on a quick turnaround of activists' portfolios and short-lived engagements with target boards.[155] As European settlements are a relatively recent phenomenon, from the eight settlements analyzed in this article, activists are still engaged[156] at three target firms they have entered in a settlement with, whereas activists have stepped down from the board or decreased below the reporting ownership threshold (or liquidated) their shareholdings in five cases.[157]

With respect to the duration of these five campaigns, RWC's engagement at AMG started in September 2013 and its affiliate held a seat on the board until the annual general meeting in May 2017, when he resigned in accordance with the settlement terms. RWC continued owning AMG's shares through December 2017, when it reported a share holding below the statutory reporting threshold. Second, Mr. Singer unexpectedly resigned from Rolls-Royce's board on December 9, 2019 after close to a 4-year tenure, and ValueAct subsequently halved its shareholding in

---

[153] *See* State Street Global Advisors, *supra* note 143, at 1 (arguing that activists may pursue short-term objectives at the expense of long-term goals at target firms); *see also* Michael Flaherty, *Big Funds Push Back Against Investor Settlements*, REUTERS (Jul. 18, 2016), https://www.reuters.com/article/us-activist-investors/big-funds-push-back-against-activist-investor-settlements-idUSKCN0ZY2DP.

[154] Bebchuk et al., *supra* note 6, at 30-34 (showing that activist-affiliated directors receive 1.7% more votes in their favor and 1.8% less against them, compared to incumbent directors that concurrently stand for reelection at the same general meeting).

[155] *Id.* at 32, 35.

[156] As of May 31, 2020, the activists still hold shares and their activist-affiliated directors still serve on the target firms' boards at Autoliv, Adient and Premier Foods. Cevian's engagement at Autoliv started in March 2018, Blue Harbour's engagement at Adient in September 2017 and Paulson & Co's and Oasis first made beneficial ownership disclosures with respect to Premier Foods's shares in April 2014 and July 2016, respectively.

[157] *See supra* Table 2.

Rolls-Royce from 9.48% to 4.50% on March 31, 2020.[158] Third, Elliott's Paul Singer first crossed the Dutch three percent ownership reporting threshold at Akzo Nobel in March 2017 and decreased its holding below the three percent threshold in July 2019.[159] Fourth, Barington Capital first engaged with Avon Products in December 2015, and together with Shah Capital and NuOrion Partners held 3.4% of Avon Products' shares and advocated for a sale or consideration of other strategic options.[160] The CEO of Avon Products resigned under pressure from the activist investor group in August 2017 and left the company at the end of March 2018.[161] On March 16, 2018, Barington Capital submitted a nomination letter to the management of Avon Products, notifying the company of its intention to nominate its own director slate for election at the subsequent general meeting and settlement was shortly reached on March 26, 2018.[162] Avon Products was sold to Brazil-based Natura & Co in May 2019 and the transaction closed in January 2020, when Avon Products became a subsidiary of Natura & Co and delisted from the NYSE.[163]

Lastly, Elliott Advisors first crossed the regulatory ownership threshold with respect to Hammerson's shares on July 5, 2018 when it acquired 5.26% and subsequently decreased its holdings below the regulatory ownership threshold on December 23, 2019 (it did not have a representative on Hammerson's board of directors).[164]

---

[158]*See* Rolls-Royce Holdings, *TR-1: Standard Form for Notification of Major Holdings* (Apr. 3, 2020), https://data.fca.org.uk/artefacts/NSM/data-migration/LSE20200403100004_3552712.html. *See* Rolls-Royce Holdings, *TR-1: Standard Form for Notification of Major Holdings* (Mar. 25, 2019, 9:37 AM), https://data.fca.org.uk/artefacts/NSM/data-migration/LSE20200403100004_3552712.html. (showing that ValueAct previously cut its stake from 10.94% to 9.48% on March 21, 2019).

[159]Maiya Keidan, *FACTBOX-Activist investor Elliott's top European holdings*, REUTERS (Mar. 2, 2018), https://fr.reuters.com/article/companyNews/idUKL8N1S721W?symbol=DUFN.S.

[160]Nathaniel Garnick, *Shareholder Group Calls on Avon Products Board to Explore the Sale of the Company*, SHAH CAPITAL (Jan. 29, 2018), https://www.shahcapital.com/shah-capital-releases-letter-to-avon-board/.

[161]*Avon CEO To Depart As Barington Pressure Prevails* (Aug. 3, 2017, 5:58 PM), http://www.finalternatives.com/node/35633.

[162]*Avon reaches deal with Barington Capital, avoid proxy fight*, REUTERS (Mar. 28, 2016), https://us.fashionnetwork.com/news/avon-reaches-deal-with-barington-capital-avoids-proxy-fight,674665.html.

[163]James Fontanella-Khan, *Brazil's Nature confirms $2bn deal to buy Avon,* (May 22, 2019), https://www.ft.com/content/604dfb16-7cd8-11e9-81d2-f785092ab560.

[164]*See* Hammerson, *TR-1: Standard Form for Notification of Major Holdings* (Jul. 10, 2018), https://data.fca.org.uk/artefacts/NSM/data-migration/LSE20180710143004_13712557.html; *See also* Hammerson, *TR-1: Standard Form for Notification of Major Holdings* (Dec. 30, 2019), https://data.fca.org.uk/artefacts/NSM/data-migration/LSE20191230093001_14365380.html; *see also* Sam Chambers, *Landlord Hammerson Given Reprieve as Elliott Advisors Backs Off,* THE TIMES, (Jan. 5, 2020),

The average engagement period across these five campaigns is thirty-seven months, with the shortest engagement being Elliot's intervention at Hammerson of seventeen months, and the longest ValueAct's engagement at Rolls-Royce (fifty-two months). This data is largely consistent with the reported average duration of 979 days for activist campaigns that have ended with settlement at U.S.-firms.[165]

2. Share buy-backs under European laws

One way activists can profit from an activist campaign at the expense of all other shareholders is by demanding that the firm repurchase their stake at a premium relative to market prices.[166] In contrast to the U.S., where this practice is a matter of board discretion, there are important share buy-back restrictions under EU law applicable to European issuers of listed securities, embedding the principle of shareholder equality. Namely, Directive 2017/1132, provides that share repurchases by European firms must be authorized by the general meeting.[167] This authorization should also refer to (i) the maximum number of shares that can be acquired, (ii) the time-period for which the authorization is granted (the maximum period is a matter of national law but may not exceed five years), and (iii) the minimum and maximum consideration to be paid for the repurchased shares.[168] Further, the national laws of the EU Member States may set a limit on the nominal value, or if the shares have no nominal value on the accountable part of the re-purchased shares.[169] This limit may not be lower than ten percent of the subscribed capital.[170]

To better illustrate the different modalities of implementation of Directive 2017/1132 into national law and the extent to which current national share buy-back rules allow corporate boards to fend off activist attacks by acquiring activists' shareholding with corporate funds at above-market prices, this section continues with an overview of the key share repurchase rules in the Netherlands, France, Germany, Sweden and the United Kingdom.

---

https://www.thetimes.co.uk/article/landlord-hammerson-given-reprieve-as-elliott-advisors-backs-off-xwhc7sqzs.

[165]Bebchuk et al., *supra* note 6, at 30.

[166]Mark Gerstein et al., *Hushmail: Are Activist Hedge Funds Breaking Bad?*, EUREKAHEDGE (Jul. 2014), https://www.eurekahedge.com/Research/News/1237/Are-Activist-Hedge-Funds-Breaking-Bad.

[167]Directive 2017/1132, art. 60, 2017 O.J. (L 169) 46.

[168]*Id.*

[169]*Id.* at art. 47.

[170]Directive, *supra* note 167.

The Netherlands. Dutch corporate boards may acquire their own shares for consideration (i.e., not on a free-of-charge basis) and only after obtaining an express authorization for this purpose by the general meeting of shareholders, specifying the purpose of the share re-purchase.[171] For listed firms, this authorization is valid for a maximum period of eighteen months (five years for non-listed firms).[172] The amount of shares to be acquired must not exceed fifty percent of the issued share capital[173] and the articles of association may impose additional limits or prohibit share repurchases entirely.[174] Selective share buy-backs are not expressly prohibited, provided shareholder approval is ensured, as share repurchase programs can be executed via open market repurchases on stock exchanges, private agreements with individual shareholders or option contracts.[175]

France. French corporate boards may only repurchase up to ten percent of listed firm's share capital upon authorization of the general meeting of shareholders, specifying the purpose of the share repurchase transaction.[176] The shareholder authorization is valid for a maximum period of eighteen months and the employees' representative body (the works council) should be *ex post* informed of the share buy-back decision.[177] The price of the share buy-back is also subject to important limitations and should at least amount to the last market price or the highest independent bid at the time of the buy-back transaction.[178] Selective (off-market) share buy-backs are allowed, but the above-mentioned pricing restrictions apply.[179] In addition to off-market

---

[171]Art. 2:98 para. 4 BW.

[172]*Id.*

[173]*Id.* at 2 BW.

[174]*Id.* at 4 BW.

[175]Hans Witteveen & Jeroen Sombezki, *The Netherlands Treasury Shares Guide*, IBA CORPORATE AND M&A LAW COMMITTEE 4 (May 23, 2014), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3AB49EE4-2A6C-413F-92C6-4C604422011E; *see also* Christoph Van der Elst, *The Modified Belgian Framework for Contributions in Kind, Share Buy Backs and Financial Assistance* (TILEC Discussion Paper 2009-025, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400530 (discussing that companies traded on a multilateral trading facility for the buy-back of their shares in order to comply with the equal treatment of shareholders-principle, and that other companies would have to make an offer to all shareholders.)

[176]CODE DE COMMERCE [C.COM.] [COMMERCIAL CODE], art. L. 225-209.

[177]*Id.*

[178]Patrick Jaïs & Delphine Vidalenc, *France Treasury Shares Guide*, IBA CORPORATE AND M&A LAW COMMITTEE 4 (May 23, 2014), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3AB49EE4-2A6C-413F-92C6-4C604422011E.

[179]*Id. See also* TECHNICAL COMMITTEE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, REPORT ON "STOCK REPURCHASE PROGRAMS" 9 (2004),

purchases, firms may also acquire shares by public offer or anonymously on the stock market, as well as through derivatives contracts.[180] A volume restriction of up to twenty-five percent of the average daily traded volume in the twenty-day period prior to the share buy-back transaction is applicable (except for off-market transactions).[181] Also, firms must inform ex ante the French securities regulator of their intent to initiate a share repurchase program.[182] The regulator may prevent the execution of the firm's buy-orders in the event the ex ante notification obligation is not complied with, or the share repurchase is otherwise being conducted in violation of the legal provisions governing share buy-backs under the French Commercial Code.[183]

Germany. The general meeting's approval of a share repurchase program at German listed firms can be given for a period not exceeding five years and for a maximum of ten percent of firms' shares.[184] No amount of the share capital or legally mandated reserves may be used for the payment of the repurchased shares.[185] Importantly, selective (OTC/off-market) share buy-backs are not allowed, and share repurchase programs must generally be publicly announced and directed to all shareholders, in line with the principle of shareholder equality.[186]

Sweden. Listed Swedish companies may also acquire up to ten percent of the share capital upon authorization of the general meeting for which a qualified, two-thirds majority of the votes cast and shares represented at the general meeting is required.[187] Share repurchases can be addressed to all shareholders,[188] but also alternative methods for repurchase are allowed under the Swedish Companies Act,[189] provided

---

https://www.iosco.org/library/pubdocs/pdf/IOSCOPD161.pdf (noting that the purchase price for off-market / selective repurchases should not exceed the on-exchange price in the central order book at the time of the repurchase).

[180]Jaïs & Vidalenc, *supra* note 178, at 4.

[181]*Id.* at 3.

[182]CODE DE COMMERCE [C.COM.] [COMMERCIAL CODE], art. L. 225-212.

[183]*Id.*

[184]AktG, art. 71.

[185]*See* Andreas Hackethal & Alexandre Zdantchouk, *Share Buy-Backs in Germany: Overreaction to Weak Signals?*, 1, 4 (Johann Wolfgang Goethe-Universität Frankfurt am Main, Working Paper Series: Fin. & Acct. No. 128, 2004).

[186]*See* Hackethal & Zdantchouk, *supra* note 185, at 4-6 (discussing the legal framework for share buy-backs in Germany); *see also* TECHNICAL COMMITTEE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, *supra* note 179, at 10; *see also* Emanuel P. Strehle, *Germany Treasury Shares Guide*, 2014 IBA CORP. AND M&A LAW COMM 4, https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3AB49EE4-2A6C-413F-92C6-4C604422011E.

[187]19 ch. 15, 18 §§ (AKTIEBOLASLAG [SFS] 2005:551) (Swed.).

[188]19 ch. 20 § AKTIEBOLASLAG (SFS 2005:551) (Swed.).

[189]19 ch. 14 § AKTIEBOLASLAG (SFS 2005:551) (Swed.).

they are conducted on an exchange, an authorized marketplace, or any other regulated market in the European Economic Area or authorized by the Swedish Financial Supervisory Authority.[190]

United Kingdom. Under the rules of the Financial Conduct Authority, firms listed on the Premium Listing-segment of the London Stock Exchange have to comply with specific restrictions on share buy-backs. The maximum number of shares that can be acquired without making a tender offer to all shareholders is fifteen percent, provided shareholder approval is granted and the share acquisition price is not higher than five percent above the average market price in the last five business days preceding the day of repurchase.[191]

In summary, the European regulations on share buy-backs reviewed in this section show that directors' discretion to engage in share buy-back programs are limited and conditional upon time-restricted advance shareholder approval.[192] Selective share buy-backs from individual shareholders are either entirely prohibited (e.g., Germany) or subject to price and/or volume restrictions (e.g., France and UK, respectively). From this perspective, it is unlikely that hedge funds would be successful in extracting short-term gains by demanding selective share repurchases at above-market prices from European firms and their management. As a comparison, under the Delaware General Corporation Law, directors do not need shareholder approval when repurchasing shares, including (selectively) from individual shareholders, and there is no limit on the number of shares that may be repurchased or the price to be paid.[193]

3. Voting Support for Directors Appointed or Nominated as Part of Settlements

In order to determine whether directors added to corporate boards via settlements are (dis)favored by all other investors, Bebchuk et al.

---

[190] 19 ch. 14 § AKTIEBOLASLAG (SFS 2005:551) (Swed.).

[191] *See* Financial Conduct Authority, LISTING RULES ch. 12.4.1 (2020), https://www.handbook.fca.org.uk/handbook/LR/1/. Additionally, the price must comply with the applicable criteria set out in ESMA's technical regulatory standards under the Council Regulation (EU) 596/2014, 2014 O.J. (L 173).

[192] Nonetheless, directors do have a fair amount of discretion if the shareholder consent is given for an extended period of time (e.g., a five-year authorization would be legal in Germany), in which case the board can decide to execute share repurchase programs conforming with the terms of the shareholder authorization with respect to purpose, price and other conditions that may be set out therein.

[193] *See* DEL. CODE ANN. tit. 8, §§ 151, 160 (2001); *see also* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 150 (2004).

analyzes the voting support and withheld votes cast for these directors and find that they receive significantly higher voting support and less withheld votes, compared to incumbent directors.[194] As shown in Table 4 *supra*, the voting results of general meetings at European target firms listed on a European stock exchange that have reached a settlement with an activist, present somewhat different results.[195] Activist-affiliated directors received lower than the average support cast for all other directors standing for election.[196] In comparison to incumbent directors standing for re-election, activist-affiliated directors similarly received lower than the average support voted for incumbent directors (at Rolls-Royce's 2016 through 2019 AGMs, and at the 2015 AGM at AMG), and marginally higher support (0.1%).[197] However, activist-affiliated directors also received a higher number of withheld votes, than the average number of ("for"/"withhold") votes cast for re-elected incumbent directors at the 2019 AGM at Premier Foods.[198]

In comparison to newly-elected directors (other than as part of a settlement), activist-affiliated directors received lower support (at Premier Foods (by 1.7%), and at Rolls-Royce during each of the 2016, 2017 and 2019 AGMs).[199] In the instances where a partial director slate submitted for an election included directors nominated in consultation with the activist (at Akzo Nobel) or affiliated with the activist (AMG), those directors received lower support than independent directors agreed upon under the settlement.[200]

Interestingly, activist-affiliated directors at the three European firms listed on the NYSE received higher than the average support for re-elected incumbent directors, consistent with the findings in the Bebchuk et al. paper.[201] Albeit anecdotal, one explanation for the different voting results for activist-affiliated directors at European-headquartered firms listed on European and American stock exchanges, can be associated with the fact that the stock exchange listing has a direct effect on the composition of the shareholder base of the listed firm.[202] As such, American investors who would appear more frequently on the shareholder register of European

---

[194] *See* Bebchuk et al., *supra* note 6, at 33.

[195] *See supra* Table 4.

[196] *See supra* Table 4.

[197] *See supra* Table 4.

[198] *See supra* Table 4.

[199] *See supra* Table 4.

[200] *See supra* Table 4.

[201] *See* Bebchuk et al., *supra* note 6, at 33.

[202] *See generally* Kobi Kastiel & Abi Libson, *Global Antitakeover Devices*, 36 YALE J. ON REG. 117, 141 (2019) (arguing that firms may use foreign incorporation and dual listings as potent antitakeover devices, insulating firms from hostile bidders and activist investors).

firms listed on the NYSE, have a higher exposure, better familiarity, and generally, more favorable view of activists' representation on corporate boards and the changes the activists aim to pursue in the course of their campaigns. In Europe, activist-appointed directors have been around for a shorter period of time and even in a jurisdiction with predominantly dispersed ownership structures such as the UK, investors are skeptical of having an activist occupying a seat on the board.[203] Cultural differences may also play a role here, given that the hostile approach commonly associated with U.S.-based activists (such as Elliott Advisers, featured in two of the eight European interventions analyzed herein) are generally perceived as counter-productive. The tide for American hedge funds in Europe is changing, however, as European-listed securities are increasingly owned by foreign institutional investors.[204]

B. *DIRECTOR ENTRENCHMENT AND OWNERSHIP CEILINGS UNDER EUROPEAN LAW*

As Table 3 *supra* illustrates, European settlements typically include standstill provisions that prevent activists from waging a proxy fight and sometimes impose maximum ownership limits on activist investors for the duration of the settlement agreement.[205] Corporate boards negotiating standstill provisions with activists may be driven by their *bona fide* belief that the activist intervention is not in the best interest of the firm and that by avoiding a proxy contest, boards would not unduly spend their time and resources on running a director election campaign and can instead focus on pursuing their long-term agenda.

Ownership ceilings, however, are a lock-in mechanism that may serve as an insulation device for boards intending to limit investor

---

[203] *See* Hollinger, *supra* note 2, at 1, 3.

[204] *See generally* DIDIER DAVYDOFF, OBSERVATOIRE DE L'EPARGNE EUROPEENE & INSEAD OEE DATA SERVICES, FINAL REPORT: WHO OWNS THE EUROPEAN ECONOMY? EVOLUTION OF THE OWNERSHIP OF EU-LISTED COMPANIES BETWEEN 1970 AND 2012, 6 (2013) *(providing empirical evidence that the foreign ownership at EU-listed firms quadrupled from ten percent in 1975 to forty-five percent in 2012 and that institutional investor ownership increased from ten percent in the years up to 1990 to twenty-one percent in 2012); see also* Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493, 525 (2015) (citing empirical evidence that foreign ownership at German listed firms on the DAX-index increased from thirty-six percent in 2001 to fifty-five percent in 2013); *see generally*, CARINE GIRARD & STEPHEN GATES, *THE PROFESSIONALIZATION OF SHAREHOLDER ACTIVISM IN FRANCE*, 2 (Vol. 3, 2011), https://www.conference-board.org/director-notes (reviewing case studies of activist interventions by American and British hedge funds at French listed firms).

[205] *See supra* Table 3 (providing further details on the applicable ownership ceilings per settlement).

influence and decrease the likelihood of their ouster as a result of a successful activist campaign or a takeover bid.[206] During the hostile takeover wave of the 1980s,[207] corporate boards regularly resorted to ownership ceilings, in combination with new share issuances, to fend off unwanted hostile bidders as part of the "poison pill-defense."[208] A poison pill incorporates an ownership ceiling, at typically fifteen to twenty percent of the outstanding shares, and once the hostile bidder crosses this threshold, the poison pill is triggered and all shareholders, with the exception of the hostile bidder that crossed the ownership ceiling, have the right to subscribe to new shares issued for the purpose of diluting the stake of the bidder in the target firm.[209]

In contrast to Delaware laws, European shareholders have a general pre-emptive right with respect to new share issuances, which may be circumvented in very limited circumstances only with prior shareholder approval.[210] Thus, selective share issuances (a key element for the operation of a U.S.-style shareholder rights plan (poison pill) in addition to the imposition of ownership ceilings) which are adopted by the board without prior shareholder approval, would in most circumstances be illegal under European company laws.[211] Stand-alone ownership caps are considered a pre-bid takeover defense under European takeover law as a technical barrier to acquiring shares in the target firm, akin to golden shares, share transferability restrictions or pyramids and cross-shareholdings.[212] From a strictly formalistic standpoint, European corporate boards are not precluded under the national European company laws from adopting ownership ceilings, and the EU Takeover Bids Directive does not require shareholder approval of pre-bid defenses, unless

---

[206]Mike Burkart & Samuel Lee, *The One Share-One Vote Debate: A Theoretical Perspective* 42 (ECGI Fin. Working Paper No. 176/2007, 2007).

[207]*See generally*, Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 4.3 J. APP. CORP. FIN. 49 (1991).

[208]*See* Unocal Corp. v. Mesa Petroleum Co., 493 A. 2d 946, 954-57 (Del. 1985) (introducing the "reasonableness" and "proportionality" tests for assessing the legality of takeover defenses introduced in response to a threat posed by a hostile bidder).

[209]*Id.*

[210]*See, e.g.,* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl. I p. 2637, last amended by Gesetz [G], (Jan. 1, 2020), art. 186 (Ger.), https://dejure.org/gesetze/AktG/186.html (providing that the shareholder right of pre-emption may only be restricted if expressly provided in the decision on the increase of the shareholder capital, adopted at a general meeting with three-quarters of the share capital represented); *see also* 4 ch. 2 § Aktiebolaslag (SFS 2005:551) (Swed.).

[211]*See* AtkG, *supra* note 210.

[212]*Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, at 74-75 (Jan. 10, 2002) (listing the most important barriers to takeover bids, among which are ownership caps).

there is a pending takeover bid which may be frustrated by the adopted pre-bid defenses (provided the pre-bid defenses are not yet (partially) implemented).[213] This is in contrast to post-bid defenses, which the board cannot implement without shareholder approval, at least in jurisdictions that have transposed the "board neutrality rule" under the EU Takeover Bids Directive.[214]

The Directive does provide, however, that pre-bid defenses, such as voting or share transfer restrictions, shall not apply with respect to the bidder for the duration of the bid and shall have no effect at the general meeting deciding on the adoption of post-bid defenses (the "breakthrough rule").[215] However, the transposition of the breakthrough rule, and the board neutrality rule, was made optional under the Directive and left to the disposition of the individual EU Member States to implement.[216] In view of its disruptive nature to well-established deviations of the one-share-one-vote rule in many EU Member States, the vast majority of European jurisdictions decided not to implement the breakthrough rule, keeping the structural pre-bid defenses traditionally featured in their local companies in place.[217]

Importantly, in the national legal orders where ownership ceilings are part of the European corporate governance landscape, like many other deviations from the one-share one-vote principle that operate as pre-bid technical barriers,[218] they are incorporated in the company's articles of association and are therefore, approved by the shareholders.[219] The

---

[213]Council Directive 2004/25/, art. 9(3), 2004 *O.J. (L 142) 12, 19 (EC).*

[214]*Id.* at art. 9, para. 1.

[215]*Id.* at 20-21.

[216]*Id.* art. 21; *see* Guido Ferrarini & Geoffrey P. Miller, *A Simple Theory of Takeover Regulation in the United States and Europe*, 42 CORNELL INT'L L.J. 301, 317-31 (2009) (discussing the implementation of Council Directive 2004/25/EC in France, Germany, Italy, Spain, and the United Kingdom).

[217]*See Report from the Commission to the European Parliament*, *The Council, The European Social and Economic Committee and the Committee of the Regions: Application of Directive 2004/25/EC on Takeover Bids*, EUROPEAN COMMISSION, at 3 (June 28, 2012), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0347&from=EN (noting that only three EU Member States—Estonia, Latvia, Lithuania—had adopted the breakthrough rule).

[218]*See* Institutional Shareholder Services, Sherman & Sterling, L.L.P., & European Corporate Governance Institute, at 5-6, 14 (2007), http://ec.europa.eu/internal market/company/docs/shareholders/study/final-reporten.pdf.

[219]*See* Ronald J. Gilson, *The Political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment*, 61 FORDHAM L. REV. 161, 180 (1992) ("[Technical barriers] are erected by statutes and statutorily authorized company regulations that allocate power between various participants in the business enterprise, such as shareholders, management, labor and, in some member states, the national government."); *see also* Allen Ferrell, *Why Continental European Takeover Law Matters*, at 2-6 (Harvard John. M. Olin

introduction of pre-bid technical defenses by corporate directors at their discretion and outside of a takeover bid-scenario, thus, may create specific shareholder-manager agency costs that are traditionally (at least in this particular context), uncommon at European firms.[220]

To control for the discretionary adoption of pre-bid technical barriers by entrenched directors, and in the absence of a statutory rule to this effect outside of the takeover bid-context, companies may either adopt bylaws or amend their articles of association to require that bilateral agreements between a target firm's board and individual shareholder(s) that incorporate ownership caps, or other technical barriers to unsolicited bids or activist interventions, ought to be approved by the general meeting of shareholders. If incumbent directors would not voluntarily move to adopt such shareholder ratification requirements, (associations of) institutional investors can collectively pressure companies to submit settlement agreements introducing technical barriers vis-à-vis bidders and hedge fund activists to ex-post shareholder approval, and can cast against/withhold votes at the re-election of incumbent directors that have entered into these agreements. Also, proxy advisory firms can play a role by picking up this issue in their voting guidelines and recommending a withhold/against vote for directors implementing insulation devices in settlement agreements, without consulting the shareholder vote. In the U.S., this type of activism by institutional investors has prompted companies to abandon non-shareholder approved poison pills and to de-

---

Discussion Paper No. 454, 2003) (discussing the dynamics between technical and structural takeover barriers in European takeover law).

[220]One may also argue that when ownership caps introduced in the terms of a settlement agreement, vis-à-vis an individual shareholder as a counterparty to the agreement, are a violation of the shareholder equality-principle that is commonly enshrined in European company laws and is a general principle of the Council Directive 2004/25/EC, 2004 *O.J. (L 142) 12, 17 (EC)*. Under European laws shareholder approval is required for corporate actions that may discriminate against (a class of) shareholders such as share issuances eliminating the statutory shareholder right of pre-emption, selective share repurchases or where directors may have a conflict in the broad sense of the word (hostile takeover bids and mergers); *see* Art. 2:92 para. 9 BW (Neth.) (providing that unless provided differently in the articles of incorporation, all rights and obligations attached to shares are equal in proportion to their nominal amount, and "[t]he open corporation (*'naamloze vennootschap'*) shall treat the shareholders, respectively, the holders of depository receipts who are in the same position, in the same way."); *see also* 1 ch. 1 § AKTIEBOLASLAG (SFS 2005:551) (Swed.) (Equality Principle: providing that all shares carry equal rights unless different share classes are issued); *see also* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, art. 53a (Ger.) https://dejure.org/gesetze/AktG/53a.html (providing that shareholders ought to be treated equally); *see also* Companies Act 2006, c.46, § 172 (UK) (providing that directors have a duty to "act fairly as between the members of the company"); *see also* Council Directive 2004/25/, *art. 3(1)(a),* 2004 *O.J. (L 142) 12, 17 (EC) (providing that "*all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.").

stagger corporate boards—two defensive mechanisms that have frequently been combined to insulate corporate management from hostile takeover threats.[221]

The potentially conflicted preferences between incumbent directors and shareholders, may make the outcome of such shareholder votes on the terms of the settlement uncertain. For example, shareholders may prefer that the hedge fund activist continue with the intervention, acquire an even higher percentage of the outstanding shares, or cross the ownership threshold for launching a takeover bid.[222] If given the chance to vote, institutional investors would also have a proper forum to voice their concerns with activists gaining board representation without committing to hold a specified percentage of shares in the long-term, and they may also recommend their own directors for inclusion on the management-sponsored director slate.[223]

Alternatively, pre-bid technical barriers introduced without shareholder approval at European firms can be made subject to judicial review. For example, the Delaware courts in the 1980s developed an intermediate standard of review (called enhanced scrutiny) to assess the validity of defensive measures (poison pills) adopted by incumbent directors in change-of-control contests.[224] Unlike the business judgment rule, which is in general deferential to directors' (unconflicted) business decisions, the intermediate (enhanced scrutiny) standard of review adopted in *Unocal v. Mesa Petroleum Co.*, subjects defensive measures to a two-prong test of reasonableness and proportionality, meaning that directors' defensive tactics should be reasonable and proportional to the threat posed by the hostile bidder.[225]

The *Unocal*-test was also applied in the context of investor activism in the recent *Sotheby's* case, where the validity of a two-tier poison pill (with separate ownership ceilings applicable for active and passive

---

[221]*See* INSTITUTIONAL SHAREHOLDER SERVICES, UNITED STATES PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS EFFECTIVE FOR MEETINGS ON OR AFTER FEBRUARY 1, 2020, 25 (Nov. 19, 2019), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf (listing the conditions that shareholder and management proposals, introducing, respectively ratifying a poison pill, should fulfill for ISS to recommend a vote "for" the proposal).

[222]*See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance and Firm Performance*, 64 J. FIN. 1729, 1743 (2008) (showing that hedge funds have used control acquisition of the target firm as a tactic in their activist campaigns in 4.2% of all events in their sample).

[223]*See* State Street Global, *supra* note 143, at 2 (arguing that it is not uncommon in U.S. settlements for the standstill provisions in settlement agreements to be of longer duration than the activist board representation rights).

[224]Unocal Corp. v. Mesa Petroleum Co., 493 A. 2d 946, 953-57 (Del. 1985).

[225]*Id.*

investors) was challenged before the Delaware Court of Chancery by an activist investor that had initiated an activist campaign at Sotheby's.[226] Even though a takeover bid was not made by any of the activist investors, the court held that the plaintiff (activist investor), in conjunction with other activist hedge funds, had formed a wolf pack, and together presented a threat of a creeping control acquisition of Sotheby's, justifying the adoption of a poison pill-defense employed by Sotheby's board.[227] Thus, under the facts of *Sotheby's*, defensive tactics implemented vis-à-vis hedge fund activists that other activists take part in jointly, or otherwise would support, can amass a critical amount of the outstanding shares, and would be reviewed under the enhanced scrutiny standard if their conduct presents a threat of acquiring a creeping control of the firm.[228] The *Sotheby*-case therefore, is an important precedent of the application of the *Unocal*-test to (a group of) activist investors in instances when no hostile tender offer is pending.

From a European perspective, creeping control acquisition scenarios by an activist investor are unlikely in view of the mandatory bid rule requiring any shareholder with a qualifying amount of approximately thirty percent of the shares to launch a takeover bid for all outstanding shares.[229] Nonetheless, the extent to which a wolf pack of hedge funds that have informally coordinated their share purchases on the open market will incur the European mandatory bid obligation critically depends on whether national regulatory authorities would find wolf packs to have formed a concert party under the facts of each case.[230] Generally, European regulatory and judicial authorities (at national level) would have to show that the group of activist hedge funds forming the wolf pack, cooperate "on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control"[231] of the target firm or at frustrating the

---

[226]Third Point LLC v. Ruprecht, No. 9469 – VCP, 1, 15 (Del. Ch. May 2, 2014).

[227]*Id.* at 21.

[228]*Id.* at 20.

[229]Council Directive 2004/25, art. 2, 2004 O.J. (L 142) 12, 17 (EC) (failing to provide a specific threshold triggering the mandatory bid rule—but has left this to be determined at the level of the individual EU Member States, which have typically imposed in their national takeover laws a threshold of thirty percent or one-third of the outstanding shares).

[230]*See* John C. Coffee Jr. & Darius Palia, *The Impact of Hedge Fund Activist: Evidence and Implications*, 1, 33 (ECGI, Working Paper No. 266/2014),

https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2881&context=faculty_scholarship (explaining that in the U.S., where no mandatory bid rule exists on the federal or state level, wolf packs of hedge funds are analyzed from the perspective of whether a "group" is formed under ownership disclosure rules (i.e. Exchange Rule 13-d, 17 CFR § 240.13d)).

[231]Council Directive 2004/25, art. 2, 2004 *O.J. (L 142) 12, 15 (EC).*

successful outcome of a bid.[232] Even though control acquisition is not a common goal of a wolf pack of hedge funds, the sole fact that these funds may have an understanding to support (including through voting at general meetings) the pursuit of the lead activist's objectives at the target firm, may lead to a finding of a concerted action aimed at acquiring control, in which case a mandatory bid obligation will ensue.[233] For example, under UK takeover rules, if a shareholder was (privately) approached by the proponent of a "board control-seeking" proposal before the proposal was submitted to target management, the UK Takeover Panel would "examine in detail the correspondence and co-operation between the parties" in order to determine whether that shareholder was acting in concert with the proponent of a "board control-seeking" proposal,[234] in which case a mandatory bid may have to be made by the concert parties, provided they hold in aggregate at least thirty percent of the outstanding shares.

Importantly, interventions of hedge fund activists may, depending on the demands and course of the campaign, present target directors with the same or similar conflicts of interests as hostile takeover bid situations.[235] Activists may not only launch a takeover bid for the target company (the most aggressive tactic that is ordinarily preceded by less hostile, but unsuccessful, engagement outcomes), but may also initiate contested director elections (a proxy contest) for the removal of all or a majority of the incumbent directors.[236] In these situations, the same director conflict and entrenchment motives that exist in the takeover bid context

---

[232]*See Germany Closes on LSE Bid,* N.Y. TIMES, (Oct. 20, 2015), at A1 (showing in 2005 the German securities regulator investigated whether two hedge funds, The Children's Investment Fund and Atticus Capital have acted in concert (and as a result, incurred the obligation to launch a takeover bid for all remaining outstanding shares of Deutsche Börse) in blocking the merger between Deutsche Börse AG and London Stock Exchange), https://www.nytimes.com/2005/10/20/business/worldbusiness/germany-closes-case-on-lse-bid.html.

[233]Ana Taleska, *Shareholder Proponents as Control Acquirers: A British, German and Italian Perspective on the Regulation of Collective Shareholder Activism via Takeover Rules,* 19 EUR. BUS. ORG. L. REV. 797, 804 (2018) (discussing the conditions when submitting (or threatening to submit) a "board control-seeking" shareholder proposal by a group of investors (concert party) may trigger the mandatory bid-rule under the UK Takeover Code).

[234]*Id.* at 804. The Panel on Takeovers and Mergers, *Shareholder Activist and Action in Concert: Statement by the Code Committee of the Panel Following the External Consultation Process on PCP 10,* 1, 11 (2002), http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp10.pdf.

[235]Taleska, *supra* note 233, at 804.

[236]*See id.*at 831 (discussing that a group of investors submitting director slates at Italian listed firms would not be presumed to act in concert and acquire corporate control, if the dissident slate is for the election of less than majority board seats). In some European jurisdictions, the submission of a director slate for the election of a full or majority director slate by a concert party, can qualify as control acquisition, triggering the mandatory bid rule.

can also exist in the context of hedge fund activism, such as the uncertainty associated with contested director elections and the fear of being removed from office (this is one of the main reasons incumbent directors enter into settlements with activists in the period leading to a general meeting).[237] Similarly, and as illustrated in the *Sotheby's* opinion, activist investors may also pose a threat to corporate long-term strategy.[238]

The development of a judicial standard to review the legality of defensive tactics against director entrenchment can be critically important for European corporate governance, given that most European firms currently do not adhere to the "board neutrality" rule, giving incumbent directors ample discretion to adopt pre-bid and post-bid defensive measures against hostile bidders and hedge fund activists.[239] A judicial standard of review would, therefore, check defensive measures that were not ratified by the shareholders for reasonableness, proportionality or any other criteria European courts would introduce when developing a separate standard of review for defensive tactics.[240] Useful European precedents in this context are the opinions by the Dutch Enterprise Chamber and the Dutch Supreme Court in the 2002 *Rodamco North America* case (the *RNA*-opinion), that assessed the legality of the defensive measures adopted by the Dutch real estate firm Rodamco North America against the hostile takeover bidder, the Australian property firm Westfield Holdings, Inc.[241] The Dutch courts argued that defensive measures should be adequate, proportionate and temporary in nature, and adopted whenever the continuity of a company's strategy, as well as the interests of the company and its shareholders, is threatened—a standard of review that resonates with the reasonableness and proportionality tests under *Unocal*.[242]

---

[237] *Id.* at 831, 833.

[238] *Third Point*, No. 9469 – VCP at 4.

[239] Christian Kirchner & Richard W. Painter, *European Takeover Law – Towards a European Modified Business Judgment Rule for Takeover Law*, 2 EUR. BUS. ORG. L. REV. (2000).

[240] *Id.* (discussing the advantages and disadvantages of adopting a modified business judgment rule in Europe for reviewing director takeover defenses and arguing that if a modified business judgment rule would be adopted in Germany, the courts should follow the Delaware-approach under *Unocal* and put the burden of proving that the defensive measures were reasonable on the board of directors of the target firm).

[241] Rodamco North America/VEB, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 18 April 2003, NJ 2003 (J.M.M. Maeijer) (Neth.)

[242] RICHARD G.J NOWAK, *Corporate Boards in the Netherlands*, *in* CORPORATE BOARDS IN EUROPEAN LAW: A COMPARATIVE ANALYSIS (Paul Davies, Klaus J. Hopt, Richard Nowak & Gerard van Sollinge (eds.)) 438 (2013) (arguing that a takeover defense adopted for a six-month period would qualify as "temporary" under the RNA-test; however, pre-bid defenses enshrined in the firm's articles of association are considered permanent and cannot be reviewed under the *RNA*-standard).

Importantly, the *RNA*-test does not apply exclusively to hostile tender offers.[243] Activist interventions may also be reviewed under the *RNA*-standard, if their objective is to implement a different corporate strategy and/or board changes.[244]

Lastly, the Delaware courts have also tested different ownership thresholds introduced via poison-pills by corporate directors, providing the legal and investment community with a valuable planning tool on the generally acceptable defensive tactics.[245] Interestingly, ownership ceilings implemented in the European settlements reported in this article (of between ten percent to fifteen percent of outstanding/voting shares) are within the range of reasonableness approved by the Delaware courts for poison pill-defenses, even though the European mandatory bid rule would only kick-in at (around) thirty percent ownership, depending on the jurisdiction.[246] This could be seen as American activists importing judicially (Delaware)-tested contractual terms into European corporate governance.

IV. DIRECTOR NOMINATIONS UNDER EUROPEAN LAWS

As Section II *supra* illustrates, the most important feature of settlements is the agreement between the activist investor and the target board on specific board changes. These changes are implemented via two modalities: (i) direct appointment of directors to the corporate board with immediate effect, subject to a confirmatory shareholder vote at the next general meeting, or (ii) nomination of the agreed-upon director candidate as part of the board-sponsored director slate for election at the next general meeting. The extent to which activists and boards can agree on a direct appointment or a nomination for election of the respective director (nominee), is largely a function of national company law provisions.[247]

---

[243] *See id.*

[244] *See id.*

[245] *See generally*, *Third Point*, No. 9469 – VCP at 1, 10 (showing Sotheby's implementation of different poison pill defenses for active and passive investors); *see generally* Moran v. Household Int'l., Inc., 500 A.2d 1346, 1355 (Del. 1985).

[246] *See generally* Third Point, No. 9469-VCP at 1, 10 (showing that Sotheby had implemented a ten percent ownership ceiling as part of its poison-pill defense for active investors filing Schedule 13D with the SEC, and a fifteen percent ownership ceiling for passive investors, filing Schedule 13G with the SEC); *Moran,* 500 A.2d at 1355 (validating the poison pill implemented by Household International, Inc., that was designed to be triggered upon the crossing of a twenty percent ownership threshold).

[247] *E.g.* DEL. CODE ANN tit. 8, § 223 (2001) (showing Delaware code as a function of national company law provisions).

Direct appointments with immediate effect are generally possible in jurisdictions where firms are authorized under the respective company law or firm's charter/bylaws or articles of association to expand the board and add new directorships for a period expiring at the subsequent annual general meeting (e.g., the U.S. State of Delaware and the UK).[248] Direct director appointment rights granted to activists as part of the settlement, however, may disenfranchise long-term institutional investors as direct director appointments circumvent the general meeting and shareholders have no opportunity to cast a vote on the new director addition, at least until the next general meeting.

Continental European company laws typically do not allow for corporate boards to create new directorships but, in some limited instances, may grant the power to the board to fill in vacancies resulting from resignation or death of an incumbent board member. In the sections that follow, I provide an overview of boards' prerogatives under Dutch, German, French, Swedish and UK law in terms of whether corporate boards can (i) directly appoint board members (as a result of newly created directorships, or resignation/death of a board member), or (ii) can only agree with an activist on director nominations forming part of the board-sponsored slate at the next director election. In any event, board-sponsored director nominees receive very high shareholder support, and the likelihood that the activist will obtain the board representation negotiated under the settlement and put for a shareholder vote is fairly certain.[249]

Board nomination practices vary on the firm and jurisdictional level, primarily because of different board composition rules.[250] However, all European listed firms, in compliance with the national corporate governance codes, have a nomination committee in place responsible for

---

[248]*See generally* DEL. CODE ANN. tit. 8 § 223 (2001) (helping to prove the British 2006 Companies Act does not deal explicitly with direct director appointments or expansion of the number of directorships by the board and companies are free to regulate this issue in the articles of association as they see fit).

[249]Todd Sirras & Austin Vanbastelaer, *2019 Say on Pay & Proxy Results*, HARV. L. SCH. FORUM ON CORP. GOVERN. (Apr. 18, 2019), https://corpgov.law.harvard.edu/2019/04/18/2019-say-on-pay-proxy-results/ (presenting evidence that the average director election vote at Russel 3000 companies in 2018 was 95.5%);

Arnaud Cave et al., *2018 European Voting Results Report*, INSTITUTIONAL SHAREHOLDER SERVICES (2018), 1, 21 https://www.issgovernance.com/file/publications/2018_European_Voting_Results_Report.pdf (showing that the dissent to management-sponsored proposals at European firms at the 2018 general meetings was 5.7% at French, 4.6% at German, 3.3% at Dutch and 2.9% at British firms).

[250]*See* Sophie Nachemson-Ekwall & Colin Mayer, *Nomination Committees and Corporate Governance: Lessons from Sweden and the UK*, 1-2 (Saïd Bus. Sch., Working Paper No. 2018-12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3170397.

evaluating and selecting candidates for nomination at general elections.[251] Nomination committees in jurisdictions with predominantly dispersed ownership structures, such as the U.S. or the UK, are typically composed of majority independent directors, whereas the independent director-requirements are more lenient under Continental European corporate governance codes.[252] Further, the presence of shareholder representatives on nomination committees is uncommon.[253] The role of a nomination committee composed entirely of board members is to keep the nomination process fair to all shareholders and not beholden to the interests of any specific shareholder.[254] This goal is hardly attainable in firms with concentrated ownership structures, where a majority or controlling shareholder would typically (informally) dominate the board nomination and election process.[255]

Activist investors more frequently engage with, and have a higher chance of running a successful campaign with, firms that have dispersed ownership structures and privately-agreed settlements between the board and an activist investor.[256] These relationships result in placing an activist-affiliated nominee on the board-sponsored director slate without consulting with or opening up the nomination process to other investors.[257] This can undermine the transparency and the integrity of the board-sponsored director nomination process.[258]

In order to determine the dynamics of the director nomination process and the role played by shareholders in the composition of board-sponsored director slates in corporate elections, the sections that follow analyze board nominations, and composition rules and practices in selected European jurisdictions.

---

[251] *See id.*

[252] *See id.* at 2; *see infra* Table 5 (listing independent director requirements for nomination committees at German, French and Dutch listed firms).

[253] *See infra* Part III, Section C (Sweden is an exception with an external nomination committee composed mainly of shareholders designated to conduct the director nomination process).

[254] *See* Nachemson-Ekwall & Mayer, *supra* note 250, at 10.

[255] *Id.*

[256] *Id.* at 9.

[257] *Id.* at 12-13.

[258] *See* Nachemson-Ekwall & Mayer, *supra* note 250, at 12-13.

A. *THE NETHERLANDS*

Large Dutch corporations—with at least 100 employees, works council and a minimum issued capital set by a statute[259]—have a duty to establish a two-tier governance structure, comprised of a management and a supervisory board of directors.[260] The management board members are appointed by the supervisory board members and the supervisory board members are elected by the shareholders at a general meeting.[261] The supervisory board may submit director slates for election at the general meeting, whereas employees and shareholders have the right to recommend candidates to the supervisory board to be included in the board-sponsored slate.[262] Supervisory board members are typically elected for a four-year period (in line with the maximum statutory term) and staggered boards are a common practice in the Netherlands.[263]

Board-Sponsored Director Nominations. At firms with a two-tier board structure, the supervisory board nominates director candidates for election at the general meeting.[264] The supervisory board can delegate this task to the selection and appointment committee, which establishes criteria for the nomination process and makes specific proposals for management and supervisory director nominees to the supervisory board. [265] There is a general obligation for the supervisory board under the Dutch Corporate Governance Code to ensure that the procedure for selection and appointment of the management and supervisory board members is formal and transparent.[266] The selection and appointment committee reports directly to the supervisory board with respect to these matters.[267]

Board nominations generally come from the supervisory board itself, taking into account that the number of non-independent supervisory board members should be less than one-half of the total number of

---

[259]Art. 2:153 para. (2)(a) BW (Neth.) (setting the minimum capital requirement via a Royal Decree from October 1, 2004 at €16 million).

[260]Art. 2:154 BW.

[261]Art. 2:162 BW.

[262]Art. 2:158 BW.

[263]State Street Global Advisors, *Board Accountability in Europe: A Review of Director Election Practices Across the Region*, 2 (May, 2018), https://www.ssga.com/investment-topics/environmental-social-governance/2018/05/board-accountability-in-europe-2018.pdf [hereinafter State Street Global Advisors, Board Accountability in Europe].

[264]De Nederlandse, CORPORATE GOVERNANCE CODE [CORPORATE GOVERNANCE CODE], 22-23.

[265]*Id.*

[266]*Id.* at 21.

[267]*Id*. at 22.

supervisory board members.[268] A distinct feature of the Dutch corporate governance system[269] is that the supervisory board typically nominates directors for election and the general meeting can reject supervisory board nominations with an absolute majority of the votes cast that represent at least one-third of the firm's share capital.[270] In this event, the supervisory board has to nominate another director for consideration by the general meeting.[271] If the general meeting neither rejects nor appoints the nominated director, the supervisory board can appoint the nominated director in its own right.[272] Dutch firms may also provide for binding director nominations by the supervisory board (or by the board of directors in firms with one-tier board structure) in their articles of association.[273]

Major Shareholder Board Representation. Generally, individual shareholders have no direct right of appointment to the supervisory board of large, publicly-held Dutch corporations.[274] However, listed Dutch firms that do not qualify as large corporations can provide in their articles of association that up to one-third of all supervisory board members can be appointed by parties other than the general meeting.[275] Under the Dutch Corporate Governance Code, however, a shareholder with at least ten percent ownership cannot have more than one representative on the supervisory board.[276]

Employees' Right to Recommend Directors. Even though all supervisory board members' nominations are made by the supervisory board, one-third of the nominations have to be recommended to the supervisory board by the employee-representative body (the works council).[277] The supervisory board may object to a recommendation by the works council if the nominated director is unable to perform the director's

---

[268]CORPORATE GOVERNANCE CODE *supra* note 264, at 20.

[269]Art. 2:158 para. 9 BW; *see supra* note 139 and accompanying text (explaining the criteria for large corporations under the Dutch Civil Code).

[270]Art. 2:158 para. 9 BW.

[271]*Id.*

[272]*Id.*

[273]*See generally* Bastiaan Kemp & Sebastian Renshof, *The Limited Power for Shareholders to Appoint and Dismiss Management Board Members in Dutch Listed Companies*, 17(2) EUR. COMP. L. J. 37 (2020) (providing empirical evidence that a majority of Dutch-incorporated listed corporations provide for binding director nominations by the supervisory board/board of directors in their articles of association). *See also* Bastiaan Kemp, Philippe Hezer, & Sebastian Renshof, *Limiting Shareholder Power in Dutch Listed Companies*, UNIV. OF OXFORD: BUSINESS LAW BLOG (May 21, 2020), https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/limiting-shareholder-power-dutch-listed-companies.

[274]*See* Art. 2:132 BW.

[275]*See* Art. 2:134 para. 2 BW.

[276]*See* De Nederlandse, *supra* note 264, at 22.

[277]*See* Art. 2:158 para. 6 BW.

duties, or the board will be improperly constituted with the election of the recommended director.[278] Conversely, if the works council objects to the election of a supervisory board's nominee, the supervisory board and the works council will have a four-week period to find a mutually acceptable solution.[279] If this process bears no fruit, the court (i.e., the Enterprise Chamber of the Court of Appeals in Amsterdam) shall resolve on whether the works council's recommendation is valid.[280] If the court finds that the recommendation is not valid, the works council may recommend another candidate to the supervisory board for nomination to the general meeting.[281] Upon deciding on the candidates to be proposed for election, the supervisory board informs the general meeting and the works council simultaneously on the nominated candidates.[282] The works council should be given sufficient time to consider the director nominations and a representative of the work council may elaborate on the work council's views with respect to the proposed directors.[283]

Shareholder-Sponsored Director Nominations. Shareholder-sponsored director slates generally cannot be submitted at Dutch firms qualifying as large corporations, as director nominations can only be made by the supervisory board, and can be rejected by the general meeting of shareholders with a majority of votes representing at least one-third of the share capital (in which case, the supervisory board shall make another director nomination).[284] Dutch companies may also provide that the supervisory board's director nominations have a binding effect in their articles of association.[285] In this event, binding director nominations can be overruled at the general meeting with a two-third majority of the votes cast that represent at least one-half of the share capital.[286] If board-sponsored director nominations, however, have no binding effect under the articles of association or the general meeting has rejected the board's binding nomination (and the articles of association do not give the right to the board to submit another binding nomination to the general meeting), shareholders may also submit their own candidates for a vote at the general meeting.[287] Shareholders holding at least three percent of the outstanding shares may put items on the agenda of the general meeting (ten percent

---

[278] *Id.*
[279] *See* Art. 2:158 para. 7 BW.
[280] *See generally id.*
[281] *See* Art 2:158 para. 9 BW.
[282] *See id.*
[283] *See* Art 2:158 BW.
[284] *See generally* Art. 2:133 BW.
[285] *See* Art. 2:140 BW.
[286] *See* Art. 2:143 BW.
[287] *See* Art. 2:118 para. 7 BW.

requirement to call a general meeting), but only upon prior consultation with the management of the company.[288] If approached by activist shareholders proposing agenda items that may change a firm's strategy by, for example, proposing the removal of management and/or supervisory board members, the firm's management can take a response time—which may not exceed 180 days—to reflect on activists' demands and engage with the activist on the issue at hand.[289]

Adding New Directorships and Filling in Director Vacancies. As already outlined in the preceding sub-sections, supervisory board members are generally elected by the general meeting only upon a nomination of the supervisory board.[290] By exception, the supervisory board of large Dutch corporations can appoint supervisory board members directly, but only in the event the number of supervisory board members falls below the statutory minimum of three directors.[291] Otherwise, the appointment and selection committee is entrusted with regularly assessing the size of the board and reports its conclusions to the supervisory board, in line with the Dutch Corporate Governance Code.[292] On this basis the supervisory board decides on the size and composition of the board, and subsequently discusses these parameters with the general meeting and the works council. [293]

B. *GERMANY*

The corporate boards of German stock corporations (i.e., companies whose capital is divided into shares) are characterized by a two-tier structure and co-determination (i.e., employee representation on the supervisory board).[294] Supervisory board members are elected for a five-year term and the director terms are typically not staggered,[295] giving shareholders an opportunity to voice discontent with supervisory board members only once every five years. In this sub-section, I lay out the specificities of the nomination process of shareholder-representatives and employee-representatives on German corporate boards, as well as the right of specific shareholders to directly delegate directors to the supervisory board.

---

[288] *See generally* Art. 2:114a para. 1 BW.
[289] *See* De Nederlandse, *supra* note 264 at 36.
[290] *See* discussion *supra* Part III Section A.
[291] *See* Art. 2:158 para. 2 BW.
[292] *See* De Nederlandse, *supra* note 264 at 22.
[293] *Id.*
[294] *See* State Street Global Advisors, *supra* note 263, at 2.
[295] *Id.*

Board-Sponsored Director Nominations. Due to co-determination, each constituency with board representation rights has a different nomination process for its director-candidates.[296] Supervisory board members elected by shareholders are typically nominated by a separate nomination committee, composed entirely of shareholder-representatives on the supervisory board[297] (i.e., employee-representatives on the supervisory board have no say over shareholder-representative director nominees and *vice versa*). Interestingly, the German Corporate Governance Code does not set out a pre-set number of independent supervisory board members that nomination committees should have, but instead leaves this issue in the discretion of the supervisory board to decide the adequate number of independent supervisory board members for the respective company.[298] The nomination committee is entrusted with preparing a general profile of the skills and experience required of sitting directors, including a determination of whether elected directors would have sufficient time to devote to the performance of their tasks on the supervisory board.[299] No other provisions specifying the role or the selection criteria of the nomination committee in the director nomination process are set out in the German Corporate Governance Code.[300]

Major Shareholder Right to Delegate Directors. The bylaws of German public companies may stipulate that specific shareholders (or the holders of specific shares whose transfer is conditional upon the consent of the company) have the right to delegate up to one-third of the members (directors) of the supervisory board (i.e., without the need of having these directors elected by the general meeting of shareholders).[301] Delegated supervisory board members can constitute up to one-third of all supervisory board members, who may be removed at any time from office by the shareholder having the delegation right, in which case the delegating shareholder can appoint a new board member.[302]

Employees' Right to Board Representation. Employees in German stock corporations with more than 500 employees have board representation rights for thirty percent of the total number of supervisory board seats, whereas in corporations with more than 2,000 employees,

---

[296] *See* Aktiengesetz, *supra* note 128, at 11.

[297] *Id.*

[298] *Id.* at 8.

[299] *Id.*

[300] *See* Regierungs Kommission, Deutscher Corporate Governance Kodex [German Corporate Governance Code], *supra* note 128, at 8.

[301] *See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, art. 101 (Ger.), https://www.gesetze-im-internet.de/aktg/__101.html.

[302] *Id.*

directors representing the employees constitute one-half of all supervisory board director seats (i.e., the number of shareholder representatives equals the number of employees representatives) and the size of the board varies with the number of employees of the company.[303] In the latter case, and provided a tie vote ensues, the chairman of the board, a shareholder representative, will have the casting (double) vote.[304] Employee-sponsored director nominations are generally not binding and all nominees for the employee-representative directorships have to be elected by the general meeting.[305]

Shareholder-Sponsored Director Nominations. Shareholders with at least five percent of the share capital or €500,000, may add items to the general meetings' agenda, including nomination of (shareholder representative) directors for election to the supervisory board, whereas holders of at least ten percent of the share capital may call a general meeting.[306] The company must publish the shareholder-sponsored nominations in the same manner as the publication of the notice calling the general meeting.[307] When publishing the shareholder-submitted director proposals in the agenda, the management board supplements the shareholder proposal with its own statement on the compliance of the shareholder-sponsored director slate with the statutory requirements (under the German Stock Corporation Act) for director elections, including the thirty percent gender diversity quota for supervisory board members.[308]

Adding New Directorships and Filling in Director Vacancies. All supervisory board members ought to be elected by the general meeting, with the exception of directors delegated by certain shareholders or by holders of specific shares set out under the company's bylaws.[309] The supervisory board, therefore, cannot fill in vacancies or add new

---

[303] *See* Mitbestimmungsgesetz [MitBestG] [Co-determination Act], May 4, 1976 BGBL I at 1153, last amended by Gesetz, Apr. 24, 2015, BGBL I at 642, art. 7, http://www.gesetze-im-internet.de/mitbestg/index.html (providing that on the supervisory board of companies (i) with less than 10,000 employees, shareholder-representatives and employee-representatives shall each constitute six board members, (ii) with more than 10,000 but less than 20,000 employees, shareholder-representatives and employee-representatives shall each constitute eight board members, and (iii) with more than 20,000 employees, shareholder-representatives and employee-representatives shall each constitute ten board members).

[304] *Id.* at §29(2).

[305] *See id*. at §§8-9.

[306] *See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL I at §122(2) (Ger.).

[307] *See id.* at §124.

[308] *Id.* at §127.

[309] *See id.* at §§100-101.

directorships.[310] In fact, if the supervisory board has no quorum to perform its legally prescribed duties (of one-half of the total number of directors and in any event, at least three board members), then the management board, a member of the supervisory board, or a shareholder should initiate judicial proceedings for the competent court to appoint the required number of directors necessary for the discharge of the supervisory board's duties.[311] The court shall also act upon a petition for appointing additional board members, in the event the supervisory board consists of less directors than provided under the law or the company bylaws for a period longer than three months.[312] The minimum number of supervisory board members is three whereas the maximum is relative to the share capital of the company.[313]

C. *FRANCE*

French companies can decide between a one-tier (board of directors) or two-tier (executive and supervisory) board structure, with the former being the most prevalent model of board governance.[314] For this reason, the below overview will focus on the rules applicable to the nomination process in companies with one-tier boards, although these rules are also instructive, by analogy, for two-tier board operations. The statutory limit for a director term in office is six years, although director terms are typically for four years and staggered boards are a common governance practice.[315]

Board-Sponsored Director Nominations. Board-sponsored directors are proposed by a nomination committee composed mostly of independent directors, with the exact proportion of independent directors appointed to the nomination committee being left for companies to decide on individually.[316] There are no specific disclosure obligations or pre-set criteria under the 2018 French Corporate Governance Code for Listed

---

[310]*See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL I at §§101, 104 (Ger.).

[311]*See id*. at § 104.

[312]*See id.*

[313]*See id.*at § 95.

[314]*See* Mojuyé, *supra* note 36, at 92.

(providing a general overview of French rules governing the operation of the board of directors).

[315]*See* State Street Global Advisors, *Board Accountability in Europe: A Review of Director Election Practices Across the Region*, 1, https://www.ssga.com/investment-topics/environmental-social-governance/2018/05/board-accountability-in-europe-2018.pdf.

[316]*See* French Association of Private Enterprises [AFEP] & French Business Movement [MEDEF], FRENCH CORPORATE GOVERNANCE CODE FOR LISTED FIRMS 14 (2018) (Fr.).

Firms as to how the nomination committee considers and decides on specific director nominations.[317] Corporate boards should strive towards gender balance and have to consist of at least one-half independent members[318] in companies with dispersed ownership, and at least one-third in companies with controlling shareholders.[319] Employee-representatives are not counted when assessing firms' compliance with these requirements.[320] Directors are elected for a term of four years and the 2018 French Corporate Governance Code for Listed Companies recommends that director terms are staggered so that the continuation of the board is ensured and complete replacement of the entire board at once is avoided.[321]

Major Shareholder Board Representation. Generally, shareholders do not have direct appointment rights to corporate boards, but may form an association of qualifying shareholders (with at least five percent of the share capital registered, held for at least two years) in order to collectively exercise their shareholder rights under the French Commercial Code, such as putting items on the agenda and calling the general meeting, or submitting written questions to the chairman of the board on matters critical to the company's business.[322] These associations of shareholders must be formally notified to the French securities regulator.[323]

Employees' Right to Appoint Directors. Co-determination, by way of direct employee representation on the corporate boards of qualifying French firms was introduced in 2013.[324] Employees of companies with a registered seat in France and at least 5,000 employees[325] have a statutory right to elect a maximum of two directors at corporate boards with at least eight directors, and one director at corporate boards with less than eight

---

[317]*See id.* at 10, 14.

[318]*See id.* at 6-7.

[319]*See id.* at 7.

[320]French Association of Private Enterprises [AFEP] & French Business Movement [MEDEF], FRENCH CORPORATE GOVERNANCE CODE FOR LISTED FIRMS 7 (2018) (Fr.).

[321]*See id.* at 11.

[322]*See* CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] article L225-120 (Fr.).

[323]*Id.; see* Carine Girard, *Success of Shareholder Activism: The French Case*, 115 BANKERS, MARKETS & INVESTORS 27, 30, 35 (2011), https://ideas.repec.org/p/hal/journl/hal-00771833.html (noting investor associations have been at the forefront of activist campaigns at French listed firms, in particular by litigating against firms that infringe upon French shareholders' rights); *see generally*, Carine Girard & Stephen Gates, *The Professionalization of Shareholder Activism in France*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE, 2011, at 1, https://corpgov.law.harvard.edu/2011/03/13/the-professionalization-of-shareholder-activism-in-france/ (providing a comprehensive overview of French investor associations and the activist goals they have pursued at a company (but also at policy) level).

[324]*See* French Association of Private Enterprises [AFEP] & French Business Movement [MEDEF], FRENCH CORPORATE GOVERNANCE CODE FOR LISTED FIRMS 1 (2018) (Fr.).

[325]Or a registered seat in France and abroad, and at least 10,000 employees. *See* CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] article L225-27-1 (Fr.).

directors.[326] The bylaws of qualifying companies have to set out a separate election process for employee-representatives, which may take any of the following forms: an election organized by the employees; direct appointment by the works council; or direct appointment by a qualifying trade union in accordance with the provisions of the 2013 French Labor Code.[327] For companies with less than 5,000 employees, the articles of association may provide that a maximum of five directors may be elected directly by the employees, provided that employee representatives may not in any event represent more than one-third of the number of shareholder-elected directors.[328] Employee-representatives are entitled to vote at board meetings and participate in board committees.[329]

Shareholder-Sponsored Director Nominations. Shareholders holding at least five percent of the share capital may add items to the agenda for consideration and vote at the general meeting, including proposals for nomination and/or removal of board members,[330] and may also petition the court to call an extraordinary general meeting, in the event the board of directors fails to do so.[331]

Adding New Directorships and Filling in Director Vacancies. The maximum number of directors is set in the company's articles of association and cannot exceed eighteen members, whereas the minimum statutorily prescribed number of directors is three (employee-elected directors do not count for the compliance with the rules relating to the minimum and maximum number of directors).[332] Directors are generally elected by the general assembly, but if the chairman of the board passes away, resigns, or is removed from office and the board cannot appoint one of the incumbent directors to the chairman position, it (the board) may directly appoint an additional director to the board.[333] Furthermore, the board may fill vacancies resulting from death or resignation of a board member provisionally (i.e., until the next general meeting, when these directors shall be subject to a confirmatory shareholder vote).[334] However, if the number of board members falls below the statutory minimum, the

---

[326] CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-27-1 (Fr.).

[327] *Id.*

[328] CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-27 (Fr.).

[329] FRENCH CORPORATE GOVERNANCE CODE FOR LISTED FIRMS, *supra* note 316, at 7 (explaining that employee-representatives do not count for the calculation of the minimum, maximum and independent director requirements); *see* CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-23 (Fr.).

[330] CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-105 (Fr.).

[331] CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-103 (Fr.).

[332] CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-17 (Fr.).

[333] *Id.*

[334] CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-24 (Fr.).

board has to immediately call the general meeting in order to resolve on the appointment of the additional board member(s).[335] In the event the number of directors falls below the number set out in the companies' articles of association, but is nonetheless above the statutory minimum, the board should fill the vacancy within a period of three months.[336]

D. *SWEDEN*

Swedish corporate governance is featured by a one-tier board structure. The board of directors is typically composed entirely of non-executive (shareholder-nominated) directors, and may have a maximum of one executive member (typically the Chief Executive Officer), although it is not uncommon for boards not to have any executive directors.[337] Directors are re-elected annually[338] and the majority of the board members have to be independent in accordance with the Swedish Corporate Governance Code.[339]

Board-Sponsored Director Nominations. Swedish corporate governance is peculiar with respect to the director nomination process in that corporate boards play no role in the nominations of directors for election at the general meeting.[340] This task is performed by an external nomination committee, that is not a sub-committee of the board, but is composed mainly (or entirely) of shareholders and shareholder representatives.[341]

Major Shareholder Board Representation. Directors of Swedish companies are typically appointed by the general meeting; however, the articles of association may provide that less than half of the board members may be directly appointed in a manner other than by the general meeting.[342]

Employees' Right to Board Representation. Under the Board Representation (Private Sector Employees Act of 1987), employees of Swedish companies with as little as twenty-five employees can have two director seats on the company's board, whereas employee board

---

[335]*Id.*

[336]*Id.*

[337]KOLLEGIET FÖR SVENSK BOLAGSSTYRNING, SVENSK KOD FÖR BOLAGSSTYRNING 9 (2020), http://www.bolagsstyrning.se/UserFiles/Koden/2020/Svensk_kod_for_bolagsstyrning_gallande_fran_1_januari_2020_00000002.pdf [hereinafter Swedish Code].

[338]State Street Global Advisors, *supra* note 263, at 2.

[339]Swedish Code, *supra* note 337, at 9.

[340]7 ch. 29 § AKTIEBOLASLAG (SFS 2005:551) (Swed.).

[341]8 ch. 49b § AKTIEBOLASLAG (SFS 2005:551) (Swed.).

[342]8 ch. 8 § AKTIEBOLASLAG (SFS 2005:551) (Swed.).

representation in companies with at least 1,000 employees amounts to three directorships.[343] Given that the minimum number of board members required under the Swedish Companies Act is three, the Board Representation Employee Act further stipulates that the number of employee representatives must, in any event, be lower than the number of shareholder representatives.[344] Employee representatives are appointed by a local employee organization that operates outside of the company, but has a collective bargaining agreement with the company where the appointments are taking place.[345]

Employees of the same company may, however, have membership with different local employee organizations.[346] Thus, if at least four-fifths of the employees belong to the same local employee organization, then that organization shall decide on the appointments of the two statutory employee representatives.[347] However, if no local employees organization represents at least four-fifths of the employees at a given company, the two local employee organizations representing the largest number of employees shall each appoint one director to the company board.[348] The employee-representative directors are appointed by the local employee organization(s) from the employees of the company to which they are appointed.[349] There are different manners in which local employee organizations decide on director appointments: (i) the appointees can be elected at a meeting of the local organization, (ii) the board of the local organization can make direct appointments to the board of the company, or (iii) a separate committee within the organization can be formed to set up elections for director appointments.[350]

Shareholder-Governed Director Nomination Process. As already stated above, the director nomination process is entirely shareholder-governed through a nomination committee whose sole function is to

---

[343] 4 § LAG OM STYRELSEREPRESENTATION FÖR DE PRIVATANSTÄLLDA [Board Representation Employee Act] (SFS 1987:1245).

[344] 8 Ch. 46 § Aktiebolasag [Swedish Companies Act] (SFS 2005:551), *see also* 4 § Lag Om Styrelserpresentation För De Privatanställda [Board Representation Employee Act] (SFS 1987:1245).

[345] 6 § Lag Om Styrelserpresentation För De Privatanställda [Board Representation Employee Act] (SFS 1987:1245).

[346] 8 § Lag Om Styrelserpresentation För De Privatanställda [Board Representation Employee Act] (SFS 1987:1245).

[347] *Id.*

[348] *Id.*

[349] 9 § Lag Om Styrelserpresentation För De Privatanställda [Board Representation Employee Act] (SFS 1987:1245).

[350] THE FORGOTTEN RESOURCE: CORPORATE GOVERNANCE AND EMPLOYEE-LEVEL BOARD REPRESENTATION. THE SITUATION IN FRANCE, THE NETHERLANDS, SWEDEN AND THE UK, 24-25 (Lionel Fulton ed., 2007).

propose directors – and directors' remuneration – for election at the general meeting.[351] It is an external committee, composed of members appointed by the general meeting directly, it is not an internal sub-committee of the board, as is the case in all other jurisdictions with a developed corporate governance system.[352] Swedish nomination committees have a chair and consist of at least three members.[353] The majority of the committee's members must be independent (from major shareholders and incumbent directors) and the executive management of the company cannot have a seat on the committee.[354] At least one member of the committee must be independent of the major shareholder(s) of the company (defined as shareholders with at least ten percent of the shares or votes in the company).[355] Similarly, under the Swedish Corporate Governance Code, at least two board members must be independent of the major shareholder(s) of the company.[356] Furthermore, incumbent directors may sit on the nomination committee, but may not constitute majority and, to the extent more than one director sits on the committee, not more than one of these directors may be affiliated with the major shareholder in the company.[357] Importantly, the Swedish shareholder-governed director nomination process encourages shareholder recommendations for director nominees, and the website of each company should provide information on how shareholders can make director recommendations to the nomination committee.[358]

Unlike any other jurisdiction surveyed in this article, plurality election standard is applicable to Swedish director elections (i.e., the candidate with the highest number of votes at the general meeting is elected, regardless of whether this constitutes majority of the votes represented at the general meeting).[359] The articles of association may deviate from the plurality standard for director elections, but may not prescribe a rule requiring more votes than would be needed under the statutory default plurality standard.[360] All other decisions customarily

---

[351]Swedish Code, *supra* note 337, at 14 (defining the entire nomination process in the Code, and no provision on the process of nominating directors can be found in the AKTIEBOLASLAG (SFS 2005:551)).

[352]*Id.* at 7.

[353]*Id.*

[354]*Id.* at 15.

[355]Swedish Code, *supra* note 337, at 15.

[356]*Id.* at 9.

[357]*Id.* at 15.

[358]*Id.*

[359]7 Ch. 41 § Aktiebolasag [Swedish Companies Act] (SFS 2005:551).

[360]*Id.*

voted on at an annual general meeting of Swedish companies are adopted with a simple majority of votes cast.[361]

Adding New Directorships and Filling in Director Vacancies. The board of directors may only appoint directors in the event vacancies have arisen due to early termination (resignation, non-compliance with statutory requirements applicable to board members) of an incumbent director's term.[362] In this case, the board-appointed director shall serve until the end of the term of the director that has left the board.[363] Given that directors of Swedish corporations are subject to re-election annually, the director filling in a specific vacancy is effectively appointed by the board until the next general meeting.[364] Swedish corporate boards, however, cannot add new directorships or appoint directors in circumstances other than early termination of an incumbent director's term.[365]

E. *UNITED KINGDOM*

The board of directors of British listed firms typically has a one-tier structure and is composed of executive and non-executive directors, subject to annual re-election in line with the UK Corporation Governance Code.[366] The Companies Act 2006 set outs a limited number of default provisions relating to corporate directors; allowing shareholders to further specify rules for the governance of the company in the articles of association (the so-called "contractarian approach").[367]

Board-Sponsored Director Nominations. British firms with premium listing on the London Stock Exchange (to which also the UK Corporate Governance Code applies), should generally conduct a formal, rigorous and transparent process of director appointments, based on objective criteria and merit that every company is expected to set on its own. The director nomination and appointment process is led by a nomination committee, composed of majority non-executive independent

---

[361] 7 ch. 40 § AKTIEBOLASLAG [Swedish Companies Act] (SFS 2005:551).

[362] 8 ch. 15 § AKTIEBOLASLAG [Swedish Companies Act] (SFS 2005:551).

[363] *Id.*

[364] 8 Ch. 13 § Aktiebolasag [Swedish Companies Act] (SFS 2005:551) ("[A]n appointment as a member of the board of directors shall apply until the close of the first annual general meeting held after the year in which the board member was appointed.").

[365] 8 ch. 8 § AKTIEBOLASLAG [Swedish Companies Act] (SFS 2005551) (providing that the right to appoint directors cannot be delegated to the board of directors).

[366] Financial Reporting Council, UK CORPORATE GOVERNANCE CODE 8 (2018), [hereinafter UK Code].

[367] Deirdre Ahern, *Nominee Director's Duty to Promote the Success of the Company: Commercial Pragmatism or Legal Orthodoxy*, 127 L. Q. REV. 118, 140-41 (2011) (explaining the "contractarian approach" to British company law in the context of nominee directors).

members.[368] No specific disclosure or transparency obligations for the operation of the nomination committee are envisaged under the UK Corporate Governance Code or under the Companies Act 2006, except that the nomination process should be disclosed in the annual report and that director vacancies are openly advertised and external search consultancy is used for the appointment of the chairman and non-executive members of the board.[369]

Major Shareholder Board Representation. Consistent with the contractual flexibility that British firms are afforded under the Companies Act 2006, the articles of association may provide for direct representation rights of different constituencies. However, given the prevalent dispersed ownership structure of British public firms, major shareholders with special director representation rights are uncommon in the UK, compared to the other European jurisdictions reviewed in this article where high ownership concentration has led to a more institutionalized role of major shareholders and employees in the board composition processes.[370]

Employees' Engagement with the Board. Employees in British firms have no statutory co-determination right by the example of German, French or Swedish workers. However, under the 2018 UK Corporate Governance Code, the board may decide to engage employees by either: appointing a director from the employees, setting up a formal employee advisory panel or designating one of the non-executive directors elected to the board to represent the employees.[371] Early evidence of the implementation of this provision by British firms shows that companies are reluctant to give board representation to employees and would most commonly designate a non-executive director to represent employee interests, followed by the formation of a work force advisory panel.[372]

---

[368]UK Code, *supra* note 366, at 8.

[369]UK Code, *supra* note 366, at 8 (the UK Corporate Governance Code further provides that any connections between the external consultancy and the firm or any of its directors should be made public in the firm's annual report).

[370]*See* DEREK FRENCH, STEPHEN MAYSON & CHRISTOPHER RYAN, COMPANY LAW 79 (Oxford Univ. Press., 31st ed. 2014) (arguing that whenever significant shareholders want to ensure that their nominee will be appointed to the board of a British firm, the articles of association are amended to provide that the significant shareholders' shares constitute a separate class (Class A) and that certain number of directors are elected with the majority of the votes of Class A shares, whereas the rest of director appointments shall be made by the majority of the votes of all other shareholders (holding a separate Class B-shares).

[371]UK Code, *supra* note 366, at 5.

[372]*See* Press Release, *Local Authority Pension Fund Forum* (May 1, 2019), http://www.lapfforum.org/wp-content/uploads/2019/05/LAPFF2019.pdf (finding that seventy-three percent of surveyed firms that have complied with the 2018 UK Corporate Governance Code have opted for designating a non-executive director, twenty-seven percent for an employee advisory panel, and five percent for an employee board representation).

Shareholder-Sponsored Director Nominations. Shareholders with at least five percent of the paid-up capital or 100 shareholders holding shares with an average paid-up capital of at least £100, can submit shareholder proposals along with a 1,000-word supporting statement for consideration and vote at the general meeting.[373] Shareholders of British firms use this right most frequently to submit shareholder-sponsored director slates, thereby triggering contested director elections. In contrast, in Continental European jurisdictions shareholder proposals are most commonly tabled on general corporate governance issues, such as reducing director powers, director independence, board liability, removal of auditors and convocation of an extraordinary shareholder meeting.[374]

Adding New Directorships and Filling in Director Vacancies. The articles of association of British public companies may provide that the board of directors may expand the size of the board and add new directorships and fill in vacancies.[375] The three British firms that settled with an activist set out in Table 3 *supra*, had a provision in their articles of association allowing the board, at its discretion, to add new directorships with immediate effect.[376]

F. *POLICY PROPOSALS FOR INCREASING TRANSPARENCY AND SHAREHOLDER ENGAGEMENT IN THE EUROPEAN BOARD-SPONSORED DIRECTOR NOMINATION PROCESSES*

The jurisdictional overview of board nomination and composition rules in Sections A through E *supra*, shows that different constituencies participate in the director nomination process and have their directors appointed to European corporate boards. For example, there is a separate quota for employee-appointed directors (co-determination) in qualifying German, French and Swedish companies, and for directors recommended by the employees' council (but formally nominated by the supervisory board) in the Netherlands.[377] In Germany and Sweden, direct director

---

[373]Companies Act 2006, c. 46, § 314 (UK).

[374]Peter Cziraki, Luc Renneboog & Peter G. Szilagyi, *supra* note 142, at 751.

[375]*See,* The Companies (Model Articles) Regulations 2008, SI 2008/3229, art. 20, https://www.legislation.gov.uk/uksi/2008/3229/introduction/made; *see also* BRENDA HANNIGAN, COMPANY LAW 156 (4th ed. 2016); *see also* LEN SEALY & SARAH WORTHINGTON, CASES AND MATERIALS IN COMPANY LAW 245 (8th ed. 2008).

[376]*See, e.g.,* Articles of Association of Rolls-Royce Holdings plc, adopted by Special Resolution passed on May 1, 2013 and amended by Special Resolutions passed on May 8, 2015, May 4, 2017 and May 3, 2018, art. 119, https://www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/about/2018-rr-holdings-plc-articles-of-association.pdf.

[377]*See* discussion *supra* Sections A-E.

appointment rights can be enshrined in the company's articles of association,[378] whereas in all reviewed jurisdictions qualifying shareholders have proxy access and may submit shareholder-sponsored director slates for consideration and vote at the general meeting (with certain exceptions for qualifying Dutch corporations).

Of all routes to corporate directorship, board-sponsored director nomination rules are, however, of key relevance for activist investors entering into settlements with European firms, given that European boards cannot add new directorships without shareholder approval (except at British firms) and activist investors typically commit, under the settlement reached with the board, not to use their proxy access rights and submit a separate activist-sponsored director slate. Thus, probably the most important concession that European boards are legally allowed to make to activist investors is to include one or more activist-supported director to the board-sponsored director slate at the next general election.[379] This dynamic between incumbent directors and activist investors, however, raises the issue of transparency in the selection and nomination process of board-sponsored directors and potentially, the risk that incumbent directors concede a board seat to an activist investor in order to eliminate contested director elections and their removal from the board, as a result thereof.

However, as the previous review of director nomination rules illustrated, the operation of European nomination committees composed of incumbent directors is generally a "black box" from a regulatory (and investor) perspective, subject to very limited and broadly-worded "comply-or-explain" principles (mainly relating to director qualifications) enshrined in the national corporate governance codes.[380] Thus, it is no surprise that incumbent directors can concede a board seat to an activist investor without any explanation as to whether any other candidate was considered for the nomination, and on the basis of which criteria the

---

[378] In Germany, only shareholders can be given direct director appointment rights under the articles of association; *see* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL I at §§101 (Ger.); *see also* 8 ch. 8, 16 § AKTIEBOLASLAG [Swedish Companies Act] (SFS 2005:551) (Swed.) ("[T]he board of directors shall be appointed by the general meeting … [t]he articles of association, may prescribe that one or more members of the board of directors shall be appointed in another manner.").

[379] *See* discussion *supra* Part III Section B (discussing the fiduciary duty-restrictions for corporate directors in the U.S. and the UK to contract directly on strategic or operational changes with activist investors).

[380] *See supra* Part III Section D (finding Sweden is an exception in this respect with its external committee composed of majority shareholder-representatives).

activist-supported director was chosen as the best candidate for inclusion on the board-sponsored director slate.[381]

An adjacent problem to the lack of transparency in board-sponsored director nomination processes is the absence of institutional investor engagement in the recruitment and selection of director nominees.[382] Most European corporate governance systems, including the French, German and British, prescribe no formalized role or established channels for institutional investors to actively participate in the director nomination process performed by board-designated nomination committees.[383]

The Swedish model, however, is an exception. In Sweden, the entire director nomination process is shareholder-governed by an external committee, appointed directly by (and on the basis of written instruction of) the general meeting, with no CEO or executive management participation.[384] Board members are allowed on the nomination committee, provided they constitute less than the majority of all members, and at least one member has to be independent of the major shareholders.[385]

In the Netherlands, the nomination committee of public companies is an internal committee of the supervisory board composed of majority independent directors (consistent with the traditional model), but the general meeting may recommend candidates for election to the supervisory board of statutorily defined large public companies, which subsequently nominates directors to the general meeting.[386] The supervisory board, therefore, has to inform the general meeting of any vacancies on the board that have arisen, and the criteria that the recommended candidate should fulfil so that the supervisory board is properly constituted.[387] To avoid collective action problems that may make the operation of this provision de facto ineffective, the Dutch company laws also provide that the general meeting may entrust this function to a separate committee with a two-year mandate to recommend directors to the supervisory board.[388] There is no obligation, however, on the part of the Dutch supervisory board or its nomination committee to (i) include the shareholder-recommended candidate in the board-sponsored slate, or (ii) to explain why it has decided not to do so; supervisory board director nominations can only be rejected by the general meeting with a majority

---

[381] *See* discussion *supra* Part II Section A.3.
[382] *See* discussion *supra* Part II Section B.
[383] *See* discussion *supra* Part III Sections B, C & E.
[384] *See* discussion *supra* Part III Section D.
[385] *See* discussion *supra* Part III Section D.
[386] *See* discussion *supra* Part III Section A.
[387] *See* discussion *supra* Part III Section A.
[388] *See* discussion *supra* Part III Section A.

of votes cast representing at least one-third of the share capital.[389] Therefore, in the absence of improved disclosure practices by European nomination committees, including reporting obligations with respect to the selection process of shareholder-recommended candidates, the extent to which investors at Dutch large public companies can influence the director nomination process is uncertain and may diminish investors' incentives to engage with nomination committees in the first place.[390]

In comparison, the SEC in 2003 adopted a disclosure rule intended to introduce transparency and incite shareholder involvement in the board-sponsored director nomination process, requiring U.S. listed firms to disclose: (1) a description of director qualifications required of director nominees, (2) the source of director nominees (board, management, large shareholder, third-party recruitment services provider), and (3) the process for "developing and considering nominees," including their policy regarding candidates recommended by shareholders.[391] In this context, nomination committees have separate duties to disclose whether they have decided to nominate a director that was recommended by a long-term shareholder who has beneficially owned at least five percent of the company's voting common stock for at least one year.[392]

A more exacting disclosure standard was initially considered, but in the subsequent stages of the rule-adoption abandoned by the SEC, providing that in the event the nomination committee chooses *not* to nominate the candidate recommended by a long-term qualifying shareholder, it has to disclose: (1) who recommended the candidate, (2) why the nomination committee did not include the candidate as a nominee; and (3) whether each member of the nominating committee believes that it was in the company's best interest not to nominate this candidate and, to the extent there are members of the nominating committee that do not have such belief, why the candidate was not included as a nominee.[393]

To be sure, long-term institutional investor engagement in the director nomination process would be rare as institutional investors are rationally apathetic and would refrain from extending resources on finding

---

[389] *See* discussion *supra* Part III Section A.

[390] *See* discussion *supra* Part III Section A.

[391] Final Rule: Disclosure Regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors, Release No. 33-8340, 68 Fed. Reg. 66,992 (Nov. 24, 2003), https://www.sec.gov/rules/final/33-8340.htm.

[392] *Id.*

[393] SEC, DIVISION OF CORPORATION FINANCE, STAFF REPORT: REVIEW OF THE PROXY PROCESS REGARDING THE NOMINATION AND ELECTION OF DIRECTORS 22 (Jul. 15, 2013), https://www.sec.gov/news/studies/proxyrpt.htm.

a suitable candidate to recommend to the nomination committee.[394] However, in the event the firm's operations are dominated by a large shareholder (including an activist investor) in a manner that is inconsistent with the firm's and long-term investor's interests, or the firm is manifestly underperforming its peers, institutional investors may find it profitable to take a more active stance in the firm's governance and recommend directors to the board that will address underperforming areas of operation.[395] In the event investor-recommended directors are not accepted by nomination committees as part of the board-sponsored director slate, the recommending investor can always fall back on the proxy access rules and submit a separate shareholder-sponsored director slate for consideration at a general meeting.[396]

Recently, active investment strategies are coming under increasing pressure from the outflow of funds to (passive) index funds,[397] mutual funds are taking up a more active investor role and are voicing their concerns or their preferred course of action vis-à-vis underperforming investee firms. Thus, regulatory measures at the EU level intended to further encourage institutional investor participation in the board-sponsored director nomination process and demanding more transparency from European nomination committees, in particular as to how they decide on long-term investors' director recommendations, may further incentivize institutional investors to discharge their stewardship responsibilities vis-à-vis European firms.[398]

Further, an EU-initiative on these issues comprising high-level principles and providing minimum harmonization across EU Member States while accommodating Member States with more exacting shareholder engagement-requirements in the director nomination processes would be in line with the objectives promoted under the recently revised Shareholder Rights Directive.[399] With current developments in the U.S. and internationally, where different stakeholders have come together to adopt common platforms to encourage dialogue between long-term investors and corporate boards, and more specifically, for advocating that

---

[394] *See* Robert C. Pozen, *Institutional Perspective on Shareholder Nominations of Corporate Directors*, 59 BUS. LAW. 95, 101 (2003).

[395] *Id.*

[396] *Id.* at 100-01.

[397] *See* Lazard's Shareholder Advisory Group, *supra* note 7, at 18 (presenting data on the staggering growth of assets managed by index funds).

[398] *See* discussion *supra* Part II Section B.

[399] Council Directive 2017/828, art. 3, 2017 O.J. (L132) 1 (EC) (one of the main purposes of the Directive was to encourage shareholder engagement by long-term institutional investors by requiring them to adopt an engagement policy vis-à-vis investee firms and to enhance transparency between firms and investors).

qualifying long-term investors should have a meaningful opportunity to recommend directors to nomination committees (e.g., the Commonsense Principles of Corporate Governance launched by a group of the largest American corporations and institutional investors,[400] and The New Paradigm adopted by the International Business Council of the World Economic Forum).[401] Finally, increasing transparency in the operation of European nomination committees and encouraging shareholder engagement in this key area of corporate governance of public firms will also increase the credibility of the nomination process that results with placing activist directors on corporate boards, as best-placed candidates selected in an impartial and transparent manner.[402]

1. Table 5 Overview of Shareholder-sponsored and Board-sponsored Director Nomination Rules Relevant in the Context of Activist Interventions in Selected European Jurisdictions

Director Nominations and Elections Per Jurisdiction	United Kingdom	Germany	France	Netherlands	Sweden
Shareholder Right to Nominate Directors | Put	Yes, 5% ownership required.	Yes, 5% ownership required.	Yes, 5% ownership required.	Yes, 3% ownership required[403].	Yes, any shareholder (minimum one share).

[400] *Commonsense Principles of Corporate Governance 2.0*, 1, 2 (Oct. 2018), https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf ("[L]ong-term shareholders should recommend potential directors for the board's consideration if they know the individuals well and believe they would be additive to the board.").

[401] International Business Council of the World Economic Forum, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth* (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf; *see* Martin Lipton, *The New Paradigm*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE, (Oct. 28, 2019), https://corpgov.law.harvard.edu/2019/10/28/the-new-paradigm/.

[402] *See generally* Chung Shu, *Rational Apathy: The Curse of Shareholder Empowerment in Uncontested Board Elections* (Jan. 12, 2020), http://www-scf.usc.edu/~chongshu/papers/shu2019rational.pdf.

[403] The supervisory board or the board of directors (for companies with one-tier board structure) may have the right under the articles of the association to make binding director nominations to the general meeting of shareholders, in which case qualifying shareholders cannot submit director nominations for elections at general meetings, unless the binding nomination is rejected by the shareholders and the board has no right to make another binding nomination under the articles of association. *See supra* Part III Section A (providing a more detailed analysis of the director nomination practices in the Netherlands).

Director Nominations and Elections Per Jurisdiction	United Kingdom	Germany	France	Netherlands	Sweden
Items on AGM | EGM Agenda (%)					
Shareholder Right to Solicit Proxies and/or Circulate Supporting Statement in Company's Proxy Materials (Proxy Access)	Yes.	Yes.	Yes.	Yes.	Yes.
Minority Shareholders Veto Rights (Majority-of-Minority Election Standard)	Yes, for firms with a controlling shareholder under the FCA's LSE Listing Rules.	No.	No.	No.	No.
Minority Director Election Rule	No.	No.	No.	No.	Yes, at least two directors must be independent of shareholders holding at least 10% of shares/votes.
Employee Representation	Firms may decide between setting up works council, direct employee board	Yes, 30% of all directors in companies with min. 500 employees; 50% of all directors in companies	Yes, min. two directors in companies with less than 5,000 employees ; max.	One-third of supervisory board members proposed by the supervisory board for election are	Yes, min. two directors in companies with at least twenty-five employees and min. three directors in companies

Director Nominations and Elections Per Jurisdiction	United Kingdom	Germany	France	Netherlands	Sweden
	representation or designating non-executive director.	with min. 2,000 employees.	one-third of all directors in companies with more than 5,000 employees.	recommended by the works council.	with at least 1,000 employees.
(Internal / External) Board Nomination Committee	Internal.	Internal; proposes Shareholder represent-tative directors only.	Internal; proposes sharehold-er representa-tive directors only.	Internal.	External.
Composition of Nomination Committee	Majority non-executive indepen-dent directors.	Number of independent directors to be decided on company level.	Number of indepen-dent directors to be decided on company level.	No specific requirement for independent directors.	Decided by the GM (but not more than half of directors /CEO).
Board's Right to Expand the Board and Add New Directorships at its Discretion	Yes, if provided under the articles of association.	No.	No, but board may fill in vacancies until the next AGM.	No, but board may fill in a vacancy, if the number of directors falls below the statutory minimum.	No, but board may fill in vacancies until the next AGM.

V. CONCLUSION

Settlements between corporate boards and activist investors are a relatively novel phenomenon in European corporate governance. In this article, I provide the first anecdotal evidence of eight recent European settlements and find that settlements regularly end with direct addition (or nomination for election) of one or more directors to the target firm's board. A direct strategic and capital structure change was agreed upon in only one settlement, but as a concession by the activist hedge fund to the target board that had decided on adopting these changes independently of the activist and in the pursuit of a different strategic course than demanded by the activist campaign. In three other settlements, a general review of a firm's strategy, remuneration policy and the formation of an investment and asset disposal committee were agreed upon as a first step towards the implementation of specific operational, leadership and governance changes in the aftermath of the settlement. These outcomes are also consistent with the findings reported by Bebchuk et al. for U.S. settlements.

The primary role of settlements is to avoid a proxy fight between management-sponsored and activist-sponsored director slates and from this perspective, their focus on board changes is unsurprising. Activist board appointments may bring the necessary positive change in the governance and operation of the target firm, but as private agreements between boards and activists, settlements may also allow activists to pursue short-term agendas, entrench incumbent directors, and disenfranchise long-term investors. I address these criticisms of settlement agreements in the context of the European legal and regulatory framework and make the following findings.

Activist hedge funds that have settled with European boards are still engaged with the target firm in three of the eight settlements analyzed herein; they have been holding target firms' shares for at least two years in each case and the directors appointed as part of the settlement are still sitting on the board. [404] In the remaining five settlements, activists have decreased their ownership below the minimum ownership reporting threshold (for activist investors without board representation) or had their board representatives resign from the board after being engaged with the target firm for a period ranging from seventeen months (at Hammerson) to fifty-two months (at Rolls-Royce) with an average engagement period of thirty-seven months across all five instances, defying the short-termism hypothesis. Relatedly, short-term rent-extraction practices, such as

[404] As of May 31, 2020.

selective share buybacks at above-market prices, are largely restricted under European laws and corporate boards need a prior shareholder authorization resolving on the purpose, time-period and price-range of share repurchase programs. However, activist-affiliated directors nominated for election at the firms analyzed herein and listed on a European stock exchange seem less popular, receiving less votes in their favor at general meetings held after the settlement, compared to the (average) number of votes cast for incumbent and new directors.

Directors may have entrenchment motives when, in addition to standstill of the activist campaign, they impose ownership ceilings to activist investors as part of the settlement. As ownership caps are implemented primarily to curb investor influence and prevent hostile takeover bids, I argue that they should either be subject to shareholder ratification or reviewed by the national courts of EU Member States against a standard of review developed for assessing the legality of defensive tactics adopted by incumbent directors of firms targeted by hostile bidders or by activist investors demanding strategic or board-related changes.

Lastly, shareholder disenfranchisement resulting from settlement-agreed director changes is unlikely in the European context, as incumbent directors do not typically have the right to unilaterally add new directorships to Continental European boards (British law is an exception in this respect), and may fill in director vacancies in some jurisdictions (Netherlands and France), if at all (Germany). Thus, the most likely route for activists to gain board representation on Continental European boards is by agreeing that their nominee will be included on the board-sponsored director slate at the next general election.

Finally, the private agreements between boards and activists on the composition of board-sponsored director slates featured in all settlement agreements, calls into question the transparency of the European director nomination process conducted by designated nomination committees. By reviewing Dutch, German, French, Swedish and British director nomination rules and practices, I show that in most European jurisdictions, nomination committees composed of incumbent directors operate in a non-transparent manner with virtually no disclosure on their recruitment and selection procedures and no established channels for shareholder engagement in the board-sponsored director nomination process. The Swedish model is an exception in this regard. Swedish listed firms are featured by a shareholder-governed system where the director nomination function is entrusted to an external committee composed mainly of shareholders. Furthermore, in Dutch (statutorily defined as large) public companies, the general meeting may recommend candidates to the

supervisory board either directly or via a separate shareholder committee designated by the general meeting for this purpose. These examples can serve as an important precedent for policy-makers at the EU level to encourage long-term investors to effectively engage in the board-sponsored director nomination process and propose (e.g. via shareholder committees) and/or directly nominate directors for election, as well as to require better disclosure practices from nomination committees, in particular when considering director candidates recommended by qualifying long-term shareholders.

***