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A Comparative Analysis of the Legal Obstacles to Institutional Investor Activism in Europe and in the US — Source link

Paolo Santella, Enrico Baffi, Carlo Drago, Dino Lattuca

Institutions: Marconi University, Sapienza University of Rome, Libera Università Internazionale degli Studi Sociali Guido Carli

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Santella, Paolo and Baffi, Enrico and Drago, Carlo and Lattuca, Dino

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A Comparative Analysis of the Legal Obstacles to Institutional Investor Activism in Europe and in the US.[1]

Paolo Santella
Bankof Italy
paolo.santella@bancaditalia.it

Enrico Baffi
University of Rome "Roma Tre"
baffienrico@hotmail.com

Carlo Drago
University of Naples "Federico II"
c.drago@mclink.it

Dino Lattuca
University of Rome LUISS
dino.lattuca@hotmail.it

Abstract

Starting from the observation that at the multilateral level shareholder activism is considered as an important aspect of good corporate governance, this paper examines several legal and economic obstacles to institutional investor activism in the EU and in the US. We also examine the voting record of 76 institutional investors in the US and of several others in the EU. We find that US investors seem to have easier access to proxy voting than in the EU (although recent EU legislation should remove several of the present legal obstacles); that conflicts of interest seem to limit the activism of several categories of institutional investors both in the US and in the EU; that some national legislations limit the ability of institutional investors to coordinate their voting policies; and that recourse to stock lending and other forms of separation of financial risk from voting rights seems to be practiced more by controlling shareholders at the expense of institutional investors than the opposite. We also find that institutional investors in the US seem to have a more adversarial voting pattern vis-à-vis company managements than in the UK; this might be due to the fewer voting rights given to shareholders by the US regulatory framework. As for Europe, institutional investors' voting pattern is by far the most adversarial in France, where there is a high incidence of control-enhancing mechanisms. Institutional investors seem to have an adversarial voting stance also in Greece, Belgium and Sweden, where control-enhancing mechanisms are also present, while in Italy they tend to have a low voting turnout. More in general, EU investors' voting pattern seems to be sensitive to the presence of control-enhancing mechanisms, ownership concentration, and to the origin of the national legal system.

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TABLE OF CONTENTS

I. INTRODUCTION

The traditional economic reasoning by which shareholders must take governance decisions in the company is based on the circumstance that they are holders of residual claims, in the sense that they are paid with the residual amount which remains once the other constituencies of the company have been paid. As they have the rights to the residual amount, they have an interest in increasing the economic results of the company By taking complete control of the residue, shareholders have an interest in maximising the company's economic results. Therefore, the most functional organisation for the corporation is also the most efficient one[2].

As observed by Gillan and Starks (2007),[3] shareholder activism may have several contents, from the simple fact that acquiring and selling shares is already a form of interest in company life, to voting management proposals, presenting and voting shareholder resolutions, and at the other end of the spectrum to initiate takeovers and LBOs. As observed by Bianchi and Enriques (2001),[4] Capital International,[5] and HFWG (2008), institutional investors see voting as just one of several possible instruments to monitor portfolio companies and induce change in their governance rules. Investors who take on a more pronounced role in dealing with companies in which they own shares with a view to encouraging behaviour more beneficial to shareholders are often referred to as "activist" investors. This includes, but is not limited to, engaging in discussions with management on issues such as overall company strategy, capital structure, dividend policy, merger or de-merger decisions and executive compensation. It could ultimately result in the investor exercising its voting power to effect changes that the investor believes will increase the value of its investment in the company. On the other hand, the term shareholder activism for mutual funds and pension funds seems to be restricted to voting at general meetings. The emerging best practice for pension funds and mutual funds seems focused in the first place on voting for the great majority of the shares held. However, the picture is not so clear-cut: as observed by HFWG (2008), while the term activism is often used to describe hedge fund managers, it is important to note that a large number of activist investors are clearly not hedge fund managers, and most hedge fund managers do not pursue activist strategies. Moreover, even if a manager is labeled as being activist, this does not mean that it engages actively with all companies in which it invests.

According to Gillan and Starks (2007)[6] and Gordon (2008),[7] shareholder activism in the US dates back to the beginning of the 20th Century, with insurance companies, mutual funds, and banks as main actors. The Glass Steagall Act and the regulatory reforms that followed the stock market crash of 1929 determined a sharp decline in investors' activism. SEC's introduction in 1942 of a rule that allowed shareholders to submit proposals for inclusion on corporate ballots set the main vehicle for shareholder participation in post-war company life which is used even today. The re-emergence of institutional investors' activism dates to the 1980s, with public pension funds and union funds submitting shareholder proposals and pressuring

[2] See Easterbrook and Fischel (1983).
[3] P. 5.
[4] P. 8.
[5] Information provided to the authors.
[6] P. 3-4.
[7] P. 6.

management for corporate reforms on such corporate governance issues as board structure, takeover defensive tactics, executive compensation, and the vote required for director election. As reported by Gordon (2008),[8] in the 1990s and early 2000s institutional investors focused their attention on the election of directors, with the aim initially to manifest their disapproval for poor corporate performance by voting against or withholding their vote for the entire board, and then focusing their campaigns on the rejection of specific directors who did not satisfy determined corporate governance standards, for instance in terms of remuneration, personal performance. According to Gillan and Starks (2007), in the last years hedge funds and private equity funds have adopted an activist stance as monitors of corporate performance. Such funds are not necessarily short-term investors and in a significant number of cases acquire large, relatively long-term positions in underperforming companies.

The OECD Corporate Governance Principles [9] explicitly refer to institutional investors' activism as well as to the need for its protection and facilitation. In Part One, Section II (F) of the Principles, which is devoted to the rights of shareholders and key ownership functions, it is stated that "the exercise of ownership rights by all shareholders, including institutional investors, should be facilitated". In Part Two, the OECD Principles provides some annotations to the mentioned principle, stating that although the Principles do not seek to prescribe the optimal degree of investor activism, many investors in considering the costs and benefits of exercising their ownership rights are likely to conclude that positive financial returns and growth can be obtained by undertaking a reasonable amount of analysis and by using their rights (Part Two, Section II, F). Another explicit reference to institutional investors' role is made in Part One, Section II, G according to which "shareholders, including institutional shareholders, should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to exceptions to prevent abuse". Moreover, Section III of the OECD Principles states that the "corporate governance framework should protect shareholders rights, which includes equitable treatment for all shareholders including minority and foreign shareholders". The Principles are one of the 12 Key Standards for Sound Financial Systems issued by the Financial Stability Forum.[10]

According to OECD (2003), there is a need to focus on additional issues which need to be dealt with if shareholders are to be able to exercise their control effectively. One of the key issues which stand out is improving the possibilities for shareholder voice to be effective, e.g. facilitating voting rights. Such a goal is closely linked to the role of institutional investors to strengthen corporate governance and monitor company performance. The Survey also stresses that such goals critically depend on the institutional investors' internal governance mechanisms.

From the consultation process conducted by European Commission (2007c), it has emerged that in parallel with their increase in ownership of total listed share capital, institutional investors are increasingly aware of the importance to prevent controlling shareholders' conflicts of interest. The main instrument chosen seems to be making more frequently use of the voting rights attached to their shares.

According to HFWG (2008), assets under management by the hedge fund industry have significantly increased over recent years and hedge funds have become

[8] P. 7-8.

[9] OECD (2004).

[10] http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html

powerful participants in equity markets. As part of their duties to their clients, hedge fund managers should participate, where possible, in corporate decisions that affect the performance of investments. However, it may not be part of a manager's strategy to vote all proxies (e.g., "black box" traders) and a manager might, for cost benefit considerations, adopt a systematic approach, for example never voting except in exceptional circumstances, rather than evaluating each proxy situation.

In the US the Council of Institutional Investors provides non-binding guidelines to more than 140 public, labour, and corporate pension funds. Among its stated objectives is that "shareowners should have meaningful ability to participate in the major fundamental decisions that affect corporate viability, and meaningful opportunities to suggest or nominate director candidates and to suggest processes and criteria for director selection and evaluation."[11]

In the US voting is also explicitely recommended, if not mandated, for shares in employee plan investment portfolios. The guidance provided by the US Department of Labor to sections 402-4 of the Employee Retirement Income Security Act of 1974 (ERISA) specifies that activities intended to monitor or influence the management of corporations in which the plan owns stock include exercising the legal right of a shareholder.[12]

The purpose of this paper is to review the theoretic debate which has produced the current institutional consensus on the necessity of shareholder activism, and to examine some of the existing legal and economic obstacles to investor activism taking into account the structural differences of the various types of institutional investors. In the last part of the paper we examine the voting record of 76 institutional investors in the US and the available voting record in the EU. The purpose is to verify whether the sensitivity of investors' voting patterns is sensitive to specific obstacles to investor activism. Chapter 2 illustrates the theoretic debate on investor activism; chapter 3 provides quantitative information on the importance of institutional investors' shareholdings in the EU and the US; chapter 4 illustrates several sources of legal obstacles to proxy voting; chapter 5 examines whether conflicts of interest limit shareholder activism; chapter 6 examines legislation in the EU and the US preventing investors' coordination of their voting policies; chapter 7 examines the consequences on shareholder activism of separating voting rights from economic risk; chapter 8 examines institutional investors' voting record; chapter 9 concludes.

II. THE THEORETIC DEBATE ON INVESTOR ACTIVISM

The usefulness of shareholder activism is not uncontested and has been the subject of an academic dispute over the assessment of its effectiveness in terms of producing a better performance from target companies. Several studies consider such activism as irrelevant and even harmful for most shareholders.[13] The debate is still open and sometimes causes bitter disputes which are unusual in the academic world. The fact that the governance of Delaware is board-oriented indicates that shareholders have limited power of action, that many choices are taken in isolation from the board, and that proxy fights are regulated in favour of the incumbent

[11] Council of Institutional Investors (2007), p. 2.

[12] US Department of Labor, Interpretative Bulletin 94-2. Information provided to the authors by Capital International.

[13] For a survey on this subject see Gillian and Starks (2007).

board. Shareholders' limited power includes introducing amendments to the articles of incorporation, mergers, sales of all or a substantial part of the corporation's assets, dissolution, and election and removal of directors. With the exception of the removal and election of members of the board of directors, everything else takes places at the initiative of the board itself. Shareholders can only apply a veto.[14] Nonetheless, shareholders have a way to make themselves heard: this is represented by precatory resolutions, which are voted on at the shareholders' meeting. However, even if they obtain a majority of votes, they are not binding for the management.[15]

According to Lucian Bebchuck the Delaware law should be transformed from board–oriented to shareholder-oriented. Bebchuck does not agree with the construction of the American corporate law as a form of representative democracy and believes, again for the purposes of increasing the performance of a company, in the model of direct democracy. For the purposes of maximising the performance of the company and its value, the powers of shareholders must be increased, in particular the powers of action. In Bebchuck's view, this reasoning is equally valid for both the corporate governance rules, the "rules of the game" which regard the corporate charter and the choice of the state of incorporation, and for business decisions[16]. In particular Bebchuck maintains that power of action to disband the company should be allocated to shareholders, since it is not in the interests of management to do so and lose their jobs, as well as the power to decide the distribution of dividends to slow the inefficient wish of management to build its own economic empire, the power to modify the "rules of the game" of corporate governance, the power of action of shareholders together with the possibility of approving binding resolutions. The author collects empirical evidence that US company boards tend to disregard shareholders' will to repeal staggered boards despite the approval by shareholders of non-binding resolutions in this sense for several consecutive years. The conclusion drawn by the author is that the existing shareholder powers in the US are not sufficient to persuade management to adopt governance changes desired by shareholders[17].

Bebchuck has received several criticisms, mainly based on the success which American corporate law, especially that of the State of Delaware, has had in accompanying the development of the US economy. It has been said that transforming the corporation into a "town meeting" would have costs unmatched by the benefits. There is an initial objection that holds that "election reform…would lead to large-scale disruption of corporate management". Management would be engaged for months every one or two years in its own electoral campaign. The selection of management would no longer be the same, since people destined to be fired within two years would be of a lower standard than those of today.[18]

Another argument holds that shareholders do not all have the same interest, i.e. maximising the value of the shares, but rather particular interests are at play. As Vice Chancellor Strine suggests, the "institutions most inclined to be activist investors are associated with state governments and labor unions, (which) often

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[14] See Welch and Turezyn (2007).

[15] Precatory resolutions were allowed for the first time by the New York Court of Appeal in the case *Auer v. Dressel.* N.E.2d 590 (N.Y. 1954). It is interesting to notice that Council of Institutional Investors (2007), p. 3, recommends that "Boards should take actions recommended in shareowner proposals that receive a majority of votes cast for and against."

[16] Bebchuck (2005).

[17] Bebchuck (2005) at 843 *and ff.*

[18] Lipton and Savitt (2007), at 746-747.

appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest"[19]. According to Stephen Bainbridge the most active institutional investors today are pension funds which follow different interests from those of other shareholders, in particular they promote the interests of workers, as the empirical evidence shows. The same author observes that such a complex organisation as a business needs a decision-making centre with authority and not subject to interference from others, in particular shareholders. The idea of attributing greater power to shareholders arises from the conviction that they have a common interest: maximising the value of shares. However, "once uncertainty is introduced it would be surprising if shareholder opinions did not differ on which course will maximize share value"[20]. There is also a problem of short-termism, that is interest in gaining the maximum possible in the least time possible, while the board of directors is called on to pursue a long–term focus[21]. Martin Lipton and William Savitt state that "Also central to Bebchuck's critique is the myth that as "owner" of the corporation, shareholders should be empowered to retain the focus and direction of the corporation they own. Shareholders do not "own" corporations. They own securities- shares of stock – which entitle them to very limited electoral rights and the right to share in the financial returns produced by the corporation's business operations". They "have no more claim to intrinsic ownership and control of the corporation's assets than do other stakeholders"[22].

A theory by which power must be in the hands of the board emphasises the inability of shareholders to be informed and therefore to take decisions which maximise the value of the company. In a complex organisation, people must specialise. Directors and managers specialize in the efficient coordination of other specialists. If the presence of an autonomous board of directors increases the agency costs, it also promotes the formation of an efficient and informed will, discourages opportunism among shareholders and, above all, encourages value specific investments in the business, understood as an organisation which operates as a team[23]. Regarding this last point, it is noted that it is not solely a category of stakeholders, i.e. the shareholders, who undertake specific investments, but in a more or less explicit way all stakeholders are called on to construct the business. It is also noted that economists have long recognised that formal contracts cannot protect specific investments in team production. Consequently, all "specific investors", whether they are shareholders, managers, customers, suppliers or employees, are vulnerable to expropriation by someone who has control of the company. This person could be represented by the class of shareholders.

Pacces in Bianchi et al. (2005, p. 43-83) and in Pacces (2008) refuses the relevance of the principal-agent relationship between shareholders and managers. According to the author, the manager entrepreneur who makes asset-specific investments makes recourse to the capital market with the objective to retain control. In Pacces vision, entrepreneurs seek to retain control to keep asset-specific investments in the company and to pursue idiosyncratic private benefits,[24] which are also

[19] Strine (2007) at 1765.
[20] Bainbridge (2006) at 20.
[21] On these matters see Lipton and Savitt (2007).
[22] Lipton and Savitt (2007) at 754.
[23] Stout (2007) at 42.
[24] Pacces derives the concept of idiosyncratic benefits of control from Clifford G.Holderness, A Survey of Blockholders and corporate Control, 9 Economic Policy Review, 51, April (2003), and Ronald J. Gilson, Complicating the Controlling Shareholder Taxonomy mimeo (2004) and subsequently: Controlling Shareholder and Corporate Governance: Complicating the Taxonomy, 119 Harv. L. Rev. 1641 (2006).

beneficial to the other shareholders. Pacces derives his theory from his observation that managerial entrenchment is ubiquitous across countries, including the UK and the US where share ownership is dispersed. The main difference he sees across systems is that some legal frameworks (the US, the UK) allow the entrepreneur to retain just a minimal stake in the company and stay entrenched, while others (Italy, France) require the entrepreneur to keep a sizable share ownership in the company.

2.1. Shareholders vs Board of directors

The next question is: why do investors in public corporations cede control over the company assets to the board of directors, rather than keep such control for themselves?

The most widely accepted theory is that which attributes to the board a monitoring role. This is the "monitoring model of the board". A limited and specialised group such as the board of directors can take more efficient decisions than dispersed and uninformed shareholders. Moreover, because of the way they are selected and paid, directors have the ability to make impartial and disinterested choices compared to executive officers. The monitoring model of the board maintains that the central economic function of the board consists in reducing the agency costs which executives would otherwise impose on shareholders. Directors are therefore agents of shareholders who have the function of controlling the work of other agents of the shareholders, i.e. executive officers. Directors are in a relatively good position to carry out this function since they have fewer conflicts of interest than executive officers, while compared to shareholders they can more easily observe executives' behaviour and take responsive actions.[25]

An alternative theory can be defined as the "Mediating Theory of the Board"[26]. This theory considers that executives are not the only possible exploiters in the company and shareholders the possible exploited, but the latter can in their turn be exploiters. Shareholders can in fact expropriate creditors, minority shareholders, employees and suppliers. Shareholder opportunism arises from the fact that various subjects make specific investments in the company. This means that they cannot easily withdraw their investment and sell it for its full value elsewhere. They are then at risk to be expropriated by the shareholders. How can the shareholders then induce these subjects to make specific investments in the company? To resolve the problem of mutual opportunism, the members of the team which invest in the company prefer to transfer control to an external subject: the board of directors.

However, the mediating theory of the board of directors has also been subject to criticisms. The academic who has most stressed its fallibility is Bebchuck, who maintains that, by isolating management from ownership, other stakeholders can only be protected wholly by chance. Bebchuck recognises the existence of rare cases where the sacrifice of shareholders' interests can advantage stakeholders, but he does not consider that the measure of isolating the board from the shareholders is particularly adequate. Firstly, there is no guarantee that the board uses its power to maximise the collective wellbeing of the various constituencies. The courts are not able to assess if this end has been pursued[27]. Indeed, the interests of management seem more aligned, at least partially, to those of shareholders than to those of stakeholders. While managers usually have part of their wealth in the form of shares and options, they normally do not have part of their wealth linked to the

[25] Shavell (2005).
[26] Shavell (2005, p. 677 ff.)
[27] Bebchuck (1990, p. 910).

wealth of bondholders or employees. The current practices for paying management rarely reflect the idea of a board whose duty is to maximise the overall wellbeing of the various constituencies[28]. Another criticism[29] to the mediating theory is that this theory refers exclusively to public companies, but does not refer to companies, including publicly traded ones, which have a controlling shareholder. In these cases ownership and control are reunited. How can this theory be applied to these cases? It seems improbable to imagine a solution in which the board is isolated from the influence of the controlling shareholder.

III. The present situation

In this section we examine the available data on shareholder ownership and presence at general meetings, with particular reference to institutional investors.

3.1. How many foreign shareholders in the EU?

Available data show that already a significant and increasing level of foreign ownership characterizes the listed companies across the EU. According to FESE (2004) and (2007), the weighted average of non-resident investors' proportion of the listed shares of European markets was 29% in 2003 and 33% in 2005 (**Table 1**). Moreover, a significant part of these foreign shareholders seems to be made of non-resident institutional investors.[30] Table 1 also shows the presence of foreign shareholders in several EU countries: at the lowest end of the spectrum there are Italy and Germany, where foreign shareholders own respectively 13% and 20% of total shares; at the other end of the spectrum we find The Netherlands where foreign ownership of listed companies reaches almost 70%. In between, close to the EU average of 33%, we find France, Poland, Sweden, Spain, and the UK.

3.2. Do foreign shareholders and institutional investors vote in the EU?

In the previous paragraph observed that a sizable amount of the shareholders in EU listed companies are cross-border shareholders and that a significant part of them is made of institutional investors. The next logical step is to understand how many foreign shareholders show up to vote. The available data seem to indicate that foreign participation at general meetings is poor.

With regard to the attendance of foreign shareholders at annual general meetings (AGMs) of some German and Finnish listed companies, figures in **Table 2** show a very low attendance rate at GMs of foreign shareholders either with regard to total share capital and, more important, with regard to the percentage of shares owned by foreign shareholders. An important caveat should be made with regard to controlling foreign shareholders or in any case to foreign shareholders who have a sizable participation in the company. The case of Polish listed companies (Table 2) shows that in such cases foreign shareholders manage to be present at GMs and to vote. Of course, this could just mean that small non-controlling cross-border shareholders are not interested to vote. In this case such low voting rates could be explained on minority shareholders' "rational apathy"[31] and not on legal obstacles to cross-border voting. That it may not be so is suggested by the fact that foreign shareholders that show up to vote at GMs as a percentage of total shares owned by foreign shareholders are significantly fewer than domestic shareholders as a percentage of total shares owned by domestic shareholders (Table 2).

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[28] ID, at 911.
[29] Steven Shavell, The Case for Increasing, supra note 18 at 909.
[30] FESE (2004), p. 1.
[31] Berle and Means (1932). See also Olson (1971).

However, the trend, at least in some EU Member States, seems to signal an increase in institutional investors' awareness of the importance to vote. According to the survey conducted by NAPF (2007), it is the norm for large pension funds to vote in the US, Japan and at least some European markets, as well as in the UK. As well as setting out their general voting policy in a public document, one third of funds surveyed disclose details of how specific votes have been cast at company meetings. More funds are exercising their voting rights overseas. Big majorities vote in Europe, the US and Japan, while almost half cast votes attached to stocks listed on emerging market exchanges.

3.3. How many shares held by institutional investors in the EU and the US?

According to Maes (2007), a crucial structural development in recent years has been the growth of institutional investors, such as pension funds and insurance companies. Against a background of ageing populations and rising longevity, a larger proportion of household savings is now being placed in private-funded pension schemes and life insurance policies investing directly in equity and corporate bonds. Moreover, in the last years the enhanced role of institutional investors, like pension and mutual funds and insurance companies, and other new actors, such as hedge funds, has been crucial for the rise of financial markets.

NAPF (2007) underlines that large pension funds are continuing to take their responsibilities as shareholders seriously and are actively engaging with the companies in which they invest. It reports complete awareness, among the funds, of the ISC Statement of principles. Such Statement reflects the Myners Review 's conclusions on the importance of shareholder engagement and sets out best practice for institutional shareholders and their agent in respect of the companies in which they invest . ISC Principles have been incorporated into managers' contracts by two thirds of funds surveyed by NAPF, and the very largest funds are most likely to have implemented them. Moreover, half of the respondents think that ISC principles have changed pension funds' engagement activities.

There is evidence that EU institutional investors are increasingly diversifying their equity portfolios. According to ECB (2007a), the share of investment funds' total holdings of all shares and other equity (excluding investment fund shares/units) issued by residents of the euro area outside the Member States in which the investment fund is located went from about 16% in 1998 to about 24% in 2006.

According to Capital International, the introduction of a single European currency has allowed institutional investors with domestic liabilities to diversify their holdings across the currency zone. This has in turn reduced the percentage of shares held by domestic investors in companies in their home markets as well as increasing the liquidity of shares in those companies.[32]

Institutional investor activism has also recently been encouraged by the rising number of institutional investors (among which a few very important European pension funds) that have a focused portfolio of company holdings for which they invest sizable sums in every company. As shown by Becht et al. (2006), in such cases investor activism is also motivated by economies of scale.

According to Gillan and Starks (2007) institutional investors in the US are today the most important category of shareholders, holding more than 60% of US equities in

[32] Information disclosed to the authors.

2005 with respect to 10% in 1953 (see Table 20). As for the EU from Table 2 we observe that institutional investors share holdings vary from 25% in Italy to 80% in the UK and the Netherlands, with such countries as Germany and France in between with respectively 29% and 59%. Rothberg and Lilien (2006) estimate that in 2004 mutual funds held about 24% of US equities.

3.4 Shareholder presence at general meetings in the EU and the US

In the absence of systematic data of shareholder voting rates, the sample analysed by PIRC (2007), p. 10 ss. shows average voting levels in France, Germany, Spain and Italy varying (**Table 9**) from 36% in the Netherlands and about 50% (Germany and Italy) to about 60% in the UK and Spain with France in between. As for variance, while in the UK levels of voting turnout below 30% are increasingly regarded as the exception, in France average figures disguise wide variations in turnout among companies, resulting from differing share structure. In particular, in the UK the percentage of voting shareholders has been constantly increasing over the last ten years, with an increase from 39% in 1996 to 60% in 2006. Finally, minority shareholder participation in Italy seems to be very low, with a particularly high proportion of shares represented at shareholders' meeting held by strategic shareholders, compared to other European countries. The latter point is also confirmed by other sources. According to Consob (2007), the average presence at shareholder meetings of small shareholders (shareholders holding less than 2% of total voting shares among whom there are mainly institutional investors) in 2006 was just of 2.5 percentage points. Such data do not include the Italian cooperative listed banks (banche popolari) which are characterised by voting rights ceilings (the principle one shareholder – one vote), restrictions to proxy voting and ownership ceilings. The total shareholder presence at the general meetings in such cases seems to be very low, as low as 3% of total shareholders.[33]

As for the US, Table 9 shows that shareholder presence is high (87%). The reasons for such high voting record seem to lie in the first place in the widespread recourse to proxy voting by the widely dispersed shareholder base and in some fundamental choices made by State legislators in the US such as the fact that the record owner of the shares is entitled to vote the shares held even when the person holds the stock in a fiduciary capacity.[34] According to PIRC (2007), for the 2006 period voting turnout for the S&P 500 compqnies would fall from 87.4% to 74.8% if broker votes were not considered. The lower voting rates in the EU seem to depend on the existence of legal obstacles to national and cross-border proxy voting (see below ch. III), to the separation of ownership and control (ch. IV) to the presence of dominant shareholder groups (ch. V) and of conflicts of interest (ch. VI).

3.5 Disclosure of Institutional investors' voting policies and voting record in the EU and the US

The OECD Principles of Corporate Governance recommend disclosure by institutional investors of their voting policies. In particular, Principle II.F.1 states

[33] http://www.senato.it/ulivo/interviste/070628_2.htm

[34] According to Anabtawi and Stout (2008), p. 34, as much as 85% of exchange-traded securities are held by brokers. However, Kahan and Rock (2007a), p. 5, also observe that the consequence of such a system is that beneficial owners who want to express their vote personally are obliged to do so by requesting to be appointed as proxy agent of their brokers/banks. According to the authors, this produces a series of inefficiencies in the voting process in the form of, among other things, votes not counted, double counting, impossibility of providing complete vote verification. The authors suggest to simplify the voting chain by giving direct voting right to the beneficial owners according to the proposal made in 2004 by Georgeson and the Business Roundtable.

that "Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights."[35]
In the US, since 2003 institutional investors are required to disclose not just their voting policies but also their voting record.[36] Such requirement was introduced after the initiatives undertaken by ** The ratio was to increase the confidence of savers in the management exercised by institutional investors, including their activism in the use of their shareholders rights.

In the EU, the action plan on corporate governance and corporate law adopted by the European Commission in 2003 contains a reference to the fact that institutional investors should be obliged, among other things, to disclose their policy with respect to the exercise of voting rights in companies in which they invest.[37]

However, such position has not resulted as yet in a mandatory requirement by any EU Member State. In the UK, the Company Act of 2006 grants reserve powers to the Secretary of State to enforce public disclosure of institutional investors' voting record. According to PIRC (2007), p. 7-8, the debate at the moment focuses on whether the enactment of such disclosure requirements would be too costly for institutional investors. Estimates provided by PIRC range such costs between £ 1,000 and £ 1,500 per institutional investor per year, and such costs seem to be incremental upon investors keeping electronic records of their voting, something which is already recommended in the UK by the Myners Principles (Myners 2007).

Waiting for mandatory voting record disclosure at EU level or EU Member-State lavel, for the moment a few institutional investors provide full disclosure of their voting record on their website (PIRC 2007, p. 8).

3.6 The effectiveness of institutional investor activism

The effectiveness of institutional investor activism is the subject of an important debate. As observed above, in the US such activism has been mainly conducted through precatory, that is not binding for the company management, shareholder resolutions. Nevertheless, as observed by Gordon (2008),[38] managements are never happy to reject a recommendation that has substantial shareholder support. A first conclusion seems to be that already the new wave of investor activism in the 1980s has had the result of persuading management in the US to dialogue with company shareholders.[39] Examining empirical evidence, Gillan and Starks (2000) and (2007) and Georgeson (2005) report a significant number of corporate governance proposals submitted in 1987-1994 and in 2001-2005 aimed at removing poison pills, classified boards, and supermajority anti-takeover amendments from

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[35] OECD (2004).
[36] The decision was adopted by the SEC on 23 January 2003 and took effect in July 2003. In particular, SEC Rule 30b1-4 (Report of Proxy Voting Record) provides that every registered management investment company, other than a small business investment company, shall file an annual report not later than August 31 of each year, containing the registrant's proxy voting record for the most recent twelve-month period ended June 30. See www.sec.gov/rules/final/33-8188.htm
[37] European Commission (2003a), p. 13. The action plan indicates such a measure to be adopted through a Directive to be adopted by 2008. At the moment (April 2008), the Commission has not yet announced any legislative proposal in this respect. It is also interesting to notice that on 25 February 2008 the European Parliament held an open hearing on the transparency of institutional investors.
[38] P. 6.
[39] Gillan and Starks (2007), p. 11. See the same article for a survey of the studies on the effectiveness of investor activism on companies' financial performance.

corporate charters, with an increase in the second period considered in proposals on executive compensation and a decrease in importance of cumulative boards[40] and staggered boards. As for the sponsors of corporate governance proposals, from the same authors we observe a significant decrease over the period considered of proposals submitted by individuals and by public pension funds, with a significant increase of proposals submitted by union funds. In this last respect Gillan and Starks (2007) observe that union funds and public pension funds seem to share the same agenda, with labour activism acting as a model for any large institutional investor. According to Capital International, over the last ten years or more, unions have increasingly worked to promote governance reforms based on the widely adopted position that companies executing good governance generally create better value for shareholders.[41] This does not necessarily mean that there has been a decrease in the activism of public pension funds. Making reference to the same data, Gillan and Starks (2007) observe a significant increase of votes in support of shareholder proposals. The authors attribute such trend to more concerted action by institutional investors, to proxy voting advisory firms, and to the public disclosure of mutual fund proxy votes.

According to Georgeson (2007b) recent shareholder activism in the US seems to have produced some results, in particular encouraging a movement from plurality voting towards majority voting. Kahan and Rock (2007a)[42] observe that another effect of investor activism has been "the more and more closely fought merger votes".

As for the EU, The survey conducted by NAPF (2007) shows a high impact of the engagement on investee companies' governance. More than three quarters of the sample (30 funds) have seen evidence that their voting and engagement activities are delivering specific, identifiable changes in investee companies

As observed by Capital International,[43] activism is most widespread and most effective in the more liquid markets, in the first place the US and the UK, in terms of its ability of disciplining failing or dysfunctional companies. Such cleavage might also run within markets: Santella et al. (2007) find a statistical relationship between disclosure of compliance to director independence requirements and company free-float in Italian non-financial companies.

3.7 Institutional investors and social and environmental issues

In the US, social and environmental issues have been one of the objects of investor activism already for a long time. According to Gillan and Starks (2007) the origin of socially-minded shareholder activism dates back to 1970, when a US federal court decision allowed a shareholder proposal to forbid the sale of napalm by Dow Chemical. The authors quote the American Society of Corporate Secretaries reporting that already in 1978 out of the 790 shareholder proposals received during the 1978 proxy season 179 were devoted to social issues.

Today in the US the Social Investment Forum (SIF) is the US association dedicated to integrate economic, environmental, social and governance factors into investment decisions. SIF's membership includes more than 500 social investment

[40] Boards elected according to cumulative voting allow in some cases minority shareholders to elect representatives on the board, though never to cause a change in control of the company: see Clark 1986, p. 361-6.
[41] Information provided to the authors.
[42] P. 2.
[43] Information provided to the authors.

practitioners and institutions, including financial professionals, analysts, portfolio managers, banks, mutual funds, researchers, foundations, community development organizations, and public educators.[44]

Georgeson (2007b) identifies as current priorities for social and environmental-minded investors such issues as political contributions, sustainability reports, greenhouse gas emissions, human rights, and labour standards. According to Capital International it is on some stakeholder issues such as employee rights or environmental impact that the largest number of shareholder resolutions are seen in the US (along with shareholder rights issues such as majority voting for directors).[45]

As for the effectiveness of investor activism in the social responsibility field, Campbell, Gillan and Niden (1998)[46] report that governance proposals tend to receive less support than social responsibility proposals do.

3.8 Ownership concentration

According to indicators of ownership concentration reported by Enriques and Volpin (2007) for the 20 largest listed companies in France, Germany, Italy, the United Kingdom and the United States widely held companies are relatively rare even among the largest listed companies in Italy while they are very common in the UK and the US, with Germany and France in between. Second, with the exception of the UK (where it is absent), family control is quite widespread even among the largest corporations. Third, pyramids are frequent in continental Europe and totally absent in the Anglo-Saxon countries. Moreover, looking at the median fraction of votes owned by the largest shareholder across all listed companies, ownership appears very concentrated in Germany and Italy, and diffused in the Anglo-Saxon countries, with France falling in between. Finally, in continental Europe ownership is largely concentrated in the hands of a small number of wealthy families (see **Table 7**).

Bianchi et al. (2005) provide data on ownership concentration of listed companies across 16 European countries (including 14 EU Member States) with reference to the percentage of total share capital owned by small shareholders (the so called free float). They show that while the general average free float across all the countries considered is about 90%, there are significant differences across in Italy the average free float is less than 60% against about 90% in the UK and Ireland, more than 70% in the Scandinavian countries and about 66% in Germany. (**Table 8**).

IV. LEGAL OBSTACLES TO PROXY VOTING[47]

As observed by Gordon (2008),[48] "Given the large number of shareholders in most public corporations, it is unfeasible for the shareholders to assemble in a physical space for the vote; yet the validity of the vote requires a large turnout, if only to satisfy quorum requirements. The practical solution is the corporation's solicitation of 'proxies' that designate corporate agents to vote on the shareholder's behalf".

[44] http://www.socialinvest.org
[45] Information disclosed to the authors.
[46] Quoted by Gillan and Starks (2007).
[47] Unless differently specified data provided in this paragraph come from answers to the questionnaire distributed by the European Commission available at: http://ec.europa.eu/internal_market/company/docs/shareholders/comm_native_sec_2006_0181_en.pdf
[48] P. 5.

In the EU the Shareholder Rights Directive was adopted by the Council and the European Parliament in July 2007.[49] The Directive aims to reduce in the first place the costs of national and cross-border proxy voting. Beneficiaries are expected to be in the first place institutional investors. The Directive consists of a series of measures aimed at removing several legal obstacles to voting at a distance, in the first place through the recourse of proxies. The Directive introduces minimum standards to ensure that shareholders of companies whose shares are traded on a regulated market have a timely access to the relevant information ahead of the general meeting (GM) and simple means to vote at a distance. It also abolishes share blocking and introduces minimum standards for the rights to ask questions, put items on the GM agenda and table resolutions. More in detail, the Directive features the following key provisions: minimum notice period of 21 days for most GMs, which can be reduced to 14 days where shareholders can vote by electronic means and the general meeting agrees to the shortened convocation period; Internet publication of the convocation and of the documents to be submitted to the GM at least 21 days before the GM; abolition of share blocking and introduction of a record date in all Member States which may not be more than 30 days before the GM; abolition of obstacles on electronic participation to the GM, including electronic voting; right to ask questions and obligation on the part of the company to answer questions; abolition of existing constraints on the eligibility of people to act as proxy holder and of excessive formal requirements for the appointment of the proxy holder; disclosure of the voting results on the issuer's internet site. The Directive was adopted in July 2006 by the Council and the Parliament and it is supposed to be adopted by the 27 EU Member States by July 2009.

Proxy voting and re-registration requirements

Concerning the specific obstacles observed before the adoption of the Directive, in the first place several constraints at present make proxy voting unduly cumbersome in some Member States. These limitations relate mainly to the persons that may be appointed as a proxy, the number of proxy appointments which any one proxy may hold or the formal requirements for a valid appointment of proxies. As for the formal requirements to be fulfilled, Manifest (2007) stresses that obtaining and submitting powers of attorney is a time-consuming and expensive process. In particular, the need to renew the power of attorney on a regular basis (e.g. annually or for every meeting) is considered to be a serious deterrent to voting, because it is costly and it takes a large amount of time and resources, especially in the markets where investors do not routinely vote.

Waiting for the adoption of the Directive, the regulation in place in countries such as Sweden, Denmark, Belgium, Poland, Portugal and Finland require setting up notarised powers of attorney for the shareholder to empower the sub-custodian to represent it and to vote at the GM. Hermes stresses that such costs are so important that they might discourage even small funds (not just small individual shareholders) from voting. On the other hand, as stressed by DAM, such countries as Germany, The Netherlands and France allow voting through a post-oriented proxy appointed by the issuer and the votes can be sent over through specific voting instruction forms/internet that allow the ultimate investor to vote in absentia and to limit his administrative and travel expenses.

[49] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. The EU Member States have two years to implement the Directive in their national laws. The Directive is available at: http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm

As shown in European Commission (2006), Annex 3, question 9, differences also concern the methods to appoint proxies, the identity of proxies, the number of shareholders who may be represented by the same person, and the power of proxies at GMs.

Manifest (2007) observes that, among the other cumbersome requirements for proxy-voting which have been addressed by the Shareholders' Rights Directive, an important role is played by the re-registration of shares. According to such requirement, shares have to be registered from nominee accounts into temporary accounts registered in a beneficial owner's name. this is considered to be a major disincentive to voting.

Share blocking
Although some Member States have taken steps to reform the law in this area, the practice of share blocking, *i.e.*, the obligation to deposit or block shares for a few days before the General Meeting to be able to vote, can still be found in several EU jurisdictions before the adoption of the Directive. As it can be seen in European Commission (2006), Annex 3, question 9, in some Member States the practice is mandatory and the blocking time varies between 3 and 7 days before the date set for the GM; in other jurisdictions (e.g., Austria, Italy, Netherlands, Spain) articles of association may require that shareholders have to deposit their shares. The reason why share blocking facilities exist is to ensure that those who show up to vote at general meetings are actually shareholders on the day of the vote. However, share blocking is very costly for shareholders as it prevents them from negotiating shares up to weeks in advance to the general meeting.

Share blocking is considered by the vast majority of institutional investors as one of the greatest obstacles to voting. Indeed, it appears that many institutional investors will choose not to vote rather than be prevented from selling their shares at any time. Voting is often considered as not being worth the financial risk associated with the immobilisation of shares. According to Institutional Shareholder Services (ISS), it is fairly common practice for clients to maintain a standing instruction of 'no action' – or not voting – in markets that practice share blocking.

This circumstance is confirmed also by ISS [50] which adds that its clients (institutional investors and global custodian banks) show much greater likelihood to vote in markets which do (table 4) and by Hermes according to which voting is an area where flexibility is detrimental, as the existence of a multitude of differing statutory provisions *de facto* creates confusion and induces custodians to implement a minimum common denominator.[51] (see table 5 and 6).

4.1. The remaining legal obstacles in the EU: complexity of cross-border voting

[50] "Much confusion persists with regard to share blocking in the mind of the institutional voter, given that blocking regulations have changed, and continue to do so, in several blocking markets. Uncertainty over whether a market practices a 'hard' block (liquidity is frozen) or 'soft' block (shares may still trade) is common, as is uncertainty over whether or not shares may be unblocked once they have been blocked prior to a meeting (France, yes; Greece, no)."

[51] Moreover, the existence of quorum requirements – which *per se* cannot be considered to be a problem – might *de facto* extend the blocking period considerably. Indeed, in some countries shares shall be blocked 5 days ahead of the date fixed for the first call of the general meting ("GM") and remain blocked till the day after the GM, which might be held on second or even third call, with a total blocking period that can reach 30 days. Given that it cannot be foreseen with certainty whether the GM will go on second or third call, the uncertainty over the length of the whole blocking period acts as a further discouragement to investors.

Investors in European listed companies face particular problems if they reside in countries other than where the company is registered. Nowadays, investors typically hold their shares in securities holding systems through accounts with securities intermediaries, who, in turn, hold accounts with other securities intermediaries and central securities depositories in other jurisdictions. These cross-border chains of intermediaries cause particular problems in the process of communicating with - and actual voting by - such shareholders.

Because of the existence of cross-border chains of intermediaries, cross-border voting usually requires the recourse to global custodian banks (or their proxy vendors), who in turn must engage proxy-related services from its network of local market sub custodians. Resulting local fees are typically passed through the global custodian to the underlying institutional voter or beneficial owner. Moreover, many local markets have specific voting requirements that incur additional fees.

According to Manifest (2007), the chain approach used to vote shares in European companies is a major source of complexity in the proxy voting process; it is time-consuming and prone to errors as a result of the large number of different participants. On the other hand, Manifest stresses that full audit trails are not available in any European market, so that in the chain approach to voting, there is no process that would enable a voting service provider to provide an institutional investor with the feedback that the votes reached the issuer.

4.2 Obstacles to proxy voting in the US

Most of the impediments to vote by proxy at shareholder meetings do not apply in the US. As observed by Capital International,[52] US issuers determine voting eligibility using a record date and distribute comprehensive information to shareholders well in advance of the meeting, and shareholders are also allowed to vote until the day prior to the meeting date by paper or electronic means, without the need to attend or send a representative to meetings in order to exercise their rights. The Proxy distribution business is effectively monopolised by one company, Broadridge,[53] that distributes materials and collects votes on behalf of issuers.

On the other hand, US shareholders' vote seems to have a more limited reach than in the EU. As we have seen above, the monitoring model assumes that directors always act according to the shareholders' interests and that shareholders should have the possibility to monitor directors. However in the US shareholders have less power to direct board directors than in the EU. According to Bebchuck the “franchise”, i.e. the sovereign power of shareholders is "an illusion."[54]

In the US system shareholders are allowed to vote in a specified and rather restricted set of circumstances. Shareholders are allowed to vote[55] mainly on director election, mergers and other extraordinary transactions, and in some cases on director self dealing transactions and executive compensation.[56] The conclusion is that in the US shareholders who wish to influence management voting decisions must do so mainly through their vote for the board of directors. As observed by

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[52] Information disclosed to the authors.
[53] www.broadridge.com
[54] Lucian Ayre Bebchuck, *The Myth of the Shareholder Franchise*, supra note 7.
[55] By State law, tax law, and stock exchange rules.
[56] See Kahan and Rock (2007a), p. 4 and Clark (1986), section 3.1.1.

Kahan and Rock (2007a), more and more director elections have become central also in takeover contest:[57]

4.2.1 The role of the SEC in restricting the effectiveness of shareholder proxy vote

An important role in the definition of shareholder voting rights in the US falls on the SEC. In particular, the Security Exchange Act, among other things, gives the SEC the authority to discipline the modalities of shareholder access to proxy voting.[58]

A prudent stance of the Sec vis-à-vis shareholder voting rights is deemed by Georgeson (2007b) evident in the case of the NYSE proposal to amend its Rule 452. NYSE Rule 452 allows brokers[59] to vote on certain "routine" proposals if the beneficial owner of the stock has not provided voting instructions to the broker at least 10 days before a scheduled meeting. The NYSE has amended Rule 452 a number of times since its adoption in 1937, and the rule identifies a number of items that are considered "non-routine" so as not allow the broker to vote on any proposal that substantially affects the rights of shareholders. The proposal, filed on 24 October 2006, subject to approval by the SEC, provides that the election of directors be considered as "non-routine" for all shareholder meetings held on or after Jan. 1, 2008.[60] According to Georgeson (2007b), the SEC has been "not so swift" in approving NYSE rule modifications.[61]

The central point of the debate lies today in the way the SEC has made use of its power to give shareholders access to the issuer's proxy statement, particularly in connection with the nomination of directors.[62] Over time the SEC has maintained

[57] Kahan and Rock (2007a), p. 2: "Delaware law, by upholding the poison pill, has channelled the decision into the annual meeting. The prevailing mode of hostile acquisitions has become a bid coupled with a proxy contest so as to replace the directors and remove the poison pill."

[58] See http://www.sec.gov/about/laws.shtml#secexact1934 : "The Securities Exchange Act also governs the disclosure in materials used to solicit shareholders' votes in annual or special meetings held for the election of directors and the approval of other corporate action. This information, contained in proxy materials, must be filed with the Commission in advance of any solicitation to ensure compliance with the disclosure rules. Solicitations, whether by management or shareholder groups, must disclose all important facts concerning the issues on which holders are asked to vote." The text of the Securities Exchange Act of 1934 is available at: http://www.sec.gov/about/laws/sea34.pdf

[59] As reported by Kahan and Rock (2007a), p. 9-10, in the US brokers, together with banks, act as custodians on behalf of their beneficial owners. Brokers and banks hold the shares through accounts at the Depository Trust Company.

[60] http://www.nyse.com/press/1161166307645.html

[61] Among the other matters that the current NYSE Rule 452 considers routine is an uncontested" election of a company's board of directors. Rule 452.11(2) defines a "contest" as a matter that "is the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management." According to Black (1990), p. 560-61, "under New York Stock Exchange (NYSE) rules, stock brokers who hold shares in street name for their client can vote those shares on routine matters unless the client gives them voting instructions at least 10 days before the meeting. They can't vote shares if they know of a contest, nor of a merger or other matter 'which may affect substantially the rights of privilege of such stock'. Operating under this vague standard, the NYSE lists in a weekly bulletin the matters on which member firms may vote client shares. Brokers invariably vote client shares promanager....The NYSE staff can be also incredibly ignorant; it has more than once authorized a promanager vote despite a well-publicized proxy fight." In April 2005, the NYSE set up a Proxy Working Group (the group) to review the proxy voting process. The group has issued in 2006 a report and recommendations (NYSE 2006). In light of the importance of the role of directors in corporate governance matters, the group believed the election of directors can no longer be considered a "routine" matter, and for this reason brokers should not be allowed to vote uninstructed shares for such elections. The group recommended that Rule 452 be amended to make voting on directors a non-routine matter.

[62] Gordon (2008), p. 7.

that the shareholder proposal[63] cannot relate to a particular election of directors,[64] with the effect of "ruling out a low-cost mechanism for a shareholder insurgent to reach fellow shareholders in a director election".[65]

The consequence is that if a shareholder wants to present an alternative list of directors, she has to put in place a proxy (shareholder) solicitation at her own expenses.[66]

As reported by Anabtawi and Stout (2008)[67] the SEC recently solicited comments on a profound rule change that would have allowed a dissident shareholder holding at least 5% of outstanding equity to propose a bylaw change that would allow the dissident to include its own director nominees in the company's proxy solicitation materials. However, the SEC eventually decided not to adopt this version of the rule.

As stressed by Gordon (2008),[68] having access to the issuer's proxy statement does not just mean important cost savings. It also means that the shareholder proponent is not subject to the disclosure obligations of a party who is formally soliciting proxies. Moreover, the ownership requirements to make a shareholder proposal are low, in some cases as little as 2000 USD in shares held for one year.

As for the justification of such a position on the part of the SEC, one possibility is that the SEC wants to prevent an ever-present threat of a director election contest which would disrupt company management.[69] Another reason has recently been spelled out by directly by the SEC

According to SEC Chairman Christopher Cox, the shareholder base in the US is made of diffuse share ownership and a "very large retail component", something which explains why the US regulators tend to focus on auditing standards and internal controls as a first measure of shareholder protection against possible managerial abuses.[70]

However, as it can be seen from Table 20, in the US more than 60% of total shares are today held by institutional investors. As observed by Black (1990)[71] and Gordon (2008),[72] instead of millions of dispersed retail investors, the US public companies are increasingly controlled by hundreds or thousands of financial intermediaries. Such institutional actors are able to coordinate their voting rights at much lower cost.

Finally and perhaps contradictorily, as observed by Gordon (2008), the SEC at the same time also acknowledges the need "to strengthen the proxy rules to better

[63] SEC rule 14a-8, the shareholder proposal rule, allows security holders to have their own proposals for action at a forthcoming shareholder meeting included in the management's proxy statement at the company's expenses. See Clark (1986), p. 371-3.
[64] Security Exchange Act Rule 14a-8(i)(8), permits a company to omit from its proxy materials any proposal that "relates to an election for membership on the company's board of directors or analogous governing body."
[65] Gordon (2008), p. 7.
[66] SEC rule 14a-7, see Clark (1986), p. 370-1.
[67] P. 34.
[68] P. 5-6.
[69] Gordon (2008), p. 7.
[70] ECGI (2007).
[71] P. 567.
[72] P. 4.

vindicate the fundamental state law rights of shareholders to elect directors" by promising to reopen the discussion in 2008.[73]

4.2.2 Recent easing of SEC restrictions on shareholder proxy voting

Notwithstanding its prudence vis-à-vis shareholder voting rights, the SEC in recent times the SEC has eased certain restrictions to voting rights, or rather to giving shareholders access to the agenda of shareholder meetings. Apart from the evolution of SEC regulatory approach concerning consultation among institutional investors (see below par 5.2.5), the recent introduction by the SEC of notice and access to proxy materials on the Internet might reduce in the short term coordination costs among institutional investors to present proxy solicitations.[74] According to Georgeson (2007b), the interest of this innovation concerns mainly voting in companies with a large institutional shareholder base. The author also signals that the switch to majority voting and the introduction of the Notice and Access rule might determine in the short term complications in the process of solicitation.

4.3. Shareholder voting rights in the EU and the US

As we have seen in the previous paragraph, in the US access to proxy voting for institutional investors has been relatively easier compared to the EU. Second, the Shareholders' Rights Directive which is supposed to be adopted by the EU Member States by July 2009, should remove a significant part of the legal obstacles to proxy voting in the EU. We have also seen that in the US the effectiveness of shareholder voting is limited by State legislation and SEC regulation. Moreover, in several important respects the US corporate law system restricts shareholder power compared to EU Member States. In particular, as observed by Bebchuk (2005, p. 836), in the US all major corporate decisions must be initiated by the board. The only way for shareholders to introduce a new corporate decision is by rejecting incumbent directors with a team that is expected to make such a change. As it can be seen from Table 25, in the US amendments to corporate charters, approvals of mergers and sale of company assets can only be done through board initiative, differently from what happens in the UK, Italy, France and Germany. Decision on dividend distribution in the US belongs exclusively to the board, something which happens in Germany, in Italy (but only in case of very rarely used two-tier boards) and which does not happen in the UK. Even for removal of directors the situation is less favourable for investors in the US than in the UK, Italy, and France, where shareholders can request at any time a vote.

The conclusion is that national legislation in the EU seems to give shareholders more voting power. Ferrarini (2005, p. 22-3) observes that already in 1998 the Italian legislator strengthened the powers and responsibilities of the board of auditors (collegio sindacale) so as to make it functionally similar to an audit committee made up of non-executive directors. The legislator also gave 5% of shareholders the power to sue directors for damages caused to the company. A very important innovation was also the introduction, as observed by Bianchi and Enriques (2001), of a blocking minority of 25% of voting rights.

Finally, as observed by Ferrarini (2005), it is also important to take into account the quality of law enforcement. La Porta et al. (2003) find a low level of private and public enforcement of securities laws in Italy and France, something which is confirmed for Italy by Ferrarini (2005, p. 26-7).

[73] http://www.sec.gov/news/press/2007/2007-246.htm

[74] Gordon (2008), p. 12ss

V CONFLICTS OF INTERESTS AND SHAREHOLDER ACTIVISM

In this section we examine whether conflicts of interest might limit institutional investors' activism at the expenses of institutional investors' clients.

As observed by Gillan and Starks (2007),[75] institutional investors "may be reluctant to undertake activism against other corporations, particularly those with which the sponsoring company does business. Because of business relations with the corporation, some institutional investors may feel compelled to vote with management even though such behaviour runs contrary to their fiduciary interests." The problem is potentially more important the more diversified the interests of the investor (Rothberg and Lilien 2006, p. 160). According to Kahan and Rock (2007b, p. 24-6), in the US mutual funds affiliated with a financial institution may be reluctant to amtagonize present or future clients of their parent company, while for large unaffiliated funds the management of corporate pension plans are an important source of revenues. The authors also observe that fund management companies only profit modestly from activism due to their portfolio diversification, so that even modest conflicts of interest might dissuade them from pursuing an activist strategy. As for pension funds, sources of conflicts of interest stem from their trustees being elected from politicians and being tempted to pursue political ends, rather than maximization of investment returns. The latter point might also hold in the EU. For instance the Italian legislative framework attributes control on the shareholder voting rights for the shares owned by pension funds to trade unions (together with employers' representatives), which might be tempted to make use of such rights following their own political agenda rather than the maximization of returns.[76] Finally, hedge funds seem to be less concerned by conflicts of interest. According to Kahan and Rock (2007b, p. 33) most hedge funds are independent investment vehicles not affiliated with any other institutions and they do not manage companies' defined contribution plans.

On the empirical side, Romano (1993) investigated whether US public pension funds are more effective monitors of management because they vote their own shares, while private pension funds usually delegate their voting to external managers. However, in her empirical study Romano finds no evidence to support this hypothesis. Along the same line, two studies surveyed by Gillan and Starks (2007)[77] also suggest that funds are no more likely to vote with management at client than non-client firms.

As for the EU, there are signs that, at least in some Member States, conflicts of interest might discourage institutional investors from voting their portfolio shares. De Rossi et al. (2008)[78] report that the Italian mutual funds owned by banks and insurance companies have about 85% market share. The boards of such funds are made mainly of directors who are also executives in the controlling bank or insurance company, while the number of independent directors sitting on such boards is very low, and sometimes nonexistent. Such potential conflicts of interest seem to translate in a low voting turnout by Italian mutual funds. According to Consob (2007) the Italian mutual funds have a very low voting turnout at the shareholder meetings of their listed portfolio companies.

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[75] P. 13.

[76] Legislative Decree 5 December 2005, n. 252, (Official Journal 13 December 2005 n. 289 S.O. n. 200), art. 8c). the Decree is available at: http://www.covip.it/documenti/PDF/LeggiDecreti/Decreto%20252.pdf

[77] P. 24.

[78] P. 23-25.

VI. ACTING IN CONCERT

The purpose of this section is to examine the economic obstacles to institutional investor coordination and to identify the cases in which the legal discipline of acting in concert might constitute an obstacle to institutional investor activism.

6.1. Economic obstacles to minority shareholder coordination

Proxy fights and in general acting in concert are not common and often fail because of shareholders' passivity. The passivity of dispersed shareholders is a tipical "collective action" problem in a twofold meaning. First all all, it is possible that spending 10 an investor could obtain 20. In this case the collection action problem is that each shareholder hopes that other shareholders act on behalf of every shareholder. Shareholder activism has the characteristic of a public good. Second, for a shareholder it may be rational to behave in a way of apathy bacause she has to spend ten dollars to obtain five. But if every one acts, each shareholder would obtain twenty. Also in this case there is a problem of collective action because activism is a public good. However, the possibility of acting in concert without restrictions helps to overcome the collective action problems: in the first case because expenses per shareholder are lower; in the second case because there is an earning per shareholder. The result is that, as reported by OECD (2007d, p. 3), capital markets around the world are increasingly dominated by institutional investors that often adopt passive investment strategies. Such trend is also encouraged by prudential regulation that limits the share of equity held in a company by some institutional investors. In this respect, Bianchi and Enriques (2001)[79] observe that the only way for institutional investors that invest in the index is to coordinate their efforts. However, Kahan and Rock (2007b, p. 15-16) observe that mutual funds and pension funds are forced by regulatory constraints, portfolio diversification and other factors to a "passive" form of activism focused at changes in corporate governance rules (instead of specific company decisions) spread over a number of companies, and further limited by the fact that shareholder resolutions in the US are usually not binding.

Gillan and Starks (2007) survey two studies on investor activism showing that an important obstacle to proxy proposals in the US is the difficulty of persuading other institutions to agree on unified proxy strategies.[80]

Sometimes a coalition of istitutional investors can go as far as to publicly undertake to remove a board of directors. One such case was widely covered by the press: it was the case of the UK Tate company. Tate management was accused to manage the company in an inefficient way. The chief executive and founder of the company owned a 23% block and believed that he could win a vote at a special shareholders' meeting. Norwich Union, which held 5% of Tate's share intevened in the dispute and after negoziations chief executive was substituted by a manager closely associated with the former chief executive. Norwich Union's chief investment officer was also the chairman of the Institutional Shareholders's Committee. He quickly made a coalition with two othe institutional investors, but one soon dropped out. Norwich Union assembled proxies from 40% of Tate's shareholders, called an emergency meeting, and voted the board out of office. The interesting aspect is that Norwich Union and the other institutional investor who joined the action found themselves with a 60,000-pound bill for solicitors' service. No other shareholder

[79] P. 10.
[80] P. 14.

accepted to share the expenses. It was a tipical case of free riding.[81] From the example it emerges that in order to have successful activism the private benefits must be higher than the benefit appropriated by the free riders, which means that coordination costs increase the cost of activism and reduce the number of proxy campaigns. The answer seems to be that shareholder activists should have more important stakes in the companies in which they are active. Hedge funds are not constrained in their shareholding levels by regulation. Georgeson (2007b) reports an increase in the number of proxy fights (proxy contests) in the US in the last ten years and attributes such increase mainly to hedge funds. Evidence surveyed by Gillan and Starks (2007)[82] also reports a sharp increase in proxy contests between 2003 and 2005 attributable mostly to hedge funds. Kahan and Rock (2007b) observe a complementarity between hedge funds and "traditional" institutional investors who lack the means to initiate proxy fights and other activist practices but who can support them.[83] Such activism, which is directed mainly at short-term shareholder value enhancement (M&A included), seems to have produced also more long-term effects in persuading companies to give up strong takeover defense profiles. According to OECD (2007d, p. 1), activist hedge funds and private equity firms could help strengthen corporate governance practices by increasing the number of investors that have the incentive to make active and informed use of their shareholder rights. The existence of a significant interest on the part of such investors allows them to establish alliances with other hedge funds (the "wolf-pack approach") so as to seek the active free riding by pension funds and mutual funds through several means, for instance contacts with proxy advisory firms (see below chapter 9.1) and institutional road shows. For the moment the success rate of such investors is quite impressive (OECD 2007d, p. 5), although the proliferation of activist hedge funds might determine in the near future difficulties in ensuring for such investors above-average returns (Georgeson 2007b). The consequence might be an increase in the hedge fund effort to sustain short term gains by creating more fights.

The collective action problem has an impact equally in the US and in Europe, although as we have seen hedge funds seem for some reason to be less active in the EU than in the US. Another economic obstacle to shareholder activism is represented by the existence of strong controlling shareholder blocks. The problem seems to be particularly important in continental Europe, where, as we have seen above (par. 3.8) controlling blocks and in general the weight of the first shareholder is particularly relevant.

6.2. Legal obstacles to acting in concert in the EU and the US

As observed by OECD (2007a, p. 57-9), many investors, including hedge funds, sometimes engage in parallel behaviour, mimicking each other's investment decisions and use of their shareholder rights. While according to the OECD such behaviour is not only not reprehensible but is part of an institutional investor's duty to monitor market developments on behalf of its clients, in some cases national legislations in the EU and in the US establishes limits to concerted shareholder action.

[81] Bernard S. Black and John Coffee, *Hail Britannia?: Institutional Investor Behavior under Limited Regulatuion*, 92 Mich. L. Rev. 1999, 2042-2043 (1994).
[82] P. 31.
[83] The authors also observe that besides the possibility to concentrate their assets on specific targets, hedge funds have further advantages with respect to "traditional" institutional investors such as their charging significant incentive fees and aiming at hig absolute returns instead of returns relative to a benchmark.

In the EU one of the core provisions of the Takover Directive[84] is the so-called mandatory bid rule (MBR). It requires a person or persons acting in concert who acquire a certain percentage of a company's voting rights giving them control of that company to make a full takeover bid for all remaining shares at an equitable price. This obligation aims at protecting the interest of minority shareholders and provides them with a right to leave the company on fair terms once the controlling shareholders change.[85]

The Directive defines acting in concert (art. 2.1.d)[86] as persons cooperating with the offeror or the offeree on the basis of an agreement aimed at either acquiring control of the offeree company or at frustrating the successful outcome of a bid. Further to the presumption of the Directive that the acquisition of a certain percentage of voting rights (defined usually at 30% at national level)[87] confers control, the Directive does not provide a unified definition for the concept of control which in turn is used by the Directive for the definition of acting in concert. Such a detailed definition is then provided by Member States. As a consequence, given the absence in the Directive of predetermined criteria for distinguishing acting in concert from corporate governance activism, different rules and standards apply which might lead to legal uncertainty. Hermes[88] remarks that the regulations of some Members State currently do not differentiate control-seeking actions from the co-operation of institutional investors aiming at developing a shared message to companies. Hermes estimates that the lack of clarity implies costs representing 3-27% of the total costs for active ownership activities

6.2.1 Germany

The German takeover act (the Securities Acquisition and Takeover Act, or *Wertpapiererwerbs- und Übernahmegesetz*, "**WpÜG**") was adopted in 2001 by the German Parliament and is in force since January 1st 2002.

The Acting in concert under the terms of the Takeover Act of 2002

Among other things, the law contains a provision on the acting in concert. According to §30 sec. 2 of the German Takeover Law (Wertpapierubernahmegesetz - WpÜG), the obligation of launching a mandatory offer applies as well to the persons with whom the shareholder trespassing the 30% threshold coordinates his voting conduct. The provision in question deems shareholders to be acting in concert whenever they coordinate "in any other way". Two jurisprudential rulings on the subject have clarified the meaning of the law with respect to the acting in concert.

In 2004 a ruling from a regional German Appeal Court provided an interpretation for the meaning of the "any other way" formulation.[89] The decision was based on two central aspects. On the one hand the court stated that the main feature of

[84] Directive 2004/25/EC of 21.04.2004 on takeover bids. The text of the Directive is available at: http://ec.europa.eu/internal_market/company/takeoverbids/index_en.htm# legislation

[85] On the debate about the effectiveness of the so-called Mandatory Bud Rule in protecting minority shareholders see Enriques (2004) and Sepe (2007).

[86] Art. 2.1.d: "persons acting in concert» shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid;"

[87] See the report published by the European Commission in February 2007 on the adoption of the Directive by EU Member States at: http://ec.europa.eu/internal_market/company/takeoverbids/index_en.htm# legislation

[88] Answering to the questionnaire distributed by European Commission (2006).

[89] The OLG Frankfurt, in its decision, rejected the assumption of acting in concert (and therefore the triggering of a mandatory offer) against two shareholders tied to each other by a strategy paper concerning the rehabilitation of the company in which they reached a holding of 40% in share capital.

acting in concert is the intentional cooperation of the shareholders with the aim of a continuous and co-ordinated use of voting rights. Moreover, such coordination has to be part of a sustained and continued connection. The second important aspect of the decision lies in the fact that the Court required the German financial supervising Authority (BAFin) to prove the existence of such an agreement against the involved shareholders in the relevant case. A mere suspicion of an agreement is not sufficient.

In September 2006 the highest German court, the Bundesgerichtshof, provided an interpretation of the acting in concert as relating only the coordination of the shareholders at the general meeting (GM) itself.[90] On the other hand, elections conducted in the supervisory board are not subject to section 30, par. 2 of the WpÜG. The judges argued that supervisory board members are obliged to serve the interests of the company and are neither representatives of the shareholders nor subject to any instructions by them.

The meaning of the acting in concert under the terms of the German Takeover Act of 2002 according to the interpretation given by the German Courts is then rather restricted, since it only covers agreements among shareholders at the GM. Moreover, such coordination has to be part of a sustained and continued connection.

Finally, as demonstrated by the case Deutsche Börse AG in 2005, the coordinated acquisition of shares by several shareholders is not sufficient evidence under the Takeover Act to demonstrate the existence of acting in concert.

The Acting in concert according to the draft amendment to the Takeover Act of 2002

The German Federal Ministry of Finance, mandated by the Federal Government, prepared in September 2007 a draft bill called "Risk Limitation Act"[91] which is supposed to come into force in Spring 2008. The draft legislation contains, among other things, an amendment to the Takeover Act of 2002 which enlarges the scope of acting in concert, and an amendment to the Securities Trading Act (*Wertpapierhandelsgesetz*, "**WpHG**")[92].

a) The new proposed definition of acting in concert

As for the new proposed definition of acting in concert, the draft legislation intends to extend the definition of acting in concert to cover not just the agreements among shareholders having as an object the coordinated exercise of voting rights at the GM.

Second, the new proposed law extends the acting in concert also to "coordinated conduct" as long as the parties involved "agree to cooperate in a manner that is qualified to influence the target company's entrepreneurial direction permanently or considerably."[93]

[90] II ZR 137/05 of 13 September 2006.
[91] German Ministry of Finance, Referentenentwurf für ein Begrenzung der mit Finanzinvestitionen verbundenen Risiken, Bearbeitungsstand: 13.09.2007
[92] The English version of the act is available at: http://www.bafin.de/gesetze/wphg_en.htm#p21 and at: http://www.bafin.de/cln_006/nn_721176/SharedDocs/Aufsichtsrecht/EN/Gesetze/wpueg__en.html?__nnn=true . The draft of a Risk Limitation Act which is still under discussion in Parliament is published under http://dip21.bundestag.de/dip21/brd/2007/0763-07.pdf
[93] Ibidem. The draft law specifies that coordinated conduct "in individual occasions" is exempted.

The draft bill provides an exception to this last provision. Agreements having as an object the composition of the supervisory board and the appointment of its chairperson do not fall within the definition of acting in concert on condition that the new members of the board and/or the new chairman do not introduce a new entrepreneurial direction to the company.

b) Notification requirements

Among other things, the Risk Limitation Act also provides [94] new disclosure requirements linked to the reaching or the trespassing of the del 10% threshold and of any further quantitative threshold provided by §21, 1 del WpHG.[95] Under such new disclosure requirements the shareholder has to specify the objectives pursued through her participation in the company and the origin of the funds used to finance the acquisition. Such information must be provided within twenty days from the trespassing. Such short delay applies also in case of change in the objectives pursued by the shareholder. The draft law specifies a number of items that must be covered by the notification, such as the whether the investment serves the purpose of implementing strategic objectives or generating trading profits; the acquirer intends to obtain further voting rights, by acquisition or otherwise, within the next twelve months; the acquirer intends to obtain control within the meaning of Section 29 subsection 2 WpÜG,; the acquirer intend to influence the composition of any issuer's administrative, management or supervisory bodies; and finally whether the acquirer intends to introduce a substantial change in the company's capital structure or the dividend policy.

As regards the origin of the funds, the party obliged to notify must indicate the respective percentages of own and external funds in the total financing. Moreover, it is intendend, although not explicitly stated in the proposed wording of the bill, that the acquirer shall also indicate whether it acts independently or jointly with other shareholders.

As a consequence of the disclosure requirement, the investor must reveal ex post business internals. The requirement to update such information without undue delay might even have the consequence that an investor must disclose new objectives before having had the opportunity to implement these objectives.

[94] Draft Risk Limitation Act, art. 1, par. 3.

[95] The version currently in force of the article provides:

Section 21 Notification requirements applicable to the notifying party

(1) Any person (the notifying party) whose shareholding in an issuer whose home country is the Federal Republic of Germany reaches, exceeds or falls below 3 percent, 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 30 percent, 50 percent or 75 percent of the voting rights by purchase, sale or by any other means shall, without undue delay, and at the latest within four trading days, notify this to the issuer and simultaneously to the Supervisory Authority in compliance with section 22 (1) and (2). In respect of certificates representing shares, the notification requirement shall apply exclusively to the holder of the certificates. The notification period set forth in sentence 1 begins at the point when the notifying party learns or in consideration of the circumstances must have learned that his/her percentage of the voting rights has reached, exceeded or fallen below the above-mentioned thresholds.

The amendment of Section 28 WpHG[96] is to introduce tougher legal consequences for violations of statutory notification obligations pursuant to Section 21 WpHG. Currently, rights arising from shares, which belong to a party obligated to notify or from shares through which voting rights are attributed to this party do not exist for the period during which the notification obligations pursuant to Section 21 paras. 1 or 1a WpHG are not fulfilled. Currently the loss of rights applies only until the point when the notification is (subsequently) made. This allows a party obligated to notify to acquire further and to make the notification only prior to the shareholders meeting in due time so as to avoid any loss of rights at the shareholders meeting. In the future the loss of rights "taking into account the amount of voting rights" ("*sofern die Höhe des Stimmrechtsanteils betroffen ist*") shall continue to apply for six months subsequent to a delayed compliance with the notification obligation if the notification was omitted by intent or gross negligence. The burden of proof placed on the party obligated to notify will cause considerable legal uncertainty. Such loss of rights should not affect financial rights (e.g the entitlement to dividends).

6.2.2 France

The regulation of acting in concert has been introduced into the french legal system in 1989. After several amendments, it is now defined by article L233-10 of French Commercial Code[97]. According to the mentioned provision, persons who have entered into an agreement with a view to buy or sell voting rights or with a view to exercise voting rights to implement a policy in relation to a company are deemed to be acting in concert. Such an agreement is presumed to exist: between a company, the chairman of its board of directors and its general managers or the members of its executive board or its partners; between a company and the companies it controls within the meaning of Article L. 233-3; between companies controlled by the same person or persons; between the partners in a simplified joint-stock company in relation to the companies it controls. Persons acting in concert are jointly and severally bound by the obligations imposed on them by the laws and regulations.

The most critical feature of acting in concert as designed by the French legislator lies in the difficulty to prove the actual existence of an agreement. Such an agreement can either be concluded or supposed. Where an agreement is actually concluded, its existence could be proved by means of written evidence. Problems arise when no written evidence is available. In such situations, highlighting a series of concurring and consistent clues seems to be the only way to be followed in order to determine whether an acting in concert occurs or not. In a recent finding, the Appeal Court of Versailles (27 June 2007) has stated that the existence of a concert agreement can be inferred by a series of "concurring serious and precise elements", such as: the consistency of the holding by one of the alleged concerting parties, the

[96] This section currently provides that:

Section 28 Loss of rights

Voting rights attached to shares held by or attributed to a notifying party pursuant to section 22 (1) sentence 1 nos. 1 or 2 are not valid during the period for which the notification requirements pursuant to section 21 (1) or (1a) have not been met. This does not apply to claims under section 58 (4) and section 271 of the German Stock Corporation Act (Aktiengesetz), provided that the notification was not deliberately omitted and was made after the fact.

[97] The english version of the French Commercial Code is available at http://195.83.177.9/code/liste.phtml?lang=uk&c=32

assessed cost of shares acquired by another party, the concomitance of acquisitions, prices and amount of the shares that had been bought.

The Law 2006-387 of 31 March 2006, while implementing the Directive 2004/25/EC on Takeover Bids, has introduced a new article in the Commercial Code; such new provision (article L233-10-1), consistently with the direction given by the Directive, provides for two different forms of acting in concert.

The first form is the concerted action with the bidder, aimed at acquiring control of the target company. This hypothesis of acting in concert is not different from the one set forth in art. 233-10. Acting in concert will be stated as existent in any case in which its basic elements (*i.e.* the existence of an agreement and the aim of the agreement itself) occur jointly. Being the agreement necessarily aimed at acquiring voting rights, the goal of acquiring control is pretty much similar to the acting in concert as defined by the above mentioned article 233-10. Therefore such first hypothesis is not really new and it is probably redundant.

The second hypothesis, provided by art. 233-10-1 of the Code de Commerce, is the really new feature of acting in concert, since it introduces for the first time the "defensive acting in concert", which is characterised by three peculiarities. As for the parties of the agreement, the innovative profile of the provision is represented by the fact that also the target company now can be recognized as party to the agreement, while in the case of concerted action with the bidder seen above the target company is not related in any way to the agreement. It is predictable that such a lack of discipline will be covered by courts judgements. Finally, the aim of this form of acting in concert is to "frustrate the successful outcome of the bid"; that should mean either dissuading the bidder or trying to convince the offeree shareholders to sell their shares. As for the actual content of the said expression, it is not clear what kind of behaviour should be considered to be covered by the provision.

a. The so-called Put up or Shut up Rule
According to Article 233-32 of its General Regulation, the AMF (the French authority of supervision on financial markets), especially when unusual volumes of financial instruments of a given issuer are traded and their prices undergo significant variations, is entitled to require those who are reasonably deemed to be preparing, either alone or acting in concert with others, a takeover bid, to disclose their intentions to the market. At this stage, there are different possible scenarios. When the reply is positive, and the requested persons disclose an actual intention to launch a takeover bid, the AMF fixes a date within which they have to publish a document containing all the details of the takeover project, or, where considered by the authority to be necessary, to immediately issue an offer. When the charateristics of a bid are not communicated or the project of takeover is not issued, the concerned subjects are considered as not interested in a takeover; article 233-35 therefore applies. According to this article, those subjects who have not declared their intention to launch a takeover bid, or who actually declared they do not want to launch such a bid, are not allowed, during six months after the deadline set by the AMF, to deposit an offer[98]. The investigating power the AMF has been given is a potential risk for the activism of investors, as long as some criteria in stating the reasonableness we referred above will not be clarified, since even simple rumors might be sufficient in order to trigger AMF's (discretional) power.

[98] The General Regulation of the AMF, and more specifically the part which the present paper refers to, is available at http://www.amf-france.org/documents/general/8004_1.pdf

b The so-called 10% Rule

Another provision which can be potentially interpreted as an obstacle to institutional investor activism can be found in the French Code de Commerce[99]: when a shareholder reaches a participation of 10% of the total capital (or voting rights), she has to disclose the objectives she foresees to pursue during the twelve following months.[100] In her declaration, the shareholder has to state, among other things : whether she is acting alone or in concert with other shareholders; whether she envisages to stop acquiring shares or intends to increase her participation; whether she aims at acquiring the control of the company. The said statement must be addressed, within ten trading days, to the company whose shares have been acquired as well as to the AMF.

6.2.3 The UK

The UK legislation seems to be the only one among those examined providing clear guidelines for distinguishing acting in concert from corporate governance activism.

As defined by the City Code on Takeovers and Mergers,[101] persons acting in concert are persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert with each other. Control in this context means 30% of the voting rights in the target company. The Code presumes that certain categories of person will be acting in concert unless the contrary is shown.[102] Under the Disclosure and Transparency Rules (DTR)[103] issued by the FSA a person will also be an indirect holder of shares held by a third party where they agree that they should adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the company in question.

Since 1968, the year of its establishment, the Panel on Takeover and Mergers has been given the task to issue and administer the City Code on Takeovers and Mergers and to supervise and regulate takeovers and other matters to which the Code applies in accordance with the Rules set out in the Code. The Panel has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers pursuant to the Directive on Takeover Bids (2004/25/EC). Its statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006.[104]

The Takeover Panel does not normally regard the action of shareholders voting together on a particular resolution as an action which of itself indicates that such parties are acting in concert. However, the Panel will normally presume

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[99] Art L233-7 of the french Code de Commerce, available at http://www.legifrance.gouv.fr/./affichCodeArticle.do?idArticle=LEGIARTI000006229205&cidTexte=LEGITEXT000005634379&dateTexte=20080131&fastPos=1&fastReqId=2116150879&oldAction=rechCodeArticle

[100] Such threshold was originally 20%, and it was lowered to 10% in 1997, see Banque & Droit (1997).

[101] Available at http://www.thetakeoverpanel.org.uk/new/codesars/DATA/code.pdf

[102] See Goergen and L. Renneboog (2003), p. 148-9: "Ownership disclosure regulation in the uk does not apply only to individuals or companies but also to individuals and companies with voting agreements. Such voting agreements consist in obligations or restrictions between shareholders with respect to the use, retention or disposal of their stakes. A coalition of shareholders with a voting agreement will be considered by regulatory authorities as one single shareholder. This implies, for instance, that if the combined direct and indirect shareholdings of a coalition amount to at least 3% disclosure is compulsory. Furthermore, a coalition controlling directly or indirectly 30% or more of the equity will be obliged to make a tender offer for all shares outstanding" .

[103] Available at http://www.fsa.gov.uk/pubs/hb-releases/rel64/rel64dtr.pdf

[104] http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf

shareholders who requisition or threaten to requisition the consideration of a board control-seeking proposal either at an annual general meeting or at an extraordinary general meeting, in each case together with their supporters as at the date of the requisition or threat, to be acting in concert with each other and with the proposed directors. Such parties will be presumed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal with the result that subsequent acquisitions of interests in shares by any member of the group could give rise to an offer obligation. Moreover, the UK has recently changed their interpretation practice in order to encourage shareholders to be more active. In case of a common shareholder action aiming at changing the board, the Panel had previously taken into account the number of board members proposed. If the shareholders wanted to change the majority of them, they were deemed to act in concert to acquire control. Now, the most important factor is whether the new managers supported by the shareholders are linked to them or not: shareholders can propose to change the entire board without their action being considered concerted action if the new board members are not linked to them.[105]

6.2.4 Italy

In Italy the discipline of acting in concert has just been modified by the law that has adopted the Takeover Directive.[106] The amendment has introduced a fourth new case of acting in concert to the three already provided by the law.[107]

The first three hypothesis of acting in concert are the following: (i) subjects who are parties in an agreement, either valid or null, aimed at regulating voting rights at the general meetings of listed companies (or general meeting of their holding companies); (ii) managers or CEOs of one same company; (iii) subjects who are connected with each other by control relationships, either a shareholder and the companies he controls (directly or indirectly), or companies controlled by the same shareholder.

Whenever one of the said hypothesis occurs, the thresholds set forth in articles 106 and 108 of TUF (*i.e.* 30% and 90%, the thresholds respectively triggering the so-called Mandatory Bid and the Residual Bid) must be calculated by summing the shares held by each subject. In such cases each one of the involved parties has the obligation to launch a takeover bid.

As said, the new Legislative Decree has added a fourth hypothesis, which considers as acting in concert “those subjects who cooperate to the purpose of acquiring the control of the issuing company". It is not entirely clear how such a cooperation is

[105] According to note 2 on Rule 9.1 (available at http://www.thetakeoverpanel.org.uk/consultation/RS10.pdf) In determining whether a proposal is board control-seeking, the Panel will have regard to a number of factors, including, in the first place, the relationship between any of the proposed directors and any of the shareholders proposing them or their supporters. Relevant factors in this regard will include whether there is or has been any prior relationship between any of the activist shareholders, or their supporters, and any of the proposed directors; whether there are any agreements, arrangements or understandings between any of the activist shareholders, or their supporters, and any of the proposed directors with regard to their proposed appointment; and whether any of the proposed directors will be remunerated in any way by any of the activist shareholders, or their supporters, as a result of or following their appointment. If, on this analysis, there is no relationship between any of the proposed directors and any of the activist shareholders or their supporters, or if any such relationship is insignificant, the proposal is not considered to be board control-seeking such that the parties are not presumed to be acting in concert. If, however, such a relationship does exist which is not insignificant, the proposal may be considered to be board control-seeking.

[106] Legislative Decree 19 November 2007, n. 229, published on the Italian Official Journal (Gazzetta ufficiale) n. 289 of 13 December 2007.

[107] Legislative Decree n. 58/1998 (*Testo Unico della Finanza, or* TUF).

supposed to be verified, something which might introduce uncertainty for institutional investors who want to actively participate in company life without acquiring control.

6.2.5 Legal obstacles to acting in concert in the US

In both situations that have been examined, where free riding is a risk, the possibiity for Institutional Investors to coordinate their action is very important. But the US regulatory framework contains several obstacles that may prevent acting in concert. Exchange Act section 13 (d)[108] requires any person or group which owns more than 5% of a public company's stock and that decides to act in concert, also informally, to file a Schedule 13 (d) containing disclosure about the person or group, its ownership, and especially its plans with respect to the company. The matters that must be disclosed have been construed in a broad sense. The company managers will usually sue the members of the group for misdisclosure of one sort on another.

According to Bernard Black "The College Retirement Equities Fund (Cref) will sponsor a poison pill resolution at Company A, and the Wisconsin Investment Board will sponsor a similar resolution at Company B, but CREF and Wisconsin typycally won't cosponsor each other's resolutions if their combined holdings exceed 5%".[109]

In 1992 the SEC amended its rules to allow large shareholders to report their holdings on the simpler form 13 (g). Schedule 13 (g) calls for less information and does not need to be filed so promptly and amended so often. But this only in the case that the investor wants to be a passive one[110]. The SEC amendment left sceptical John Coffee Jr, who commented: "You can communicate freely, but your audience must stay at a distance and not indicate that they agree"[111]. However, other more positive commentators observed that the 1992 reform introduced the ten-or fewer-rule, which allows a shareholder to solicit up to ten other shareholders without the need of any filing. Also the free-speech-rule allows a shareholder to solicit a limited number of shareholders without any required filing, except a copy of any written material.[112]

According to Coffee the problem is in the initial interpretation of the rule 13 (d), which requires two shareholders to file when they act as a group "for the purpose of acquiring, holding, or disposing of securities". The SEC interpreted the rule as meaning that "two or more persons agree to act together for the purpose of acquiring, holding, *voting*, or disposing of equities securities". Coffee observes that

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[108] http://www.sec.gov/about/laws/sea34.pdf

[109] Bernard S. Black, Shareholder Passivity Reexamined, 89 Mich, L. Rev 520, 544 (1990)

[110] Schedule 13 (g) is a SEC form used to report a party's ownership of stock that is over 5% of the company. Schedule 13G requires less information from the filing party with respect to Schedule 13 (d). Ownership of over 5% in a publicly-traded stock is considered to be significant ownership, and therefore must be reported to the public. To be able to file a 13G instead of a 13D, the party must own between 5% and 20% in the company and it must also be clearly understood that the party acquiring the stake in the company does not intend to exert control, i.e. is only a passive investor. If these criteria are not met a 13D must be filed. See INVESTOPEDIA, entry Schedule 13 (g) available at http://investopedia.com.

[111] John Coffe, Jr, *The SEC and the Institutional Investors: A Half- Time Report*, Cardozo L. Rev 847, 881. See also Stephen Choi, *Proxy Issue Proposal:Impact of the1992 SEC Proxy Reforms*, 16 J. L. Econ.&ORG. 233 (2000) (explaining that liberalization of the proxy rules has not affected shareholder communication practices).

[112] Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, The Summer 2007Journal of Corporation 682, 687.

the idea of the "voting group" was the creation of the SEC, and he takes sides for its abolition. However, Coffee also recognises that the 1992 rule also has a positive side: "proxy reform has radically reduced the cost of shareholder's communications. For example, after proxy deregulation, the United Shareholders Association estimated that it could target a mailing to a corporation's 1000 largest shareholders for a total cost to it of 5,000 to 10,000$, whereas previously a full scale proxy statement would have cost it $ 1 million to prepare and distribute"[113]. Anabtawi and Stout (2008)[114] also observe that the 1992 rule also allowed most shareholders to make public statements, including speeches, press releases, newspaper advertisements, broadcast media, and internet communications, and to coordinate with each other and combine their share holdings into larger voting blocks.

The courts have also contributed to making the regulations less severe and thus favouring institutional investors and hedge funds in particular. The most important development concerns the continual attitude of the courts of refusing to accept that, when two investors speak and exchange opinions on their investments in a company, this constitutes a clandestine group. For example in one case, Hallwood Realty Partners L.P. versus Gotham Partners L.P., the Second Circuit found that two parties which had filed a Schedule 13D and one party that had filed a Schedule 13G did not constitute a group, even though one party was a raider, two had bought shares in the same period and all three had discussed their investments. [115]

Liability of the Controlling Person.
Another obstacle to acting in concert in the US is represented by the rules contemplating liability of controlling persons. When a group of investors, acting in concert, controls the company, shares can be sold only in particular ways that involve delay, expense, strict liability for material mistatements. The controlling shareholder is also liable for securities law violation. There is an exempion when shareholder has acted in good faith. The SEC construes control in a broad way. It is quite sure that controlling the nomination of board of directors means controlling the company.[116]

Shareholders who are also creditors (such as banks) face additional risks: the debtor can sue claiming improper influence over the businessor his debtor can be subordinated. In general a 10% holding should be sufficient to have a controlling shareholder if the rest of shares is dispersed.[117]

Poison Pills
Another obstacle agaist acting in concert is represented by flip-in poison pills. These tools, which are means to defend managers against raiders, work in this way: if a shareholder tries to take the control of the company, managers distribute to other shareholdes shares at a discount price with respect to market price. In this way the stake of the raider is diluted. The risk to have an investment diluted and destroyed is a strong deterrent to organize a coalition.[118]

State anti-takeover statutes

[113] John Coffe, Jr, *The SEC and the Institutional Investors,* supra note .. at 840-841.
[114] P. 28.
[115] Briggs (2007, p. 691).
[116] Black (1990, p. 545).
[117] Black (1990, p. 549).
[118] Black (1990).

Several US states have statutes that increase, directly or indirectly, obstacles to action in concert of institutional investors. For instance, a first type of statutes prohibits mergers and other operations on the part of shareholders who have bought a certain amount of shares, generally 10% or 15%. There are, also disclosure laws with the same content of Schedule 13 D an 13 G. This means that these statutes require certain formalities to institutional investors who do not want to be passive while they demand less disclosure to subjects who want to make an investment but want to be passive. These statutes tipically deprive investors with 20% of shares or more of their voting rights, unless other shareholders vote for allowing the shareholder to exercise her right to vote. The definition of group that is adopted is the one used by the SEC, which includes voting groups.[119]

6.2.6 Comparison of the national systems in the EU and with the US

The German legislature has pointed to the rules of France and the US in the context of the reasoning for the proposed extension of the share ownership reporting obligations to also cover the goals pursued with and the source of funds for the acquisition of significant shareholdings. There is an explicit reference to Section 13(d) of the US Securities Exchange Act of 1934 (the "1934 Act"), and that US law requires disclosure of the goals pursued with and the source of funds for an investment triggered by the acquisition of a shareholding of 5% or more. There are, however, significant differences.

Pursuant to Section 13 of the 1934 Act, as we have seen, fund managers generally report on Schedule 13G rather than Schedule 13D, and thus are not subject to the 5% disclosure requirement noted above. More in detail, the US rules allow managers to "disaggregate" holdings for reporting purposes if different entities within their group exercise investment discretion to acquire or dispose of securities and proxy voting separately and independently. This concept of "disaggregation" is also found in the reporting rules in the EU Transparency Directive and the French takeover rules.

Under the US rules, in the case of a passive investment, a qualified fund manager will be eligible to file a short-form report on Schedule 13G and will, thus, not be required to make any disclosure regarding the source and amount of funds used for the acquisition of its shareholding and the purposes of the acquisition, regardless of the size of its shareholding. Under the proposed new German rules on extended share ownership disclosure, the acquisition of a significant shareholding will trigger an obligation to disclose the source of funds used for the acquisition and the purposes pursued with the acquisition. The proposal does not provide for a general exemption from the extended share ownership disclosure obligations for qualified investors making a passive investment.

The wording of the proposed new German acting in concert rules seems broader and less specific than the US rules on groups in the sense that under the new German acting in concert rules, the relevant coordination of conduct is not limited to the "acquisition, holding, voting and disposal" of securities, and can be in reference to an event or specific proposal in relation to a company. Also, it may be easier to infer a common objective from parallel conduct under the proposed new German rules. The consequences of "acting in concert" under the German draft law are significantly more far reaching than those of forming a "group" under the US law by virtue of the German mandatory offer rules. As for the UK legal system, there are legal barriers to joint actions, and in many regards they are similar to those in

[119] Black (1990, p. 556).

the US, but they are fewer in number, and those which are the most inhibiting do not exist. Regarding the draft German law which requires a coalition which exceeds 5% to state its shareholding, its identity and, above all, its intentions in relation to the company, this is only valid given a formal agreement, and an informal agreement is not sufficient as in the United States. This, therefore, seems to be a particularly restrictive provision.

A 1989 amendment to the UK Companies Act lowered the threshold for disclosure of major shareholdings to 3% from 5%. However, the requirement for documentation in Britain is much more limited than that required under rule 13 (d) of the United States' Exchange Act according to the interpretation which the SEC has provided of it. Only a formal agreement triggers the requirement to present documents to the local authority and, more importantly, there is no requirement to state intentions in relation to the company, so the risk of legal action for incomplete disclosure is very remote. In the UK, like in the US, fear of insider trading liability, or of losing liquidity because of possessing inside information, is a significant obstacle to close communication between managers and their major shareholders.

6.2.7 Conclusion on the present section

The way in which acting in concert is regulated in Europe and in the US might affect in different ways the possibility for institutional investors to have an active role in the governance of a company. As we have seen, the current definition of acting in concert provided by the Takeover Directive gives wide discretion to Member States as of the meaning of control, to such an extent that it does not preclude it to be applied to discourage shareholder activism. In turn, the European national regulators have customized the European rules on acting in concert with rather different results. On the one hand, some legal systems (Germany and Italy) have introduced ambiguous provisions (see **Table 6**). The difficulty in interpreting such rules may lead to a certain degree of uncertainty, both for investors – for whom it might be difficult to predict whether their conduct might be considered as acting in concert – and public authorities, who are confronted with the task of applying the existing provisions when detecting the actual existence of acting in concert. On the other hand, some legislators have introduced far-reaching rules. This is the case of the French and the German provisions on acting in concert which could discourage investors' activism. However, the UK's City Code and Disclosure and Transparency Rules contain detailed and unambiguous provisions for the interpretation of acting in concert which do not prevent shareholder activism.

VII. SECURITIES LENDING[120]

Securities lending normally consists in the outright transfer of securities by the lender to the borrower who undertakes to transfer equivalent securities back to the lender at a later point in time. Voting rights pass with the transfer of the securities.[121]

Securities lending provides liquidity to capital markets (equity, bond and money markets), with an estimated 3 trillion US dollar of securities on loan at any given time. On the lending side, securities lending forms a growing part of the revenue,

[120] Unless otherwise specified this section is based on the public consultation organised by the European Commission during the summer 2007. The text of the consultation and the comments of respondents are available at: http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm

[121] As observed by Spitalfields (2005), p. 5, the word "lending" is to a certain extent misleading, being an absolute transfer of title against an undertaking to return equivalent securities.

among others, of institutional investors.[122] On the borrowing side, securities lending plays an important role in ensuring market liquidity by making settlement[123] more flexible, taking into account that settlement, in today's markets, often takes several days. Securities lending also allows for arbitrage and can offer advantages where tax laws provide for privileges for the payment of dividends. The benefits that stock lending provides to the market were recognised almost unanimously by the respondents to the consultation held by European Commission (2007).

Although the practical relevance of securities lending has diminished in the last few years due to tighter tax regulation, in a number of Member States there are still some systems where securities lending can be advantageous for the parties involved. Securities lending around dividend record dates also takes place where companies offer their shareholders the choice to receive the dividend either in stock or in cash.[124]

7.1. Investor activism and securities lending

While OECD (2007d, p. 5) observes that in principle there is nothing problematic about share lending, according to SLRC (2004) securities lenders should also consider their corporate governance responsibilities before lending stock over a period in which an annual general shareholder meeting or an extraordinary general shareholder meeting is expected to be held. The OECD Prinicples of Corporate Governance (II.F.1)[125] recommend that "Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights."

Under the commonly used Master agreements, as for example the Global Master Securities Lending Agreement (GMSLA) issued by the International Stock Lending Association (ISLA),[126] there is no obligation incumbent on the borrower to exercise the voting right in line with instructions issued by the lender if there is not an explicit agreement to the contrary.[127] There are no provisions contained in it stressing the influence of the stock lending agreement on the voting right. The "Securities Borrowing and Lending Code of Guidance" set up by the by the Securities Lending and Repo Committee (chaired and administered by the Bank of England), that however is only applicable in the UK, states that provision should be made between the parties of a stock lending agreement concerning the exercise of the votes. It furthermore encourages lenders to consider their corporate governance responsibilities before lending stock over a period for which an annual general meeting or an extraordinary general meeting can be expected.[128] However, even in

[122] Spitalfields (2005) and EFAMA (2006). According to Hu and Black (2006), CalPERS, the large Californian public-sector pension fund, earned $103 million from securities lending for its fiscal year 2004. According to Kahan and Rock (2007a), p. 10, beneficial owners in the US earn about 5 USD billion a year in fees from securities lending.
[123] According to Giovannini Group (2001), "The clearing and settlement process is an essential feature of a smoothly functioning securities market, providing for the efficient and safe transfer of ownership from the seller to the buyer. The process involves four main steps, which are confirmation of the terms of the securities trade, clearance of the trade by which the respective obligations of the buyer and seller are established, delivery of the securities from the seller to the buyer and the reciprocal payment of funds. When both delivery and payment are finalised, settlement of the securities transaction has been achieved."
[124] See the example in Spitalfields (2005).
[125] OECD (2004).
[126] Available at: http://www.isla.co.uk/industry_documentation.asp
[127] Point 6.3 of the GMSLA
[128] Point C.7.4 of the Code of Guidance.

that code, there is no recommendation with a view to ensuring that voting rights are exercised in an appropriate way during the duration of the loan (or that the loan is returned in time to allow for the lender to exercise the voting right himself).[129]

According to EFAMA (2006) what happens in practice is that standard stock lending agreements provide for the recall of shares lent, usually within two working days. The consequence is that the practice of stock lending does not prevent in principle shareholders to vote.[130] However, it is essential that the record date for the shareholder meeting is convened sufficiently in advance so as to allow fund managers to recall the shares on loan and that the notice convening a shareholder meeting be issued well in advance to the record date, at least ten days according to EFAMA. This problem has already been addressed in the Shareholder Rights Directive (art. 7.3) which provides for a minimum period of 8 calendar days to be respected between the convocation of the meeting and the record date. The minimum requirements set by the Shareholder Rights Directive are deemed by EFAMA to be barely sufficient.

According to HFWG (2008), there is a concern that some market participants could borrow stock in order to vote at shareholder meetings, while not being economically exposed. As a result, the voting rights attaching to the holding would not necessarily be exercised in the best interest of the lender who has the economic exposure. The HFWG is concerned that this use of borrowed stock undermines investor confidence in the results of shareholder votes. Since this issue is not specific to hedge funds but is of wider application, the HFWG would welcome wider consultation with regulators and market participants to develop a regime that is applicable to all parties and ties votes to underlying economic exposure. Moreover, there might be specific situations where it should be acceptable to vote on borrowed stock, e.g. when a fund is invested in shares (and the trade has settled), but the shares have not transferred into their name.

For the moment, the "more commonplace" position seems to be that securities are recalled only in such special circumstances as when a takeovers is being considered, while there are still organisations that choose not to vote in any circumstances due to the transaction costs involved in vote recalling and to lack of interest in voting.[131]

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[129] See points C.2.2., C.2.5 and C.7.3 of the Code of Guidance, available at: http://www.bankofengland.co.uk/markets/gilts/slrc.htm

[130] According to Spitalfields (2005), "Recalls are part and parcel of the securities lending business. However, borrowers seek to avoid recalls wherever possible and frequent recalls may discourage borrowers from accessing portfolios. In practice the lenders, or their agents, communicate the lender's position with regards to voting to the borrowers so as to avoid any surprises." From the answers to the consultation held by European Commission (2005) and (2007) it emerges that there are three securities lending models typically used by an investor: (1) Lending by the investor himself as a direct lender, who would manage his own securities lending trading activities; (2) Lending by a third party lender, whereby the investor would outsource the lending to a third party agent to negotiate the loans; (3) Lending by a custody lending agent, whereby the investor would outsource the lending to his custodian, who would act as lending agent. In all cases, the securities will normally be held with a custodian who will arrange delivery of the loans and might also monitor the collateral receipts. The first two cases should not create problems in terms of transparency as here the investor should be informed of the lending transaction at least by the end of the business day. In the third case, where a custody lending agent manages the lending, the investor has to await activity reports from the custodian. Where no activity report has been established or reached the investor or where an investor wants to vote his shares between two activity reports he might discover at that moment that his shares are lent and that he therefore is prevented from doing so. An additional problem arises where the investor has outsourced also the voting process: here the voting agency may not even be informed about the stock lending where the information does indeed reach the investor.

[131] Spitalfields (2005) and Hu and Black (2006).

ESME, the group of European Security Markets Experts established by the Commission, points out in its first report on the Transparency Directive[132] that a systematic recall is not even desirable as it would lead to reducing the liquidity of the market.

Myners (2007) also recommends, among other things, that in case of contentious votes stock should not be lent, while ICGN (2005) recommends that stock should be lent according to consistent and clear policies.

As for trends in securities lending, there seems to be a raising awareness on the part of fund managers to monitor the usage of lent securities. According to RiskMetrics (2007) fund managers have recently shifted from focusing exclusively on making sure that securities lending was profitable for funds to seeking also to ensure that the borrower is acting responsibly with the lent securities. Allaire and Firsirotu (2007) observe that some institutional investors (including some of Europe's biggest pension funds) have stopped their share lending activities altogether. Finally, more than a half of the funds surveyed by NAPF (2007), 23 funds, lend stock. Most of these (14) said they recall stock for contentious votes. In total, more than 70% of funds surveyed either do not lend stock or recall it in order to vote on contentious resolutions.

7.2. Investor activism and securities borrowing

According to Myners (2007), "borrowing shares for the purpose of acquiring the vote is inappropriate, as it gives a proportion of the vote to the borrower which has no relation to their economic stake in the company." The author goes on to quote SLRC (2004): "there is consensus in the market that securities should not be borrowed solely for the purposes of exercising the voting rights…" Micossi (2008) observes that "investors can temporarily increase their votes through derivative operations[133] or share lending. This may lead to alter outcomes of proxy fights or general meetings, not necessarily to the benefit of shareholders."

But how many securities are borrowed for voting purposes? According to Spitalfields (2005), in the UK normal levels of borrowing seem to be around 3% of market capitalisation, with increases to around 6% coinciding with dividend dates. However, since for historical reasons the entitlement to the dividend in many EU countries is often linked to the date of the general meeting, it is not entirely clear whether this period increase in stock lending is exclusively linked to the purpose of receiving the dividend, at least with a view to countries that still maintain a tax privilege in this respect and in cases where the dividend is offered in stock. Even if the dividend record date does not normally correspond with the voting record date, it often lies too close to it to make sure that shares on the voting record date are with the lender (in order to allow her to vote them) and on the dividend record date with the borrower (in order to allow her to cash in the dividend). As for the US, Kahan and Rock (2007a)[134] observe that with the increasing number of shareholder votes decided with close majorities, borrowed shares may sometimes have a decisive influence on the voting outcome.

[132] ESME (2007), page 7.

[133] According to the author "it is possible for a hedge fund to purchase shares in two companies, one bidding to acquire the other, and then to hedge away the risk of shares in the acquiring company, and to vote in favour of the proposed acquisition at an abnormally high price in the general meeting of the target company. In this example, the investor's behaviour may damage the shareholders of the acquiring company."

[134] P. 2-3.

7.3 Separation of economic risk and voting rights and shareholder activism

As observed by Hu and Black (2006, p. 1), equity derivatives and other capital market developments now allow shareholders to separate voting rights from economic ownership of shares (decoupling). It is a subject of current debate whether and to what extent shareholder activism conducted by having recourse to such means (empty voting)[135] goes against the interest of other shareholders. The authors quote a number of cases where stock borrowing seems to have taken place in order to influence the outcome of votes in the general meeting. They draw the attention to the fact that in extreme cases empty voting can not only mean voting by investors who have no equivalent economic interest but even voting by investors who have a negative economic interest in the outcome of the vote, i.e. an interest to make the company enter into a transaction that, from its point of view, is economically disadvantageous. This can happen where the stock borrower is standing on the other side of that transaction (e.g. in a merger) and is able to draw benefits from the company's decision. Anabtawi and Stout (2008) [136] observe that minority shareholders in public companies push for corporate actions that serve their personal economic interests which are not necessarily aligned to the interest of the firm and its other shareholders. According to the authors, activist minority investors in public companies have the possibility to push through interested transactions, for instance making recourse to derivatives to hedge away their financial interest in the company. According to Hu and Black (2008) there is now substantial evidence that decoupling is important and common, and that it can materially affect the control of major corporations throughout the world.[137] observe that empty voting might become more relevant in the US as long as voting outcomes in shareholder meetings are getting closer. From a contrary point of view, Kahan Rock (2007b, p. 42) observe that, in the absence of quantitative evidence, it is not clear to what extent empty voting is a significant problem.

Even if there is not sufficient evidence at present that empty voting by way of stock lending is a relevant phenomenon, stock lending creates a problem for shareholder voting in another sense. As it emerges from European Commission (2007), many investors borrow stock for reasons other than for voting and do not make the effort of exercising the voting rights where a general meeting occurs during the period of lending. Also the lenders do not always insist that the shares be voted on the basis of their instructions. Furthermore, in the context of the lending agreement the lender receives collateral for the loan. This collateral may consist in cash but also in stock or other securities. Where stock is given as collateral, the same problem with a view to the voting rights attached can arise as for the lent stock.

As observed by Hu and Black (2006, p. 1), decoupling is not exclusive to minority shareholders, but it might also be used by management and controlling shareholders to facilitate entrenchment and maintain control. According to the authors empty voting is just one of the techniques used to differentiate economic interest in a company from voting rights and perhaps not even the most widespread. From ISS et al. (2007) we observe for instance that companies listed in the EU make very frequent recourse to decoupling techniques. As observed by OECd (2007e, p. 29), most forms of CEMs are permitted in most European countries and in the US. A notable exception is that in the US pyramids are discouraged by taxation. As for

[135] Hu and Black (2008) define empty voting as voting while holding greater voting power than economic ownership.

[136] P. 7 and 34-47.

[137] The authors collect a list of 80 cases of decoupling around the world.

legal limitations to other forms of decoupling, while some EU Member States and the US prevent making recourse to some forms of decoupling such as multiple-voting shares (ISS et al. 2007), the European Commission recently deemed not necessary to introduce limitations at EU level (European Commission 2007c). The Commission motivated such decision on the absence of available evidence on the link between decoupling and shareholder expropriation.

In the absence of more coercitive regulatory interventions, decoupling seems to be discouraged by investors themselves. As we have seen above self-regulatory bodies explicitly discourage the recourse to empty voting, while other forms of decoupling are opposed by shareholders in the US, where most public companies employ a one share-one vote structure, which links economic interest to voting rights (Hu and Black 2006, p. 1). As for the EU, from ISS et al. (2007) it emerges that decoupling is quite widespread among the European Blue Chips, something which is perhaps linked with the lower weight and influence of institutional investors.

The conclusion seems to be that the case against empty voting, if any, falls within the one share-one vote debate and should not be treated in isolation.

La Porta, Lopez-de-Silanes and Shleifer (1999), Claessens, Djankov and Lang (2000), and Faccio and Lang (2002) show that in many cases European companies are characterised by individual or a family control over the majority of the votes via pyramids and other such instruments as multiple voting shares, cross-holdings, shareholder agreements and so on. As observed by Mork et al (2005), entrusting the governance of huge slices of a country's corporate sector to a tiny elite can bias capital allocation, retard capital market development, obstruct entry by outsider entrepreneurs, and retard growth.

Although no systematic data are available on the degree of separation of ownership from control across the entire EU, there are signs that such a phenomenon can reach rather impressive extremes. As shown by Enriques and Volpin (2007),[138] thanks to company pyramids separation of ownership from control can go as far as giving the controlling shareholder of the French Louis Vuitton Moet Hennessy (LVMH) 47 percent of the voting rights in LVMH with a direct and indirect ownership of 34 percent of the cash flow rights (Figure 1). The separation of ownership from control is more dramatic in Telecom Italia, one of the world's largest telecom companies with a market capitalization of about $40 billion. The pyramidal group includes three listed companies and two nonlisted companies, shown in Figure 2. Marco Tronchetti Provera controls 18 percent of the votes in Telecom Italia (and is by far its largest shareholder), although he holds only 0.7 percent of the cash flow rights. Because of the combined effect of the dual classes of shares and the pyramidal structure, the Porsche family controls 25.1 percent of the votes in Volkswagen AG but owns only 9.44 percent of its cash flow rights.

Family control can even go beyond a specific listed companies to reach systemic dimensions: for instance Agnblad, Berglöf, Högfeldt and Svancar (2001) show that in Sweden a single family shareholder controls about 50% of the Stockholm stock exchange mainly through recourse to company pyramids and multiple-voting rights. According to Faccio and Lang (2002) a single Italian family controls about 10% of the Borsa Italiana total market capitalization. More in general, according to the findings reviewed in Morck et al. (2005), the large corporate sectors, excluding state-owned enterprises, of several EU countries are predominantly controlled by a

[138] P. **

small number of very wealthy families through pyramids and such other means as dual-class shares, cross shareholdings and differential voting shares.

More in general, systematic measurements of the separation of ownership from control are available only for Italy. Bianchi et al. (2005) show that the Italian listed companies are characterised by a high incidence of pyramidal structures, shareholder agreements, and shareholder coalitions.

On the other hand, the study conducted by ISS et al. (2007) quantifies the recourse to the various instruments that allow to obtain separation of ownership from control, the so called control-enhancing mechanisms, or CEMs. The study shows that corporate CEMs are rather common across the EU. Of all the 464 European companies considered, 44% have one or more corporate CEMs (or other alternative mechanism). The countries with the highest proportion of companies featuring at least one these mechanisms are, in decreasing order, France, Sweden, Spain, Hungary and Belgium, which all have a majority of companies with corporate CEMs or alternative mechanisms. The occurrence of those mechanisms varies from one country to another, but varies also between large companies and recently listed companies. A majority of large caps (52% of the companies analysed) have corporate CEMs or alternative mechanisms while one quarter of recently listed companies (26% of the companies analysed) have corporate CEMs or alternative mechanisms. Overall, the more used mechanisms are pyramid structures, multiple voting rights shares, and shareholders agreements. It is also interesting to notice that recently listed companies in Europe which were included in the ISS sample feature a smaller number and a smaller variety of those mechanisms than large companies. As in large companies, pyramid structures, shareholders agreements and multiple voting rights shares are the most common mechanisms in recently listed companies. Finally, some of these companies combine different mechanisms thereby enhancing their impact.

From European Commission (200*) institutional investors seem to deem deviations from proportionality between capital and control an obstacle to shareholder activism. OECD (2007e, p. 23-7) quotes several corporate governance codes issued by investor groups and individual institutional investors that support, although to a different extent, one-share-one-vote principles: from ICGN's recommendation that ordinary shares should feature one vote for one share, to Euroshareholders' Corporate Governance Guidelines and Hermes that directly endorse proportionality between ownership and voting rights.

Manifest (2007) stresses the role of the 'one share one vote' issue as fundamental to shareholder democracy and the protection of shareholders' rights. In particular, voting restrictions and unequal voting rights may present a significant disincentive for investors to participate in company meetings, may add confusion to the voting process and may lead to errors in the determination of voting rights.

ISS et al (2007) also conducted a survey addressing institutional investors. The purpose of the survey was to determine whether and to what extent investment decisions are influenced by the ways companies do or do not follow the proportionality between capital and control. The survey was distributed to 7,792 investors, corresponding to all the institutional investors identified worldwide. In total, 445 institutional investors worldwide replied to the questionnaire. They represent collectively more than 13% of assets under management in Europe, that is more than 4.9 trillion euros. Such figures are underestimated as 59 respondents (13% of the total) chose not to disclose their assets under management. Most of the respondents to the survey, by number, have an asset manager profile (60%). The second largest group of respondents has a hedge fund profile (11%), closely followed by pension funds (10%). A majority of the investors surveyed by ISS et al. (2007) perceive all CEMs negatively. However, some CEMs are perceived as more negative than others. CEMs that investors perceive most negatively are priority shares, golden shares, voting right ceilings, pyramid structures, multiple voting rights shares, ownership ceilings, non-voting shares and to a lesser extent cross-shareholdings and depositary certificates.

Depending on the type of CEM, between 58% and 92% of investors say they take the presence of CEMs into account in their investment decisions. Multiple voting right shares impact investors'decisions most. In addition, 80% of investors would expect a discount on the shares price of companies with CEMs. This discount ranges from 10% to 30% of the share price for the majority of investors who attempted to quantify it. This discount is seen in the first place as compensation for the absence of a bid premium. It is also seen as the price of a vote, as a compensation for a lower valuation, and as the remuneration of the extra risk taken by minority shareholders in a company that may not defend their interests.

The conclusion of this section is that separating risk from voting rights has ambiguous effects on shareholder activism. With regard to stock lending it is not clear whether it has a zero effect on investor activism, that is whether the lenders are not interested in voting and the borrowers make use of the voting rights attached to the borrowed shares. On the other hand, empty voting seems to be a boost of minority shareholders' activism while separation of risk from voting rights put in place by managers and controlling shareholders limits investors' activism. From the relevant literature quoted above it seems that the recourse to decoupling by controlling shareholders might be more important than the recourse to stock lending and empty voting by institutional investors in continental Europe.

VIII. NEW DATA ON INSTITUTIONAL INVESTORS VOTING RECORD IN THE US AND THE EU

As we have seen above (ch. 3), since 2003 in the US institutional investors must disclose their voting policy and their voting record. Rothberg and Lilien (2006) examine the voting record for the twelve months up to August 2004 for ten mutual fund families which accounted in 2004 for about two-thirds of the industry total assets under management. They find that the five large mutual funds sampled voted against management an average of 17% of the time, with percentages of votes against management higher than average on antitakeover issues (in the first place dual-class shares) and executive compensation. Votes against management regarding the election of directors were on average 14%, the main reason being boards lacking a majority of independent directors. The sampled leading mutual funds also showed little support for a social or political activist agenda. In the absence of such a requirement in the EU, a best practice seems to be emerging, at the initiative primarily of global investors who have to comply with the US transparency requirements but also of investors that are aware of the importance of giving full accountability to their clients. One third of the UK funds surveyed by NAPF (2007) disclose details of how specific votes have been cast at company meetings.

As we have also observed above (par. 1.3), voting is just one of the possible forms of institutional investor activism. However, we observe that institutional investors that disclose their voting record in the US and in the EU tend to have as a policy to vote the great majority of shares they own: the mutual funds examined by Rothberg and Lilien (2006) voted in 2003-2004 for almost 98% of their shares. The examination of their voting record can then be considered as a proxy of their entire range of activist measures.

In this chapter we illustrate the voting record in the US and in the EU of two sets of institutional investors. The first one is made of 76 institutional investors…The second one…Of all the investors considered, Hermes is the only one for which we have a voting record for the US and the EU at the same time.

8.1 Voting record in the US

Voting record in the US of 75 mutual funds[139]

Table 12 illustrates the percentages of votes cast by the 75 funds considered (detail in table 13) in favour and against proposals, as well as the percentage of abstain votes cast. The table also differentiates between management proposals and shareholder proposals (the detail is listed in table 14). The percentage of votes in favour of management proposals admitted to shareholder vote is 88%, against 1% of abstain votes and 11% of votes cast by the 75 shareholders considered against shareholder resolutions. As for shareholder proposals, on the whole they do not total the majority of the votes cast (36%), while the abstain votes are equal to 8% and the votes against such proposals are equal to 56%. Of course it is important to investigate on the types of proposals and, in the case of shareholder proposals, from which shareholder such proposals are formulated.

Preliminarily, table 15 illustrates the incidence of the various categories of proposals on total votes cast. Director election is by far the most important item voted at US shareholder meetings (almost 68% of the total votes cast). This corresponds to the literature examined above according to which the main issues in US company life turn around the election of the slate of directors proposed by the management. Interestingly, there is no correspondent category of shareholder proposal concerning director election, proof that alternative slates of directors are very difficult for shareholders to present to voting at the general meetings. The next most important category of proposal is auditor ratification (9%), followed by other management proposals (7%), and executive compensation (6%). As it can be seen from table 14, all such proposals are management proposals. The total incidence of shareholder proposals on total votes cast adds up to less than 4% of total votes cast, with the most recurring item (executive compensation proposed by shareholders) adding up to 1% of total votes cast. Such results correspond to previous findings in the literature. Table 21 provides a ranking of corporate governance proposals based on Gillian and Starks (2007) which shows executive compensation as the type of shareholder proposal most frequently submitted.

We now move on to examine (table 16) the percentage of votes cast by shareholders according to each specific resolution. Beginning with the management resolutions, we observe that the 75 funds considered voted globally in favour of all the

[139] The database was provided by Andy Eggers of www.proxidemocracy.org. The goal in data collection for this preliminary database was to get votes from: the largest 3-4 retail large-cap funds from the largest fund families; the leading socially responsible funds; two other leaders in vote transparency, CBIS and CalPERS. There are omissions due to the data being difficult to access or parse, including American Funds (the 2nd US largest fund family) and PIMCO. The assumption is that each fund's voting record is representative of the entire family of funds to which it belongs. Such an assumption is based on the finding by Rothberg and Lilien (2006, p. 162) that fund families tend to make proxy decision at an aggregate level.

categories of management resolutions, with percentages varying from 76% to 94%. In particular, the management resolutions that gathered more consensus were those concerning auditor ratification, mergers and acquisitions and corporate governance (94%), director election (88%), and executive compensation (81%), the latter item confirming the particular antagonist attitude of the shareholders considered vis-à-vis director remuneration. Among those proposals that gathered less consensus we signal issuance of stock (79%), perhaps attributable to a concern for possible dilution of the dividend rights for the existing shares. As for shareholder resolutions, we notice in the first place that just one of the shareholder resolutions gathers a majority consensus, and that consensus varies according to the type of shareholder proposal. The higher rate of support is gathered by those shareholder resolutions that sustain corporate governance issues: in the first place "takeover defense" (80%), perhaps attributable to shareholders' sensitivity to staggered boards, poison pills and other anti-takeover tactics; "voting rules" is the first category of shareholder resolutions to gather majority approval (59%, something which fits with the literature quoted above which refers to shareholders' sensitivity to cumulative voting), followed by executive compensation (37%) and board independence (30%).

A lower degree of consensus is gathered by those shareholder resolutions that promote social issues, such as proposals on environmental and social issues (11%), political influence and charitable contributions (14%), employment and working conditions (20%).

Since five out of the 75 funds considered here are socially-responsive investors, it is interesting to observe the degree of support from such investors for the latter category of shareholder resolutions (table 17). As expected, such funds express much stronger support for all the socially-oriented shareholder resolutions. However, such funds also voet strongly in favour of corporate-governance shareholder resolutions such as on executive compensation and board independence and performance. Finally, socially-engaged funds tend also to vote less in favour of the management on such key management resolutions as director election (56% against 88% of votes in favour cast by our total sample of 75 funds) and executive compensation (66% against 81%).

Voting record in the US by T.RowePrice

Table 24 reproduces the voting disclosure by *T.RowePrice* for the period July 2006-June 2007 compared to the period July 2006-June 2005. In both periods the total voting was for more than 80% in favour of management, a figure which is in line with the voting expressed by the 75 funds as illustrated above (although not to the 5 socially-engaged funds included in the sample of 75 funds). We find here a confirmation of the inflationary contribution of broker voting in favour of management, which here looks about half of the broker votes cast. The investor expressed its closest support for the management for such issues as those auditor related, director election, and mergers and acquisitions, something which confirms the voting record for the 75 funds examined in the previous paragraphs. A more adversarial stance was taken by T.RowePrice on subjects such as separation of Chairman and Ceo, cumulative voting, anti-takeover provisions, and especially in supporting majority voting for the election of directors, once again a confirmation of the previous voting record examined. The investor sided strongly with the management on socially-minded resolutions, with the exception of resolutions on political contributions, also confirming the previous voting record and the literature quoted above.

8.2 Voting record in the EU

Hermes voting record
We provide here an analysis of the Hermes voting record in the UK, the rest of Europe and in the US with reference to their share portfolio managed on behalf of the British Telecom pension fund. The data refer to the 3d and 4th quarters 2006 and to the 1st-2nd 2007 and include more than 2000 voting decisions voted in Europe and in the US.[140]

Table 10 and **11** represent Hermes' voting record at shareholder meetings in Europe and in the US. The first observation concerns the number of companies' meeting in which Hermes voted over the period considered, the first group being made of UK companies (998) followed by the US (663). Continental Europe follows with much less important numbers, roughly distributed according to the number of listed companies in each of the countries considered, with France, Germany, and Italy with respectively 83, 72, and 68 voted companies, followed by Spain, by the Scandinavian countries, Belgium, Greece, Ireland and Austria.

As for the voting record, Sweden, Denmark, Norway, Switzerland, Canada and the UK are the countries with the highest percentage of votes expressed in favour of company management. In such countries Hermes voted all the items on the agenda in favour of management in more than 80% of meetings (Table 10, fifth column). A second group of countries is made of those where Hermes voted between 60% and 70% of meetings in favour of management all the items on the agenda: Austria, Finland, Germany, Ireland, Luxembourg, Italy, The Netherlands, Portugal. In this group also the US are included. In the last group are a few countries for which Hermes has a low and very low voting record in favour of the board: Belgium, France, Greece, Spain. The case of France is particularly interesting, since only in 20% of meetings Hermes voted in favour of the board on all the items on the agenda. Such a datum translates (Table 10, fourth column) in an average number of votes against management of 3.8, by far the highest rate in the entire panel of countries (see also Table 11 on all such points).

Fidelity voting record[141]
The very low percentage of French shareholder meetings at which Hermes voted in favour of management raises the question whether this fact is investor specific. It also raises the question whether the "all for " measurement might be impaired by other legal or structural factors. As for the first point, we observe (Table 26) that even in the case of Fidelity France shows a much lower percentage of "all for" votes than other European countries. As for the second point, from the voting record expressed by Fidelity it is also possible to calculate the average number of voting items per meeting, which shows that in France shareholders vote a much higher number of items per meeting than the UK, Germany, and Italy, but only slightly higher than Sweden. This could raise the objection that it is more difficult to have

[140] The data are available at: http://www.hermes.co.uk/corporate_governance/voting_disclosure.htm

[141] http://www.fidelity.co.uk/direct/aboutus/corporategovernance/votingrecord.html and http://personal.fidelity.com/myfidelity/InsideFidelity/?refhp=pr. Fidelity proxy voting guidelines focus on four types of proposals. Election of Directors: Fidelity will generally vote in favor of incumbent and nominee directors except where a director has failed to exercise reasonable judgment. Equity-Based Compensation: states to generally vote against equity award plans or amendments that are too dilutive to existing shareholders, may be materially altered without shareholder approval, permit options repricing, allow management discretion in granting certain awards, or are otherwise inconsistent with the interests of shareholders. Anti-Takeover Plans: Fidelity will generally vote against a proposal to adopt or approve the adoption of an anti-takeover plan unless the plan includes a number of provisions that are designed to protect shareholders.

an "all for" voting record the higher the number of items to be voted. Fidelity voting record also allows to calculate the percentage of votes in favour of management as a percentage of total votes cast by shareholders, which should allow to discount the differences in the number of items voted across countries. The result is that the distance between France and the other European countries is much less important. On the other hand, although Sweden has a comparable average number of items per meeting than France, it shows a much higher incidence of "for" votes (93% against 80%). No matter which voting variable used, France is still behind the UK, Germany, and Sweden. The much more adversarial character of the Fidelity vote in French companies is confirmed looking at the percentage of "against" votes on the total number of items voted (with France showing the highest percentage, 8%, compared to Germany, 4%, Sweden 2%, and the UK, 1%) and at the percentage of "abstain" votes (8% for France compared to less than 1% for the UK and Sweden and zero for Germany).

A different case concerns Italy, which shows a low percentage of "all for" votes (higher only than France) and the lowest percentage of "for" votes. However, the main factor explaining this record seems to be not so much an adversariality vis-à-vis Italian management (the percentage of "against" votes is very low, the same as the UK's) as a very low participation of Fidelity to shareholder meetings in Italy: Table 26 shows that Fidelity voted only 71% of the items, against 97% for Sweden, 98% for France, 99% for the UK, and 100% for Germany. This raises the question on the causes of such a low presence of Fidelity at the Italian shareholder meetings. One explanation could be in terms of costs of proxy voting, which might be particularly high in Italy (see above ch. *). Other possible explanations might be a favour for company management which, united with the high percentage of shares owned by the controlling shareholders, might discourage Fidelity from voting.

More in general, the ranking of the consensus for companies' management expressed by Herms is confirmed by Fidelity. Although the percentages vary (Fidelity in general seems to be more favourable to company boards than Hermes) the UK is still the country which collects the highest investor consensus in favour of the board, followed

There is also a confirmation on the composition of the portfolio with respect to Hermes, which even in the case of Fidelity seems to follow the number of companies listed in the different countries.

NBIM voting record
Even in the case of NBIM (Table 23) France shows the highest level of investor adversariality, with 73% of votes cast in favour of management against 86% for Germany and 97% for the UK. This result is also confirmed by the percentage of votes against management, with France showing by far the highest percentage (26%) against Germany (14%) and the UK (2%). Italy is not included in the portfolio of countries voted by NBIM.

The NBIM voting record replicates, although for a smaller number of countries, the ranking of the two other investors considered above, with the only exception of the high percentage of votes in favour of management in Spain. For the rest, Sweden and the UK confirm their position ahead of Germany and The Netherlands, with France in a much lower position.

Morley voting record

The voting record disclosed by Morley shows, as in the previous cases examined, France at the lower end of the voting spectrum, with only 9% of the meeting voted "all for" (zero scored by Luxembourg is based on only one observation), and the UK and Scandinavian countries at the higher end. An outlier is Sweden, which here performs badly (only 10% of "all for"), differently from the two funds previously examined. In the middle of the distribution we Ireland and Italy, while Belgium, Germany, the Netherlands, and Spain follow behind, ahead of France and Sweden.

Standard Life Investments UK voting record
Standard Life vote its clients' shares at the AGMs of all their UK shareholdings but historically have only voted at selected European AGMs. Standard Life is currently planning to vote more generally at European AGMs. For its UK voting, Standard Life has a policy of voting disclosure with regard to meetings at which it abstains or votes against any of the resolutions.[142] Voting disclosure (Table 22) shows for the UK a 85% of votes in favour of all management resolutions ("all for") presented at a specific meeting. However, it is not possible to evaluate such record with reference to other countries.

Provident Voting record[143]
The voting record disclosed by Provident confirms the voting ranking expressed by the previous investors, with the UK performing ahead of Germany and France following behind (Table 19).[144] The table also confirms that Sweden collects a high level of votes in favour of management and that the Netherlands tend to follow Germany. The two outliers here are Spain (which performs very well here) and Italy, where Provident showed up to vote only in 10% of the cases, confirming the high ratio of absence from voting already observed above with the Fidelity voting record.

8.3 Comparison of the voting records for the EU and the US

To sum up the evidence collected in the present section for Europe, we observe (see also tables 27-30 for a comparison of the five main voting records examined) that the institutional investors considered have a much more adversarial voting vis-à-vis French (and Greek and Belgian) company boards than elsewhere in Europe. The evidence also shows that the UK tends to stay at the other end of the spectrum, with the highest percentages of votes in favour of management and the lowest percentages of abstention votes and votes against management. Third, the funds examined tend to vote very favourably also in Scandinavian countries, although two funds out of five tend to vote less favourably in the case of Swedish companies. Fourth, Germany tends to be ahead of France, Greece and Belgium, on the same level with the Scandinavian countries considered collectively (but ahead of Sweden) and behind the UK. The voting record in Dutch companies tends to be less favourable than in German companies but still well ahead of French, Greek and Belgian ones. Finally, Italy and Spain tend to have the highest level of variance in

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[142] Voting disclosure is at:
http://uk.standardlifeinvestments.com/content/profile/shareholder/voting_disclosure/voting_disclosure_index.html

[143] http://www.friendsprovident.co.uk/common/layouts/subSectionLayout.jhtml?pageId=fpcouk%2FSitePageSimple%3Avoting+record#

[144] Even in this case France shows the highest average number of voting items per meeting which seems to translate in a difference from the other countries in terms of "all for" higher than the distance expressed in terms of "for" votes. Using the UK as a benchmark, while Provident voted "all for" in France just 8/1000 times against 7/100 times in the UK, it voted in favour of the board 80% of resolutions against 98% in the UK and against the board 17% of resolutions in France against 1% in the UK.

our investors' voting record, which for Italy might be explained at least in part with the low percentage of meetings voted.

The voting record seems to show a pattern correspondent to the literature on the European legal families referred to in Shleifer (2008). According to this literature legal rules protecting investors vary systematically among legal traditions or origins, with the laws of common law countries being more protective of outside investors than the laws of civil law countries. The European countries voted by the investors' voting record available in our paper are attributed to this literature to the common law tradition (UK, US, Canada and Ireland), the German legal tradition (Germany, Austria), the French legal tradition (France, Belgium, Luxembourg, Portugal, Spain, The Netherlands, Greece and Italy), and the Scandinavian legal tradition (Sweden, Finland, Denmark, and Norway). Our findings show that the degree of support for board and management resolutions by the institutional investors considered in this paper goes according to legal traditions, with the highest degree of consensus fro the UK, followed by Scandinavian and German countries, and lastly by French civil law countries.

Moving on to compare the voting record in the US with the UK (two countries which, as observed above, have a similar shareholder structure made of widely held companies), we observe from the Hermes voting record (table 10) a significantly higher voting record in favour of management in the UK where Hermes voted 89% of meetings all resolutions in favour of management against 67% of times in the US. Considering the votes in favour of management proposals (table 12) we observe for the US that the 75 institutional investors considered voted 88% in favour, and TRowePrice voted 87% of resolutions in favour of management in 2006-2007 and 85% in 2005-2006 (table 24). The percentages of votes in favour of management are higher for the UK: 98% for Provident (table 19), 98% for NBIM (table 23), 98% for Fidelity (table 26). Such a difference is probably more important if we consider, as seen above, that broker voting makes an important part of total voting in the US (14 percentage points according to PIRC 2007 out of a total voting attendance of 87% of total voting shares) and that brokers tend to vote in favour of management.

Finally, comparing the voting record in the US with continental Europe (where admittedly, as seen above in chapter 3.1, companies have a much more concentrated shareholder structure than the US) we observe a higher percentage of votes in favour of management also in several continental European countries (Sweden, Germany, Spain). Again, the difference gets more important if we consider the broker voting component in the US voting record.

8.4 Do national differences in shareholder rights explain different patterns in investor activism in the US and the EU?

As we have seen above, in the US shareholders seem to have fewer voting rights than in the EU, particularly with reference to their more limited possibility to express their binding vote vis-à-vis the company management (table 25). The participants to the conference organised by ECGI (2007) formulated a thesis according to which shareholder rights could be a substitute for regulation. With reference to the different regulatory pattern in the US and in the UK, several participants to the conference observed a more interventionist stance for the US supervisory authorities vis-à-vis the UK ones. Our contribution to this debate is, in the light of the institutional investors' voting pattern examined in the previous paragraph, that institutional investors in the US seem to have a significantly more adversarial voting pattern vis-à-vis company managements than in the UK.

As for Europe, institutional investors' voting patterns seem to have a link with the incidence of separation of ownership from control. Institutional investors' voting pattern is by far more adversarial in France, the country for which ISS et al (2007) found the highest percentage of companies characterized by the presence of control-enhancing mechanisms (see above chapter VI). From ISS et al (2007) it can also be observed that Belgium and Sweden have in common a high incidence of diversions from the one share one vote principle.

Moreover, while there does not seem to be a link between investors' voting patterns and other aspects considered in the present paper above such as the incidence of foreign investors on total share ownership (see above chapter III), voting patterns seem to be more adversarial in countries with higher obstacles to proxy voting (chapter IV and tables 3 and 4) and in countries with a higher ownership concentration (chapter III and tables 7 and 8).

It is interesting to notice that investors' dissatisfaction with the management of French companies takes place within a legal environment which provides guarantees for minority shareholders against expropriation by the management and controlling shareholders. As observed by Hertig and McCahery (2006), in France (as well as in the UK) minority shareholders have to approve transactions in conflict of interest. Institutional investors seem to attribute more importance to the presence of CEMs than to the guarantees that should compensate for their negative effects. On the other hand, institutional investors in Sweden seem to coexist more happily with the level of separation of ownership and control given by a significant presence of CEMs. For Sweden but not for France shareholders seem satisfied that "when functionally good law constrains the level of private benefits of control, minority shareholders benefit from a controlling shareholder's more focused monitoring, leading to better performance."[145] It might be that beyond a critical level of CEMs legal safeguards against shareholder expropriation are not considered credible by institutional investors.

The conclusion for Europe is that institutional investors seem to be very dissatisfied with French listed companies' governance, and to a lesser extent, Greece, Belgium, the Netherlands and Sweden. However, they choose to express their dissatisfaction through an adversarial voting stance rather than by selling the shares. Perhaps surprisingly, institutional investors seem to be much less adversarial in such a country as Germany which has frequently been denounced for its recourse to cross-shareholdings and for the presence of employees' representatives on the supervisory boards. Italy and Spain are the surprise is even more important if we consider that it has been considered as one of the worst cases in the world for expropriation of minority shareholders.[146]

8.5 Voting patterns in the US and the EU: a trend towards uniformity?

The voting record examined shows uniformity in the case of the US funds, while in the case of the EU funds such uniformity is much less evident. The main two explanations for uniformity in the US seem to be in the first place (see chapter ** above) that in the US the legislative framework gives more space to institutional investor to coordinate their voting policies and practices than in at least some EU Member States. The second possible explanation is related to the much wider recourse to voting advisors by US funds than in the EU. As observed by Gordon

[145] Gilson (2006).

[146] See Dyck and Zingales (2004) and Nenova (2003).

(2008),[147] the importance of shareholder proposals in US corporate life is such as to have elicited the development of a new market for governance service intermediaries. 14 of the funds surveyed by NAPF (2007) subscribe to voting reference agencies. The agencies most often subscribed to were RREV/ISS, which uses the NAPF's corporate governance policy (nine funds) and PIRC (five funds). Other reference agencies were Manifest and Glass Lewis. Of the 14 funds which subscribe to voting reference agencies, eight had at some stage chosen not to follow the agency's recommendation. Rothberg and Lilien (2006, p. 163) find that in the majority of the voting record by institutional investors they examine vote followed the advice received from voting advisors, in the first place ISS (now Proxinvest). This raises the question whether and to what extent the voting activism of the mutual fund industry (and possibly of other institutional investors) is influenced by a small group of voting advisors. In this respect, concern has been expressed recently by the influence of such intermediaries on inevstors' voting policies and on the possible existence of conflicts of interest. In the US Proxy Voting Group (2006) raised attention to the multiple roles of such groups in advising both companies and investors, as well as exercising votes on shareholders' behalf.

Examining the methodology disclosed by some of the main voting advisors, RiskMetrics (formerly ISS)[148] offers analysis and voting recommendations based on its benchmark policies and best practices in corporate governance. RiskMetrics requests periodical feedback from its clients on the benchmark policies and best practices to be considered. for a supplementary fee, RiskMetrics also provides client-specific custom analyses and recommendations based on policy guidelines provided or developed in collaboration with individual clients. The voting advice provided by Glass, Lewis & Co.[149] to its clients focuses, among others, on such governance issues as mergers and acquisitions, equity-based compensation, the composition of the board of directors, director remuneration, and auditor issues. Manifest[150]offers three levels of service, from a best-practice governance and voting policy to a personalized voting advisory service based on particular concerns funds may have and to a comparison with other funds' voting policies. Proxinvest[151] performs an analysis of the company and the resolutions submitted to a vote of the shareholders through an analytical grid in which more than 150 legal and financial criteria can be combined and applied to each proposed resolution. At the request of certain investors, Proxinvest also supplies raw data or assigned ratings in the corporate governance area for listed European companies. Egan Jones[152] provides its clients with voting recommendations based on two sets of voting guidelines so clients can choose whether shares should be voted with respect to Taft-Hartley concerns or whether overall shareholder value considerations should take precedence. Clients are also given the opportunity to review and override specific

[147] P. 6.

[148] ISS merged in 2001 with its competitor Proxy Monitor. It has also acquired the research group IRRC and, outside the US, it took over Proxy Australia and, in Europe, the corporate governance division of Deminor (in 2005). In the United Kingdom ISS has joined the forces with the Napf (National Association of Pension Funds) in 2003. Also as a result of this extensive acquisition campaign, ISS has become the dominant operator in its field. In 2007 ISS was acquired by the RiskMetrics Group: http://www.riskmetrics.com/issgovernance.html For more information See also Verdam (2006).

[149] http://www.glasslewis.com/downloads/overviews/proxypaper.pdf Glass Lewis' clients include money managers, mutual funds, hedge funds, public pension funds, labor union funds, SRI managers and religious pension funds.

[150] http://www.manifest.co.uk/services/governance_watch.htm

[151] http://www.proxinvest.com/index.php/fr/page/index.html

[152] http://www.ejproxy.com/services.aspx

proxy vote recommendations. PROXY Governance[153] takes into account several factors, such as an individual company's financial performance relative to its industry, its business environment, the strength of its management and corporate strategy, and the quality of its corporate governance. Proxy Governance also allows its clients to have proxies voted based on their own policies, through an automated voting platform.

The conclusion that seems to emerge in this respect is that the voting of institutional investors is a collective process worked out by the voting advice providers under the collective guidance of institutional investors that subscribe to their services and interact with their voting advisors, although such interaction differs according to the characteristics of the services offered by each proxy advisor. The recourse to voting advice providers is probably an important precondition to allow institutional investors to cast their votes at all the shareholder meetings of their portfolio shares.

IX. CONCLUSION

Starting from the observation that at the multilateral level shareholder activism is considered as an important aspect of good corporate governance, this paper has examined several legal and economic obstacles to institutional investor activism in the EU and in the US. We also examined the voting record of 76 institutional investors in the US and of several others in the EU.

The results of our research show in the first place that participation at shareholder meetings is significantly higher in the US than in the EU. In turn, the situation in the EU is very different across some of its main Member States, with the UK showing a higher voting participation. The UK is also the European country with the higher ownership fragmentation and the higher percentage of total shares held by institutional investors. The reasons for the lower voting presence in the EU seem to be related to the difficulty to have access to proxy voting and the rational apathy of institutional investors not to take part in voting in companies for which they own a small number of shares. Legal obstacles to proxy voting have just been lowered through the adoption of the Shareholder Rights Directive, while the willingness of institutional investors to vote at shareholder meetings seems to be increasing also due to the encouragement from multilateral fora, national supervisory authorities, and self-regulatory bodies. Institutional investors active in the EU are also differentiating their equity portfolios across companies listed all over the EU, something which should contribute to reduce in the near future national differences in voting attendance.

Institutional investor activism has also been encouraged in recent times by the rising number of hedge funds that have a equity portfolio focused in a limited number of companies, in which they hold significant share holdings. Such a trend is more visible in the US, but is also beginning to spread in the EU. The specificity of this kind of investors translates in the higher propensity, vis-à-vis "traditional" institutional investors such as pension funds and mutual funds, to put in place proxy fights.

We also found that conflicts of interest seem to limit the activism of several categories of institutional investors both in the US and in the EU; that some national legislations limit the ability of institutional investors to coordinate their

[153] http://www.proxygovernance.com

voting policies and practices; and that recourse to stock lending and other forms of separation of financial risk from voting rights seems to be practiced more by controlling shareholders at the expense of institutional investors than the opposite.

We then moved on to examine institutional investors' voting record in the US and in the EU through new data covering 76 institutional investors' voting records in the US and 6 institutional investors' voting records in the EU. Our observation is that institutional investors in the US seem to have a significantly more adversarial voting pattern vis-à-vis company managements than in the UK, something which might be connected to the fewer voting rights given to shareholders by the US regulatory framework.

As for Europe, institutional investors' voting pattern is by far the most adversarial in France, where there is a high incidence of control-enhancing mechanisms. Institutional investors seem to have an adversarial voting stance also in Greece, Belgium and Sweden, where control-enhancing mechanisms are also present, while in Italy they tend to have a low voting turnout. More in general, EU investors' voting pattern seems to be sensitive to the presence of control-enhancing mechanisms, ownership concentration, and to the origin of the national legal system.

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Table 1. Share ownership of European listed companies in 2005

	Foreign investors	*median=100*	Collective investment	median=100	Banks and other	median=100	Private non financial companies	median=100	Individual investors/ households	median=100	Public sector	median=100
France	39%	*115*	20%	*143*	9%	*180*	15%	*100*	6%	*38*	11%	*147*
Germany (2004)	21%	*62*	8%	*57*	7%	*140*	42%	*280*	15%	*94*	7%	*93*
Italy	13%	*38*	12%	*86*	11%	*220*	28%	*187*	26%	*163*	10%	*133*
Netherlands (2003)	69%	*203*	12%	*86*	0	*0*	Na	*Na*	11%	*69*	2%	*27*
Poland	38%	*112*	16%	*114*	1%	*20*	8%	*53*	17%	*106*	20%	*267*
Spain	34%	*100*	9%	*64*	8%	*160*	25%	*167*	24%	*150*	0.30%	*4*
Sweden	34%	*100*	26%	*186*	3%	*60*	11%	*73*	18%	*113*	8%	*107*
UK	33%	*97*	49%	*350*	2%	*40*	2%	*13*	14%	*88*	0.10%	*1*
EU weighted average	**33%**		**24%**		**7%**		**16%**		**15%**		**5%**	
US (2004/5)			60% (of which 24% mutual funds and 10% pension funds)									
Median	34%		14%		5%		15%		16%		8%	

Source: FESE (2007), Kahan and Rock (2007b), Rothberg and Lilien (2006) and our elaborations.

Table 2. Attendance rate at GMs of foreign shareholders

THYSSEN KRUPP (German issuer)

	Foreign shareholders	Domestic shareholders
As % of total share capital	20%	80%
Present at GM (as % of total share capital)	0,4% (2%*)	53,6% (67%**)

* As a percentage of total shares owned by foreign shareholders
** As a percentage of total shares owned by domestic shareholders

MAN AG (German issuer)

	Foreign shareholders	Domestic shareholders
As % of total share capital	37 %	63 %
Present at GM (as % of total share capital)	0,1 % (0,27 %*)	45,4 % (72,06 %**)

VOLKSWAGEN AG (German issuer)

	Foreign shareholders	Domestic shareholders
As % of total share capital	50 %	50 %
Present at GM (as % of total share capital)	5 % (10%*)	35% (70%**)

* As a percentage of total shares owned by foreign shareholders
** As a percentage of total shares owned by domestic shareholders

ARBEITSKREIS NAMENSAKTIE (The working group of the larger German companies with registered shares)

Figures of German DAX-companies with registered shares (Epcos is a TecDAX constituent)

		Foreign shareholders	Domestic shareholders
Allianz AG	As % of total share capital	50	50,0
2004	Present at GM (as % of total share capital)	6,3 (12,6)*	30,8 (61,6)**
DaimlerChrysler AG	As % of total share capital	43,0	57,0
2005	Present at GM (as % of total share capital)	15,3 (35,6)*	22,6 (39,6)**
Deutsche Bank AG	As % of total share capital	45,9%	54,1%
2004	Present at GM (as % of total share capital)	11,8 (25,7)*	20,2 (37,3)**
Deutsche Börse AG	As % of total share capital	57,7	42,3
2003	Present at GM (as % of total share capital)	12,1 (21,0)*	32,5 (76,8)**
Dt. Lufthansa AG	As % of total share capital	24,3	75,7
2004	Present at GM (as % of total share capital)	7,7 (31,7)*	33,4 (44,1)**
Deutsche Post AG	As % of total share capital	17,9%	82,1%
2004	Present at GM (as % of total share capital)	3,4% (19,0%)*	69,5% (84,7%)**
Dt. Telekom AG	As % of total share capital	32,1	67,9
2003	Present at GM (as % of total share capital)	2,7 (8,4)*	56,8 (83,6)**
Epcos AG	As % of total share capital	45,0	55,0
2005	Present at GM (as % of total share capital)	22,5 (50,0)*	23,9 (43,5)**
Infineon Techn. AG	As % of total share capital	47,6	52,4

2005	Present at GM (as % of total share capital)	17,0 (35,7)*	31,0 (59,2)**
Münchener Rück AG	As % of total share capital	45,2	54,8
2005	Present at GM (as % of total share capital)	9,1 (20,1)*	33,7 (61,0)**
Siemens AG	As % of total share capital	56,2	43,8
2005	Present at GM (as % of total share capital)	12 (21,4)*	21,6 (49,3)**

* As a percentage of total shares owned by foreign shareholders

** As a percentage of total shares owned by domestic shareholders

Source: DEUTSCHES AKTIENSTITUT

FCSD – Finnish Central Securities Depository Ltd

	Foreign shareholders	Domestic shareholders
As % of total share capital	31.71%	68.29%
Present at GM (as % of total share capital)	8.46% (18.46%*)	38.76% (54.12%**)

* As a percentage of total shares owned by foreign shareholders
** As a percentage of total shares owned by domestic shareholders

According to FCSD the attendance rate at GMs of foreign shareholders varies from 0% to 70-90% in different companies applying the same arrangements based on our Companies Act. The wide variety in attendance rate with basically similar rules (Companies Act ja by-laws) applied in all companies proves that the present company law framework works well enough and that the attendance at GMs depends mostly on other factors than the company law provisions dealing with shareholders´ right to attend GM.

Table 3. Percentage of votable share positions notified by ISS to institutions which subsequently are voted by those same institutions (June 2003- June 2005).

Market	**Blocking**	**Vote Return Rate (%)**	**Median=100**
Australia	no	67,6	154
Spain	no	71,2	162
UK	no	76,6	174
Argentina	yes	49,2	112
Austria	yes	34	77
Belgium	yes	32,8	75
France	yes	37,6	86
Germany	yes	49,4	113
Greece	Yes	20,5	47
Netherlands	Yes	43,9	100
Portugal	Yes	34,2	78
Median		43,9	100

Source: ISS and our elaborations

Table 4. “DE FACTO” SHARE-BLOCKING PROVISIONS AND “FREE-FLOAT” VOTE

Countries	Attendance rate of the free float	Market practice rules (driven by custodians’ internal rules)	Legal rule
Belgium*	20.00%	- Deadline to send proxy voting instructions to custodians: 7 days prior to GM - Blocking: 6 days ca	Share-blocking: Generally 3-6 days before meeting
France*	17.45%	- Deadline to send proxy voting instructions to custodians: 8 days prior to GM - Blocking: 5 days ca. Actually, blocked shares can be traded up to 3 ay prior to GM. Trading would imply cancellation of votes cast	Prior to the reform[154] the blocking date used to be 5 days before the meeting. Nowadays, unless the shareholder’s name is recorded in the company shareholders list (if any) prior to the meeting, the "Freezing" of the shares to be voted (*immobilisation or certificat d'indisponibilité des actions*) is still requested by French law. However the NRE decree allows for a defreezing prior to the GM in case of the sale of the shares.
Germany*	10.05%	- Deadline to send proxy voting instructions to custodians: 7 days prior to GM - Blocking: 6 days ca. Actually, blocked shares can be traded up to 3 any prior to GM. Trading would imply cancellation of votes cast	Blocking has been abolished in 2005. It used to be about 5 days before GM
Italy*	4.40	- Deadline to send proxy voting instructions to custodians: 7 days prior to GM - Blocking: 6 days ca.	Used to require a 5 days blocking period. Current rules vary from company to company (with a maximum blocking period of 2 days before GM).[155] However most of the custodians still apply a blocking system.
Netherlands*	12.95%	- Deadline to send proxy voting instructions to custodians: 5 days prior to GM - Blocking: 5 days ca	Blocking has been abolished by the Law 15 December 1999, art. 2:119, which establish record date procedure (max 7 days ahead of GM). Prior to the reform the blocking date used to be 5-6 days before the meeting.
Sweden	45%**	Record date	Re-registration 10 days prior to GM
UK	40.20%-53.20%	Record date	Record date: 48 hours before the GM

*) 2003 data
**) Data based on a small sample

Source: Deminor country ratings 2003-2004, Manifest Voting Review 2004, JP Morgan internal rules manual 2004-5, Hermes calculation

Table 5. Voting costs charged to investors by voting intermediaries

Costs for investors	Estimates range from a minimum to a maximum value			
	%			
Understanding the framework - Costs due to lack of harmonisation (E)	11.1			
Voting platform (F)	1.8			
Powers of attorney (E)	1			
Re-registration of shares (E)	4.5			
Share-blocking (E)	58.9			
Voting in remote areas (E)	0.3			
Lack of voting in absentia facilities (E)	0.2			
Voting recommendations (F)	9.8			
Lack of timely/exhaustive information on agenda items (E)	12.4			
Total	**100**			

*) "F" stands for fixed costs, due to setting up a global voting system.
"E" stands for ad hoc costs due to voting in European countries.

Source: Hermes.

[154] Regulation has been amended by Decree dated May 3, 2002 (art. 38 modifying art. 136 of the Decree dated March 23, 1967).
[155] As per Vietti reform and companies articles of association amended after 1/1/2004.

Table 6. The discipline of acting in concert across the EU

	Ambiguity	**Explicit provisions against investor activism**
Germany*	High	High
France	Low	High
Italy	Average	Low
UK	Low	Low

Including the reform proposal currently under discussion by the German Parliament

Table 7. Ownership concentration
Widely held is the fraction of firms with no controlling shareholder among the 20 largest companies by stock market capitalization at the end of 1995. A company has a controlling shareholder if the sum of a shareholder's direct and indirect voting rights exceeds 20 percent. Family control is the fraction of the 20 largest companies where the controlling shareholder is an individual. Source: La Porta, Lopez-de-Silanes and Shleifer (1999), Table 2. Pyramid control is the fraction of the 20 largest companies, where the controlling shareholder exercises control through at least one publicly traded company. Source: La Porta, Lopez-de-Silanes and Shleifer (1999), Table 4. Median largest block is the median size of the largest ultimate voting block for listed industrial companies. Source: Barca and Becht (2001). Family wealth is the percentage of total stock market capitalization controlled by the 10 richest families. Source: Faccio and Lang (2002), Table 10.

	(1)	(2)	(3)	(4)	(5)
	Widely held	Family control	Pyramid control	Median largest block	Family wealth
France	60%	20%	15%	20%	29%
Germany	50%	10%	20%	57%	21%
Italy	20%	15%	20%	55%	20%
United Kingdom	100%	0%	0%	10%	6%
United States	80%	20%	0%	5% (NYSE) 9% (Nasdaq)	NA

Source: Enriques and Volpin (2007).

Table 8. Ownership concentration in listed companies: main European companies (2003)

	companies considered	weight	Average free-float	Weighted average free-float	Percentage of widely-held companies
Austria	11	58.1	57.1	46.8	18.2
Denmark	24	82.9	74.2	61.2	50
Bel, Fra, Ned, Por	197	86.4	66.4	74.7	37.6
Finland	26	85.7	79	89.3	53.8
Germany	87	76.3	67	72.9	37.9
Greece	28	65.1	57.9	58.6	21.4
Ireland	16	80.6	89.2	95	75
Italy	79	90	56.9	59.1	17.7
Norway	15	79.9	67	46.2	33.3
UK	317	92.9	91.4	96.1	83.3
Spain	49	61.4	59.1	70.3	26.5
Sweden	56	87.3	77.2	77.9	51.8
Switzerland	76	92.5	78.7	87	57.9

Source: Bianchi et al. (2005).

Table 9. Average voting turnout in 2006

Country	**Voting turnout**	**Median=100**
UK (FTSE 350)	61%	107
Netherlands	36%	63
Italy	52%	91
France	57%	100
Germany (Dax30)	49%	86
Spain	65%	114
US (S&P 500)	87%	153
Median	57%	

Source: PIRC (2007) and our elaborations

Table 10. Hermes BT portfolio: voting record

The Table represents in the first column the countries where Hermes has voted in the period 2nd half 2006-first half 2007; the second column indicates the number of meetings in which Hermes has voted in each country; the third column the number of items at the meeting for which Hermes has abstained; the fourth column the number of items at meeting for which Hermes voted against; the fifth column the number of company meetings in which Hermes voted in favour for all the items; the sixth the number of shareholder resolutions for which Hermes voted in favour (votes against shareholder resolution are included with the votes in favour of management).

Country	Number of Meetings voted	Number of Abstain votes (average per meeting)	Number of Against votes (average per meeting)	Number (perc) of Meetings voted all for	For (Shareholder resolution)*
Austria	12	0	6 (0.5)	8 (0.67)	0
Belgium	31	0	31 (1)	15 (0.48)	0
Denmark	24	1 (0.04)	3 (0.1)	20 (0.83)	0
Finland	24	0	2 (0.1)	19 (0.79)	3
France	83	5 (0.06)	313 (3.8)	17 (0.20)	5
Germany	68	3 (0.04)	18 (0.3)	54 (0.79)	0
Greece	26	0	40 (1.5)	6 (0.23)	0
Ireland	14	0	6 (0.4)	9 (0.64)	0
Italy	72	4 (0.05)	23 (0.3)	56 (0.78)	0
Luxembourg	9	0	2 (0.2)	7 (0.78)	0
Netherlands	50	0	22 (0.4)	39 (0.78)	0
Norway	29	0	4(0.1)	25 (0.86)	0
Portugal	13	0	7 (0.5)	10 (0.77)	0
Spain	44	0	44 (1)	23 (0.52)	0
Sweden	44	0	2 (0.04)	42 (0.95)	0
Switzerland	37	0	13 (0.3)	31 0.84)	0
UK*	999	17(0.02)	71 (0.07)	893 (0.89)	?
US	663		151 (0.2)	444 (0.67)	142
Canada	169		28 (0.2)	138 (0.81)	1

Source: our elaboration on Hermes data published at www.hermes.co.uk

* Under the UK law abstain votes are not considered in determining the level of support or dissent for a proposal, although they are included for the purposes of determining voting turnout.

Table 11. Hermes BT portfolio: voting record – comparative statistics
The fourth column indicates the average number of against votes over the meetings in which

Country	**All for/total meeting**	**Number of meeting no all for**	**Average number of Against by Meeting no all for**	**Average number of Shareholder Resolutions**
Austria	0,67	4	1,5	0
Belgium	0,48	16	1,94	0
Denmark	0,83	4	0,75	0
Finland	0,79	5	0,4	0,6
France	0,2	66	4,74	0,08
Germany	0,79	14	1,29	0
Greece	0,23	20	2	0
Ireland	0,64	5	1,2	0
Italy	0,78	16	1,44	0
Luxembourg	0,78	2	1	0
Netherlands	0,78	11	2	0
Norway	0,86	4	1	0
Portugal	0,77	3	2,33	0
Spain	0,52	21	2,1	0
Sweden	0,95	2	1	0
Switzerland	0,84	6	2,17	0
country				
Bermuda	0,73	6	2,33	0,17
British V.I.	1	0	0	0
Canada	0,82	31	0,9	0,03
Cayman Islands	0,78	2	1,5	0
Marshall Islands	1	0	0	0
Mauritius	1	0	0	0
Netherlands Antilles	1	0	0	0
USA	0,67	219	0,69	0,59
country				
Guernsey	0,94	2	0,5	0
Ireland	1	0	0	0
Isle of Man	1	0	0	0
Jersey	0,78	2	0,5	0
U.K.	0,89	105	0,67	0
UK	0	1	1	0

Source: our elaboration on Hermes data.

Table 12. Voting record in the US of 75 mutual funds
Percentages. See table 14 for the list of the 75 funds considered. Data refer to the period July 2003 January 2008.

Management proposals				**sh proposals**			
	Against	abstain	in favour		against	abstain	in favour
a	2300	495	51950	bi	3348	55	1438
c	6527	321	29555	ec	7814	403	4866
cg	270	114	5992	es	5068	1540	863
d	45126	3558	369263	l	1997	557	653
m	146	70	3714	os	5244	628	1715
n	252	9	831	p	3255	855	666
om	3162	945	13374	svr	3245	154	5009
s	1230	256	5778	td	1077	64	4485
tot	**59013**	**5768**	**480457**	**tot**	**31048**	**4256**	**19695**
perc	**0,11**	**0,01**	**0,88**	**perc**	**0,56**	**0,08**	**0,36**

Source: our elaborations based on data provided by Andy Eggers, www.proxydemocracy.org

Table 13. Detail of the 75 US mutual funds considered in our voting record survey

id,"ticker","name","fund_family"
1,"DSEFX","Domini Social Equity Fund","Domini Social Funds"
2,"CSXAX","Calvert Social Index Fund","Calvert Funds"
3,,"CalPERS",
4,,"CBIS (Christian Brothers Investment Service)",
5,"FKINX","Franklin Income Fund","Franklin Templeton Funds"
6,"MUTHX","Franklin Mutual Shares Fund","Franklin Templeton Funds"
7,"BEGRX","Franklin Mutual Beacon Fund","Franklin Templeton Funds"
8,"PRFDX","T Rowe Price Equity Income Fund","T Rowe Price Funds"
9,"PRGFX","T Rowe Price Growth Stock Fund","T Rowe Price Funds"
10,"TRBCX","T Rowe Price Blue Chip Growth Fund","T Rowe Price Funds"
11,"PREIX","T Rowe Price Equity Index 500 Fund","T Rowe Price Funds"
12,"SNXFX","Schwab 1000 Index Fund","Schwab Funds"
13,"SWPIX","Schwab Capital Trust S&P 500 Index Fund","Schwab Funds"
14,"SWANX","Schwab Capital Trust Core Equity Fund","Schwab Funds"
15,"SWHEX","Schwab Hedged Equity Fund","Schwab Funds"
16,"GSCGX","Goldman Sachs Capital Growth","Goldman Sachs Funds"
17,"GSGRX","Goldman Sachs Growth & Income","Goldman Sachs Funds"
18,"FALDX","Federated American Leaders","Federated Funds"
19,"FEDEX","Federated Capital Appreciation Fund","Federated Funds"
20,"MXCCX","Federated Max-Cap Index Fund","Federated Funds"
21,"DGAGX","Dreyfus Appreciation Fund","Dreyfus Funds"
22,"PEOPX","Dreyfus S&P 500 Index Fund","Dreyfus Funds"
23,"DREVX","Dreyfus Fund","Dreyfus Funds"
24,"SGROX","Wells Fargo Advantage Growth","Wells Fargo Funds"
25,"SFCSX","Wells Fargo Advantage Equity Index","Wells Fargo Funds"
26,"STFRX","Wells Fargo Advantage Dow Jones Target 2040","Wells Fargo Funds"
27,"SHRAX","Legg Mason Partners Aggressive Growth","Smith Barney Funds"
28,"SHAPX","Legg Mason Partners Appreciation Fund","Smith Barney Funds"
29,"SBSPX","Legg Mason Partners S&P 500 Index Fund","Smith Barney Funds"
30,"SSIAX","Legg Mason Partners Social Awareness","Smith Barney Funds"
31,"PGRWX","Putnam Fund for Growth and Income","Putnam Funds"
32,"KDHAX","DWS Dreman High Return Equity Fund","DWS Funds"
33,"SCDGX","DWS Growth & Income Fund","DWS Funds"
34,"BTIEX","DWS Equity 500 Index Fund","DWS Funds"
35,"EVSYX","Evergreen Large Cap Equity","Evergreen Funds"
36,"EGIAX","Evergreen Fundamental Large Cap","Evergreen Funds"
37,"ESINX","Evergreen Equity Index","Evergreen Funds"
38,"MSFRX","MFS Total Return Fund","MFS Funds"
39,"MEIAX","MFS Value Fund","MFS Funds"
40,"TWCUX","American Century Ultra","American Century Funds"
41,"TWCGX","American Century Growth","American Century Funds"
42,"BIGRX","American Century Income & Growth","American Century Funds"
43,"ACSTX","Van Kampen Comstock","Van Kampen Funds"
44,"ACEGX","Van Kampen Strategic Growth","Van Kampen Funds"
45,"JANSX","Janus Fund","Janus Funds"
46,"JAVLX","Janus Twenty Fund","Janus Funds"
47,"JAGIX","Janus Growth and Income Fund","Janus Funds"
48,"DIVAX","Morgan Stanley Dividend Growth Securities","Morgan Stanley Funds"
49,"AMOAX","Morgan Stanley Focus Growth","Morgan Stanley Funds"
50,"SPIBX","Morgan Stanley S&P 500 Index","Morgan Stanley Funds"
51,"INDZX","RiverSource Diversified Equity Income Fund","RiverSource Funds"
52,"ADIDX","RiverSource S&P 500 Index Fund","RiverSource Funds"
53,"NBSRX","Neuberger Berman Socially Responsive","Neuberger Berman Funds"
54,"DRTHX","Dreyfus Premier Third Century Fund","Dreyfus Funds"

55,"CSIEX","Calvert Social Investment Fund","Calvert Funds"
56,"CLGAX","Calvert Large Cap Growth Fund","Calvert Funds"
57,"PAXWX","Pax World Balanced Fund","Pax World Funds"
58,"PXWGX","Pax World Growth Fund","Pax World Funds"
59,"PARNX","Parnassus Fund","Parnassus Funds"
60,"MMPAX","MMA Praxis Core Stock Fund","MMA Praxis Funds"
61,"WAIDX","Citizens Funds Core Growth/Standard","Citizens Funds"
62,"VFINX","Vanguard 500 Index","Vanguard Funds"
63,"VTSMX","Vanguard Total Stock Market Index","Vanguard Funds"
64,"VWNFX","Vanguard Windsor II","Vanguard Funds"
65,"VWELX","Vanguard Wellington","Vanguard Funds"
66,"FCNTX","Fidelity Contrafund","Fidelity Funds"
67,"FMAGX","Fidelity Magellan","Fidelity Funds"
68,"FSMAX","Fidelity Spartan 500 Index","Fidelity Funds"
69,"FMILX","Fidelity New Millennium","Fidelity Funds"
70,"TIGEX","TIAA-CREF Growth Equity Fund","TIAA-CREF Funds"
71,"TIGIX","TIAA-CREF Growth & Income Fund","TIAA-CREF Funds"
72,"TCEIX","TIAA-CREF Equity Index Fund","TIAA-CREF Funds"
73,"TCSCX","TIAA-CREF Social Choice Equity Fund","TIAA-CREF Funds"
74,"DODGX","Dodge & Cox Stock Fund","Dodge & Cox Funds"
75,"DODBX","Dodge & Cox Balanced Fund","Dodge & Cox Funds"

Source: our elaborations based on data provided by Andy Eggers, www.proxydemocracy.org Socially responsible funds are in yellow.

Table 14. Types of Proposals in the US

Management proposals:
a -- Auditor Ratification
cg -- Corporate Governance
d -- Director Election
c -- Executive Compensation
s -- Issuance of Stock
m -- Merger/Acquisition Agreement
om -- Other Management Proposals

Shareholder Proposals
bi -- Board Independence and Performance
l -- Employment and Working Conditions
es -- Environmental and Social
ec -- Executive Compensation
os -- Other Shareholder Proposals
p -- Political Influence and Charitable Contributions
td -- Takeover Defenses
svr -- Voting Rules

Source: our elaborations based on data provided by Andy Eggers, www.proxydemocracy.org

Table 15. Proposals by year in the US

prop_code	year 2003	2004	2005	2006	2007	2008	Total
a	142	1,228	1,379	1,399	2,517	98	6,763
	7.39	8.70	9.06	9.01	9.91	11.32	9.26
bi	2	51	36	63	106	7	265
	0.10	0.36	0.24	0.41	0.42	0.81	0.36
c	156	1,001	1,021	898	1,444	54	4,574
	8.12	7.10	6.71	5.78	5.69	6.24	6.26
cg	17	117	125	158	215	0	632
	0.88	0.83	0.82	1.02	0.85	0.00	0.87
d	1,269	9,456	10,323	10,564	17,325	582	49,519
	66.06	67.03	67.81	68.01	68.23	67.21	67.79
ec	17	156	161	132	260	1	727
	0.88	1.11	1.06	0.85	1.02	0.12	1.00
es	6	74	75	87	117	2	361
	0.31	0.52	0.49	0.56	0.46	0.23	0.49
l	2	36	38	42	44	0	162
	0.10	0.26	0.25	0.27	0.17	0.00	0.22
m	30	106	135	156	268	15	710
	1.56	0.75	0.89	1.00	1.06	1.73	0.97
n	0	2	6	0	949	78	1,035
	0.00	0.01	0.04	0.00	3.74	9.01	1.42
om	177	1,100	1,257	1,283	1,323	17	5,157
	9.21	7.80	8.26	8.26	5.21	1.96	7.06
os	15	174	107	68	69	0	433
	0.78	1.23	0.70	0.44	0.27	0.00	0.59
p	2	52	35	46	55	1	191
	0.10	0.37	0.23	0.30	0.22	0.12	0.26
s	69	388	344	402	567	11	1,781
	3.59	2.75	2.26	2.59	2.23	1.27	2.44
svr	4	54	103	148	84	0	393
	0.21	0.38	0.68	0.95	0.33	0.00	0.54
td	13	112	79	86	50	0	340
	0.68	0.79	0.52	0.55	0.20	0.00	0.47
Total	1,921	14,107	15,224	15,532	25,393	866	73,043
	100.00	100.00	100.00	100.00	100.00	100.00	100.00

Source: our elaborations based on data provided by Andy Eggers, www.proxydemocracy.org

Table 16. Voting record by proposal in the US
The table illustrates the voting record of the 75 institutional investors (listed in table 14) according to proposal. The list of the proposals is displayed in table 15. Data refer to the period July 2003 January 2008. Shareholder proposals are in bold.

	a	**bi**	c	cg	d	**ec**	**es**	**l**	m	n	om	**os**	**p**	S	**svr**	**td**
Votes against proposal	2300	3348	6527	270	45126	7814	5068	1997	146	252	3162	5244	3255	1230	3245	1077
Votes against proposal (perc)	0.04	0.69	0.18	0.04	0.11	0.6	0.68	0.62	0.04	0.23	0.18	0.69	0.68	0.17	0.38	0.19
Abstain votes	495	55	321	114	3558	403	1540	557	70	9	945	628	855	256	154	64
Abstain votes (perc)	0.009	0.01	0.009	0.02	0.008	0.03	0.20	0.17	0.02	0.008	0.05	0.08	0.18	0.03	0.02	0.01
Votes in favour of proposal	51950	1438	29555	5992	369263	4866	863	653	3714	831	13374	1715	666	5778	5009	4485
votes in favour of proposal (perc)	0.94	0.30	0.81	0.94	0.88	0.37	0.11	0.20	0.94	0.76	0.76	0.23	0.14	0.79	0.59	0.80
Total votes cast	54745	4841	36403	6376	417947	13083	7471	3207	3930	1092	17481	7587	4776	7264	8408	5626

Source: our elaborations based on data provided by Andy Eggers, www.proxydemocracy.org

Table 17. Voting record by proposal in the US by 5 socially-engaged funds
The table illustrates the voting record by proposal of the 5 institutional investors included in the list of 75 mutual funds listed in table 14. The list of the proposals is displayed in table 15. Data refer to the period July 2003 January 2008. Shareholder proposals are in bold.

	a	**bi**	c	cg	d	**ec**	**es**	**l**	m	n	om	**os**	**p**	S	**svr**	**td**
Votes against proposal	237	50	1089	35	14157	169	23	26	28	64	326	114	55	123	102	41
Votes against proposal (perc)	0,05	0,24	0,33	0,10	0,43	0,25	0,09	0,14	0,09	0,24	0,32	0,31	0,22	0,23	0,23	0,12
Abstain votes	16	1	11	2	141	7	3	1	3	0	9	5	1	3	1	1
Abstain votes (perc)	0,004	0,005	0,003	0,006	0,004	0,010	0,012	0,005	0,009	0	0,009	0,013	0,004	0,006	0,002	0,003
Votes in favour of proposal	4108	157	2158	322	18315	501	227	164	293	201	674	253	198	412	337	293
votes in favour of proposal (perc)	0,94	0,75	0,66	0,90	0,56	0,74	0,90	0,86	0,90	0,76	0,67	0,68	0,78	0,77	0,77	0,87
Total votes cast	4361	208	3258	359	32613	677	253	191	324	265	1009	372	254	538	440	335

Source: our elaborations based on data provided by Andy Eggers, www.proxydemocracy.org

Table 18. Morley Fund Management voting in 2007

Data refer to all shares voted in 2007 by Morley Fund Management. The second column refers to the percentage of meetings in which Morley voted in favour of management on all the items voted at a meeting.

Country	All for/total meeting (in brackets absolute numbers)
Austria	17% (1/6)
Belgium	23% (3/13)
Denmark	100% (1/1)
Finland	75% (3/4)
France	9% (5/57)
Germany	18% (6/34)
Ireland	42% (5/12)
Italy	43%(15/35)
Luxembourg	0 (0/1)
Netherlands	20% (5/25)
Spain	17% (5/29)
Sweden	10% (1/10)
UK	57% (692/1212)

Source: Morley

Table 19. Provident voting in 2007

Data refer to all shares voted in 2007 by Provident. In brackets the percentages of for, against and abstain votes on the total voting items. The "For" row refers to the voting items for which Provident voted in favour of the management. The "Abstain" row refers to the voting items for which Provident participated to the specific meeting and chose to vote "abstain". The "No Action" row refers to the voting items which have not been voted by Provident because Provident did not participate to the specific meeting. The "Non Voting Itels" row refers to items which were not supposed to be oted by shareholders (for which Provident in its disclosed voting record did not provide any specification under the column "vote"). The "Tot. voting items" row is the sum of "for", against", "abstain", and "no action" rows. The "Voted/voting" row refers to the percentage of items voted by Provident (row 8) on the total number of items admitted to shareholder voting (row 9). The last row refers to the number of meetings in which Provident voted in favour of management in all the voting items. Notice that Under the UK law abstain votes are not considered in determining the level of support or dissent for a proposal, although they are included for the purposes of determining voting turnout.

	Italy	France	Germany	UK	Sweden	Spain	Netherlands	Belgium
1. Meetings	18	19	24	268	7	12	14	3
2; Companies	12	19	24	240	5	9	13	2
3. For (perc)	4 (0.67)	277 (0.80)	195 (0.94)	3372 (0.98)	110 (0.93)	129 (0.98)	112 (0.92)	0
4. Against (perc)	0	58 (0.17)	8 (0.04)	37 (0.01)	8 (0.07)	1 (0.01)	5 (0.04)	0
5. Abstain (perc)	2 (0.33)	10 (0.03)	5 (0.02)	41 (0.01)	0	1 (0.01)	5 (0.04)	0
6. No Action (perc)	68 (0.9)	18 (0.04)	23 (0.09)	4 (0.001)	0	0	100 (0.45)	52 (1)
7. Non Voting items	0	0	28	0	2	2	48	16
8. For+against+abstain	6	345	208	3450	118	131	122	0
9. Tot. voting Items (For+against+abstain+no action)	74	363	231	3454	118	131	222	52
10. Voting items/meeting	4.1	19.1	9.6	12.9	16.8	10.9		17.3
11. Voted/voting items (8/9)	0.08	0.95	0.90	0.99	1	1	0.55	0
12. All for (perc)	0	3 (0.008)	9 (0.04)	243 (0.07)	3 (0.02)	7 (0.05)	3 (0.01)	0

Source:http://www.friendsprovident.co.uk/common/layouts/subSectionLayout.jhtml?pageId=fpcouk/SitePageSimple:voting+record and our elaborations.

Table 20. Percentage ownership of institutional investors in US stock markets
Source: Gillan and Starks (2007)

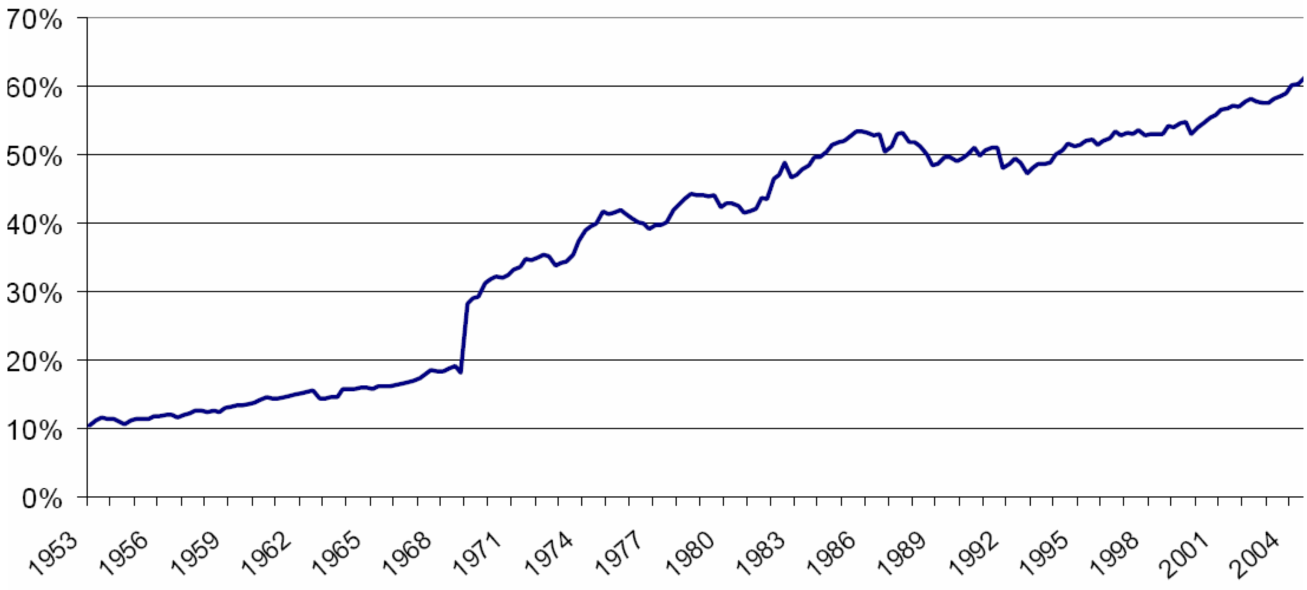

Table 21. Number of corporate governance proposals submitted over two separate periods
Source: Gillan and Starks (2007), with our elaboration. In brackets the relative importance of each issue.

Major issues	**1987-1994**	**2001-2005**
Repeal classified boards	314 (2)	199 (4)
Eliminate poison pill	249 (5)	220 (3)
Cumulative voting	274 (4)	93 (6)
Supermajority	21 (7)	47 (8)
Audit-related	19 (8)	62 (7)
Board-related	279 (3)	353 (2)
Executive compensation	233 (6)	573 (1)
other	653 (1)	183 (5)
Total	2042	1730

Table 22. Standard Life Investments voting record in UK Jan 2005-Feb 2008

Data refer to all shares voted in the UK 2007 by Standard Life. The second column refers to the number of meetings in which Standard Life did not vote against or abstained in at least one resolution.

Country	All for\total meeting	Number of meeting no all\for	Average number of Against by meeting	Average number of Shareholder resolutions
UK	85% (1940/2286)			

Source: www.standardlifeinvestments.com and our elaborations.

Table 23. Norges Bank Investment Management (NBIM) voting record

Source: http://www.norges-bank.no/default____25991.aspx and our elaborations.

Country	Year	Companies	votes For (perc)	Votes against management recommendations (perc)	Votes Abstain (perc)	Proposals Subject to voting (For+ Against+ Abstain)
Belgium	2007	1	7 (1)			7
France	2007	93	1369 (0.73)	492 (0.26)	2 (0.01)	1863
Germany	2007	58	486(0.86)	81 (0.14)		567
Netherlands	2007	10	94 (0.85)	16 (0.15)		110
Spain	2007	40	496 (0.92)	39 (0.07)	6 (0.01)	541
Sweden	2007	42	747 (0.93)	57 (0.07)		804
UK*	2007	337	4237 (0.97)	102 (0.02)	26 (0.01)	4365

* Under the UK law abstain votes are not considered in determining the level of support or dissent for a proposal, although they are included for the purposes of determining voting turnout.

Table 24. T.RowePrice voting record in the US.
Data refer only to the invetor's domestic stock funds.

Proposal	% Voted With Management 2006-2007	% Voted With Management 2005-2006	% Voted Against Management 2006-2007	% Voted Against Management 2005-2006
Anti-Takeover Provisions (Management and Shareholder)	70%	73%	30%	27%
Appoint/Ratify Auditors Proposals (Management)	99%	99%	1%	1%
Capital Structure (Management)	91%	90%	9%	10%
Compensation (Management) * All Types	85%	86%	15%	14%
Auditor	96%	97%	4%	3%
Director	94%	90%	6%	10%
Employee Stock Purchase Plan	96%	98%	4%	2%
Executive	82%	83%	18%	17%
Option Plan Only	81%	83%	19%	17%
Compensation (Shareholder)** All Types	39%	41%	61%	59%
Auditor	N/A	N/A	N/A	N/A
Director	100%	100%	0%	0%
Employee Stock Purchase Plan	N/A	N/A	N/A	N/A
Executive	39%	39%	61%	61%
Option Plan Only	40%	N/A	60%	N/A
Compensation (Management and Shareholder) All Types	79%	83%	21%	17%
*Represents 95% of total compensation proposals				
**Represents 5% of total compensation proposals				
Director (Management and Shareholder) All Types	84%	78%	16%	22%
Election of Directors (Management)	86%	81%	14%	19%
Cumulative Voting (Management)	67%	75%	33%	25%
Cumulative Voting (Shareholder)	24%	14%	76%	86%
Declassify (Management)	100%	99%	0%	1%
Declassify (Shareholder)	12%	2%	88%	98%
Majority Vote for Election of Directors (Shareholder)	8%	3%	92%	97%
Merger and Acquisition Proposals (Management)	96%	96%	4%	4%
Separate Chairman and CEO (Shareholder)	62%	32%	38%	68%
Social/Environ/Maximize Shareholder Value (Shareholder) All Types	87%	85%	13%	15%
Political Contributions	56%	55%	44%	45%
Maximize Shareholder Value	71%	80%	29%	20%
Social/Environmental Miscellaneous	95%	92%	5%	8%
Total	87%	85%	13%	15%

Source:
http://www.troweprice.com/indexCorporatePopup/0,4527,lnp%253D10502%2526cg%253D2210%2526contentid%253D2210%2526pgid%253D12242,00.html?rfpgid=9899

Table 25. Shareholder rights in the US and the EU : comparative table

	Approval of conflicted transactions by disinterested shareholders	**Amend corporate charters/articles of association**	**Remove directors**	**Blocking minority**	**Dividend distribution**	**Mergers**
US	No	Proposed only by board	Yes, but only at annual general meetings or at meetings convened by shareholders holding at least 10% of voting capital.	No	Decided by the board	Proposed by the board
UK	Yes	Proposed by board and shareholders	Shareholders may propose binding resolution at any time	Yes	Binding vote from shareholders	Binding vote from shareholders
France	Yes	Proposed by board and shareholders	Shareholders may propose binding resolution at any time		Binding vote from shareholders	Binding vote from shareholders
Gerrmany	No		Shareholders may propose binding resolution at any time (only for supervisory board members)		Adopted by supevisory board	
Italy	No	Proposed by board and shareholders	Shareholders may propose binding resolution at any time	Yes	Binding vote from shareholders	Binding vote from shareholders

Source : our elaborations based on Bebchuk (2005), Shleifer (2007), Djankov et al. (2008), Hertig and McCahery (2006), and Bianchi-Enriques (2001). Kraakman et al ?, Ferrarini ?

Table 26. Fidelity voting record

Data refer to all shares voted in the period july 2006-June 2007 by Fidelity. In brackets the percentages of for, against and abstain votes on the total voting items. The "For" column refers to the voting items for which Fidelity voted in favour of the management. The "Abstain" column refers to the voting items for which Fidelity participated to the specific meeting and chose to vote "abstain". The "No Action" column refers to the voting items which have not been voted by Fidelity because Fidelity did not participate to the specific meeting. The "Tot. voting items" row is the sum of "for", against", "abstain", and "no action" columns. The "Voted/voting" column refers to the percentage of items voted by Fidelity on the total number of items admitted to shareholder voting. The last column refers to the number of meetings in which Fidelity voted in favour of management in all the voting items.

Source : www.fidelity.com and our elaborations.

Country	Companies	Meetings	votes For (perc on total proposals subject to voting)	Votes against management recommendations (perc on total proposals subject to voting)	Votes Abstain (perc on total proposals subject to voting)	No action	Proposals Subject to voting (For+ Against+ Abstain+no action)	Proposal per meeting	All for (perc on the meetings)
Belgium									
France	101	116	1611 (0.82)	160 (0.08)	160 (0.08)	33 (0.02)	1964	16.9	47 (0.4)
Germany	88	94	771 (0.95)	36 (0.04)	0	0	807	8.6	79 (0.84)
Netherlands									
Italy	76	111	256 (0.65)	4 (0.01)	18 (0.04)	114 (0.29)	392	3.5	66 (0.59)
Sweden	45	57	797 (0.94)	17 (0.02)	4 (0.004)	29 (0.03)	847	14.8	42 (0.73)
UK*	826	1123	9297 (0.98)	110 (0.01)	12 (0.001)	15 (0.01)	9434	8.4	1039 (0.92)

Under the UK law abstain votes are not considered in determining the level of support or dissent for a proposal, although they are included for the purposes of determining voting turnout.

Table 27. Voting record in Europe: ranking of countries according to "for" votes
Rankings are made from the tables of each investor considered: table 20 for Hermes, table 36 for Fidelity, table 33 for NBIM, table 28 for Morley, and table 29 for Provident.

Country	Hermes	Fidelity	NBIM	Morley	Provident
UK		1/5	1/6		1/8
Germany		2/5	4/6		3/8
France		4/5	6/6		6/8
Italy		5/5			7/8
Sweden		3/5	2/6		4/8
Spain			3/6		1/8
Netherlands			5/6		5/8
Belgium					8/8

Table 28. Voting record in Europe: ranking of countries according to "against" votes

Country	Hermes	Fidelity	NBIM	Morley	Provident
UK	2/15	1/5	1/6		3/8
Germany	7/15	4/5	3/6		5/8
France	15/15	5/5	5/6		8/8
Italy	8/15	1/5			1/8
Sweden	4/15	3/5	2/6		7/8
Finland	1/15				
Denmark	3/15				
Spain	13/15		2/6		3/8
Portugal	14/15				
Norway	4/15				
Netherlands	11/15		4/6		5/8
Ireland	6/15				
Belgium	10/15				1/8
Austria	9/15				
Greece	11/15				

Table 29. Voting record in Europe: ranking of countries according to "all for" votes

Country	Hermes	Fidelity	NBIM	Morley	Provident
UK	2/15	1/5		2/10	1/8
Germany	5/15	2/5		7/10	3/8
France	15/15	5/5		10/10	6/8
Italy	7/15	4/5		3/10	7/8
Sweden	1/15	3/5		9/10	4/8
Finland	5/15			1/10	
Denmark	4/15				
Spain	12/15			8/10	2/8
Portugal	9/15				
Norway	3/15				
Netherlands	7/15			6/10	5/8
Ireland	11/15			4/10	
Greece	14/15				
Belgium				5/10	7/8

Table 30. Voting record in Europe: ranking of countries according to "no action"
Ranking goes from the companies with lower "no action" percentage to companies with higher "no action" percentage.

Country	Hermes	Fidelity	NBIM	Morley	Provident	
UK		2/5			3/8	
Germany		1/5			6/8	
France		3/5			4/8	
Italy		5/5			7/8	
Sweden		4/5			1/8	
Spain					1/8	
Netherlands					5/8	
Belgium					8/8	

Table 31. Indicators on anti self-dealing provisions

The table summarizes three series of indicators on anti-self dealing measures collected by Djankov et al. (2008). The first one (second column, values from zero to a maximum of four) refers to the presence of private enforcement provisions related to the adoption of conflicted transactions; the second one (third column, values from zero to a maximum of six) refers to ex-post private enforcement provisions; the third one (fouth column, values from zero to one) refers to the presence of public enforcement measures. The indicators refer to 2003 and are updated (second column only) according to Hertig and McCahery (2006) and our elaborations.

Country	**Ex-ante control of self dealing**	**Ex-post private control of self dealing**	**Public enforcement**
UK	4/4	4.33/6	0/1
US	2/4	5.75/6	0/1
Germany	0.83/4	2.65/6	1/1
France	1.50/4	3.30/6	0.50/1
Italy	0.50/4	2.75/6	0/1
Sweden	1/4	3.40/6	1/1
Netherlands	0.33/4	1.10/6	0/1