Abstract

While ownership and control were under the effective supremacy of the firm’s (factual) owners at the beginning of the 20th century, the 21st century was entered by listed companies of which the growing size and the dispersion of ownership have paved the way for public corporations entailing systemic risk that are often characterized by a separation of ownership and control, coinciding the well-defined agency problem. While the agency problem was first attempted to be covered by monitoring mechanisms offered by the law – i.e. (i) the market for corporate control; (ii) the legal, political and regulatory system; and (iii) the internal control system – the modern corporate governance wave applies itself to the rights and responsibilities of shareholders as the owners and monitors of public corporations. The central figure in this debate are large shareholders who have acquired a reputation of being able to successfully affect corporate decision-making process of corporate boards.

The features of large shareholder activism, however, have come under great scrutiny. A variety of studies indicate that under the vein of corporate monitoring, the activities of large shareholders circumvent the existing legal devices regulation investor voice and give rise to substantial concerns in the corporate governance arena. Commissioned by the European Parliament in January 2009, this study contemplates on the economic consequences of large shareholder activism in five European countries (Belgium, France, Germany, the Netherlands and the UK) and refers to two other countries (Italy and Spain).
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EXECUTIVE SUMMARY

While ownership and control were under the effective supremacy of the firm’s (factual) owners at the beginning of the 20th century, the 21st century was entered by listed companies of which the growing size and the dispersion of ownership have paved the way for public corporations entailing systemic risk that are often characterized by a separation of ownership and control, coinciding the well-defined agency problem. While the agency problem was first attempted to be covered by monitoring mechanisms offered by the law – i.e. (i) the market for corporate control; (ii) the legal, political and regulatory system; and (iii) the internal control system – the modern corporate governance wave applies itself to the rights and responsibilities of shareholders as the owners and monitors of public corporations. The central figure in this debate are large shareholders who have acquired a reputation of being able to successfully affect corporate decision-making process of corporate boards.

The features of large shareholder activism, however, have come under great scrutiny. A variety of studies indicate that under the vein of corporate monitoring, the activities of large shareholders circumvent the existing legal devices regulation investor voice and give rise to substantial concerns in the corporate governance arena. Commissioned by the European Parliament in January 2009, this study contemplates on the economic consequences of large shareholder activism in five European countries (Belgium, France, Germany, the Netherlands and the UK) and refers to two other countries (Italy and Spain).

Large shareholder activism – Definition

Large (activist) shareholders can be defined as those investors that own large equity positions in a corporation and that try to increase the value of their investments by actively pressuring the management of listed companies to apply certain changes. In order to further illuminate the terminology of this study, however, large shareholder activism and voice must be embedded in the relevant context, which is particularly a matter of defining the different legal thresholds of shareownership – ranging from 95 per cent to 20 per cent or even less – at which shareholders are given the right to vote on important corporate decisions. Such voting power covers, for instance, the right to appoint board members representing shareholder interests, the right to hire (or fire) management and the right to exercise power by blocking ratification of unfavourable decisions, or possibly by initiating decisions.

However, one should also make notice of the fact that the legal threshold defined above are certainly not a decisive factor in defining a large shareholder. In particular, small shareholders owning less voting rights sufficient to determine corporate decision-making have shown themselves to be in the position to exercise de facto control through the use of informal private mechanisms. In addition to legal equity thresholds, it is thus of great importance to also make allowance for the effects that shareholders may have on the corporation, in spite of their size. In short, legal requirements are unable to guarantee in all circumstances the position of shareholders.

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1 Or, in some cases, have the right to vote with voting shares which they do not necessarily "own".
The relationship between large shareholders and firm performance

Following previous studies on the relationship between different ownership structures and firm performance, the relationship between the developments in shareholder structures in six European countries over a period of 8 years (1999-2007) is addressed on the general hypothesis that firm performance is related to the specific shareholder structure of the company, which can be considered as a proxy for shareholder activism.

In order to clearly understand the market for shareholder activism, the large shareholders in this study were assessed on the basis of their particular shareholder types whereafter they were categorized into one of ten “shareholder stability classes” – being either classes indicating the stability of the company shareholder structure, or the classes representing changes in the shareholder structure.

The spread of some important shareholder types in Europe can be listed as follows:

- **Individuals/Families are overrepresented** in the six European countries:
- **Banks** are important large shareholders in the financial industry in Spain, Italy and France (average voting block of 20 per cent). A strong decrease was seen in Germany, where large share ownership by banks declined from 8.6 per cent in 1999 to 5 per cent in 2007.
- **Governments hold less than 3 per cent of the total number of large voting blocks.** However, the government is a large shareholder in Belgium, France and Germany (average voting block of > 20 per cent) and a controlling shareholder in Italy (average voting block of 34 per cent) in a limited number of companies.
- **Private equity funds and hedge funds are large shareholders in only a very limited number of European listed companies;**
- **Investment funds have 25 per cent of all large stakes in the UK,** while in the other countries the proportion of large stakes they hold varies between no large stakes in Belgium and 3 per cent in Germany (average voting blocks of < 10 per cent);
- **Foreign large shareholders gained importance in most countries. However there are many different developments in their strategies.** Foreign individuals and families appear infrequently in all countries (yet with controlling voting blocks in Germany and Belgium; and large stakes in France and the UK), foreign non-financial companies have large stakes in Belgium and Germany (controlling voting blocks); foreign investment funds appear as large shareholders in the UK, Italy and Belgium; foreign private equity funds and hedge funds acquired large stakes in all countries but Belgium by 2007; and foreign banks are important large shareholders in Spanish listed companies.

Out of these shareholder types (i) families and non-financial companies in Belgium, France, Italy, Germany and Spain; and (ii) some banks and foundations in Spain can be categorized as shareholder classes indicating stable shareholder structures. Thereby, the concentrated ownership assumption assigned to continental European companies has paved the way for a rise of companies with widely dispersed ownership or large shareholders without a controlling block (10-30 per cent of the companies) in these countries compared with the UK (50 per cent of the companies). Finally, there is a remaining class of other companies – containing companies with large, non controlling shareholders that changed over time – that is important in Germany, the UK and Spain.
Based on the empirical analysis and confirming the findings of many previous studies, the analysis shows that there is no direct relationship between shareholder types and that the different shareholder structures and types do not denote any explicit positive or negative effect on firm performance. If it can be assumed that large shareholder activism is well proxied by the size of the shareholder stake in combination with the stability of this ownership, large shareholder activism is at an aggregate level not a good driver for better firm performance. However, these results do not reveal whether individual large shareholder activism enhances performance or whether other techniques used by large activist shareholders generate better returns.

**Activist strategies**

Shareholder activism can be measured inter alia by the assessment of shareholder attendance and voting at general meetings, shareholder resolutions and shareholder litigations. As to the first, the average attendance rate in all countries in this study is more than 50 per cent. Attendance rates can also go to extremes, having excessively high attendance rates of over 90 per cent in highly concentrated firms – e.g. in France and Spain – and excessively low attendance rates of less than 20 per cent in Belgian companies. The significant differences in attendance between companies are hard to explain, yet the results show that there is a positive relationship between the shareholdings of large shareholders and the attendance at general meetings. Large shareholders do not take the risk of unexpected voting turnouts at the general meeting.

The differences in attendance of general meetings can be assigned to the different types of company. In particular, the average attendance rate is significantly higher in companies with a controlling shareholder; the attendance at meetings of companies with a dispersed ownership structure is lower but still passes the threshold of 50 per cent; and the lowest attendance rate can be found in the group of companies with a large shareholder with an equity stake between 10 and 30 per cent and without the presence of other large shareholders. Smaller shareholders seem to be discouraged from attending general meetings when a large (non controlling) shareholder seems to have – at least ex ante – the majority of the votes at the meeting. The differences in size of the voting block of the largest shareholder can influence the behaviour of the other shareholders. Lowering the difficulties for smaller shareholders to participate in the general meeting, like a direct invitation of the company, should be considered.

Next to the attendance of large shareholders at general meetings, the voting behaviour of shareholders at general meetings can also serve as an indicator for shareholder activism. Adding to prior research, our dataset shows that most resolutions are approved with an overwhelming majority of more than 90 per cent, while the average minimum voting turnout is more than 50 per cent turnout in Belgium, but less than 50 per cent in France and the UK. In particular, the approval turnouts in concentrated companies are much higher, while under the assumption that the controlling shareholder approves the resolutions, the dissenting voice of the other shareholders is then higher.
Another technique of shareholder activism is the submission of resolutions to the general meeting of shareholders, which in Europe, however, hardly occurs. Regardless of the activist aim, however, it is stated that most shareholder proposals in continental Europe are unsuccessful and exhibit a negative stock market reaction, presumably because the market reacts to the fact that the shareholder proposal signals a badly performing company or a company with severe agency problems.

The last mechanism of shareholder activism are shareholder litigation suits. Vermeulen and Zetzsche (2009) have only recently revealed in their study on shareholder litigation that substantial rates of litigation appear in the Netherlands and Germany. However, the results indicate that differences in the legal litigation frameworks result in differences of the shareholder type of activism: large professional shareholders start litigation in the Netherlands versus small opportunistic shareholders in Germany act similar.

Case studies

The case studies have shown that the ownership structure of companies is an important determinant for activism. In particular, 7 out of 10 companies that were analysed in this study had a widely-dispersed ownership structure. In the end of the activist involvement of their shareholders, only 3 of these companies remained widely-dispersed, while in the other cases the ownership structure of the companies changed with the activist shareholders laying the basis for their activities by increasing their stakes in the company.

The development of the company performance appears to be another key feature for activism to arise. The study shows that 7 out of 10 companies were either underperforming or had a downturn in their performance when the activist shareholders started imposing their strategies. Consequently, underperformance became the most important motive underlying the active involvement of the majority of activist shareholders in our case studies.

As regards the types of shareholders, it should be noted that activism by hedge funds is overrepresented in this study. In particular, 6 out of 10 case studies involve the activism by a hedge fund, which is characterized by a specific methodology of hedge fund activism. In particular, the funds contact the (board of directors of the) company to start negotiations, but the response of the company is often considered insufficient. Therefore, the next step in line for these hedge funds is a choice out of continuing the informal way, or employing the existing formal shareholder rights. As to the first, hedge funds have send open letters to the company in 3 cases, being successful in their demands in 2 out of these cases. Regarding the second choice, hedge funds have used their formal shareholder voice in the other 3 cases out of 6. Speaking in general terms, hedge funds have proven themselves to be thriving in their activist demands, since they have failed to force changes in the company in only 1 out of 6 cases.

Concerning the assessment of instruments used and the results they led to, two variables seems to be of importance. First, the size of the voting blocks of shareholder activists is important. Calling a general meeting, submitting shareholder resolution and litigation all require minimum thresholds which not all activists pass. In general, the legal environment and the investor protection measures facilitate or discourage individual shareholder activism. Natixis, for example, is controlled by two large shareholders resulting in the fact that the activism of a hedge fund via an open letter was set aside in the debate on the development of the strategy of the company.
Second, **shareholder activism in other companies is much more embedded in the internal corporate framework.** In our case studies we found that while the first phase of activism often takes an informal stance by the engagement of activists in private negotiations (7 cases), formal shareholder voice is employed as a first choice in 3 cases, whereas it is a follow-up on private negotiations in 4 cases. In particular, large shareholders often combine their position with board membership or are represented at the board of directors. Discussions regarding strategy take place in the board of directors or via other means which are not publicly disclosed. Different opinions are discussed and most often only unanimous – at least in appearance – decisions are disclosed. Therefore, it does not come as a surprise that **shareholder activism**, in the second phase which begins when private negotiations do not provide the expected result, **uses mechanisms to help with the election of a board representative** (see for example in the case of Atos Origin or Fortis). In many European countries, the legal framework facilitates the nomination of shareholder board members, contrary to the United States. In many cases, **this technique is less commonly used by different types of institutional investors.** Many institutional investors are not interested in developing the strategic policies of the companies in which they invest, the borderline being the support for alternative strategic policies as provided by activist shareholders.

Large shareholders with board representatives make it almost impossible to measure shareholder activism. It can result in a misrepresentation of shareholder activism, in particular in the reduction of shareholder activism to board attacks by hedge funds.

**Recommendations**

Based on the findings of this study we recommend that:

- corporate strategic matters put forward by activist shareholders are made subject to voting by all shareholders at the company’s general meeting;
- the participation of all shareholders should be supported; the company should be informed of their identity and be required to invite shareholders;
- unregulated instruments used by active shareholders or third parties should indicate the position of the issuer of the letter (be they a shareholder or any other third party) vis-à-vis the company.
- fiduciary duties are imposed on large shareholders of listed entities if the developments of shareholder activism are to be thus interpreted that shareholders can influence corporations on a strategic level.
THE ECONOMIC CONSEQUENCES OF LARGE SHAREHOLDER ACTIVISM

1. INTRODUCTION AND OVERVIEW OF THE LITERATURE

In January 2009, the European Parliament commissioned a quantitative study on the economic consequences of large shareholder activism in five countries (Belgium, France, Germany, the Netherlands, and the UK) that was intended to provide a basis of reflection for the Committee on Economic and Monetary Affairs. This study’s aim is to provide this basis. It contains four major parts. This chapter provides an overview of the literature regarding shareholder activism. The next chapter relates shareholder structures to corporate performance. The third chapter provides information on shareholder attendance at general meetings, shareholder voting, shareholder resolutions and shareholder litigation, all different mechanisms of shareholder activism. The last chapter analyses ten company case studies of shareholder activism.

The study was executed between mid March 2009 and mid May 2009. A first draft of this report was delivered on May 17. The final report was handed to the European Parliament’s Policy Department A - Economic and Scientific Policy on July 10.

1.1 Background to shareholder activism

The public corporation is characterized by the separation of ownership and control, on account of which the controlling authority over corporate business is subtracted from corporate owners – shareholders – and vested in corporate management (Berle and Means, 1932). Redressing the common failure of concentrating both equity capital and managerial competences in either investors or managers, it is argued that the separation of ownership and control bears the benefits of specialized decision-making by management in addition to the risk-taking attitude of the company’s shareholders (Fama and Jensen, 1983).

Conversely, dispersing ownership among high numbers of shareholders and concentrating control in the hands of only a small group of managers is attended with the potential problem of agency conflicts (Jensen and Meckling, 1976) and the accompanying effects on managements’ sensitivity towards shareholder value maximization (Clifford, 2008). Therefore, notwithstanding the economic virtues of management authority (Blair and Stout, 1999; Bainbridge, 2005), the accountability of managers to shareholders is denoted to be the central issue of corporate governance for listed companies (Kraakman e.a., 2004). This perception entails constraining managerial discretion, in an attempt to redress agency costs and endorse shareholder value maximization. According to American scholars, this is not to say that corporations should merely serve shareholders instead of other stakeholders, but that the corporations’ best contribution to the interests of all stakeholders is achieved by making corporate managers strongly accountable to shareholders rather than labour, government, or even themselves (Hansmann and Kraakman, 2000).
In this vein, the attention in the past three decades was mainly devoted to the **basic mechanisms of corporate governance** – being (i) the market for corporate control; (ii) the legal, political and regulatory system; and (iii) the internal control system – as the main alternatives for dealing with the ways in which suppliers of finance to corporations were presumed to assure themselves of getting a return on their investments (Shleifer and Vishny, 1997). In particular, these corporate governance mechanisms were introduced as having the potential to align the interests of managers and shareholders and to discourage managers from pursuing objectives other than enhancing the market price of shares. Accordingly, good corporate governance was stated to require a balanced interplay between the internal and external control devices (Hopt and Leyens, 2004), but the emphasis was initially laid on the latter and, in particular, on the market for corporate control.

The assumption underlying the **market for corporate control** is that management will be incentivised to enhance firm value under the potential threat of being expelled in case of a hostile takeover which will tend to occur in poorly performing corporations. It is believed, however, that the market for corporate control by itself does not have the intensity that is required to meet the objections that managerial discretion results in opportunistic behaviour. First, the success of a takeover threat is not self-evident. This is particularly true where the effect of the market for corporate control as a mechanism of corporate governance is diluted in the presence of anti-takeover regulation which can be enforced by incumbent management in defence of a hostile takeover. Therefore, the threat of a hostile takeover is considered to act primarily as a deterrent on managers of companies whose shares are widely-held rather than companies with highly concentrated ownership as in continental Europe (Rossi and Volpin, 2004). Second, it is not only underperformance by management that provokes a hostile bid. In fact, regardless of management’s performance, market fluctuations can continuously cause share prices to diverge from their initial values and trigger a tender offer at low share values, while discouraging any such offer in the event of shares being overvalued by the market. Since the performance of corporate management then only has a marginal effect on a potential tender offer, the effectiveness of the market for corporate control as a constraint on management is questionable (Anabtawi, 2006).

The factual failure of the market for corporate control came to light in the aftermath of corporate scandals involving Enron, Parmalat and Ahold at the beginning of the 21st century. Apart from the fact that the takeover market had proven itself to be inadequate, particular concern was raised by the failure of specific corporate organs to avert scandals of such extent. On the one hand, it was argued that gatekeepers – e.g. auditors and analysts verifying and assessing financial information – were responsible for the corporate incidents (Coffee, 2002), while on the other hand it was stated that it was the monitoring board that had failed in its role as shareholder representative (Gordon, 2002). In between, shareholders were blamed for their passivity as corporate owners (Hill, 2008). Accordingly, the international corporate scandals and the underlying interpretations resulted in the modern wave of corporate reform which contemplates reshaping the governance structure of corporations by reassessing the rights and responsibilities of the main corporate constituents, being the board, managers, shareholders, and other stakeholders (OECD, 2004). In this vein, existing corporate governance structures have experienced reforms in their different components, including changes in executive pay, internal and external audit processes, sanctions on managers’ misconduct and self-dealing transactions and the role of monitoring board members (McCaheery and Vermeulen, 2008).
The monitoring board is viewed as an essential mechanism of internal control in many countries (Hermalin and Weisbach, 2003). Many European jurisdictions, either in their laws or corporate governance codes, embrace the idea that good corporate governance requires the efficient supervision of management by the (supervisory) board, acting on behalf of the company’s shareholders by ensuring that the corporate strategy is established and run in their interests. Nevertheless, the safeguard against management opportunism provided by board supervision is disputed. On one interpretation, Fama (1980) argues that the (supervisory) board is provided with good governance incentives by the equity market as the price of a company’s shares will reflect the performance of the (supervisory) board as an intermediary between the firm’s constituents. On the other hand, it is stated that despite the effectiveness of corporate boards as a mechanism of internal control in theory, there is a lack of solid evidence for the influence of boards of directors on the effectiveness of corporate governance (Denis and McConnell, 2003).

Recently, the evolutionary process of corporate governance has moved towards adding more emphasis to the role of shareholders in public corporations. Referring to it as ‘proposals for corporate democracy’, Anabtawi (2006) states that the current corporate governance wave reunifies ownership and control in the modern public corporation by defining the corporate powers of shareholders and delimiting the discretionary authority of managers. Still, the literature does not provide a consistent view on the contribution of shareholder involvement to the economic interests of the firm or its stakeholders. To some, also called the ‘director primacists’, shareholder activists lack the capacity and incentives required to engage in the decision-making activity in relation to corporate business affairs, implying that it is necessary that such authority is vested in the board of directors (Bainbridge, 2008). In the same vein, it is argued that no end will be achieved by corporate managers being replaced by fund managers, since both are believed to pursue their own private interests and agenda (Romano, 1993). However to others, also called the ‘shareholder primacists’, shareholder involvement in corporate governance is a prospective way to erode agency problems (Shleifer and Vishny, 1986; Admati, Pfleiderer and Zechner, 1994, Noe, 2002). In particular, theory suggests that as a counterbalance for management authority, corporate law should offer shareholders adequate opportunities to monitor the actions of corporate managers that prevail over the incentives for shareholder passivity created by the features of dispersed ownership (Black, 1992). Moreover, it is argued that increasing the ability of shareholders to intervene in corporate management would redress agency conflicts, improve corporate governance and hence shareholder value (Bebchuk, 2005).

It is argued that the diffused nature of ownership in public firms, the difficulty of forming coalitions and the problem of free-ridership (Grossman and Hart, 1980; Schleifer and Vishny, 1986) make it difficult for small shareholders to exert their influence on the board. Conversely, the investor with a larger stake in the firm is assumed to have stronger incentives to undertake monitoring activities, supposing that the large shareholder’s increased return from monitoring is sufficient to cover the associated monitoring costs (Gillan and Starks, 2000). Conversely, large shareholders have incentives to expropriate part of the profits of the company and these private benefits can negatively influence corporate performance (Dyck and Zingales, 2004). Company law can mitigate private benefits if it appropriately addresses expropriation by large shareholders (Gilson, 2006) as well as management shirking. Hence company law must provide techniques and mechanism to address different agency relationships, i.e. between large shareholders and small shareholders and between managers and shareholders (Van der Elst, 2006).
There is considerable anecdotic evidence which suggests that many jurisdictions are facing an increase in the direct influence of shareholders on corporate management as a substitute for ‘ineffective’ mechanisms of corporate control. In fact, activist shareholders are and have been in a powerful position to affect the decision-making process of corporate boards using different types of activist strategies. A study by Armour (2008) on the mechanisms used to control managerial agency problems in the UK reveals a taxonomy of enforcement strategies consisting of (i) formal or informal private enforcement; and (ii) formal or informal public enforcement. Based on this taxonomy, Armour concludes that formal private and public enforcement – that is to say, shareholder lawsuits or legal litigation by public agencies respectively – takes up only little or no space in the UK field of management monitoring, while informal private and public enforcement activities are dominant. In particular, Armour (2008) makes note of the informal private enforcement activities employed by institutional investors in response to managerial failure and concludes that ‘strong informal private enforcement has historically been the flipside, in the UK, of weak formal private enforcement’. This observation is also presented in a study by Becht e.a. (2006) on the monitoring activities of one UK pension fund, the Hermes UK Focus Fund, concluding that the lion’s share of interventions by this fund have been in the nature of informal private engagements with corporate boards in the pursuit of various corporate objectives varying from restructurings to restrictions on corporate policies.

In view of this tendency towards informal activism, it is obvious that activist shareholders go further than plain company monitoring as they engage in private negotiations with boards in order to influence the company on a strategic level. In so doing, these investors seem to circumvent the existing legal devices regulating investor voice, which gives rise to substantial concerns in the corporate governance arena. A disturbing observation is that where shareholder involvement in corporate decision-making is subject to equity thresholds defined by law, informal enforcement enables any shareholder who sees ‘a significant probability of intervention being successful and resulting in substantial gains’ to intervene in corporate affairs, regardless of whether the performance of corporate management is good or bad (Becht e.a., 2006). Examples of this development are given by Millo and Wearing (2008), who indicate that even investors with ‘relatively small stakes’ in companies have been able to successfully pressure corporate boards in the pursuit of strategic changes. In particular, reference is made by the authors to the Cadbury/Trian case, where Trian (a US hedge fund), owning a mere 3 per cent stake in Cadbury, succeeded in influencing the company’s policy by forcing it to split its operations (Millo and Wearing, 2008).

Moreover, the informal character of shareholder activism means that activist shareholders can operate outside the limits of shareholder power defined by regulation. It gives rise to a change in the existing roles and responsibilities of a company’s organs as defined by the stewardship and resource dependence theory, which might not be entirely in line with present corporate governance systems, a question that has not yet been fully addressed in literature.
1.2 Definition of large shareholders

The notion of activism by large shareholders is well entrenched in literature. Contemporary research concentrates on the responsibilities and monitoring activities of large shareholders, defining them as *investors owning large equity positions in a corporation* (Gillan and Starks, 2000). The taxonomy of the large shareholder simply having a large share ownership, however, is too general an observation to set the tone for this research. At the outset of giving a more specified classification, it is important to give consideration to the differences in the **ownership patterns of large public corporations** across national capital markets (Schleifer and Vishny, 1997), including corporations having concentrated ownership and corporations having their shares widely-held. Indicating the various patterns of ownership, the taxonomy of ‘large shareholders’ requires then to be illuminated by having regard to the potential implications of different ownership sizes on a firm’s corporate governance; that is, the ability of shareholders to influence corporate decision-making. Finally, although the **ownership sizes of large shareholders** provide us with perceptible insights into the possible implications thereof on corporate governance, it is of particular importance to define the **individual classes of shareholders** holding such equity sizes in order to specify clearly their different motives for taking part in management monitoring. The next sections provide a brief overview of different levels of ownership that are used to consider shareholders as “large” or even “controlling” shareholders and discuss three types of shareholder that are considered to be important and influential “large” or even “activist” shareholders, i.e. institutional investors, hedge funds and private equity funds.

1.2.1 Large shareholders and ownership blocks

Recent literature on corporate ownership structures in Europe underlines the primary difference between the corporate landscapes of the UK and continental Europe. As opposed to the **widely-held corporations in the UK**, continental Europe is **primarily characterized by the prevalence of concentrated ownership**, or public corporations in which equity ownership and control are vested in the hands of a controlling shareholder (La Porta e.a., 1999; Enriques and Volpin, 2007). In this vein, the corporate governance framework of the UK is referred to as an ‘outsider’ system with dispersed ownership, in contrast to the ‘insider’ system of corporate control in continental Europe based on concentrated ownership (Franks and Mayer, 2001). These frameworks are characterized by the need to control the agency problems of self-dealing by managers and by dominant shareholders respectively (Conac e.a., 2007).

In Europe, the seminal work of Barca and Becht (2001) provided detailed information on **shareholder structures**. Their network found that in many European countries there was only one large shareholder. The average voting block of the largest shareholder of listed entities in Germany, Belgium, Italy and Austria exceeded the absolute majority. In the Netherlands the shareholder structure resembled that of the countries just mentioned, with the largest shareholder holding a stake of 43,5 per cent on average. For France only the largest companies provided detailed information: the average voting block of the largest shareholder was 20 per cent. A significantly different picture emerged in the UK. With a voting block of only 10 per cent on average, the largest shareholder in a UK company must take into account other shareholder activism. The average combined stake of the second and third largest shareholder exceeded the average voting block of the largest shareholder.
Faccio and Lang (2002) confirmed the findings of Barca and Becht. Their research covered the second half of the nineties. It provided more detailed information on the French shareholder structures. For over 600 French companies they found that the median largest voting block was 50 per cent, shifting the typical French shareholder pattern into the group with Belgium and Germany.

Van der Elst (2008) updated and refined the data for Belgium, France, Italy, Spain and the UK for 2007. By and large, the findings of Barca and Becht (2001) and Faccio and Lang (2002) were confirmed. As to shareholder structures, Van der Elst showed that ownership concentration decreased in France, Italy and Belgium, while in the UK and Spain, the average largest shareholder increased its stake.

In all continental European countries large shareholders hold more than half of the votes with the absolute power in hands of the largest shareholder. The largest group of companies in Italy, France and Belgium have a *de jure* controlling shareholder. When this group is combined with the group with a *de facto* controlling shareholder – holding more than 30 per cent of the votes – approximately 60 per cent of all companies are in firm hands, leaving some room for voice by other shareholders, though this shareholder activism does not go hand in hand with shareholder power.

In the UK the sum of the voting blocks of all large shareholders is close to 50 per cent but several large shareholders must combine forces to control the general meeting of shareholders and overrule the voting power of the largest shareholder. Whilst the relative importance of the voting blocks of all other shareholders vis-à-vis the largest shareholder increased, in the continental European countries in this study the size of their combined voting blocks remained far below the voting block of the largest shareholder.

Considering the **shareholder types, families and non-financial companies are the most important type of largest shareholders in continental European countries** though there are major differences between countries and over time. In Spain, France and Belgium families and individuals became a more important class of largest shareholders, whilst non-financial companies are more pronounced largest shareholders in Spain and Italy, but not in Belgium and France. Other types of shareholders are important in the UK where foreign shareholders and investment managers are the largest shareholder in half of the companies, a significant increase compared with the results for 2001.

**Investment policies** differ significantly between the different shareholder classes as well between different countries. However investment policies change only at moderate pace over time. Families strive for controlling blocks in French companies but are satisfied with small blocks of 10 per cent to 15 per cent in the UK, Spain and Belgium. Non-financial Italian companies increased their voting blocks to de facto controlling blocks, the converse scenario is found for French non-financial companies which act as major shareholders. Banks increased their shareholder blocks in French companies whilst the mean bank stake decreased in British companies. All over Europe the investment policies of insurance companies converged: they acquired significant, though not controlling blocks in listed companies. The presence of foreign shareholders was more pronounced in 2007 than in 2001 whilst the mean voting block of foreign shareholders remained stable over time in most countries. In Italy foreign shareholders not only acquired more large voting blocks, the mean size of this voting block increased too. In their research report to the Dutch Social Economic Council, Van der Elst, De Jong and Raaijmakers (2008) provided details on the development of the position of large shareholders in the Netherlands between 1992 and 2007.
The largest shareholder lost its position as the only relevant shareholder, and power shifted towards a small group of large shareholders. In 2007, in 90 per cent of the companies the largest shareholder had a stake of less than 20 per cent whilst the total ownership of all large shareholders in that year was on average 53 per cent.

The shareholder structures, shareholder types and the investment policies found by Van der Elst (2008) are listed in short in box 1.

**Box 1. (i) Shareholder structure; (ii) shareholder type, and (iii) investment policies in Europe by 2007**

- **France**: (i) Decrease in ownership concentration; (ii) 50% of all companies have a family as largest shareholder (iii) families strive for controlling equity blocks; non-financial companies have majority equity blocks; banks increased their equity blocks.

- **Belgium**: (i) Decrease in ownership concentration; (ii) 20% of all companies have a family as largest shareholder (iii) families have equity stakes in the range of 10-15%.

- **Italy**: (i) Decrease in ownership concentration; (ii) 40% of all companies have a family as largest shareholder (iii) non-financial companies increased their voting blocks to de facto controlling blocks.

- **Spain**: (i) Increase in the average largest shareholder stake; (ii) 40% of all companies have a family as largest shareholder (iii) families have equity stakes in the range of 10-15%.

- **UK**: (i) Increase in the average largest shareholder stake; (ii) 50% of all companies have a foreign shareholder or investment manager as largest shareholder (iii) the mean banks stake decreased; families have equity stakes in the range of 10-15%.

**Source**: Van der Elst (2008)

### 1.2.2. Large shareholders and shareholder rights

The aforementioned data are of relevance as large shareholder activism and voice must be embedded in the relevant legal context. The general framework in which to identify the controlling shareholder(s) of a public corporation is a matter of different levels of shareholder rights; that is to say, the different thresholds of voting power necessary to influence corporate decision-making. Such voting power covers, for instance, the right to appoint board members representing shareholder interests, the right to hire (or fire) management and the right to exercise power by blocking ratification of unfavourable decisions, or possibly by initiating decisions (Becht e.a., 2002). Considering the influence that shareholder rights might have on a firm’s corporate governance, the definition of controlling shareholders can be subjected to certain equity thresholds, which are by far indefinite. Based on the rights of minority shareholders and the discretionary powers of shareholders holding large equity positions, at least 5 legal thresholds can be distinguished.
In the extreme stands the shareholder who owns a block of **95 per cent** and has the **right to acquire the shares of the remaining minority**, according to the corporate laws of Germany, the Netherlands, Belgium and France. This so-called ‘squeeze-out’ right is fixed at 90 per cent in the UK (Van der Elst, Van den Steen, 2007). Conversely, if certain conditions have been met, a minority shareholder can force majority shareholders to acquire the remainder of the shares, i.e. the sell-out right. The next thresholds in line are the equity ownerships of **66⅔ per cent**, **75 per cent** or sometimes even **80 per cent** (table 1), giving the controlling investor complete discretion in corporate decision-making. For these thresholds there is no specific right or requirement to buy out the minority, which might provide a basis for minority dilution opportunities (Jenkinson and Ljungqvist, 1999).

In essence, however, controlling ownership is often identified by reference to the ability of individual shareholders or groups of affiliated shareholders to appoint directors to the board. In particular, Grant and Kirchmaier (2004) refer to investors as having ‘legal control’ when they hold over **50 per cent** of the votes **at the annual general meeting**. Anabtawi and Stouts (2008) join in the same threshold, indicating that a shareholder owning more than 50 per cent of the company’s shares is the **typical controlling shareholder**, based on the shareholder’s **right to elect and remove directors** by a majority vote. In view of the corporate laws of European jurisdictions subject to this research, the 50 per cent threshold for the appointment and removal of directors is applied in the UK, Belgium and France, while its use in jurisdictions applying the two-tier board structure, i.e. Germany and the Netherlands, is subject to certain deviations. It should be noted that different rules may apply to the right to nominate board members to be elected at the meeting.

In Germany, management board directors are appointed and dismissed by the supervisory board (art. 84 AktG), while the appointment and removal of the latter takes place at the shareholder meeting, requiring a majority vote of 50 per cent and 75 per cent respectively (art.101 and 103 AktG). The threshold of 75 per cent also applies to the appointment of supervisory board members at the general meeting in the Netherlands (art. 2:158 subd. 4 NBW).

It should be noted that in many (economic) studies control is considered to be in the hands of a shareholder if he holds more than 50 per cent of the votes, although many corporate decisions are taken by more than 50 per cent of the votes **present or represented** at this general meeting. As we will illustrate 50 per cent of the votes at the general meeting is a threshold that must be analysed as “company-specific”. Apart from control based on a majority of equity ownership, de facto control is often defined at the level of the national mandatory bid threshold. According to article 5 subd. 1 European Takeover Directive, the mandatory bid threshold is reached when equity ownership of a company provides the investor with a specified percentage of voting rights, that gives the investor **control of a company**. In case the mandatory bid threshold is reached, Member States are required to ensure that such investor has to make a bid as a means of protecting the minority shareholders of that company. In Europe, the national **mandatory bid threshold** is fixed at **30 per cent** for the UK, Germany, Belgium and the Netherlands, while the required threshold is **33.3 per cent** in France, varying in Europe between 25 per cent and going as high as 66,6 per cent in Poland (European Commission, 2007). According to Grant and Kirchmaier (2004), this threshold indicates the level of equity ownership at which legislators have concluded a shareholder will have significant influence on the outcome of decisions at the annual meeting.
This presumption, however, does not take into account practical observations where certain shareholders set their equity ownership at a slightly lower threshold – e.g. French shareholder owning only 33.3 per cent of equity ownership, or a UK shareholder owning 29.99 per cent of equity ownership – in order to avoid having to make a mandatory bid.

Furthermore, Franks and Mayer (2001) elaborate on a few more thresholds that determine the control rights of shareholders in Germany, starting at the threshold of 25 per cent. In particular, the legal threshold of 25 per cent indicates a blocking minority that enables shareholders to control important corporate decisions, e.g. amendments to the corporation’s articles of association. In addition, a common economic criterion that is used by researchers to identify a controlling shareholder is when the direct or indirect holding of such shareholder exceeds the 20 per cent threshold (Berle and Means, 1936; La Porta e.a., 1999; Enriques and Volpin 2007; Faccio and Lang, 2002; Claessens e.a., 2000). While this threshold might be of certain significance within accounting provisions, its use is less important in corporate law.

Nevertheless, the thresholds mentioned above, ranging from 95 per cent to 20 per cent, do not make any allowance for lower legal thresholds at which shareholders are facilitated in influencing corporate management. In fact, the majority thresholds disregard the fact that shareholders who do not have the level of voting rights sufficient to determine the outcome of a general meeting or to submit a member to the board of directors, might still be in a position to exercise de facto control. Referring to the 20 per cent threshold used by Berle and Means in their renowned study of ‘Modern Corporation and Private Property’, Leech (1987) argues that “the 20 per cent threshold makes no allowance for the effect of variations in shareholding dispersion among companies”, indicating that “a smaller proportional shareholding is sufficient for control where holdings are more widely dispersed, requiring a different criterion to be used for each company” (Leech, 1987).
Table 1: Overview of the Shareholder Rights given at Various Thresholds of Equity Ownership.

<table>
<thead>
<tr>
<th>Rights of Minority Shareholders</th>
<th>France (Cod. de Comm.)</th>
<th>Germany (AktG)</th>
<th>UK (CA 2006)</th>
<th>Belgium (Wet Venn.)</th>
<th>The Netherlands (Boek 2 NBW)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participation in the general meeting</td>
<td>1 share (225-113)</td>
<td>1 share (118;134)</td>
<td>1 share (310)</td>
<td>1 share (533, 536)</td>
<td>1 share (2:227)</td>
</tr>
<tr>
<td>Voting rights</td>
<td>1 share (225-122)</td>
<td>1 share (134)</td>
<td>1 share (284)</td>
<td>1 share (541)</td>
<td>1 share (2:227)</td>
</tr>
<tr>
<td>Information rights</td>
<td>1 share (225-115)</td>
<td>1 share (131)</td>
<td>1 share (310)</td>
<td>1 share (553)</td>
<td>1 share (2:107;114)</td>
</tr>
<tr>
<td>Right to ask questions</td>
<td>1 share (225-108)</td>
<td>1 share (ex. 131)</td>
<td>1 share (540)</td>
<td>1 share (2:107 (2))</td>
<td></td>
</tr>
<tr>
<td>Right to put items on the agenda of the general meeting</td>
<td>5% (225-105)</td>
<td>5% (122 (2))</td>
<td>5% (292)</td>
<td>20% (532)</td>
<td>1% (2:114a (2))</td>
</tr>
<tr>
<td>Right to call a general meeting</td>
<td>5% (225-103)</td>
<td>5% (122 (1))</td>
<td>10% (303 (3))</td>
<td>20% (532)</td>
<td>10% (2:110)</td>
</tr>
<tr>
<td>Mandatory bid</td>
<td>33½ %</td>
<td>30%</td>
<td>30%</td>
<td>30%</td>
<td>50%</td>
</tr>
<tr>
<td>Blocking minority</td>
<td>33½ %</td>
<td>25%</td>
<td>25%</td>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>Simple majority</td>
<td>50% (255-98)</td>
<td>50% (133)</td>
<td>50% (282)</td>
<td>50% (574)</td>
<td>50% (120)</td>
</tr>
<tr>
<td>Amendment to company articles</td>
<td>66% (225-96)</td>
<td>75% (179 (2))</td>
<td>75% (283)</td>
<td>75% (558)</td>
<td>50% (121)</td>
</tr>
<tr>
<td>Amendment to company objectives</td>
<td>66% (225-96)</td>
<td>75% (179 (2))</td>
<td>75% (283)</td>
<td>80% (559)</td>
<td>50% (121)</td>
</tr>
<tr>
<td>Acquisition of company shares</td>
<td>50% (225-209)</td>
<td>50% (71 (1) nr. 8 &amp; 133 (1))</td>
<td>Only if authorized by firm’s articles (684)</td>
<td>80% (620)</td>
<td>50% (98)</td>
</tr>
<tr>
<td>Company conversion</td>
<td>50% (225-244)</td>
<td>75% (240 (1) UmwG)</td>
<td>75% (97; 109)</td>
<td>80% (781)</td>
<td>90% (2:18)</td>
</tr>
<tr>
<td>Right of squeeze-out</td>
<td>95% (236 RG AMF))</td>
<td>95% (327a (1))</td>
<td>90% (979)</td>
<td>95% (513)</td>
<td>95% (2:92a)</td>
</tr>
</tbody>
</table>
In fact, relatively small investors holding less than **10 per cent** of a company’s shares have apparently been able to pressure corporate boards into changing their corporate strategy (Yuval and Millo, 2008). Smaller shareholders can form coalitions or have a marginal impact on the outcome of a corporate decision (Anabtawi and Stouts (2008, p. 1269). Leaving the legal possibilities for exercising shareholder voice aside, shareholders are more inclined to rely on informal interventions with company boards than on the mere filing of resolutions at AGMs in order to indicate the issues they want to be changed rather than to be considered only. Indeed, shareholder activism is predominantly executed by private engagements with corporate boards in the pursuit of various objectives. In the event that these informal interventions do not lead to an agreeable outcome, activist shareholders have proven themselves to be persistent in the sense that they will either file a proxy statement or otherwise go public by carrying their objectives to the media.

### 1.3 Institutional investors

The increasing prominence of **institutional investors** in equity markets has coincided with an international call upon this class of shareholders to actively pursue their responsibilities in the corporate arena. This focus on institutional activism can be found in a variety of corporate governance codes and other regulations. In particular, European jurisdictions, like the Netherlands and the UK, have established a legal framework conferring upon institutional investors a monitoring role within a company’s system of checks and balances. The framework provides them with legal devices that enable them to exert their influence on a company’s policy and decision-making process, e.g. by making use of their voting rights or by submitting proposals at the company’s AGM.² Likewise, the OECD requires the exercise of ownership rights by institutional investors to be facilitated. Institutional investors are expected to disclose their voting policies and their strategies for managing material conflicts of interest that may affect the exercise of key ownership rights regarding their investments.³ The perception underlying these corporate governance provisions is that unlike individuals, institutional investors are presumed to be sophisticated investors who professionally manage their investment funds in different portfolio companies (David and Kochhar, 1996) and hence have the potential to perform monitoring activities.

The notion of ‘institutional investor’ encloses a **broad set of financial institutions**. In general, the main characteristic of institutional investors is the fact that they amass large pools of capital from outside investors, in order to reinvest in corporations. Within the meaning of this definition, the primary types of institutional investors are private and public pension funds, mutual funds, investment funds, insurance companies and often banks. The literature attempts to further classify institutional investors in various ways. According to Camara (2005), for instance, the classification of institutional investors should be consistent with the ‘incentive-creating forces’ of market, political and social drivers. By assuming the incentive-creating forces as the point of origin for the differences between institutions and their investment behaviour, the author specifically implicates those objectives of institutional investors that deviate from shareholder value maximization.

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³
In the taxonomy of Camara, mutual funds are classified as market-driven investors, public pension funds as political-driven investors, families as socially-driven funds and private funds, banks and insurance companies as multilateral investors, having a variety of financial relationships with the portfolio firm.

In practice, institutional investors can further be classified on the basis of their specific features, being e.g. their mode of collecting funds and issuing payments, time horizon and liquidity constraints, managerial incentives and the process of picking portfolio companies (Goyer, 2006). In view of a comparative analysis on institutional activism, any answer to whether institutional monitoring of corporate management has the potential to be an effective means of corporate governance, requires consideration of the heterogeneous nature of institutional investors (Black, 1992).

Nevertheless, the literature implicates various constraints on the activist role of institutional investors in the corporate governance affairs of their portfolio companies. In so doing, the notion of institutional investors is observed to embrace various conflicts of interest, subject to the basic features of each particular institution (Santella e.a., 2008). For instance, Black (1992) attributes the conflicts of interest endured by (i) banks and insurance companies to their extensive dealings with corporate management; by (ii) private pensions funds to their controlling corporate managers; and by (iii) public pension funds to outside political pressures (see also Romano, 1993). It is even argued that institutional investors, such as pension funds or insurance companies, would rather draw back from challenging corporate management in the event of prospective business relations with the portfolio corporation (Brickley, Lease and Smith, 1988; Pound, 1988; Scott and Dallas, 2006; Gillan and Starks, 2007). In addition, while the fiduciary duties of institutional fund managers require their active involvement in the governance matters of their portfolios, the fact that the funds invested by these investors basically belong to their beneficiaries imposes on institutions the duty to protect their holdings from devaluation and might possibly prevent fund managers from involving themselves in corporate management. At length, viewing the conflicts of interest in institutional investors from a more general perspective, it is alleged that given their quality of 'corporate managers managing the pooled savings of small individual investors', institutional investors merely relocate the principal-agent problem rather than actually solving it (Bainbridge, 2005). The concerns raised in this regard assume that no end will be achieved by corporate managers being replaced by fund managers, since the latter will potentially pursue their own interests just like the former.

Apart from these internal conflicts of interest, there are also regulatory constraints on corporate monitoring by institutional investors (McCahery and Vermeulen, 2008). Regulation is not only perceived to be a decisive factor in the determination of what the institutions are, but also of what these institutions are permitted to do in terms of corporate governance (Black, 1992). In particular, the regulatory frameworks of various jurisdictions impose restrictive provisions on institutional investors, e.g. portfolio diversification requirements and provisions on the use of derivatives, in order to prevent these investors from building large equity positions (OECD, 2007a). A study by the OECD in 2007 found that limitations on the equity capital held by institutional investors in firms strengthen the collective action problems of these shareholders. In the words of the OECD, 'limiting the proportion of equity held in a company reduces the private returns from monitoring the corporate governance arrangements of a company and in exercising shareholder rights' (OECD, 2007a).
Overall, their internal conflicts of interest and the external regulatory provisions reduce the ability and incentives of institutional investors to engage in the effective monitoring of corporate management, while at the same time expanding the monitoring arena for the alternative investment sector, including hedge funds and private equity funds.

### 1.4 Hedge funds

One obstacle to comparative research on large shareholders is the lack of a comprehensive regulatory or generally acknowledged definition of hedge funds. In its 2006 report, the Technical Committee of the International Organisation for Securities Commissions (IOSCO) found that ‘none of the responding members to the survey have adopted a formal legal definition of what is a hedge fund’ (IOSCO, 2006). While an attempt to define hedge funds considers them as ‘lightly regulated investment firms funded by large investors and creditors’ (European Parliament, 2007), the overall perception is that a detailed definition should be given by ‘looking at certain key characteristics of and the strategies employed by entities that would consider themselves to be hedge funds’ (IOSCO, 2006). In particular, the IOSCO, the OECD (2007) and the European Parliament (2007; 2007a) in their earlier studies, have associated the hedge fund industry with at least the following characteristics:

- In comparison to institutional investors, hedge funds are subject to a limited level of regulation and oversight and have no diversification requirements, and are therefore able to use high levels of leverage, derivatives, short positions and other financial assets to increase their risk diversification and hence their market power;

- Hedge funds are subject to limited transparency or disclosure requirements, they are however, like all shareholders, obliged to disclose their holdings when they reach or exceed the defined thresholds (often starting at 3 per cent);

- Hedge funds are often organized as limited partnerships – *i.e.* the investors being limited partners and the managers being general partners – and are regulated by contract, while being exempt from many complementary provisions within the regulatory framework (McCahery and Vermeulen, 2008); and

- Hedge funds use substantial performance-based remuneration policies, often subject to the provision that there be co-investment by the fund manager.

An important side note that is made to this list, however, is that a number of these features are also possessed by other investors or investment vehicles. The adverse outcome deriving therefrom is an unavoidable level of resemblance between hedge funds and other financial investors, so that the attempt to give a univocal definition to the former class of investors becomes even more complicated. In part, this impediment is strengthened by reason of the significant characteristic of hedge funds being **incorporated in offshore jurisdictions.** In particular, although they are managed onshore, hedge funds are often incorporated in offshore jurisdictions with minimum levels of regulation and public oversight (European Parliament, 2007). Offshore tax havens – *e.g.* Cayman Islands and the British Virgin Islands – are amongst the most desired domiciles of incorporation given that these jurisdictions simplify the implications of both the regulatory and tax provisions predominating investment strategies intrinsic to the hedge fund industry (Crockett, 2007).
Extending the aforementioned feature with their **privately organized business structure**, hedge funds have consequently been able to shut themselves off from any public insight, to the great resentment of many scholars and policymakers. In fact, the rather indefinable and inaccessible character of hedge funds has not precluded the increasing public sentiment in favour of regulating them (Prada, 2007). At the European level, the new proposal for a directive addresses these types of funds (Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/../EC, April 2009, hereafter proposal for the AIFM Directive).

Nevertheless, while in the last two decades public attention was primarily directed towards institutional investors taking a stand in the field of both corporate governance and corporate control, the absence of the requisite incentives for these investors to challenge underperforming managers have paved the way for activist strategies to be provoked by hedge funds more extensively (Bratton, 2007). Hence, it is even stated that contrary to traditional institutional investors, it is hedge funds that ‘hold great promise as active shareholders’ (Kahan and Rock, 2006), owing primarily to the **organizational and regulatory features** of hedge funds which constitute significant determinants for activism on the part of these investors (Clifford, 2008).

First, hedge funds have the added advantage over institutional investors of having **less internal conflicts of interest**. A significant argument brought up in this proposition is that hedge funds, as opposed to traditional investors, infrequently take part in the organization of large entities such as banks or insurance companies ‘whose wider interests may conflict with their duties as shareholders’ (European Parliament, 2007a).

Second, hedge funds are also stated to have **greater incentives to become activist investors** or to pursue activist strategies under their **performance-based remuneration policies**. In fact, the compensation structure of hedge funds is found to typically consist of an annual fixed fee of 1 per cent to 2 per cent of portfolio assets, with a performance-based fee in the range of 15 per cent to 25 per cent of the profits earned each year, provided that these profits are in excess of the pre-defined high-water mark (Goetzmann e.a., 2001). This is in marked contrast to traditional institutional investors the majority of which offer their fund managers a fixed compensation fee only. In addition, hedge fund managers are required to co-invest in the hedge fund in order to overcome the potential hazard of hedge fund managers taking extreme risks in the anticipation of high private returns without having any regard for downside risks (OECD, 2007). As such, the private gains of fund managers are highly conditioned to the outcome of investment strategies employed, thereby enabling hedge funds – as opposed to traditional investors – to better reduce agency costs and to become ‘true partners with fund investors’ (Illig, 2008).

Third, by using high levels of leverage, derivatives and by taking short positions, hedge funds amass **larger equity positions** in public corporations than do traditional investors (Brenner, 2008). In the absence of liquidity requirements, and provided for by the investment contracts with their investors, hedge funds are also able to lock-up their investors’ capital for longer periods of time, e.g. in the course of a large activist agenda, or to impede withdrawals from investors by requiring prior notice for any such request; this is in strong contrast to many institutional investors, who are subject to the obligation of having sufficient levels of liquidity in the fund to comply with withdrawal requests by investors at any time (Clifford, 2008).
As a result, hedge funds have the ability to raise large amounts of capital, lock the investments for fixed periods of time and pursue their own investment strategies so long as it takes to generate high returns on their portfolio investments.

For the reasons mentioned above, hedge funds are stated to have increased incentives and negotiating power when compared to institutional investors to engage in activities that challenge underperforming corporate boards (Kahan and Rock, 2006; Bratton, 2007; Clifford, 2008). Nevertheless, there is also great public concern about the strategies employed by hedge funds in the pursuit of trading induced profits and short-term value creation rather than long-term value creation.

### 1.5 Private equity funds

Being another class of the alternative investment sector, the private equity fund shows great similarities with hedge funds. Equally to hedge funds, no formal or regulatory definition of private equity fund exists. The definition of private equity fund that is available in literature is predominantly linked to buy-outs. In particular, the OECD (2007), defines private-equity funds as ‘financial enterprises/funds that pursue a business model based on acquiring control of publicly held companies and, in the process, taking the acquired company private’.

Thereby, private equity firms are also defined by their specific characteristics. First, most private equity funds are formed as limited partnerships. The partnership consists of the firm’s limited partners – i.e. the fund’s investors such as pension funds, insurance companies or individuals – and the general partner, which is often a limited company established by the private equity partnership (OECD, 2007). While the general partner often contributes to the fund in an amount of at least 1 per cent, the greater part of capital is collected from the fund’s limited partners (Kaplan and Strömberg, 2009). Consequently, investors are provided with the ability to raise money via private equity managers who have the specific market-knowledge needed to assess the potential of investments and the ability to diversify risk.

Second, the investment structure of private equity firms shows a great deal of correspondence with the remuneration structure of hedge funds. In particular, private equity managers are paid an annual management fee by the fund’s limited partners, ranging from 1 per cent to 3 per cent of the fund’s committed capital. In addition, fund managers are paid a carried interest, comprising 20 per cent of the fund’s profits (Jenkinson, 2008).

Finally, the private equity fund is a ‘closed-end fund’ having a pre-defined term of 10 years, which can often be extended for another period of 3 years. The investment period of the fund in a particular portfolio company generally covers a period of 5 years, after which the fund normally exits the company and returns the proceeds to its investors (Jenkinson, 2008). During the period of investment, limited partners are obliged to restrain themselves from any direct involvement in the portfolio company or the investment strategy of the general partner. In particular, it is the fund’s agreement that regulates the general partner’s investment behaviour by imposing restrictions on the investment strategies to be employed (Kaplan and Strömberg, 2009).
As stated by Bratton (2008), the private equity structure prevails over the agency problem, by providing a large set of incentives to the fund manager. In particular, it is the ‘*debt-heavy, risky capital structure with a transfer of control to a temporary super monitor who makes no significant capital contributions*’ that the author considers to contribute to the potential of private equity funds in enhancing the performance incentives of the manager (Bratton, 2008).

The next part will address the different types of shareholders and their importance in different European countries and will study the impact of the different types of shareholders on performance. This relationship can serve as a proxy for shareholder activism, be it public or private, which will be the issue in the further sections of this study.

**Conclusion**

While ownership and control were under the effective supremacy of the firm’s (factual) owners at the beginning of the 20th century, the 21st century was entered by listed companies of which the growing size and the dispersion of ownership often have established a substantial change in the governance structure of these firms. In fact, public corporations are now characterized by a *separation of ownership and control*, by which the controlling authority over corporate business operations is subtracted from corporate owners – the shareholders – and vested in corporate management. The expected consequence in this regard entails managerial authority leading up to managerial opportunism – *the agency problem* – which was attempted to be covered by the law, offering shareholders and other corporate constituents adequate opportunities to monitor the actions of corporate managers.

Over the past three decades, regulatory attempts concentrated on (i) the market for corporate control; (ii) the legal, political and regulatory system; and (iii) the internal control system as the main alternatives of management monitoring. Recently, the increasing dominance of large shareholders in capital markets has moved the modern corporate governance wave towards underlining *the rights and responsibilities of shareholders* as the owners and monitors of public corporations. The object of attention comprises *large shareholders* in particular, since there is considerable anecdotal evidence to state that many jurisdictions are facing an increase in the direct influence of large shareholders as a substitute to ‘ineffective’ mechanisms of corporate control.

Indeed, large shareholders have proven themselves to be in the position to affect the decision-making process of corporate boards, but their *activist strategies* have come under criticism for being accompanied by characteristics that are rather distressing. A variety of studies indicate that under the vein of corporate monitoring, the activities of large shareholders have rather taken the form of *private informal interventions* in the pursuit of strategic corporate changes than mere company monitoring. In so doing, *activist shareholders seem to circumvent the existing legal devices regulation investor voice and give rise to substantial concerns in the corporate governance arena.*
In terms of elucidating the terminology of this report, large (activist) shareholders can be defined as those investors that own \(^4\) **large equity positions in a corporation and that try to increase the value of their investments by actively pressuring the management of listed companies to apply certain changes.** Still, large shareholder activism and voice must be embedded in the relevant context, which is particularly a matter of defining the different **thresholds of shareownership** – ranging from 95 per cent to 20 per cent – at which shareholders are given the right to vote on important corporate decisions. Such voting power covers, for instance, the right to appoint board members representing shareholder interests, the right to hire (or fire) board members and the right to exercise power by blocking ratification of unfavourable decisions, or possibly by initiating decisions.

Many of these legal thresholds and levels, however, do not make any allowance for lower thresholds at which shareholders are facilitated in influencing corporate management. In fact, the majority thresholds disregard the fact that shareholders who do not have the level of voting rights sufficient to determine corporate strategy might still be in a position to exercise de facto control. In fact, relatively small investors holding less than 10 per cent of a company’s shares have apparently been able to pressure corporate boards to change their corporate strategy. Private enforcement activities are regularly employed to address management failure in addition to different kinds of other, more open activist techniques.

\(^4\) Or, in some cases, have the right to vote with voting shares which they do not necessarily "own".
2. EMPIRICAL ANALYSIS OF THE RELATIONSHIP BETWEEN LARGE SHAREHOLDERS AND PERFORMANCE

2.1 Overview

Over the last two decades, shareholder structures and shareholder activism have been widely debated, in particular in corporate governance literature. This structure and the activism are considered as solutions for the agency problem between the management and the shareholders of the company (See chapter 1). In particular, it is argued that many deficiencies in corporate governance of companies are mitigated by higher concentrations of ownership as well as by activism of (these) shareholders.

In the previous chapter it was illustrated that in most European countries a small group of shareholders controls a large number of companies. Their “activism” follows from their position as shareholder which provides them not only with a (decisive) voice in the general meeting of shareholders but also in all layers of the company, including board membership and (monitoring of the) strategic decision making. It raises questions about the performance of those companies vis-à-vis companies with a dispersed ownership structure.

In the last number of years many studies addressed the influence of different types of large shareholders on performance. Common classes of large shareholders whose effect on the performance of companies has been studied are family ownership, management, banks, institutional investors, hedge funds and private equity funds, governments and sovereign wealth funds.

- Family ownership

There is an important and growing body of analysis that focuses on the impact of family firms on corporate performance. Villalonga and Amit (2004) found for a large sample of American companies that family firms controlled by their heirs destroy value. Ehrhardt and Nowak (2003) support the findings for German firms dominated by family owners with the use of a dual share class. Andres (2008) clarified the findings for German family firms. His study showed that family firms outperform other companies but only if the family is still active and represented in the board structure. Family shareholdership as such does not generate better returns. This finding is supported in the study of Maury (2006) and Miller (2007). The latter provides evidence that the definition of family business is crucial and only families with lone founders outperform the market. Companies controlled by multiple family members do not enhance firm value.

- Management ownership

Related to family ownership and performance are studies that address the position of management as equity holders and the effect on performance. Whereas the first studies consider linear relationships between equity stakes and managerial shareholders (Demsetz and Lehn, 1985), more recent models approached the relationship in a non-linear form (Morck et al. and Kole, 1995). The latter methodology started from the premise that two effects influence performance: alignment and entrenchment.
As managerial ownership concentration increases, the interests of the management are more aligned with the interests of the other shareholders. Shareholder value maximization becomes more in line with management interests. At certain levels of equity ownership, management has sufficient control to follow their own objectives without fear of being disciplined by the other remaining shareholders. In the thrift industry, Cole (1998) confirmed the positive influence of insider ownership on corporate performance. McConnell, Servaes and Lins supported the findings for a sample of American companies (2008). In a comparative study for American and European companies and generalizing for all blockholders, Thomsen and others (2006) showed that while they have no effect on American companies, in European countries blockholders have a significant negative effect on firm value and accounting profitability.

- **Banks**

Banks are considered efficient monitors of corporate behavior. However, their monitoring role is studied via loan agreements and less via their shareholdings. Byers, Fields and Fraser (2008) found that banks serve as monitoring devices when internal corporate governance structures are underdeveloped. A Spanish study revealed that banks as shareholders act as efficient monitors (Azofra-Palenzuela, López-Iturriaga and Tejerina-Gaité, 2007). Bank shareholdings improve the corporate governance and increase the performance of the firm but only if the banks are not controlling shareholders. In the latter type of firms, banks have incentives to expropriate minority shareholders.

- **Institutional Investors**

Institutional investors were since the nineties observed as a solution for management shirking. Their substantial shareholdings offer them the necessary incentives to adequately monitor the corporations. Many empirical papers support their positive influence. Among them are the papers of Chung, Furth and Kim (2002) which proved that earnings management is mitigated in companies with important institutional investors. Gillan and Starks (2000) confirmed the positive influence of shareholder activism via shareholder proposals backed by institutional investors. These can be considered as mechanisms to put pressure on managers. The findings are supported by the analysis of the Hermes fund’s behavior which, via private interventions unobservable in studies relying on public information, generated significant abnormal returns (Becht, Franks, Mayer, and Rossi, 2008). Overall, institutional investors are drivers of better corporate governance (Aggarwal, 2009) but it requires long term relationships with the investee company and significant shareholdings (Chen, Harford, Li, 2007) and/or institutional investors without a business relationship with the investee companies (Cornett et al., 2007). Others cast doubt on whether institutional investors are better monitors. Among them are Duggal and Millar (1999) who showed that institutional investor activism and ownership does not improve the market for corporate control.

Faccio and Lasfer (2000) confirmed the weak monitoring roles of occupational pension funds. Pension funds are long-term period investors but their added value is negligible. Nelson (2006) supports these finding after studying investments made by CalPERS. While Smith (1996) and Wahal (1996) found significant abnormal returns for poorly performing companies targeted by CalPERS, Nelson showed that the CalPERS effect does not persist into later years.
• **Hedge funds and private equity funds**

Hedge funds and private equity have been under scrutiny for a number of years. Dai (2007) studied private investments in public entities and discovered that performance of companies in which venture capitalist funds were active is significantly better than performance of companies in which hedge fund invest. However, the author doubted whether the improved performance is due to the better monitoring of venture capitalists. For a German sample, Achleiter, Betzer and Gider (2009) showed that there are significant investment differences between hedged funds and private equity funds. While the former acquire minority blocks to create wealth in the short run, the latter buy controlling stakes to mitigate agency problems and create wealth in the long run.

• **Governments**

The efficiency of government ownership is addressed in a study by Gunasekarage, Hess and Hu (2007). High levels of government ownership is negatively related to performance, but more balanced ownership structures with government shareholdership can enhance firm performance.

• **Sovereign Wealth Funds**

In a recent paper, Kotter and Lel (2008) document an average positive risk-adjusted return of 2.1 per cent surrounding a sovereign wealth fund investment, driven by transparency of the fund. However, sovereign wealth funds seem to be passive investors, not generating any increase in profitability in the investee companies over a period of three years following the investment.

• **Foreign shareholders**

Ferris and Park (2005) studied the relationship between foreign shareholders and Japanese firm value. Foreign investors, in particular foreign institutional investors, enhance corporate performance as long as they do not become insiders. Firm value rises until foreign ownership reaches approximately 40 per cent, and then it begins to decline.

Overall, the overwhelming majority of these studies address the American market and ownership structure is in most studies approached as a stable independent variable over time. This study will add to the former studies the relationship between the developments in shareholder structures in six European countries in a uniform way. It is related to the work of Attig and others (2008) who identified that the cost of equity is lower in companies with large shareholders next to the controlling shareholder, hence considering the shareholder dynamics at company level. The next section addresses the relationship between shareholder structure and performance, the database that is used as well as the methodology.

### 2.2 Impact of shareholders on performance

The general hypothesis examined here is that performance of the firm is related to the specific shareholder structure of the company, which can be considered as a proxy for shareholder activism. In contrast to all other studies that address the relationship with one-year data on ownership concentration, this study starts from the analysis of the shareholder structure developments over a period of eight years and tests the (i) relationship between the structure and the performance of the firm over this period; and (ii) different types of stability of shareholder structures as well as shareholder evolutionary patterns.
Specifically the **model** to be tested is as follows:

\[
\text{Performance} = \alpha + \beta \text{ shareholder structure} + \gamma \text{ control variables (size, industry, country)}.
\]

### 2.2.1 Sample and variables

The sample was chosen from firms listed on the NYSE Euronext stock exchange (Brussels and Paris), the London Stock Exchange (LSE), the Deutsche Boerse, Bolsas y Mercados Españoles and the Borsa Italiana for the period 1999 and 2007 (LSE, 2001 and 2007). Although the performance data were retrieved from the on-line Datastream facility, the shareholder data had to be collected manually from different sources. To be included in the sample, a company had to be quoted on the stock exchange from the starting year until the end of 2007. The condition was imposed to ensure that the performance of the firms and other variables are not affected as a result of a listing or a delisting. The basis of selection was random, although for Belgium the total population of listed entities in 1999 was the starting point.

Different databases are used to identify the voting rights of the large shareholders of listed companies (the shareholder variables). The analysis is based on hand collected data as published by individual companies and their shareholders according to the legislation implementing the Major Shareholdings Directive of 1988 and the Transparency Directives of 2001 and 2004 for Belgium – via Euronext NYSE Brussels and in annual reports – and France – via the Autorité des Marchés Financiers and in annual reports – and the information that is provided by the Italian and Spanish supervisory authorities Consob and Comision Nacional del Mercado de Valores. For the UK, the ownership data were acquired from Hemscott and annual reports. For Germany the shareholder data were collected from the database of Hoppenstedt and the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) as well annual reports.

The data are from December 1999 for the Belgian, German, Italian, Spanish, and French companies and from April 2001 for UK companies. The procedure for data collection was repeated in the second half of 2007 for Belgium, France, Italy, Spain and the UK and the beginning of 2008 for Germany. Annex 2.1. provides an overview of the number of companies and the average size of the companies in the database. The numbers reflect more or less the relative importance of the stock markets, with the exception of France for which less data could be collected. The total sample contains more than 900 companies.

Most countries introduced lower thresholds than the minimum requirement of 5 per cent in the Transparency Directive 2004, but as this study compares 1999 and 2007 data, the database had to start for comparability reasons with the lowest threshold of 5 per cent, the most common requirement in 1999.

The model makes use of a number of control variables. First, the size of the company is taken into account. The size of the company is defined as the logarithm of the average market capitalisation at the end of 1999 and 2007. The data were provided by the different stock exchanges. Next, for each company the industry was taken from the Standard Industrial Classification (SIC) at a two-digit level as it was provided in the World’Vest Base. For statistical reasons of sampling, in this study only one-digit classification was used. Finally, the place of incorporation is taken into account. **Box 2** shows the variables that are used in this study.
Box 2. Variables: Performance is measured via three different variables:

(i) Return on equity (ROE)
ROE is measured as:
\[
\text{Net Income before Preferred Dividends} - \text{Preferred Dividend Requirement} / \text{Average of Last Year’s and Current Year’s Common Equity} \times 100\%
\]

(ii) Return on assets (ROA)
ROA is measured as
\[
\frac{\text{Earnings before Taxes and Interest}}{\text{Assets (Total)}}
\]

(iii) Tobin’s Q is calculated as
\[
\frac{\text{Enterprise value}}{\text{Assets (Total)} / \text{Total Cash and Short Term Investment}}
\]

For all three variables the average values over the period 1999-2007 are used. Datastream provides the data. However, Datastream does not contain all the performance results for all the years of all companies. If the performance data are not included for at least four years, the company is excluded.

2.2.2 Methodology

In this study, each large shareholder is classified into one of the following shareholder classes:

- Families/individuals, non-financial companies, insurance companies, banks, government, investment funds, employees, foundations, abroad (subdivided in similar classes as “national” shareholders), and others.

The others include private equity funds, hedge funds and sovereign wealth funds. Their importance is growing though the number of ownership stakes of more than 5 per cent of the voting rights held by these funds remains fairly limited. As will be further developed, these funds often focus on particular companies which were not necessarily included in the database. The databases include the names of the large shareholders but no information as to the type of the shareholder. For many large shareholders it is obvious to which the shareholder belongs but especially for investment funds, trusts, private equity and hedge funds this information is not readily visible. The absence of a legal definition of some of these investors further complicates the classification. To this end, Google, websites and newspaper articles are used to classify these investors.

A particular difficulty in the classification process of all large shareholders is pyramids. Pyramidal structures are well documented in the non-financial industry. However, banks often hold majority blocks in asset management companies.

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5 For Insurance companies, Policyholders’ Surplus is substituted where Net Income before Preferred Dividends is not available and Policyholders’ Equity where Common Equity is not available.

6 For companies with more than one type of ordinary shares, Market Capitalization represents the total market value of the company calculated as total number of listed and unlisted common equivalent shares multiplied by the price of the primary issue at fiscal year end date.

7 Cash represents Cash & Due from Banks for Banks; Cash for Insurance Companies; and Cash and Short Term Investments for all other industries.
Whereas the disclosure requirements require the identification of the controlling entities of shareholders and the classification methodology identifies the voting rights as belonging to the controlling shareholder, there is no disclosure as to which party determines the voting policies, if any, in these chains in the financial industry (or in pyramidal structures in general).

The results of this classification analysis are presented in the section on the univariate variables. For the econometrical part, companies are classified according to the development of the stakes and the identity of the large shareholders. Companies were classified in one of ten “shareholder stability classes”. Five classes indicate the stability of the company shareholding structure, five classes represent the classes with changes in the shareholder structure. Stable shareholders are those shareholders that hold both a voting block of more than 30 per cent in Germany, Belgium, Italy, Spain and the UK in 1999 and in 2007 whilst the threshold is set at 33,33 per cent for France due to this different threshold in French take-over law. Also considered stable shareholders are shareholders with an ownership block both in 1999 and 2007 that can be considered large, but which does not necessarily count as a controlling voting block.

The five classes illustrating the stability of the shareholding structure are:

- (i) stable family shareholder (SFS);
- (ii) stable non-financial subsidiary (SNFS);
- (iii) stable concerted parties (SCP);
- (iv) stable other type of shareholder (SOTS); and
- (v) large stable shareholder (LSS).

In the latter class are those companies with a large shareholder owning a voting block between 20 per cent to 30 per cent in both 1999 and 2007, or more than 15 per cent in both periods if no other shareholder owns a voting block of more than 10 per cent. The threshold of 15 per cent is taken into consideration as half the votes required by law to launch a take over bid.

The five classes illustrating the changes in the shareholding structure are:

- (i) concentrated ownership structure towards a dispersed ownership structure (CSDS);
- (ii) dispersed ownership structure to a concentrated ownership structure;
- (iii) company’s with a large, but different controlling shareholder (LDCS);
- (iv) companies with a widely dispersed ownership structure (DS); and
- (v) companies with other shareholder structures (OST).

According to this classification, a number of companies saw their shareholder base developing from a concentrated ownership structure towards a dispersed ownership structure with no large shareholder owning more than 20 per cent of the votes or less than 15 per cent of the votes if this shareholder was already a large shareholder in 1999 (CSDS). A number of companies developed from a dispersed shareholder structure to a concentrated shareholder structure (DSCS) with at least one large shareholder holding more than 30 per cent of the votes. This type of company was found relatively frequent in Germany where national take-over rules were only introduced in 2002, providing a number of large shareholders the opportunity to acquire a controlling stake without the mandatory requirement of offering for the remainder of the shares/votes. Another reason for finding this type of company can be found in France and Belgium where national legislation allowed for a “garanti du cours”, informing the remaining shareholders that the aim of the (new) large shareholder is not to take the company private but to keep it listed on the stock exchange. It lowers the pressure for the remaining shareholders to tender their shares.
This procedure can also explain the shareholder structure where the company has, both in 1999 and 2007, a large, but different controlling shareholder, the next identified class (LDCS). Fourth, companies with a widely dispersed shareholder structure (DS) are identified. In this class we grouped the companies with shareholders that do not hold more than 20 per cent of the votes or not more than 15 per cent if the shareholder is present both in 1999 and 2007. The remainder of the companies is classified as “other shareholder structure” (OST).

Companies with similar (stable) shareholder structures in 1999 and 2007 might have seen significant ownership changes in the time interval. However, the likelihood of significant changes in the time interval is reduced by using the threshold of 30 per cent or 33.33 per cent of the votes. Take-over rules oblige shareholders that pass this threshold to launch a takeover for all remaining outstanding shares. The rules are also applicable in cases where a large shareholder decreases his ownership below the threshold and passes the threshold again. This approach is highly uncommon and generally large shareholders launch a voluntary bid and take the company private. To further reduce the likelihood of significant interval changes, some databases, like the Italian Consob database, and the use of annual reports were used to control the changes of the large shareholder stakes for each year.

### 2.2.3 Univariate results

- **Large shareholders – General overview**

One of the reasons large shareholder activism is becoming more important might be due to the fact that there are more large shareholders. This presumption is confirmed for Spanish and British companies. The average number of large shareholders, defined as shareholders owning a voting block of more than 5 per cent of the votes increased from 2.6 to 3.3 and 3.4 in those countries. In France, Belgium, Italy and Germany the average did not change significantly. As can be seen in annex 2.2., each listed company in those countries has approximately two large shareholders.

Companies without large shareholders are uncommon in all countries in this study. Between 1 per cent of the Spanish companies and 6 per cent of the German companies are not familiar with a large shareholder. It may come as a surprise but in the UK less than 5 per cent of the companies had a very widely dispersed shareholder structure without any shareholder owning more than 5 per cent of the shares. Companies with many large shareholders are not uncommon. In Spain and the UK the maximum number of large shareholders passes ten; in the other countries the maximum number of large shareholders lies between five and eight. Over a period of eight years more companies experienced an increase in their number of large shareholders than a decrease: in Spain and the UK more than half of the companies had more large shareholders in 2007. Only in Germany did the number of companies with more large shareholders decrease slightly (annex 2.3.).

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8 This type of companies can have a stable shareholder structure, but not large stable shareholders.
• **Individuals, non-financial companies and foreign shareholders**

Three types of shareholders are overrepresented as large shareholders in the database: individuals, non-financial companies and foreign shareholders. Both in 1999 and 2007, in all continental countries the total number of large voting blocks of these three classes exceeded 75 per cent of the total large voting blocks. Their number exceeded 50 per cent in the UK. However, the relative importance of each class changed. Individuals and families hold between 20 per cent in the UK and Belgium and 40 per cent in Italy of all large voting blocks. In the other countries the relative number is around 35 per cent. The number dropped significantly in the UK and Germany but increased in Belgium and Spain. In Germany a large number of stakes were acquired by foreigners whilst British stakes of families flew to investment funds and foreigners. The significant increase of large family stakes in Belgium and to a lesser extent in Spain is due to the disentanglement of familial pyramid structures for which the ultimate owners could not always be traced in 1999. The position of non-financial companies as large shareholders remained stable over time with the exception of the decrease in Belgium and France, both of which are countries that are familiar with pyramids. In France the disentanglement of pyramids did not cause an increase in family shareholdings but resulted in an increase in the number of large stakes held by foreigners, among which were a number of private equity funds.

• **Banks**

Banks are important large shareholders in Spain with one out of six large stakes in the hands of financial institutions. In France and Italy banks hold half this number of large stakes. German banks sold a significant part of their large shareholdings. Approximately 5 per cent of large blocks are owned by German banks, down from 8.6 per cent in 1999.

• **Governments**

Considering the number of large stakes, the government is not important in any country with less than 3 per cent of the total number of large voting blocks. That is not to say that in some companies the government is the largest, even controlling shareholder. Whereas the government was not a large shareholder in any company in the UK, government agencies acquired a limited number of large stakes in listed companies by 2007. In 1999 hedge funds and private equity funds were found as large shareholders only in the UK. In 2007 in most countries these funds hold a limited number of large stakes. Another growing large shareholder class is investment funds. In the UK 25 per cent of all large stakes are in hands of investment funds, in the other countries the proportion of large stakes they hold varies between no large stakes in Belgium and 3 per cent in Germany. Employees (investment schemes) are an important class of large shareholders in France. An overview of these main findings can be found in annex 2.4.

• **Large foreign shareholders**

Large foreign shareholders were further classified as well (see annex 2.5.). The pattern of foreign large shareholders is different from the national distribution of large shareholder stakes. Foreign individuals and families, although present in all countries in the study, are relatively less important. Foreign non-financial companies are important large shareholders in Belgium and Germany, where more than 10 per cent of the total number of large stakes are in the hands of this type of shareholder.

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9 The British government, like many other governments, became more involved in 2008 when the financial crisis hit the capital market.
Foreign investment funds are far more often found as large shareholders in the UK, Italy and Belgium than in the other countries. Dutch foundations are an important control vehicle in a number of Belgium companies. Finally, foreign private equity funds and hedge funds were absent as large shareholders in 1999 but acquired a limited number of large voting blocks in all countries but Belgium by 2007.\footnote{Belgium is familiar with this type of large foreign shareholder though not in the listed entities in the sample. We can refer to Ontex. In 2003 Candover acquired a controlling voting block in Ontex and took the company private.} Foreign banks are important large shareholders in Spanish listed companies with more than 6 per cent of all large blocks. Finally in the UK more than 10 per cent of large voting blocks are in hands of other types of shareholders, most often trusts or pension funds. Sovereign wealth funds were found in less than 1 per cent of the companies in the database.

- **Behaviour and policies of large shareholders**

Annex 2.6. provides information on the investor behavior and policies of the different classes of large shareholders. This is an important indication of the probability that the large shareholder uses informal activism techniques to influence the (strategy of the) company. In France but also in Italy, families strive for a large, controlling voting blocks of even more than 41 per cent in the former country. In Belgium, Spain and the UK the average size of the large voting blocks of this type of shareholder is less than 20 per cent. This pattern did not change significantly over time with the exception of German families, which reduced their large voting blocks and Belgian families who increased their average stake significantly. Non-financial companies acquired, on average, large controlling blocks in Italy and Germany, whereas French non-financial companies obtained large significant blocks. That aspect of their investment policy changed, as the average voting block was more than 34 per cent in 1999. In the three other countries, Belgium, UK and Spain non-financial companies hold on average large stakes but insufficient to control the company. As was expected, the government is a large and even a controlling shareholder in a limited number of continental European companies with voting blocks of more than 20 per cent in Belgium, France and Germany and, on average, a controlling voting block of 34 per cent in Italy. However, the position of the government as large shareholder is fading: in 1999 the government had, on average absolute control in Italian companies and controlling large stakes in Belgian and French companies.

Insurance companies and investment funds are most often and, from a voting block perspective almost always pure financial investors. Their average voting block as large shareholder is less than 10 per cent. It is only in German companies that insurance companies hold - on average - large voting blocks of 19 per cent. For banks the situation is different. In France, Germany and Italy, the average voting block of banks in listed entities passed the threshold of 20 per cent, the average in Spain. It should be noted that it is only in Germany that banks hold large stakes outside the financial industry. These results support the hypothesis that the consolidation process in the financial industry has not yet ended, but only slowed down due to the financial crises.

A limited number of foundations in Germany, but in particular in Italy and Spain serve as control vehicles. In Belgium and Italy foreign foundations are sometimes used for similar purposes.
Foreign non-financial companies hold controlling voting blocks in France, Belgium and Germany (annex 2.7.). It can be expected that a number of listed entities will be fully taken over in the near future. In all those countries the average voting block increased significantly in comparison with the average voting block of this type of shareholder in 1999. The policy of foreign non-financial shareholders in Italian companies illustrates the opposite. While in 1999 this type of foreign shareholder held on average a controlling voting block of more than 33 per cent, by 2007 this average decreased to less than 19 per cent.

For foreign families and individuals as large shareholders the situation is different. This type of shareholder has relatively small stakes in Italy and Spain but controlling blocks in Belgium and Germany. In France and the UK they can be considered as large important shareholders but not necessarily controlling shareholders. The average voting block of 25 per cent in the latter countries hides differences in policy. At the end of the last century these shareholders held on average an absolute majority block in French companies whereas in UK companies these shareholders have increased their average voting block since the turn of the millennium.

Foreign investment funds, foreign banks as well as foreign pension funds can be considered as "financial" investors. With the exception of foreign banks in Germany the average voting block of these types of shareholders is less than 10 per cent of the voting rights.

The limited number of hedge funds and private equity funds held relatively large stakes in German and UK companies. In these countries this market is the best developed.

- Large shareholders defined in shareholder stability classes

Finally this part of the summary statistics discusses the development of the position of large shareholders in accordance with the ten defined classes of companies (annex 2.8.). As regards the shareholder classes indicating the stability of the shareholder structure, it can be stated that in Belgium, France and Italy approximately half of the companies are firmly in the hands of families or non-financial companies. In Spain and Germany this number is much lower at approximately 25 per cent. In the UK this type of control is exceptional. In Spain and Italy some banks and foundations control companies over a long period of time. Large stable shareholders, whose ability to control the company is not possible to determine, are relatively common in the UK, whereas they are relatively uncommon in continental Europe.

Considering the shareholder classes indicating the changes in the shareholder structure of companies, more than half of the companies in the UK, 1/3 of the companies in Spain and between 10 per cent and 20 per cent of the companies in the other continental European companies have a widely dispersed ownership structure or larger shareholders without a controlling voting block. This number increased in all countries with the exception of Spain. In the former countries the number of companies where the largest shareholders decreased their holdings is larger than the number of companies where the largest shareholders acquired a controlling voting block. Companies without a large shareholder remain relatively uncommon in Italy and Belgium.

In Germany and to a lesser extent in Spain a large number of companies changed from controlling shareholder to another controlling shareholder. One German company in six experienced this adjustment over the last eight years and one out of eight in Spain.
The remaining class of companies is important in Germany, the UK and Spain. It contains companies with large, non controlling shareholders that changed over time, companies that have a widely dispersed ownership and saw a number of larger shareholders acquiring significant stakes, companies with larger shareholders but insufficient to be classified as a company with stable large shareholders and the like.

To complete the analyses, annex 2.9. provides data which most studies on shareholder structures present. The voting block of the largest, second largest and third largest shareholder and summed stake of all large shareholders is provided. The results confirm previous studies. In continental Europe, the largest shareholder has on average a controlling voting block of 36 per cent in Spain and Belgium going up to 46 per cent in Italy, whereas the largest voting block in the UK is less than 20 per cent. The stake of the second and third largest shareholders is similar in all countries being between 10 per cent and 13 per cent for the second largest shareholder and 7,5 per cent to 8,7 per cent for the third largest shareholder. This illustrates the differences in power (and activism) of the second and third largest shareholder in continental Europe and the UK. In the latter country, smaller shareholders can, acting in concert, defeat proposals of the largest shareholders which in the former countries is impossible. The combined stakes of all large shareholders in continental Europe is smaller than half the stake of the largest shareholder.

The aforementioned analysis helps us to understand the market for shareholder activism. In a large number of companies in continental Europe, monitoring as opposed to shareholder activism is widespread.

The success of monitoring in different forms and with different types of shareholders as opposed to managerial empowerment where shareholder activism can be considered to be more prominently present, will be analysed in the econometrical part.

**2.2.4 Empirical results**

In the former part we illustrated the differences in shareholder structures; this part will combine that data with information on the performance of the companies over a period of eight years. Annex 2.10. provides the descriptive statistics of the three performance measures. The average *Tobin’s Q* is 1,37 but this average is influenced by a number of large values as the median is only 0,89. The average *return on equity* over a period of eight years is a little bit above 2 per cent a year but the median is above 9 per cent a year. The difference between the average and the median value of the *return on assets* is less: 4,1 per cent for the average, 5,6 per cent for the median.

Next to the logarithm of the average market capitalization of each company varying from less than 1 mio. euro to more than 100 bio. euro, follows the ten different shareholder types. As dummy variables are used, the mean indicates the relative number of companies of that particular shareholder type in this sample. The two most common classes, each with more than 20 per cent of the total number of companies, are the class with dispersed ownership (28 per cent of the companies) and the class with a stable family as large controlling shareholders (20 per cent of the companies). Subsidiaries of non-financial companies, companies that developed from a controlled towards a dispersed ownership structure and the class of companies with a shareholder structure that can not be classified into a particular category, count each for approximately 9 per cent of all companies.
Companies with stable concerted parties are relatively uncommon (less than 2 per cent) but data on shareholder agreements are not appropriately disclosed in all countries in the publicly available databases. The number can be considered as a lower threshold.

Listed companies in Europe can be found in all different industries though the mining and agriculture industry is underrepresented as is the miscellaneous last industry class (SIC 9). In all other industries between 3 per cent and 26 per cent of the companies are classified.

In this analysis the majority of the companies are British and German companies. The remaining four countries each represent approximately 10 per cent of the companies.

For each of the three dependent variables, ordinary least squares regression was performed, three with the database excluding the banks and insurance companies, one including these types of companies. The models introduce in each step one more control variable, starting with the size of the company, next the country of incorporation and finally the industry. The results of the analysis are presented in annex 2.11. Overall, the different regressions do not provide evidence that different shareholder structures result in better or worse performance, independent from the performance variable used. The results support the thesis of Demsetz and Villalonga (2001) who argued that there is no systemic relationship between ownership and performance.

The size of the company has a significant positive effect on the return on assets and the return on equity over a period of eight years, though the effect is generally not significant on Tobin’s Q. French and German companies have significantly lower returns on equity.

The model does not explain much of the variance in the performance measures as R² remains under 10 per cent.

The robustness of the results was tested via a reclassification of the ten shareholder types we previously determined. We reclassified the companies into three classes: companies with stable shareholder structure over the period of eight years, companies with dispersed ownership and other companies. The results of the reclassification are presented in annex 2.12. The companies with controlled and dispersed shareholders were tested against the other types of companies. Companies with a concentrated shareholder structure have a significantly higher average return on assets as well as a higher return on equity but a lower Tobin’s Q. Companies with a dispersed ownership structure do not significantly have better or worse performance than other types of companies.

The finding that the size of the company has a positive impact on return on assets and return on equity is confirmed. The explanatory power of the variable remains low.

Overall the empirical research does not reveal a large number of performance differences between companies, classified according to their shareholder type. If it can be assumed that large shareholder activism is well proxied by the size of the shareholder stake in combination with the stability of this ownership, large shareholder activism – measured from the overall developments in the market of shareholder (transactions) – is not a good driver for better performance. However, these results do not reveal whether individual large shareholder activism enhances performance or whether other techniques used by large activist shareholder generate better returns. The next sections will address other ways to measure shareholder activism from an economic point of view and illustrate the benefits/costs of other types of activism.
Conclusion

Following previous studies on the relationship between different ownership structures and firm performance, the relationship between the developments in shareholder structures in six European countries over a period of 8 years (1999-2007) is addressed on the general hypothesis that firm performance is related to the specific shareholder structure of the company, which can be considered as a proxy for shareholder activism.

In order to clearly understand the market for shareholder activism, the large shareholders in this study were assessed on the basis of the following classification: family/individual, non-financial companies, insurance companies, banks, government, investment funds, employees, foundations, abroad and others (hedge funds, SWF, private equity funds). In addition, companies were classified into one of ten “shareholder stability classes” – being either classes indicating the stability of the company shareholding structure, or the classes representing changes in the shareholder structure. The spread of some important shareholder types in Europe can be listed as follows:

- **Individuals/Families** are overrepresented in the six European countries:
  - UK: family ownership decreased to 20%, due to the fact that British stakes of families flew to investment funds and foreigners; (average voting block of < 20% per cent);
  - Belgium: family ownership increased to 20%, due to the disentanglement of familial pyramid structures resulting in direct ownership; (average voting block of < 20%);
  - Germany: family ownership decreased to 35%, due to the fact that German stakes of families were acquired by foreigners;
  - Spain: family ownership increased to 35%, due to the disentanglement of familial pyramid structures; (average voting block of < 20%);
  - France: family ownership decreased to 35%, due to the increase in the number of large stakes held by foreigners; however, many families strive for large, controlling voting blocks.
  - Italy: family ownership 40%; families strive for large, controlling voting blocks
- **Banks** are important large shareholders in Spain, Italy and France (average voting block of 20 per cent). A strong decrease was seen in Germany, where large share ownership by banks declined from 8.6 per cent in 1999 to 5 per cent in 2007.
- **Government** hold less than 3 per cent of the number of large voting blocks; however, the government is a large shareholder in Belgium, France and Germany (average voting block of > 20 per cent) and a controlling shareholder in Italy (average voting block of 34 per cent) in a limited number of companies.
- **Private equity funds** and **hedge funds** are large shareholders in only a very limited number of European listed companies;
- **Investment funds** have 25 per cent of all large stakes in the UK, while in the other countries the proportion of large stakes they hold varies between no large stakes in Belgium and 3 per cent in Germany (average voting blocks of < 10 per cent);
- Different types of **foreign large shareholders gained importance in most countries. However there are many different developments in their strategies.** While foreign individuals and families appear infrequently in all countries (yet with controlling voting blocks in Germany and Belgium; and large stakes in France and the UK), foreign non-financial companies have large stakes in Belgium and Germany (controlling voting blocks);
foreign investment funds appear as large shareholders in the UK, Italy and Belgium; foreign private equity funds and hedge funds acquired a limited number of large voting blocks in all countries but Belgium by 2007; and foreign banks are important large shareholders in Spanish listed companies;

Out of these shareholder types (i) families and non-financial companies in Belgium, France, Italy, Germany and Spain; and (ii) some banks and foundations in Spain can be categorized as shareholder classes indicating stable shareholder structures. Thereby, the concentrated ownership assumption assigned to continental European companies has paved the way for a rise of companies with widely dispersed ownership or large shareholders without a controlling block (10-30 per cent of the companies) in these countries compared with the UK (50 per cent of the companies). Finally, there is a remaining class of other companies – containing companies with large, non controlling shareholders that changed over time – that is important in Germany, the UK and Spain.

Based on the empirical analysis and confirming the findings of earlier studies, the analysis shows that there is no direct relationship between shareholder types and that the different shareholder structures and types do not denote any explicit positive or negative effect on firm performance. If it can be assumed that large shareholder activism is well proxied by the size of the shareholder stake in combination with the stability of this ownership, large shareholder activism is on an aggregate level not a good driver for better firm performance. However, these results do not reveal whether individual large shareholder activism enhances performance or whether other techniques used by large activist shareholders generate better returns.
3. LARGE SHAREHOLDER ACTIVISM - AN INSTRUMENTAL APPROACH

In previous parts it was illustrated that shareholder activism exists in many different forms. A number of these aspects of large shareholder monitoring will be further developed in this part of the study.

- First, attendance and voting of large shareholders at general meetings will be discussed. A large part of the corporate decision making process in relation to important decisions takes place at the (extra-ordinary and ordinary) general meetings of shareholders.

- Second, the agenda of the general meeting will be addressed. Shareholder proposals serve as a proxy for shareholder activism. In particular when large shareholders require the agenda to be amended, shareholders are playing their role as monitors of the company.

- Third, shareholders can develop a litigation strategy. Decisions of the corporation in general and the board in particular can, in many countries, be overruled by court decision.

3.1 Large shareholder attendance and large voting behavior

Since the nineties of the last century shareholder structures have been relatively well examined. In common law countries separation of ownership and control can be found in a large number of listed entities, whereas in civil law countries the separation is less developed with major shareholders controlling large voting blocks. In all countries the opposite type of companies can be found. However, not all issues can be addressed via the shareholder structure of the company. Companies can be considered as incomplete contracts and the mechanism used to fill this gap is the decision-making process of the corporate organs of the company. The general meeting of shareholders is considered as one of the most important processes used to “complete” the contract called a company. Hence it could be expected that not only shareholder structures but also the processes at general meetings would be well documented. However, data on practices of general meetings of shareholders are scarce in Europe. This finding is well illustrated in the work of Baums and Wymeersch on “Shareholder Voting Rights and Practices in Europe and the United States” (1999). In this overview of sixteen European countries, all contributions provided detailed information how to convene the general meeting, who determines the agenda of the meeting, which quorums must passed to adopt a decision, etc., but regarding the practices of the general meeting all but three papers are silent. For Belgium, Sweden and Italy some very general attendance ratios are provided. For Belgium and Sweden it was noted that in the majority of a large sample of listed companies, the majority of the votes attached to all shares outstanding. For Italy similar results were found for a sample of 15 large companies.

Recently two major drivers can be identified as triggering the disclosure of general meetings attendance and voting in continental Europe.
• First, there is an increasing regulatory focus on proxy voting and disclosure of voting policies as well as on rules regarding the disclosure of voting results. As an example we can refer to the European Shareholders Directive requiring companies “to establish for each resolution at least the number of shares for which votes have been validly cast, the proportion of the share capital represented by those votes, the total number of votes validly cast as well as the number of votes cast in favor of and against each resolution and, where applicable, the number of abstentions” and to publish on the companies’ internet site the voting results established in accordance with the former requirement. The regulatory focus is also on “empty voting” and “hidden ownership”. In short the first, “empty voting” refers to voting of shares which belong to a third party, whilst the second, “hidden ownership” refers to a situation where the economic interest of the shareholder is larger than its voting interest. In a number of recent cases it was found out that different parties had acquired positions driving them to vote at general meetings in accordance with own personal interests which had nothing to do anymore with the rationale of voting the item on the agenda. These interests and voting in accordance with these interests could even have adversarial effects on the company. Many regulators have stand up to tackle techniques of securities lending which can boost the voting position of shareholders significantly before general meetings take place. Nobody, was informed about the size of the voting block of these “shareholders”. These positions can be the result of several techniques like securities lending and other contractual arrangements. Many regulators address the “sudden” changes in ownership and voting power. A detailed analysis of these arrangements increasing voting power are beyond the goals of this report but in general we support a disclosure regime that includes long positions stemming from contracts for differences in combinations with an appropriate enforcement mechanism. It can be argued that the first is already achieved via the transparancy Directive, but the second is still lacking. Intermediaries, like investment bankers that are familiar and informed about arrangements that might be set up to avoid public disclosure of significant voting blocks must be encouraged to inform market authorities. With Zetzsche we agree that leniency programs can serve as an appropriate mechanism.

• Next, a corporate governance industry has developed. As an example we can refer to ISS – now RiskMetrics – a corporate governance service provider considered as “the market leader, which provides both governance ratings and proxy voting recommendations. Proxy advisers generally base their decisions on corporate governance standards that are derived from the same policies as those used to formulate governance ratings and related governance advice.

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13 AMF 2008. Rapport sur les opérations de prêt emprunt de titres en période d’assemblée générale d’actionnaires. 16 p. The French AMF supports the disclosure of the voting rights attached to stock lending as well as a suspension of voting rights in certain conditions of securities lending shortly before the start of the meeting (with an appropriate discouraging system ex post).

14 In particular article 10 g) of this Directive.

Because of the influence proxy advisers like ISS have with institutional investors (and, as discussed below, given that they are in some cases directly empowered by clients to vote shares according to their policies), proxy advisers play a more direct role in effecting corporate governance changes than firms that only rate governance. There are about a half-dozen well-established firms in the U.S. corporate governance industry, and a few others who operate in Asia and Europe. The significant U.S. market players include: the Corporate Library and its subsidiary, Board Analyst; Glass Lewis; GovernanceMetrics International; ISS; Proxy Governance, Inc.; and the credit rating agencies, Egan-Jones, Moody’s Inc. and Standard and Poor’s. European governance service providers include CoreRatings/DNV and Deminor Ratings. Asian governance providers include CRISIL Ltd. (India) Governance and Value Creation Ratings and ICRA Limited” (Rose, 2006, 112). In addition many others provide their services in Europe, like Proxinvest in France, DSW in Germany, Manifest in the UK, etc.

In this section the companies’ websites of a sample of French, British and Belgian companies have been researched for data on the attendance of shareholders at general meetings as well as on voting turnouts. These data have been combined with the data collection of the CNMV, the Spanish supervisory authority and the German DAX-data of DSW on annual general meeting turnouts. In combination with the data on shareholder structure of companies as developed in the previous part, the data reveal large shareholder activism at general meetings.

Annex 3.1. provides a summary overview of the attendance of shareholders at general meetings in five European countries: France, Belgium, UK, Spain and Germany. For Belgium and France, the websites of all the companies in the dataset have been consulted. Approximately 40 per cent of the companies disclose the minutes of the meeting on the website, although this disclosure is considered as best practice in the Belgian corporate governance code. For the randomly selected UK companies the average was 65 per cent. The sample was randomly selected from the dataset of listed companies for the UK, for Germany it is based on the DSW-data for the DAX-30 companies. In interpreting the data, it should be taken into account that only the largest German companies are in the sample. Most data are from the general meeting of 2007, some are from the general meeting of 2008. In order to avoid misunderstandings, some basic facts about the companies in the sample are provided in annex 3.2. Larger companies with a more dispersed ownership structure are more overrepresented in the German and French sample though the UK data also tend towards the larger listed entities.

For a long period of time, shareholder passivity was seen as a major obstacle to improving corporate governance. Many corporate governance codes endorse monitoring by shareholders, in particular via active participation at the general meeting of shareholders. This encouragement has resulted in more shareholder participation as shown in annex 3.1. In all countries in this study, the average attendance at general meetings is more than 50 per cent, in France more than 60 per cent and in Spain even more than 70 per cent. The median values are all around 60 per cent with Spain as the exception with a median attendance of 72 per cent. These results illustrate that most large shareholders are active and attend general meetings. It is shown that the summed stakes of all large shareholders was between 23 per cent in the UK and 54 per cent in Spain with France, Germany and Belgium somewhere in between. Compared with attendance results that are significantly higher in all countries, ranging from 10 per cent in Belgium to more than 30 per cent in the UK and Germany, it can be assumed that many large shareholders, and perhaps even all of the large shareholders, attend the meeting.
Very **high levels of shareholder attendance can be found in some companies in all countries**. In France and Spain, some meetings are attended by almost all of the company’s shareholders: in 15 per cent of the Spanish companies and in almost 10 per cent of the French companies the attendance level is higher than 90 per cent. As it will be illustrated this is due to high ownership concentration. Large, controlling majority shareholders always attend – or are represented – at the meeting.

Very **low attendance levels can be found in Belgium**: of the eight companies with an attendance of less than 20 per cent, six are Belgian companies. One company organized the general meeting for 2.7 per cent of the shareholders. At all the company meetings during 2006 and 2008 the attendance was very low: between 2 per cent and 2.7 per cent. Notwithstanding the widely dispersed ownership structure of some German companies in the sample, the lowest attendance was the Daimler Chrysler meeting with more than 39 per cent. The significant differences in attendance between companies are hard to explain. One argument could be that large companies have more institutional investors as large shareholders. These investors more frequently attend and vote – via proxy – at general meetings. The argument is hardly convincing. Among the six Belgian companies with low attendance, four are BEL-20 companies with relatively dispersed ownership and more institutional shareholders. In the UK the lowest attendance was for Standard Chartered, a large bank with many institutional investors.

**Annex 3.3. relates the attendance of shareholders at general meetings with the summed voting blocks of all large shareholders.** Approximately all observations are located on the left side of the figure. This is logical as it illustrates that the attendance is higher than the summed block of the large shareholders. There are a minor number of exceptions. In one British company the attendance level is less than half the summed voting block of all large shareholders. Due to the concentration of the voting blocks the attending large shareholders still have more than half of the represented votes at the meeting. In some other companies the differences might be due to the disclosure requirements. In most countries changes in voting rights that occur between two thresholds, which thresholds are often spaced at intervals of 5 per cent, need not be notified. Theoretically, in case there are three large shareholders, their summed block can be 14.97 per cent higher or lower than the disclosed holdings. If large shareholders dispose of a part of their voting block but remain above the lower threshold, it may be that the notified summed blocks are higher than the attendance, notwithstanding the presence of all large shareholders at the general meeting.

**Annex 3.3. clearly established the positive relationship between the shareholdings of large shareholders and the attendance at general meetings.** For every increase of 1 per cent in the size of the voting block of the large shareholders, the attendance at the general meeting is 0.42 per cent higher. The data have been reiterated for individual countries (annex 3.3.A.). In the UK the increase is significantly lower at 0.13 per cent and significantly higher in Belgium and France at 57 per cent. However, in the UK the attendance of small shareholders is much higher (see next section).

It is also found that **not only large but also small shareholders attend the general meeting.** If the company has a widely distributed ownership structure without shareholders holding more than 5 per cent of the votes, it is estimated that the attendance at the general meeting is 45.3 per cent. **There are large differences between countries in the attendance of small shareholders.**
When there is a dispersed ownership structure, it is estimated that only 28 per cent of small shareholders attend the general meeting of Belgian companies, whereas in Germany and Spain it is about 47 per cent and almost 55 per cent of small shareholders are present in the UK. Part of these large differences can be explained by the size of the companies. In annex 3.4, the difference between the attendance and the summed voting block of all large shareholders is plotted against the market capitalization of the company. The larger the company the more small shareholders attend the general meeting. As, on average, the Belgian sample contains more small companies, the difference between the attendance in the UK and Belgium can be partly explained. However not all differences are due to differences in the size of the companies. Spanish companies in the sample are significantly smaller than the German and French companies, but the attendance of small shareholders in the former companies is higher than the attendance of such shareholders in the latter companies.

### 3.2 Attendance at general meetings and types of shareholders

The attendance of shareholders is further explored for different types of companies, according to their shareholder structure. In this part of the analysis we divide the sample of companies into six classes according to differences in their shareholder structures, as listed in box 3.16

#### Box 3. Company Classification

- **Class A**: Companies with dispersed shareholders, i.e. no shareholders owning more than 10 per cent of the votes;
- **Class B**: Companies with a controlling shareholder holding more than 30 per cent of the votes and whose voting block is larger than the summed block of the other large shareholders. The voting block of the largest shareholder also represents more than the majority of the votes attending the general meeting;
- **Class C**: Companies with a controlling shareholder holding more than 30 per cent of the votes and whose voting blocks is larger than the summed block of the other large shareholders. These are the companies for which the voting block of the largest shareholder is less than the majority of the votes attending the meeting;
- **Class D**: Companies with at least one large shareholder owning more than 10 per cent of the votes, but the summed block of the other large shareholders is larger than, and the attendance at the general meeting is more than double the voting block of the largest shareholder. The vote of the largest shareholder is not sufficient to adopt the items on the agenda of the general meeting;
- **Class E**: Companies with a large shareholder owning a voting block of between 10 per cent and 30 per cent which is more than the summed block of the other larger shareholders and more than half the attendance at the general meeting;
- **Class F**: Companies with a large shareholder owning a voting block of between 10 per cent and 30 per cent which is more than the summed block of the other larger shareholders and less than half the attendance at the general meeting.

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16 The classification used in the empirical part is not suitable given the different construction of the dataset.
The classes E and F resemble the classes B and C. However, the differences in size of the voting block of the largest shareholder – more than 30 per cent in class B and C and less than 30 per cent in class E and F - can influence the behavior of the other shareholders. As the size of the voting blocks has been disclosed, other shareholders can be discouraged from attending a meeting where the controlling shareholder will probably have a decisive voice. When the voting block of the largest shareholder is smaller, it can encourage the participation of the smaller (large) shareholders. Ex ante they can consider their voice at the general meeting as decisive.

Annex 3.5. provides an overview of the composition of the samples in the different countries. The classes C and E are considerably smaller. Class D is uncommon in Belgium, France and Germany. First, from Annex 3.6. it is clear that there are significant differences in attendance between the different classes of companies. The average attendance is significantly higher in class B – 72 per cent - and C – 81 per cent - which was expected due to the controlling voting block of the largest shareholder. The attendance at meetings of companies with a dispersed ownership structure is lower but still passes the threshold of 50 per cent. The lowest attendance can be found in the group of companies with a large shareholder but without other large shareholders. The attendance at the general meeting of this type company (class E) is less than 25 per cent. Smaller shareholders seem to be discouraged from attending general meetings when a large shareholder seems to have – at least ex ante – the majority of the votes at the meeting.

In the second step of the analysis it is assumed that the largest shareholder participates. Its voting block is deducted from the attendance. The remainder of the attendance is weighted against the remainder of the total number of votes, excluding the largest shareholder. It provides information of the activism of other large as well as small shareholders. The results are presented as the second red bar in annex 3.6.. As could be expected, the attendance of large and small shareholders in companies with a dispersed ownership structure is similar. However, there is a large difference between companies where the controlling shareholder has a larger voting block than the sum of the voting blocks of the other large shareholders and companies where this shareholder has only a minority position vis-à-vis the position of the other large shareholders. In the former class 71 per cent of the shares of the other large and small shareholders were represented while in the latter class less than 40 per cent of the other large and small shareholders attended the meeting, i.e. 36 per cent. These results reflect rational behavior. The average largest voting block of class B companies is 54 per cent, while for class C companies this figure is 36 per cent. Large shareholders that attend the meeting of a B class company can use their voice but have no decisive influence whilst the voting turnout at class C companies cannot be determined ex ante. Large shareholder activism – voice through attending and voting at the meeting – is in these situations relevant.

The results for class D are similar as those for class B. On average more than 60 per cent of the remaining large shareholders attended the meeting to counterbalance the voting block of the largest shareholder. The limited number of companies in class E shows a significantly different picture. Not only is the overall attendance low, hardly any other large shareholder attends the meeting: less than 5 per cent of all other large and small shareholders.
Finally the green bars in annex 3.6. assess the attendance of small shareholders. Under the assumption that all large shareholders attend the meeting, the remainder of the attendance is weighted against the free float. 40 per cent to 60 per cent of the these shareholders are present or represented at the meeting of companies with dispersed ownership, at meetings of companies with a number of large shareholders with balanced voting blocks and – less easy to explain – at meetings of companies where the largest shareholder has a voting block which is larger than the summed block of all other large shareholders. Small shareholders of companies with a controlling or large shareholder without many other large shareholders “vote with their feet”: only 15 per cent attend the meeting with a controlling shareholder and only 1 per cent participate in meetings with another type of large shareholder.

Overall annex 3.6. illustrates that shareholder activism, measured via the attendance at general meetings, differs widely due to many different features: the size of the voting block of the largest shareholder, the voting blocks of the other large shareholders, the size of the company, the country of incorporation, etc.

The two largest classes of companies, the companies with a dispersed ownership structure and the companies with a controlling shareholder are assessed at country level (annex 3.7). The attendance at the first class of companies is compared with the attendance of all but the largest shareholder in controlled companies. It can be hypothesized that the attendance in the former class is significantly higher than in the second class where the remainder of the shareholders are discouraged from being present at the meeting, being confronted with a controlling shareholder. This hypothesis is confirmed for the general meetings of Belgian, British and Spanish companies, though not for French and German companies. For the former companies the relative attendance of other large and small shareholders varies between 29 per cent and 38 per cent, 7 per cent to 24 per cent lower than the attendance of shareholders at general meetings of companies with dispersed ownership. In Germany and France attendance at the meetings of companies with dispersed ownership is less than 50 per cent whereas the presence of shareholders other than the controlling shareholder is more than 50 per cent in controlled companies. Large and small shareholders seem to attach more importance to the use of their voice at meetings of controlled German and French companies than at meetings of companies with dispersed ownership. More detailed research will be required to explain the reasons for these differences.

### 3.3 Voting on resolutions

Next to the attendance of large shareholders at general meetings, shareholder activism can be addressed via the voting behavior at general meetings. Manifest and Georgeson published an overview of the voting behavior of shareholders at general meetings of large companies in Europe.\(^\text{17}\) Their results show that most resolutions are approved with an overwhelming majority of more than 90 per cent. As can be seen in annex 3.8., the average approval ratio lies between 92 per cent in Germany and 98 per cent in Spain.

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For three countries (France, Belgium and the UK) we analysed all voting turnouts for each company in the dataset. For each company we selected the resolution with the highest and lowest turnout. The results of this analysis are presented in annex 3.9.

**Activism via dissenting voice is different in the three countries.** Average voting turnouts are similar to the results of the Manifest report. However the average minimum turnout is more than the 50 per cent turnout in Belgium, but less than 50 per cent in France and the United Kingdom. In the former country, some resolutions were defeated with a yes vote of as little as 1 per cent.

Further assessment will be required in relation to which variables influence the differences in voting turnouts. Company law can be one of these variables. One of the resolutions that has very low turnouts in a number of French companies is the delegation of power to the board of directors to issue shares to the employees of the company. This resolution was not on the agenda of general meetings in the UK or Belgium.

The former results were further explored for two types of companies: companies with dispersed ownership and companies with controlling shareholders (annex 3.10.). It can reasonably be assumed that in controlled companies the largest shareholder approves the resolution. Hence the dissenting voice stems from the other large and small shareholders attending the meeting. As the number of companies in each class is limited – only four British companies had a controlling shareholder – further research will be required to confirm the results. **The first results show that in the large majority of the companies with a dispersed ownership, shareholders support the resolutions of the management and the board of directors. The highest level of dissenting voice can be found in French companies. The approval turnouts are much higher in controlled companies but under the assumption that the controlling shareholder approves the resolutions**¹⁸, **the dissenting voice of the other shareholders is higher.** In companies with a controlling shareholder, dissenting voice is much higher in all three countries: whereas the relative number of dissenting votes cast by the remaining shareholders in France stays just beneath the threshold of 50 per cent, in the UK it reaches more than 70 per cent. However it should be noted that the median value in the UK is only 20 per cent, illustrating that French companies with controlling shareholders encounter the most dissenting shareholder activism.

The foregoing analysis showed that **shareholder activism via attending the general meeting as well as via voting is in many countries and companies relatively low.** Resolutions that are strongly opposed by shareholders are uncommon but the approval levels of resolutions differ from country to country and between different types of companies. In the UK remuneration reports are frequently debated and opposed; in France the delegation to the board of directors of the power to issue shares is often questioned. Belgian companies do not experience much shareholder opposition¹⁹; some directors that the board of directors proposes to be elected are not warmly welcomed by a minority of shareholders. Annex 3.11. provides an overview of some differences between the three countries and the two types of companies.

It should be noted and will be illustrated next that in individual cases general meetings are used for some fierce debates.

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¹⁸ This hypothesis should be further studied. In a number of French companies some resolutions, and in particular the resolution to delegate the power to issue shares to employees to the board of directors, is not always supported by the controlling shareholder. A first analysis of this resolution at six general meetings of controlled French companies showed that the approval rate was much lower than the voting block of the largest shareholder.

¹⁹ Although the crisis in the financial industry, and the collapse of the stock price of a number of large Belgian banks, caused severe turmoil and shareholder opposition at the general meetings of these institutions.
3.4 Shareholder proposals

Another technique of shareholder activism is submitting resolutions to the general meeting of shareholders. In many countries only large shareholders are allowed to submit a proposal: often the threshold of 5 per cent is used, in some countries an absolute amount of money invested is put forward.

Shareholder sponsored proposals could not be found in the sample of Belgian companies. This is in line with a Dutch study by De Jong, Mertens and Rosenboom (2006) who found in a large sample of general meetings that all 1583 proposals were sponsored by directors. Only 9 were withdrawn or rejected.

In our sample of minutes and agendas from the general meetings of French companies we found three companies that received shareholder proposals. In one company the shareholders submitted eight proposals of which three were supported by the majority of the attending shareholders. In the other two companies the shareholder proposals – one in the first company, three in the other company - were all defeated.

This kind of activism has, so far, not been extensively investigated in continental Europe. A recent unpublished study by Tilburg researchers Cziraki, Renneboog and Szilagyi (2009), which the authors agreed to share, shows that shareholder proposals were received by 0.0117 companies per year. 23 companies received during 28 general meetings 95 shareholder proposals. Annex 3.12. provides an overview of the subject of the shareholder proposals. The continental European data span a period of four years, from 2005 to 2008.

A large majority of the shareholder proposals are related to corporate governance issues and a second class of important proposals envisage directors’ elections or dismissals. Corporate governance related proposals envisage special audits and the establishment of special committees or representatives. In particular, shareholder proposals related to the election and dismissal of directors receive large support. The total number of successful proposals remains limited. 15 per cent passed: 3 director proposals, 7 governance proposals and 2 asset restructuring proposals.

For the UK, the time series on shareholder proposals started in 1998. Shareholder activism started earlier in the UK, but there are similarities with continental shareholder behavior regarding the submission of shareholder proposals. The largest number of UK shareholder proposals are related to the election or dismissal of board members. These proposals receive large support. Approximately 35 per cent of these proposals were successful. The other shareholder proposals receive less support and only a few were successful.

In the second part of the paper the authors addressed the cumulative abnormal share price returns around the time of a general meeting where shareholder proposals have been submitted. Different time windows show a significant negative market reaction. In particular the proposals that were submitted to elect or remove directors had a much deeper negative impact than the other proposals.

In a third part, the authors selected peers with which to compare the target and non-target firms. The non-target firms had superior performance whereas the target firms had higher institutional ownership.
Overall the authors show that **shareholder proposals are less common in Europe than in the US**, that shareholder proposals in the UK are more focused on director election and dismissal, that activists target underperforming firms with more concentrated ownership, that most proposals in continental Europe are unsuccessful and exhibit a negative stock market reaction. Presumably the market reacts to the fact that the shareholder proposal signals a badly performing company or a company with severe agency problems.

### 3.5 Litigation

**Litigation** can be considered as another shareholder activism mechanism. Politicians and managers frequently refer to shareholder suits as being unjustified and often even abusive or frivolous similar to other shareholder activist behavior. Examples are the contest of shareholders’ resolutions in the German stock corporation and the inquiry proceeding into the Dutch listed and non-listed companies. However, hardly any data on shareholder suits are available. Two scholars recently analyzed in detail the **Dutch and German shareholder litigation culture**. Vermeulen of the University of Tilburg and Zetzsche of the University of Düsseldorf agreed to share their analysis for this Parliamentary report. The study “The Use and Abuse of Investor Suits- An Inquiry into the Dark Side of Shareholder Activism” is based on two proprietary datasets. For the Netherlands, the dataset comprised of 972 reported decisions in 323 inquiry proceeding requests in the period from 1 January 2002 through 31 December 2008; only 52 decisions (5.34 per cent) with respect to 19 cases related to listed companies not involved in bankruptcy proceedings. For Germany, the scholars analyzed 1,003 corporate announcements disclosed in the Electronic Federal Bulletin in the period from 22 September 2005 to 31 January 2009 regarding the contested resolutions of 583 shareholder meetings, with 135 related settlements and 105 related court decisions (Germany). Almost all of the rescission suits are filed by shareholders of listed companies.

The **Dutch inquiry procedures** are lodged with the Dutch Enterprise Chamber which has adopted the premise that strong shareholder rights and a takeover-friendly approach should counter poor management performance. In particular, fast preliminary relief was often requested and granted. In the period 2000-2007, out of 23 inquiry requests with respect to public companies, injunctive relief was requested in 21 of these cases; a preliminary remedy was granted in 57 per cent of these cases. In the context of close corporations, 234 injunctive reliefs were requested in 300 cases with a ‘success rate’ of 47 per cent. Annex 3.14. shows the Dutch Enterprise Chamber’s most popular remedies.

In listed companies, the **top 3 Dutch preliminary remedies are (1) the appointment of independent board members; (2) the prohibition of voting on particular agenda items; and (3) the deviation from the articles of association. Suspending directors’ and shareholders’ resolutions are popular injunctive reliefs in non-listed companies.**

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20 The gap between suits filed and the sum of the number of settlements and judgments is due to the fact that in many cases, the proceeding is either still ongoing, or its conclusion has not been reported in the official bulletin.

21 The list is derived from our dataset including both listed and non-listed companies that were not involved in bankruptcy proceedings. In the period 2002-2008, the Enterprise Chamber granted more than 130 preliminary reliefs.
This list reveals that the inquiry proceeding is not limited to a mere after-the-fact adjudication. The inquiry proceeding often assists the parties in overcoming their differences by promoting informal and supposedly efficient solutions. These non-formalistic remedies offer parties an additional round of after-the-fact bargaining either by themselves or under the supervision of independent observers. The principle of fast, informal and what we call judge-initiated ‘mediation’ or ‘conciliation’ appears to be very attractive to minority shareholders. In many cases, after the injunctive relief, the company and its shareholders tend to follow the preliminary relief. In 42 per cent of the cases, the preliminary remedy ended the court proceeding by virtue of a settlement or the ‘voluntary’ retreat of one of the parties.

The practice of shareholders using the German Anfechtungs- und Nichtigkeitsklage differs from the practice of contested resolutions in other jurisdictions in three respects. The first is the scale. On average, contested resolutions for approx. 154 shareholder meetings are reported per year (see Annex 3.15.). Every year approx. 12 per cent of all issuers whose shares are traded at stock markets are subject to rescission suits.

Secondly, the ownership of shareholders involved in German rescission suits is quite small. While the suitors’ shareholdings are disclosed only occasionally, suitors very rarely exceed the notification threshold for major shareholdings, which is set at 3 percent. For the most part, shareholders hold a few shares, sometimes even just one share, which is sufficient in order to file the suit.

Finally, contesting shareholder resolutions is not subject to class-actions; shareholders contest resolutions essentially on their own. Nevertheless, the tendency is for many shareholders to be involved in filing rescission suits, in approx. 7 per cent of our sample 20 or more shareholders are involved.

Of 271 shareholder meetings with contested resolutions, for which the names of the suitors are at least partially disclosed, the twenty most active suitors are reported to be involved in 191 of the cases, i.e. 70.47 per cent. These most active suitors typically focus on material resolutions. If settled, these transactions may go through within 9 to 10.5 months on average, otherwise they will remain in court for an average of 15.9 months.

22 The dataset comprising resolutions of 583 shareholder meetings whose contest was reported in the period of 22 September 2005 - the date of the coming-into-force of mandatory disclosure of settlements regarding contested shareholder meetings under s. 248a of the Aktiengesetz - through 31 January 2009. However, the dataset is likely to be incomplete in that not all issuers report the respective suit, related court decisions or the respective settlement, or details thereof. Consequently, the numbers of shareholder meetings on which the data is reported vary.

23 The dataset offers just one example: The four contestors of Rinol AG’s shareholder resolutions from 31 August 2005 held 2,152 shares together (i.e. in total, 0.137 per cent of the nominal capital). T Baums, A Keinath, D Gajek, "Fortschritte bei Klagen gegen Hauptversammlungsbeschlüsse? - Eine empirische Studie" (transl. "Rescission Suits – Steps Forward? – An Empirical Analysis", ILF Working Paper 7/2007, at 44 (partly published in (2007) DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1629), collected the shareholdings in 13 proceedings. According to this study, the suitors owned 1 to 20,000 shares per person, representing a total value of EUR 3.96 to EUR 143,460.00. Moreover, Vermeulen and Zetsche find references to the size of the suitors’ shareholdings in the judicature. E.g. the five suitors contesting Nanoinvest’s rights issue of 2007 held 53 shares together (i.e. 0.019 per cent of the share capital), Landgericht Frankfurt am Main, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 2007, 949; in BGHZ 122, 211¶20, the Bundesgerichtshof is concerned with a rescission suit based on five shares; in Oberlandesgericht Stuttgart of 10 January 2001, 20 U 91/99, supra note 9, the initiator of the rescission suit did not hold a single share, but financed a shareholder’s suit; later, in the same proceeding, the initiator asked the suitor for a cession of 1 or 2 shares valued at approx. EUR 4 each.
In addition, management avoids the risk associated with rescission suits: of 100 rescission suits which went to trial, for which the results are reported, the suit was rejected in 64 cases (64 per cent); in 27 cases the contest was completely successful (27 per cent), and in 8 cases at least some of the resolutions passed at the meeting were declared invalid (8 per cent). The company’s risk of defeat is thus 35 per cent. In contrast, in less than 3 per cent of the settlements, the company conceded by cancelling the transaction. A quick settlement avoids both undue delays and the risk of defeat.

The scholars find **five types of issuer commitments**:

i. In 5.5 per cent of the cases the company agrees to settle the case;  

ii. Some kind of asset transfer takes place between the company or its controlling shareholder and the suitors, and/or all shareholders, in approx. 50 per cent of the settlements. In 40 of 135 disclosed settlements (28.99 per cent), the issuer or a controlling shareholder conceded a premium from between 1.18 per cent (Bremer Woll-Kämmerei AG) to 76.57 per cent (Allbecon AG) on top of the previously offered compensation to **all** minority shareholders. Out of the relevant sample of 109 settlements where the dataset includes details of additional benefits granted, in 3 cases (2.75 per cent) issuers committed to an additional dividend for holders of preference shares; in 19 cases (17.43 per cent) an additional subscription right, the organization of a trade in its subscription rights, or the option to purchase securities on favorable terms was conceded.  

iii. In many settlements (22.93 per cent), we find the issuer’s or controlling shareholders’ commitment to disclose additional information on its website. None of the information was material in that it prompted a current change report. Most information was public, albeit not on the corporate website but in the Commercial Register, or already presented at the shareholders meeting, partially, or in full.  

iv. Substantial corporate governance improvements were conceded in 3 cases, and the apparent wrong was revised by the beneficiary conceding its advantage to the corporation four times.  

v. The remainder of the settlements resulted in technical adjustments to the corporate charter or cancellation of the transaction.

In the 19 Dutch proceedings resulting in 52 decisions rendered in the period 2002-2008, in which shareholders (or holders of depository receipts) applied for an inquiry into the policy and management of a listed company, Vermeulen and Zetzsche identified **four types of complaints**:

i. conflicts over the use of defensive mechanisms in takeover cases (26 per cent);  

ii. cases where members of the board of management or the supervisory board had conflicts of interest (26 per cent);  

iii. cases in which a reorganization (merger, dissolution, spin-off) was proposed by either management or the minority shareholders (37 per cent);  

iv. cases where an explanation of the law or articles of association were discussed and debated (11 per cent).

It appears that **minority shareholders** use the inquiry proceeding in response to conflicts over corporate goals and strategy, planned acquisitions, and poor performance. In the context of listed companies, each case has its own unique facts. We have not found any evidence of boilerplate language in the requests for inquiry proceedings and injunctive reliefs.
The most **common motivations for requesting an inquiry and asking for a preliminary injunction** are ‘undervaluation of the company’, ‘corporate governance’, and ‘the interest of the shareholders’. We have not found any evidence or indication that side-payments were paid to neutralize the threat of an inquiry.

The costs of the inquiry will be borne by the company. In this respect, it should be noted that the Enterprise Chamber can determine the maximum amount of the costs of the inquiry as well as the remuneration of the investigators. If the Enterprise Chamber decides that the request was not made on reasonable grounds, the company could file a suit for damages caused by the inquiry application. If the report indicates an “abusive” request, the Enterprise Chamber may rule that applicants should reimburse the inquiry costs to the company. These measures arguably reduce the possibility of using the inquiry proceeding for personal financial benefits. The fact that Vermeulen and Zetzsche have not found any decision in which the Enterprise Chamber decided that the company could recover the costs from the applicants indicates that our dataset does not seem to include clear-cut abusive inquiry proceedings.

In 42 per cent of the 19 requests submitted by (minority) shareholders institutional investors, such as pension funds, mutual funds and hedge funds were involved. In 32 per cent these investors were the principal applicants. In 26 per cent of the cases, the Dutch Investors’ Association acted as an interested party supporting the institutional investors. Institutional investors tend to act in concert with other institutional investors. If institutional investors act as faithful representatives of the overall shareholder constituency, the involvement of a group of professional and sophisticated shareholders signals a rightful intervention in order to counter management failure.

In 47.3 per cent of the requests in our sample, the Dutch Investors’ Association (Vereniging van Effectenbezitters, VEB) could be viewed as the leading applicant of the inquiry. As the Investors’ Association does not easily meet the threshold for initiating an inquiry, they rely on other shareholders being willing to join as an applicant. In 50 per cent of these cases they were supported by institutional investors.

The German dataset does not include the briefs filed by the claimants. Based on the anecdotal evidence from judges and defendants’ lawyers, as well as the personal experience of one of the authors who had access to files of approx. 20 contested shareholder meetings, many of the briefs filed for contesting shareholder resolutions include boilerplate language and carbon copy complaints. While some suitors have a reputation for well-grounded complaints, the majority of briefs are of a boilerplate and formalistic nature. However, given the deviation from the statistical method, this conclusion necessitates a cautionary note.

In Germany at least one of the top 20 claimants (or their associates) was reported to be involved in 191 of 271 proceedings, i.e. in 70.47 per cent of the sample. Each of the top 5 claimants was involved in more than 25 per cent of the overall number of proceedings reported. Considering the personal or legal relationships of these Top claimants shows that the most active suitors participate directly or indirectly in as much as 40 per cent of all rescission suits in our sample. German governmental agencies do not have jurisdiction over intra-corporate matters.

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24 In principle, the public prosecutor, labour unions and shareholders can ask the Enterprise Chamber to conduct an inquiry into the policy of a company if it suspects mismanagement.
Rescission suits find very low support among investor protection agencies: Our dataset does not comprise a single case where the largest German investor protection association, the Deutsche Schutzwirtschaft für Wertpapierbesitz e.V. (‘DSW’), is involved, while the DSW is active in evaluation proceedings. The second largest investor protection association, the Schutzwirtschaft der Kapitalanleger e.V. (‘SdK’), participated in 6.28 per cent of the cases where the parties’ names are reported (12 out of 191).

Conclusion
Shareholder activism can be measured inter alia by the assessment of shareholder attendance and voting at general meetings, shareholder resolutions and shareholder litigations. As to the first, many corporate governance codes underline the importance of active involvement of shareholders at company’s general meetings, resulting in considerably high attendance rates in Europe. In particular, the average attendance rate in all countries in this study is more than 50 per cent. In highly concentrated firms, attendance levels can even exceed 90 per cent – e.g. in France and Spain – since large controlling majority shareholders appear to be always present at the meetings. In contrast, very low attendance levels can also be found as in Belgium, since of the eight companies with an attendance of less than 20 per cent, six are Belgian companies. The significant differences in attendance between companies are hard to explain, yet the results show that there is a positive relationship between the shareholdings of large shareholders and the attendance at general meetings. Large shareholders do not take the risk of unexpected voting turnouts at the general meeting.

The differences in attendance of general meetings can be assigned to the different types of company. In particular, the average attendance rate is significantly higher in companies with a controlling shareholder; the attendance at meetings of companies with a dispersed ownership structure is lower but still passes the threshold of 50 per cent; and the lowest attendance rate can be found in the group of companies with a large shareholder with an equity stake between 10 and 30 per cent and without the presence of other large shareholders. Smaller shareholders seem to be discouraged from attending general meetings when a large shareholder seems to have – at least ex ante – the majority of the votes at the meeting. The differences in size of the voting block of the largest (non controlling) shareholder can influence the behaviour of the other shareholders. Lowering the difficulties for smaller shareholders to participate in the general meeting, like a direct invitation of the company, should be considered.

Next to the attendance of large shareholders at general meetings, the voting behaviour of shareholders at general meetings can also serve as an indicator for shareholder activism. Adding to prior research, our dataset shows that most resolutions are approved with an overwhelming majority of more than 90 per cent, while the average minimum voting turnout is more than 50 per cent turnout in Belgium, but less than 50 per cent in France and the UK. An important variable in explaining the differences in voting turnouts is the type of company. Dividing the dataset into companies with dispersed ownership and companies with concentrated ownership, our analysis shows that in concentrated companies the approval turnouts are much higher but under the assumption that the controlling shareholder approves the resolutions, the dissenting voice of the other shareholders is then higher. The analysis shows that shareholder activism via attending the general meeting as well as via voting is in many countries and companies relatively low.
Another technique of shareholder activism is the submission of resolutions to the general meeting of shareholders, which in Europe, however, hardly occurs. The analysis illustrates that shareholder sponsored proposals could not be found in the sample of Belgian or Dutch companies. Compared to the US, Cziraki, Renneboog and Szilagyi (2009) even conclude that the amount of shareholder proposals in Europe is substantially lower than in the US. The proposals that are being submitted by shareholders primarily focus on corporate governance issues and especially target underperforming firms with more concentrated ownership. Regardless of the activist aim, however, it is stated that most proposals in continental Europe are unsuccessful and exhibit a negative stock market reaction, presumably because the market reacts to the fact that the shareholder proposal signals a badly performing company or a company with severe agency problems.

The last mechanism of shareholder activism that is dealt with in this chapter are shareholder litigation suits. Vermeulen and Zetsche (2009) have only recently revealed in their study on shareholder litigation that substantial rates of litigation appear in the Netherlands and Germany. In the Netherlands, out of 23 inquiry requests with respect to public companies, injunctive relief was requested in 21 of these cases, while a preliminary remedy was granted in 57 per cent of these cases. The top 3 Dutch preliminary remedies are (1) the appointment of independent board members; (2) the prohibition of voting on particular agenda items; and (3) the deviation from the articles of association. Suitors are often large shareholders or shareholders acting in concert assisted by important Dutch law firms.

The practice of shareholders using the German Anfechtungs- und Nichtigkeitsklage differs from the practice of contested resolutions in other jurisdictions. First, approximately 12 per cent of general meeting resolutions are contested every year. Second, suitors’ ownership levels only rarely pass the threshold of 3 per cent, but they still have the ability to file a suit. Third, shareholders always sue in their own name and on their own behalf, assisted by local law firms. Finally the suits are often settled and relate more to technical, legal issues than to strategic issues.
4. CASE STUDIES

In this last part of the study we provide an analysis of shareholder activism in ten large European companies in five European member states. The ten companies have all experienced specific shareholder interventions. As shareholder activism is most often related to hedge funds or private equity funds, but at the same time should not be limited to these types of investors, we have deliberately opted to include other types of shareholders in the analysis, like individual interventions, concerted actions and government rescue. The ten companies that were selected are:

<table>
<thead>
<tr>
<th>Atos Origin (FR)</th>
<th>Fortis (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natixis (FR)</td>
<td>Heidelberger Cement (D)</td>
</tr>
<tr>
<td>Cadbury Schweppes (UK)</td>
<td>Volkswagen (D)</td>
</tr>
<tr>
<td>Royal Bank of Scotland Group (UK)</td>
<td>Stork (NL)</td>
</tr>
<tr>
<td>London Stock Exchange (UK)</td>
<td>ASML (UK)</td>
</tr>
</tbody>
</table>

4.1 Atos origin

Atos Origin is one of the largest IT services providers in the world. It particularly focuses on the management of IT infrastructures and card payment processes. Next to the management of IT structures the company is also very active in system integration. Approximately two thirds of its sales are realized in Europe, in particular France, the United Kingdom and the Netherlands, the rest of the sales come from all over the world. Worldwide sales are above 5 billion euro and the company employs more than 50,000 people.

Atos Origin was established in 2000 through the merger of the French company Atos and the Dutch company Origin. Atos was formed by the merger of Axime and Sligos in 1997. The latter companies were also formed after mergers: Axime was established in 1991, Sligos in 1970. Otis resulted from the 1996 merger of BSO/Origin and Philips’ Communications and Processing (CandP) Services.

4.1.1 Development of the ownership structure

As the foregoing description has illustrated, Atos Origin developed via multiple mergers and acquisitions. This development can be traced in the development of the ownership structure. Table 4.1 illustrates that the 2000 merger with Origin made Philips the largest de facto controlling shareholder. The policy of Philips was to step out of the company, which occurred during 2004 and 2005. Atos Origin retained its position as a company with a widely dispersed ownership structure until late 2007 when two funds, Centaurus and Pardus, who built a large stake in a relatively short period of time, announced their concerted actions.
Their aim was to increase the shareholder value of the company for which purpose they used the mechanism of directors. The general meeting appointed two supervisory board members – both employees of the two funds - nominated by Centaurus and Pardus. The concerted parties further announced that market opportunities would be a driver for their shareholdings but that the aim was not to acquire control and take over the company. In June 2008, one week after the general meeting of shareholders that supported the shareholder proposals (cf. infra), PAI private equity partners, related to the investment activities of Paribas, acquired approximately 18 per cent of Atos Origin and by the end of the year their shareholding exceeded 22 per cent. Their notification of the acquisition announced their intention to support the nomination of two supervisory board members. It can be argued that the Paribas Groupe that disposed of its shareholding at the turn of the millennium returned and the acquisition of such a large stake in such a short period of time resembles a white knight defensive mechanism via an old ally.

Table 4.1.: Development of the shareholder structure of Atos Origin

<table>
<thead>
<tr>
<th></th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
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<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>apr-09</th>
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<tbody>
<tr>
<td>Philips</td>
<td>48,70%</td>
<td>48,60%</td>
<td>44,70%</td>
<td>44,60%</td>
<td>15,40%</td>
<td>22,60%</td>
<td>22,60%</td>
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<tr>
<td>PAI Partners</td>
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<tr>
<td>Centaurus Capital LP</td>
<td>6,20%</td>
<td>4,90%</td>
<td>2,10%</td>
<td>5%</td>
<td></td>
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<tr>
<td>Pardus Capital</td>
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<tr>
<td>concert Centaurus and Pardus</td>
<td>20,00%</td>
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<tr>
<td>Groupe Paribas</td>
<td>12,80%</td>
<td>6,20%</td>
<td>4,90%</td>
<td>2,10%</td>
<td>5%</td>
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<tr>
<td>Threadneedle</td>
<td>8,20%</td>
<td>2,80%</td>
<td>5%</td>
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<td></td>
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<tr>
<td>Janus</td>
<td>4,90%</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Fidelity</td>
<td>1,60%</td>
<td>0,60%</td>
<td>0,70%</td>
<td>4,90%</td>
<td>3,20%</td>
<td>0,50%</td>
<td>2,20%</td>
<td>3,10%</td>
<td>3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salariés Employees</td>
<td>3,70%</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>KPMG partners Audit</td>
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</table>

Source: own research based on annual reports, websites of the involved parties and the database of AMF.

On January 5, 2009 the concert parties Centaurus and Pardus ended their agreement and Centaurus Capital started to dispose of a large part of the shares.

4.1.2 Development of performance

The most important argument Centaurus and Pardus developed after the acquisition of a large stake in Atos Origin was underperformance. The reasons why they started to invest in Atos Origin is less clear. It is argued that the prospects in the IT industry in general and Atos Origin in particular supported there investment behavior. The underperformance was, in the opinion of the large shareholders, due to strategic choices of the board of directors which were not challenged by the supervisory board. The board of directors’ strategy, which involved remaining active in all different fields of the industry, was not generating shareholder value. Documenting their theses, Centaurus and Pardus disclosed a detailed overview of the performance of Atos Origin in comparison with its peers, as selected by these shareholders.
Atos Origin is part of the research presented in the former parts. The performance of the company is presented in relation to peers, the French market, as well as in relation to other companies with the same type of ownership structure in the next table. Compared to a large number of peers, only Tobin’s Q is significantly lower than the industry average. Return on assets as well as return on equity of Atos Origin over the period 1999-2007 is higher than the industry average. Compared to the performance of other French companies in the database as well as of other companies with a similar dispersed ownership structure, Atos Origin is performing on average.

Table 4.2.: Summary of performance of Atos Origin (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>number</th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atos origin</td>
<td>4,04%</td>
<td>1,37</td>
<td>6,38%</td>
<td></td>
</tr>
<tr>
<td>Industry</td>
<td>-5,15%</td>
<td>2,70</td>
<td>38,50%</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>5,74%</td>
<td>1,29</td>
<td>-4,64%</td>
<td></td>
</tr>
<tr>
<td>Ownership type</td>
<td>4,33%</td>
<td>1,65</td>
<td>5,12%</td>
<td></td>
</tr>
</tbody>
</table>

Source: own research based on datastream

4.1.3 Shareholder activism: activities

After the acquisition, Centaurus and Pardus argued that they started private negotiations but the board was reluctant to discuss the different strategic issues with the company. One of the strategic issues was the search for takeover offers, but this process was stopped by the board. The board supported a plan to enhance organic growth but this plan was not backed by the two shareholders. Next, the investors disclosed a public letter with information regarding the different views on the strategic issues. Their position as shareholders allowed them to issue shareholder proposals to have 5 supervisory board members elected, two representatives of the investors and three other directors, and to dismiss another board member.

4.1.4 Results of the activism

The proposals were supported at the general meeting of shareholders with a large majority of the votes. 61 per cent of the shares were present or represented. As the board membership of the two representatives of Centaurus and Pardus was supported by 83 per cent and 89 per cent, it follows that more than 50 per cent of all shareholders supported the proposals of Centaurus and Pardus, an absolute majority.

The board of directors had postponed an earlier general meeting when it was discovered that the employees’ fund had changed position and was acting against the proposals of the board.
4.2 Natixis

Natixis is a large financial institution, which was formerly known as Natexis (Banques Populaires), its predecessor until 2006. It serves as an investment bank as well as a finance provider and also provides the banking service activities of two groups: Banque Populaire and Caisse d'Epargne. The bank has five main activities:

- Finance and investment
- Asset management
- Capital investment (private equity) and private asset management
- Financial services and insurance
- Clients (financial management)

Like most financial institutions, Natixis suffered from the financial crises. Over a number of years the company flourished with large profits of more than 800 mio. in 2004, more than 1 bn. in 2005, more than 2 bn. euro in 2006, profits decreased in 2007 to less than 1 bn euro and to a loss of almost 3 bn. euro in 2008. Natixis has announced that it will refocus its strategy towards “client-driven” revenues. It should be noted that this new strategic approach has been announced by several financial institutions.

4.2.1 Development of the ownership structure

Natixis and its predecessor Natexis was always a controlled company with the largest shareholders, which acted in concert, owning approximately 70 per cent to 85 per cent of the votes. Some small shareholders owned between 0,5 per cent and 3 per cent of the votes, further reducing the liquidity of the shares. As Natixis is a large company it still is considered as an interesting investment opportunity for institutional investors.

Table 4.3.: Development of the shareholder structure of Natixis

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Banque Fédérale des Banques Populaires (BFBP)</td>
<td>65,51%</td>
<td>51,98%</td>
<td>82,02%</td>
<td>80,22%</td>
<td>84,69%</td>
<td>83,84%</td>
<td>84,88%</td>
<td>34,44%</td>
<td>34,66%</td>
<td>35,62%</td>
</tr>
<tr>
<td>Maine Services (subsidiary BFBP)</td>
<td>2,52%</td>
<td>0,98%</td>
<td>0,85%</td>
<td>0,85%</td>
<td>0,83%</td>
<td>1,48%</td>
<td></td>
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<tr>
<td>Caisse Nationale des Caisses d'Epargne et de Prévoyance Banques Populaires régionales et Casden BP</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>34,44%</td>
<td>34,66%</td>
<td>35,62%</td>
<td></td>
</tr>
<tr>
<td>DZ Bank</td>
<td>19,12%</td>
<td>31%</td>
<td>2,55%</td>
<td>3,26%</td>
<td>2,72%</td>
<td>2,68%</td>
<td>1,91%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intesa San Paolo Holding</td>
<td>2,42%</td>
<td>1,49%</td>
<td>1,22%</td>
<td>1,27%</td>
<td>1,11%</td>
<td>1,09%</td>
<td>1,87%</td>
<td>1,88%</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Employees (FCPE)</td>
<td>2,46%</td>
<td>1,68%</td>
<td>4,05%</td>
<td>2,98%</td>
<td>2,19%</td>
<td>1,38%</td>
<td>1,40%</td>
<td>1,68%</td>
<td>1,68%</td>
<td>-</td>
</tr>
<tr>
<td>New Eagle Holdings LLC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0,60%</td>
<td>0,70%</td>
<td>0,53%</td>
<td>-</td>
</tr>
<tr>
<td>ASB Holdings Neptuno</td>
<td>1,96%</td>
<td>1,71%</td>
<td>1,80%</td>
<td>1,80%</td>
<td>1,80%</td>
<td></td>
<td>0,43%</td>
<td>0,50%</td>
<td>-</td>
<td></td>
</tr>
</tbody>
</table>

Source: own research based on annual reports, websites of the involved parties and the database of AMF.
4.2.2 Development of performance

In July 2008 Natixis announced that it would increase its capital. The prospectus states that the capital base of Natixis is still sufficient to meet its requirements for the next 12 months. However, in particular in relation to finance and investments activities, there are a number of assets that contain structural risks (CDO and US insurance) and the company would like to sell these activities to the extent the market conditions support the sale. As these market conditions are very bad, it can be assumed that the disposal will not take place and Natixis will remain subject to the volatility of the market. The capital increase would allow it to increase the capital adequacy ratio to a more comfortable 9 per cent.

In December 2006 the shares of Natixis were traded at around 15€. In 2007 the price began to fall and ended around 9€. By the end of 2008, the stock price further declined to 1.4€. The capital increase that took place in September 2008 occurred at a price of 2.25€, at that moment in time it was at a discount of approximately 60 per cent. Given the large controlling blocks of the two major shareholders the share issue could – ex ante - be seen as a major shift of benefits to the controlling owners. As the stock price further declined after the share issue, to a low of 1.4€ at the end of the year and hit its lowest share price in Marche 2009 of 0.76 € and was traded at around 2€ in May 2009, the shift of benefits to the major shareholders ex post did not occur.

As Natixis is a bank, comparing performance with other types of companies may not be helpful. However, our database contains 43 other banks with which a comparison is possible. The results are mixed. Whereas the return on assets is significantly higher for the peers of Natixis in six European countries as is the return on equity, Tobin’s Q of Natixis is the exact average. In comparison with companies with similar ownership structure over the last eight years as well as the country average, the return on assets of Natixis is significantly lower. However the return on equity of Natixis is much higher than the return on equity of the other French companies in the sample. All in all, these results illustrate that the performance of Natixis was moderate.

Table 4.4.: Summary of performance of Natixis (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>number</th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natixis</td>
<td>1</td>
<td>0,48%</td>
<td>0,52</td>
<td>8,28%</td>
</tr>
<tr>
<td>Industry</td>
<td>43</td>
<td>2,34%</td>
<td>0,51</td>
<td>12,22%</td>
</tr>
<tr>
<td>Country</td>
<td>90</td>
<td>5,74%</td>
<td>1,29</td>
<td>-4,64%</td>
</tr>
<tr>
<td>Ownership type</td>
<td>41</td>
<td>2,49%</td>
<td>0,77</td>
<td>8,42%</td>
</tr>
</tbody>
</table>

Source: own research based on datastream
4.2.3 Shareholder activism: activities

The announcement of the capital increase in July 2008 resulted in a public letter from Greenlight Capital, a Nasdaq listed company. Greenlight Capital Re is a holding company that was incorporated in July 2004 under the laws of the Cayman Islands, and operates as a specialty property and casualty reinsurer. It is generally considered as a hedge fund and was actively selling Lehman Stock before it collapsed.

The letter stated that the capital increase “is enormously destructive to Natixis’ Net Asset Value (“NAV”) per share, earnings per share, economic value, and just about any measure that one would consider in valuing Natixis shares.” Greenlight Capital argued that alternative mechanisms were available. More particularly, the large stakes in the parent banks of 20 per cent could be used. This alternative scheme would be efficient from a capital adequacy perspective as it would not only generate cash but it would also reduce the limitation in Tier I capital credit for the CCI stake.

The letter was preceded by private meetings. Greenlight capital is said to be pushing for further private negotiations but it had not yet received any response from the management of the company.

Greenlight Capital never disclosed its shareholdings in Natixis. Its annual report does not refer to the shareholding in Natixis. As it is unlikely that Greenlight Capital acted in breach of the law, the total shareholdings of Greenlight capital must be less than 5 per cent of all issued shares.

4.2.4 Results of the activism

There are no results in relation to the activism by Greenlight Capital Re to be reported. At the general meeting of Natixis in April 2009, there were no resolutions (with the exception of the resolution regarding the delegation of powers to the board to issue shares to the employees) voted down. Neither did Greenlight Capital initiate any shareholder resolution.

4.3 Cadbury Schweppes

Cadbury Schweppes plc – the former holding company of the Cadbury Group – was a London and New York Stock Exchanges company that was formed by a merger between Cadbury (confectionery) and Schweppes (beverages) in 1969. The company concentrated on the business of confectionary and beverages manufacturing on the global market and operations were divided into five regional units, being Americas Beverages, Americas Confectionery, Europe, Middle East and Africa Confectionery, Asia Pacific and European Beverages, the latter being separated from the company in 2005. Cadbury Schweppes' product portfolio had a worldwide market outlet and included brands such as Cadbury, Schweppes, Halls, Trident, Dr Pepper, Snapple and Trebor. The Group employed over 70,000 people.

On 7 May 2008, Cadbury Schweppes plc ceased trading on the LSE after separating its American beverages unit Dr Pepper Snapple. Completion of the demerger resulted in the Cadbury Schweppes plc shares being divided into two new companies, being Cadbury plc and Dr Pepper Snapple Group. Inc (DPSG).
At present, Cadbury plc is the new holding company of the Cadbury Group, concentrating on the business of confectionary manufacturing, with a portfolio consisting of chocolate, gum and candy brands of which Cadbury, Trident and Stimorol are a few examples. On the international scale, Cadbury plc is the second largest confectionary company, occupying a 10.5 per cent share of the global market and reporting $150bn of retail sales in 2008. The company employs around 45,000 people and operates in 60 different countries.

4.3.1 Development of the ownership structure

In the years preceding the demerger, Cadbury investors were strongly convinced of the corporation’s potential for generating higher shareholder value by separating its two core business operations, being the global confectionary business and the North American beverages manufacturing. In October 2006, however, Cadbury informed its investors that it did not intend to dispose of any business unit and that no such spin-off was being considered.

Table 4.5.: Development of the shareholder structure of Cadbury Schweppes

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Morgan Stanley</td>
<td>3.00%</td>
<td>3.00%</td>
<td>3.00%</td>
<td>3.00%</td>
<td>3.47%</td>
<td>7.18%</td>
<td>4.87%</td>
</tr>
<tr>
<td>Legal &amp; General</td>
<td>3.00%</td>
<td>6.00%</td>
<td>5.77%</td>
<td>4.95%</td>
<td>4.01%</td>
<td>5.04%</td>
<td>4.01%</td>
</tr>
<tr>
<td>Franklin Resources</td>
<td>3.00%</td>
<td>5.77%</td>
<td>4.95%</td>
<td>4.01%</td>
<td>3.47%</td>
<td>3.47%</td>
<td></td>
</tr>
<tr>
<td>Trian</td>
<td>3.00%</td>
<td>3.01%</td>
<td>3.47%</td>
<td>3.47%</td>
<td>3.47%</td>
<td>3.47%</td>
<td></td>
</tr>
<tr>
<td>Barclays</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Van Kampen Inv.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: own research based on annual reports

In March 2007, a 3 per cent stake in the share capital of Cadbury Schweppes was acquired by Trian Partners Fund, a US activist hedge fund created by Nelson Peltz in 2005. Thereby, the investor became one of the company’s biggest shareholders, following Morgan Stanley Investment Management holding 7.18 per cent, Legal & General Investment Management holding 5.04 per cent and Franklin Resources holding 4.01 per cent of Cadbury shares respectively. While Trian did not expose any intentions of active involvement in the company and confined itself by stating that its intentions did not go beyond that of investing in an undervalued company, it was very much expected that the investor would either pursue a spin-off or require strategic changes in the underperforming arms of the company’s portfolio.

4.3.2 Development of performance

Contrary to the general sentiments that Trian’s share acquisition in Cadbury Schweppes was of an activist nature, the investor indicated that it was ‘undervaluation’ that inclined the fund to acquire a stake in the corporation. In reality, the retail sales of Cadbury’s confectionery division outperformed the sales of its beverages, while the Beverage Digest statistics revealed that the total market for soft drinks in the US experienced a 0.06 per cent decline in 2006, in contrast to the 0.02 per cent decline in 2005.
In addition, even though Cadbury’s market share increased as opposed to Coca Cola and PepsiCo’s market share decreases, Cadbury’s beverages division in the US was still considered to be less valuable in view of the former companies’ global market outlet. In addition, Cadbury’s management renounced its 2006 profit targets, while the company’s shares showed a 3 per cent fall in the same year which altogether resulted in the long-term profitability of the corporation being challenged by its investors.

Table 4.6.: Summary of performance of Cadbury Schweppes (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>number</th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cadbury</td>
<td>11,40%</td>
<td>1,56</td>
<td></td>
<td>21,98%</td>
</tr>
<tr>
<td>Industry</td>
<td>6,60%</td>
<td>0,97</td>
<td></td>
<td>9,52%</td>
</tr>
<tr>
<td>Country</td>
<td>2,93%</td>
<td>1,55</td>
<td></td>
<td>2,63%</td>
</tr>
<tr>
<td>Ownership type</td>
<td>4,04%</td>
<td>1,53</td>
<td></td>
<td>5,79%</td>
</tr>
</tbody>
</table>

Source: own research based on datastream

Overall the company did not perform badly. Compared to its peers all three performance measures are well above the average. The same finding goes when comparing the company with other companies with a similar ownership structure or other UK companies.

4.3.3 Shareholder activism: activities

The acquisition by Trian of 3 per cent of Cadbury’s shares was followed by an announcement by the latter only two days later, indicating that the company would split its confectionery and beverages divisions. Cadbury would not react to any assumptions conceiving that the spin-off was the outcome of private negotiations between the board and Trian, while the company’s chief executive stated that the separation had already been contemplated for two to three years and that the split was a mere result of these prior considerations.

This statement, however, was challenged by Anthony Bolton – a UK Fidelity fund manager – who brought up the fact that Cadbury had underlined its business strategy to consist of both confectionery and beverages in February 2007 when it announced its annual report over 2006. Hence, according to Bolton, the sudden change in strategy only two days after the announcement of Trian having acquired a mere 3 per cent stake in the company in March 2007 led to the impression that Cadbury was “afraid to have a public fight with an activist who had generally succeeded in getting his way”. In fact, Cadbury’s explanation seems rather believable, taking into consideration that the desire among other Cadbury investors to split the corporation existed even before the acquisition of shares by Trian in March 2007.

In December 2007, however, Trian joined forces with the Qatar Holding LLC (a sovereign wealth fund) in order to increase its stake in Cadbury Schweppes, which resulted in Trian’s economic interest in Cadbury being raised from 3.4 per cent to 4.5 per cent. Immediately after, Trian sent the Cadbury Schweppes board a public letter demanding that the company increase its financial performance. Indicating that the fund had already been in dialogue (private negotiations) with the Cadbury board in the nine months preceding the letter and that it supported many of the company’s plans, Trian said it was the stock price decrease that was the main source of concern.
In particular, the letter continued that Trian believed Cadbury’s share value could be enhanced to being worth 60 per cent above the then prevailing share price. For that reason, the fund required Cadbury to accomplish “meaningful improvement” in 2008; to lift profit margin targets for its confectionery business to the “high teens” by 2011; to reduce costs more intensively and transform the beverage business; to appoint new members to the board and announce a new chairman in-waiting to replace outgoing chairman Sir John Sunderland; and to recapitalize the balance sheet and return capital to shareholders.

The hedge fund warned that it would “look to become significantly more active in evaluating all of its alternatives as a large shareholder” – *i.e.* by imposing a takeover threat in order to acquire both the confectionary and beverages divisions – if Cadbury failed to make progress in achieving the targets as mentioned above.

### 4.3.4 Results of the activism

As indicated above, Cadbury decided to separate its confectionery and beverages unit only two days after the activist hedge fund Trian had acquired a 3 per cent stake in the company and thereafter announced that it was considering either a demerger or a sale of its North American beverages unit. It is speculated that the dialogues (private negotiations) between Trian and Cadbury had convinced the company to demerge rather than sell its beverages division. At the general meeting held on 11 April 2008, the demerger was approved by 99,39 per cent of the company’s shareholders.

As for Trian’s demands in its letter to the board for achieving targets in the pursuit of enhancing firm performance, the fund had been able to gain support from the company’s other large shareholders, of which Franklin Resources Inc (holding 4.01 per cent) and Harris Associates (holding just over 2 per cent) publicly expressed their positive stance towards the targets of the hedge fund’s activist efforts.

### 4.4 The Royal Bank of Scotland Group

The Royal Bank of Scotland PLC was founded in 1727. For more than 100 years it developed banking activities in Scotland. In 1874 it opened its first office in London. From then on, the Bank not only saw an internal growth but also focused on external growth. The most famous acquisition was the takeover of National Westminster Bank, the biggest banking takeover ever in Britain. The Royal Bank of Scotland won the fierce take-over battle in 2000. In 2005 the bank formed a strategic partnership with Bank of China. In 2007 it was one of the three banks that won the takeover battle for the largest Dutch bank ABN-Amro (see also the Fortis case). The stake of RBS in this said to be around 15 bn.€.

The RBS Group operates a wide variety of banking brands offering personal and business banking, private banking, insurance and corporate finance throughout its operations located in Europe, North America and Asia.

The financial crisis hit the second largest UK Bank hard. On April 22 2008, the day before the 2008 general meeting, it announced a share issue of approximately 12 bn. £. However the position of RBS deteriorated and many feared the capital position of the bank would be insufficient. The issue took place in October 2008 and was backed by the UK government.
As the stock price tumbled the share issue, at a price which was above the stock market price, was a total failure: only 0,24 per cent of the shares were subscribed. The UK government subscribed the remainder and became the majority shareholder with preferential shares of approximately 58 per cent in total. Later these shares were converted into ordinary shares, providing the government with a controlling voting block of 70 per cent. At the start of 2009 further financial assistance seemed to be required. The share price further dropped and lost more than 97 per cent of its value.

### 4.4.1 Development of the ownership structure

Until late 2008, the Royal Bank of Scotland could have been considered as a typical “Berle and Means” corporation with a widely dispersed ownership structure. Investors with relatively large voting blocks were all other companies in the financial industry that came and went. That picture changed completely in 2008. The failure of the large rights issue in 2008, subscribed by the British government made the bank a subsidiary of the government.

| Table 4.7.: Development of the shareholder structure of Royal Bank of Scotland Group |
|--------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Her Majesty’s Treasury       | 57,92 %        | 57,92 %        | 57,92 %        | 57,92 %        | 57,92 %        | 57,92 %        | 57,92 %        | 57,92 %        |
| Legal & General              | 3,40 %         | 3,05 %         | 3,14 %         | 3,95 %         | 4,01 %         | 4,01 %         | 3,01 %         | 3,01 %         |
| Barclays                     | 3,02 %         | 3,05 %         | 3,14 %         | 3,95 %         | 4,01 %         | 4,01 %         | 3,01 %         | 3,01 %         |
| The Capital Group of         | 3,01 %         | 3,01 %         | 3,01 %         | 3,01 %         | 3,01 %         | 3,01 %         | 3,01 %         | 3,01 %         |
| Companies Inc.               | 3,40 %         | 3,40 %         | 3,40 %         | 3,40 %         | 3,40 %         | 3,40 %         | 3,40 %         | 3,40 %         |
| Cater Allen International    | 3,41 %         | 5,04 %         | 5,15 %         | 3,41 %         | 5,04 %         | 5,15 %         | 3,41 %         | 5,04 %         |
| Santander Central Hispano    | 3,41 %         | 5,04 %         | 5,15 %         | 3,41 %         | 5,04 %         | 5,15 %         | 3,41 %         | 5,04 %         |
| CGNU                         | 3,41 %         | 5,04 %         | 5,15 %         | 3,41 %         | 5,04 %         | 5,15 %         | 3,41 %         | 5,04 %         |

Source: own research based on annual reports

### 4.4.2 Development of performance

RBS had to announce a loss of 24 bn.£ over 2008, the biggest loss ever in the UK, and its first loss in more than 40 years. It included the write-off of 16.2 bn. for previous acquisitions, mainly ABN-Amro. Before that, the group operating profit grew between 1999 and 2007 from approximately 3 bn. £ to more than 10 bn. £ in 2007, a steady growth. The performance of RBS can be considered average if compared with its peers. Its return on equity is higher than the average returns in the financial industry but the return on assets and Tobin’s Q is lower.
Table 4.8.: Summary of performance of Royal Bank of Scotland (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>number</th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>RBS</td>
<td>1,49%</td>
<td>0,37</td>
<td>15,08%</td>
<td></td>
</tr>
<tr>
<td>Industry</td>
<td>43</td>
<td>2,34%</td>
<td>0,51</td>
<td>12,22%</td>
</tr>
<tr>
<td>Country</td>
<td>271</td>
<td>2,93%</td>
<td>1,55</td>
<td>2,63%</td>
</tr>
<tr>
<td>Ownership type</td>
<td>257</td>
<td>4,04%</td>
<td>1,53</td>
<td>5,79%</td>
</tr>
</tbody>
</table>

Source: own research based on datastream

4.4.3 Shareholder activism and results

The British government became involved as a shareholder while preventing the collapse of the second largest British bank. So far, the government has been involved in two major shareholder actions of the company. First, they restructured the board. At the start of 2008 the board of directors was composed of 17 members. In addition to the chairman there were 6 executive directors and 10 non-executive directors among which were 9 independent non-executive directors. In May 2009 only 4 of the directors were still in place, 1 executive and 3 non-executive directors, all three of them being independent. The Chairman, the CEO and very recently the CFO have been replaced. The new board of directors has only 9 members, 4 executive directors and 5 non-executive directors.

Second, at the general meeting of shareholders of April 3, 2009 the resolution regarding the remuneration report of the company was voted down with 90,42 per cent. In particular the former CEO's Pension was rejected by almost all shareholders. All the other items on the agenda were approved with more than 98 per cent. In the mean time the attendance of shareholders decreased from 66,3 per cent in 2007 to 59,9 per cent in 2008 to 56,7 per cent in April 2009. Given the development towards a concentrated ownership structure with a controlling shareholder, almost all the remaining shareholders refrained from attending the general meeting.

At the last general meeting a number of small shareholders took the floor to accuse the former directors for the failure. According to the BBC News Michael Lamoureux founded the RBS shareholder action group. He told the BBC News that shareholders had been "grossly misled in the prospectus" and were being contacted about taking a class action against RBS.

4.5 London Stock Exchange

Although trading in stocks and commodities is much older, a regulated stock exchange was established in London in 1801. In 1986, with the deregulation of the markets, the London Stock Exchange became a private company. In 1999 the company was demutualised. In July 2001 the shares of the London Stock Exchange were listed. During the last decennium consolidation of stock exchanges occurred to compete with new trading platforms. Euronext was established, joining Amsterdam, Brussels, Paris and later Lisbon and Euronext later merged with the New York Stock Exchange. In the Nordic countries OMX was further developed and became part of the Nasdaq and Borse Dubai group, the largest global network of exchanges.
In 2000 LSE even announced a merger with Deutsche Börse and proposed to work together with Nasdaq. Finally, in 2007 the London Stock Exchange merged with the Borsa Italiana after a period during which the London Stock Exchange was involved in a number of takeover attempts.

### 4.5.1 Development of the ownership structure

After demutualization and going public, the London Stock Exchange became a company with a widely dispersed ownership structure: in 2001 only two shareholders held a voting block of more than 3 per cent. In 2005 Nasdaq started to acquire a large block in the company and announced a take-over.

Table 4.9.: Development of the shareholder structure of London Stock Exchange

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Borse Dubai Limited</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>20,60%</td>
<td></td>
</tr>
<tr>
<td>Qatar Investment Authority</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15,10%</td>
<td></td>
</tr>
<tr>
<td>Kinetics Asset Mng./Horizon</td>
<td>7,10%</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>UniCredito Italiano</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7,10%</td>
<td>10,90%</td>
<td></td>
</tr>
<tr>
<td>Intesa Sanpaolo</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>5,90%</td>
<td>5,90%</td>
<td></td>
</tr>
<tr>
<td>Legal&amp;General</td>
<td>3,08%</td>
<td>3,29%</td>
<td>3,29%</td>
<td>3,29%</td>
<td>25,10%</td>
<td>30,00%</td>
<td>3,00%</td>
<td></td>
</tr>
<tr>
<td>Nightingale Acquisition Ltd.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Nasdaq)</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Credit Suisse</td>
<td></td>
<td></td>
<td></td>
<td>3,33%</td>
<td>8,83%</td>
<td>12,00%</td>
<td>3,80%</td>
<td></td>
</tr>
<tr>
<td>Bear Stearns</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deutsche Bank</td>
<td></td>
<td>5,85%</td>
<td>5,36%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Barclays</td>
<td></td>
<td></td>
<td></td>
<td>4,95%</td>
<td>3,19%</td>
<td>3,07%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Goldman Sachs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Threadneedle Investments</td>
<td>4,07%</td>
<td>4,07%</td>
<td>6,07%</td>
<td>12,01%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UBS</td>
<td>3,05%</td>
<td>9,07%</td>
<td>8,94%</td>
<td>8,87%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fidelity</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,84%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scottish Widows Inv. Partn.</td>
<td>3,18%</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Source: own research based on annual reports

However the all bids were rejected and Nasdaq announced that it was abandoning its plan to take over the LSE. After the merger with Borsa Italiana, Borse Dubai, which was established in 2007 by the Dubai Government, became the largest shareholder. Borse Dubai closely cooperates with Nasdaq. Together with Qatar Investment Authority, Borse Dubai would be able to control the company.

### 4.5.2 Development of performance

The London Stock Exchange is a **profitable company**. Different performance measures show a steady increase of profits and earnings. Underperformance was not the issue. Activism was the result of the consolidation efforts of different parties in the industry.
4.5.3 Shareholder activism: activities

Late 2005, Macquarie launched an unsolicited offer. Macquarie is an Australian listed company and provider of a wide range of financial services but is also active in other service areas, like transport, airports and utilities. Later that year Nasdaq started an unsolicited offer, which could be seen as a solution to the shrinking American IPO market and the flourishing UK IPO market, but all offers were rejected by the board of directors and the shareholders. Nasdaq began divesting its stake and sold parts large parts to Borse Dubai Limited. In the mean time to two hedge funds, Kinetics Asset Management and Horizon Asset Management built an important stake in the London Stock Exchange. The board must have been in close contact with the other shareholders in relation to taking a position in the takeover bid.

The merger with Borsa Italiana was supported, in particular by Kinetics Asset Management and Horizon Asset Management, which empowered the CEO of LSE against the dissident shareholder, Nasdaq. However, the transfer of the voting block formerly held by Nasdaq to Borse Dubai, with whom Nasdaq controls OMX, balances the relations between different stock exchanges.

4.5.4 Results of the activism

The support of the two hedge funds provided the incumbent management with sufficient power to resist the takeover plans of Nasdaq and finally resulted in the withdrawal of the offer.

4.6 Fortis

Fortis combines insurance and banking activities. Fortis was established by a merger of AMEV, a large Dutch insurer, VSB a Dutch financial group with banking activities, and later that year AG Group, a large Belgian insurance company. In 1993 Fortis acquired a majority stake in ASLK, a Belgian government owned bank and insurance company. In 1997 MeesPierson was acquired as well as another 25 per cent of ASLK. Fortis won the takeover battle in relation to the largest Belgian Bank, Generale Bank in 1998 against ABN-Amro. Via this transaction Fortis became the largest Belgian bank and the fourth largest Dutch Bank and insurance and banking activities were on equal footing. One of the largest transactions ever was the takeover of ABN-Amro in 2007. Together with Royal Bank of Scotland and Banco Santander Fortis acquired the largest Dutch Bank for more than 72 billion €, after Barclays offered 67 billion €. The Fortis share in the takeover could be valued at 24 billion €, nearly two thirds of its own market capitalization at the moment of the takeover (which had already started to decline). To finance the deal Fortis issued new shares worth more than 13 billion €. The credit crunch caused difficult liquidity problems for Fortis which were resolved in different steps with the overnight sale of its banking activities to the Belgian and Dutch government. The Belgian government sold these activities to BNP. A court ruling forced Fortis to allow shareholders to vote on these transactions. The agreements were first voted down in February 2009 and, after difficult renegotiations, a majority of the shareholders approved the transaction at the end of April 2009. At the beginning of May the European Commission approved the financial assistance given by the different governments and considered these as reasonable interventions.
4.6.1 Development of the Ownership Structure

After one of the most famous Belgian take-over battles in the late eighties, Suez acquired control over the Generale Maatschappij. The Generale Maatschappij was the most important Belgian holding company with assets in all Belgian industries, including the financial industry.

Table 4.10.: Development of the shareholder structure of Fortis

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ping An</td>
<td>4,99%</td>
<td>4,81%</td>
<td>5,70%</td>
<td>5,54%</td>
<td>6,07%</td>
<td>6,06%</td>
<td>5,52%</td>
<td>5,52%</td>
<td>4,99%</td>
<td>4,81%</td>
</tr>
<tr>
<td>Stichting VSB</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Fonds</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suez Generale</td>
<td>20,96%</td>
<td>19,66%</td>
<td>11,20%</td>
<td>10,50%</td>
<td>6,07%</td>
<td>6,06%</td>
<td>5,52%</td>
<td>4,99%</td>
<td>4,81%</td>
<td></td>
</tr>
<tr>
<td>Maatschappij</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fortales</td>
<td>5,06%</td>
<td>4,90%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Swiss Reinsurance</td>
<td>2,03%</td>
<td>1,86%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Caixa Holding</td>
<td>1,53%</td>
<td>1,49%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mutuelle Solvay</td>
<td>1,46%</td>
<td>1,42%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asahi</td>
<td>2,37%</td>
<td>0,46%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Immoran</td>
<td>0,43%</td>
<td>0,42%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Selstra</td>
<td>0,64%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: own research based on annual reports

It had large voting blocks in Generale Bank and later Fortis. As Suez focused on energy, it sold many other assets, including the holdings in Fortis. This divestment occurred while fully integrating Generale Maatschappij into Suez. The restructuring of the bi-national group in 2001 introduced Stichting VSB as a large shareholder of Fortis. Finally in 2007 the Chinese Investor Ping An became the largest shareholder in 2007. Fortis developed as a typical “Berle and Means” corporation with a widely dispersed ownership structure and a very powerful board of directors.

4.6.2 Development of performance

The company performed very well over the last ten years. However the financial crises hit the financial industry very hard and particularly affected banks that were involved in many different kinds of derivative instruments and other kinds of “toxic” assets. In a very short period of time the liquidities of these banks dropped dramatically whilst other banks could not or were not willing to provide liquidities. The lender of last resort had to enter the market to prevent large systemic failures. Fortis is an example. Table 4.11 illustrates that the performance of the company over the period 1999-2007 was, in comparison with its peers in the financial industry, lower from the point of view of return on assets and Tobin’s Q but higher if return on equity is considered. The other results (country and ownership type) are less relevant, given the differences between the financial industry and the other industries.
Table 4.11.: Summary of performance of Fortis (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>number</th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fortis</td>
<td>1,09%</td>
<td>0.39</td>
<td>18.43%</td>
<td></td>
</tr>
<tr>
<td>Industry</td>
<td>43</td>
<td>2.34%</td>
<td>0.51</td>
<td>12.22%</td>
</tr>
<tr>
<td>Country</td>
<td>84</td>
<td>6.91%</td>
<td>1.06</td>
<td>11.13%</td>
</tr>
<tr>
<td>Ownership type</td>
<td>257</td>
<td>4.04%</td>
<td>1.53</td>
<td>5.79%</td>
</tr>
</tbody>
</table>

Source: own research based on datastream

4.6.3 Shareholder activism: activities

Recent developments in relation to Fortis are very complicated as there were several levels of negotiation, discussions, proceedings etc. The most important shareholder interventions and shareholder activism can be structured as follows. As soon as the structural crises and the intervention of the Belgian, Dutch and Luxemburg governments were disclosed several shareholders started questioning the board of directors of the group. Several smaller shareholders started concerting court actions in Belgium as well as in the Netherlands. These actions resulted in the court ruling to organize a general meeting of shareholders. At the meeting of February 2009 the restructuring of Fortis was voted down. Representatives of the shareholders were invited to discuss the developments. Shareholder groups filed resolutions at general meetings, which tended to propose the election of representatives as board members.

It should be noted that notwithstanding the many different kinds of shareholder activism at Fortis, one of the most important techniques used to influence the behavior of the company, i.e. filing resolutions and attending and voting at general meetings, was not fully exploited. With the exception of the meeting deciding on the capital increase in August 2007 where the attendance was approximately 35 per cent, less than 25 per cent of the shareholders showed up at the other meetings held over the last four years. At the general meetings of shareholders most resolutions were approved with a large majority of the attending votes. Until the second half of 2008 only the resolution to grant the right to the board of directors to issue shares in case of a hostile take-over bid was rejected (50 per cent approval whereas 75 per cent is required under Belgian law). At the tumultuous general meeting in December 2008 the election of new directors was rejected. The results of the vote should be seen in light of the fact that the share price had decreased by more than 95 per cent. Fortis shares were always considered as a safe harbor for small investors. The meeting of February 2009 was organized in light of the court decision and provided shareholders with the opportunity to ventilate their view on all the transactions in which “their” company had become involved overnight (in October 2008). The rejection of the deals resulted in a modified proposal, which is generally considered as a moderate improvement, and which was agreed upon in April 2009. It should be noted that the attendance at this meeting in February 2009 was very low: 20 per cent. The rejection of the resolutions passed with a small majority. At the last meeting of April 2009 the discharge of the former directors was denied.
4.6.4 Results of the activism

The company faced serious financial difficulties, particularly when the interbanking loan facilities dried up. Government support was necessary to prevent bankruptcy. In general, an overaggressive strategy is seen as a major cause of the difficulties. Many shareholders consider the board of directors responsible for taking up too much risk. Conversely it must be noted that many decisions, like the deal to take-over ABN-Amro and the capital increase were approved by the shareholders (or at least the minority of the shareholders that attended the meetings). The capital increase to finance the deal with ABN-Amro was approved by 98 per cent of the attending shareholders.

The activism of the shareholders has resulted (so far) in the convocation of a general meeting to decide on the transactions to sell large parts of the company; in the terms of the deal with Paribas being reconsidered and in the refusal to discharge the board of directors.

4.7 Heidelberger Cement

The history of Heidelberg Cement goes back to the late nineteenth century when Schifferdecker started producing cement which continued to be its core business. Later it also developed the production of related construction materials like sand, concrete, etc. Since the nineties of the last century, Heidelberger Cement has expanded and acquired many companies in different European countries as well as in the US and Asia. Since the take-over of British Hanson it became world leader in a number of construction materials. Hanson was taken over for approximately 14 bn. € and financed via the divestment of the French subsidiary Vicat and of a stake in the French Saint-Gobain, but for the large remainder via debt.
4.7.1 Development of the ownership structure

For a long period of time Heidelberger Cement had a relatively stable ownership structure. In addition to the large non controlling shareholder Schwenk Beteiligungen GmbH\(^25\), Heidelberger was part of the typical German ownership structure with a number of large financial institutions holding important voting blocks. For Heidelberger the relationship with the German financial industry was organised via Allianz – after its acquisition of Dresdner Bank – and Deutsche Bank. In 2005 A. Merckle acquired the majority of the votes via Spohn Cement which later sold part of its controlling block to VEM Vermögensverwaltung GmbH, another company controlled by A. Merckle. A. Merckle died in January 2009 and in May 2009 Ludwig Merckle disclosed that he controls, directly or indirectly, 79,52 per cent of the votes of Heidelberger Cement.

Table 4.13.: Development of the shareholder structure of Heidelberger Cement

<table>
<thead>
<tr>
<th>Year</th>
<th>Spohn Cement GmbH</th>
<th>VEM Vermögensverwaltung mbH</th>
<th>A. Merckle Schwenk Beteiligungen GmbH Co. KG</th>
<th>AXA</th>
<th>Allianz</th>
<th>Deutsche Bank</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>77,95%</td>
<td>10,40%</td>
<td>22,00%</td>
<td>17,10%</td>
<td>8,70%</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>66,00%</td>
<td>12,80%</td>
<td>22,44%</td>
<td>17,66%</td>
<td>8,84%</td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>60,59%</td>
<td>12,80%</td>
<td>22,44%</td>
<td>17,66%</td>
<td>8,84%</td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>53,60%</td>
<td>12,80%</td>
<td>22,44%</td>
<td>10,22%</td>
<td>7,54%</td>
<td></td>
</tr>
</tbody>
</table>

Source: annual reports of the company.

4.7.2 Development of performance

Heidelberger Cement was performing well in light of the cyclical nature of the industry in which the company has its operational activities. The balance sheet provided for sufficient own funds vis-à-vis the debt and liabilities of the company. The ratio of own funds to the total of the balance sheets remained stable between 2000 and 2006 and fluctuated between 30 per cent and 40 per cent even after important acquisitions like C.B.R. in 1999 and Indocement 2001. Table 4.14 illustrates that Heidelberger Cement had similar returns on equity, returns on assets and Tobin’s Q in the period 1999-2007 as those of its peers.

Table 4.14.: Summary of performance of Heidelberger Cement (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>number</th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heidelberger Cement</td>
<td>7,52%</td>
<td>0,87</td>
<td>10,18%</td>
<td></td>
</tr>
<tr>
<td>Industry</td>
<td>22</td>
<td>7,78%</td>
<td>0,75</td>
<td>10,47%</td>
</tr>
<tr>
<td>Country</td>
<td>242</td>
<td>2,51%</td>
<td>1,53</td>
<td>-5,79%</td>
</tr>
<tr>
<td>Ownership type</td>
<td>39</td>
<td>2,54%</td>
<td>1,31</td>
<td>-1,12%</td>
</tr>
</tbody>
</table>

Source: own research based on datastream

\(^{25}\) Although it is said that Schwenk Beteiligungen GmbH is related to A. Merckle wife.
The situation changed significantly in 2006 and 2007. In 2006 the capital structure was strengthened but in 2007 the takeover of Hanson – which could be considered ill-timed - was financed to a large extent via loans. The company’s liabilities increased threefold to more than 21 bn. € whereas its capital was only strengthened by approximately 30 per cent. Although the financial structure still looked relatively healthy compared to that of many peers, the financial crises that started in 2008 made it extremely difficult to refinance such large amounts of debt. In combination with the significant downturn in the construction industry, Heidelberger Cement experienced large difficulties. From the latest quarterly reporting it can be seen that the primary concern of the board is the rescheduling of the finance rather than the business activities of the company, whereas it can be argued that the board should be able to focus on business activities.

Table 4.15.: Development of the balance sheet of Heidelberger Cement (1999-2008)

<table>
<thead>
<tr>
<th>Year</th>
<th>Capital</th>
<th>Debt and liabilities</th>
<th>Capital/total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>3,26</td>
<td>7,15</td>
<td>31,30%</td>
</tr>
<tr>
<td>2000</td>
<td>3,64</td>
<td>7,36</td>
<td>33,08%</td>
</tr>
<tr>
<td>2001</td>
<td>3,85</td>
<td>7,93</td>
<td>32,69%</td>
</tr>
<tr>
<td>2002</td>
<td>3,85</td>
<td>7,29</td>
<td>34,53%</td>
</tr>
<tr>
<td>2003</td>
<td>4,19</td>
<td>6,71</td>
<td>38,42%</td>
</tr>
<tr>
<td>2004</td>
<td>3,96</td>
<td>8,35</td>
<td>32,19%</td>
</tr>
<tr>
<td>2005</td>
<td>5,06</td>
<td>8,60</td>
<td>37,03%</td>
</tr>
<tr>
<td>2006</td>
<td>5,83</td>
<td>6,49</td>
<td>47,31%</td>
</tr>
<tr>
<td>2007</td>
<td>7,52</td>
<td>21,68</td>
<td>25,75%</td>
</tr>
<tr>
<td>2008</td>
<td>8,26</td>
<td>18,03</td>
<td>31,42%</td>
</tr>
</tbody>
</table>

Source: own research based on annual reports

4.7.3 Shareholder activism: activities

Heidelberger Cement has not – so far – experienced shareholder “turmoil” as it can be found in a number of other case studies in this report. However, there a number of similarities between Heidelberger Cement and the other cases. First, there is an important strategic issue. In the case of Heidelberger Cement the issue is the decision to acquire Hanson and become one of the largest companies in the industry. This decision required a capital increase that could not be achieved without the consent of the major shareholder after private negotiations, i.e. A. Merckle. This increase resulted in Heidelberger Cement having a different financial structure. Next, A. Merckle was involved in short selling activities in Volkswagen via his investment vehicles. These activities resulted in huge losses (and huge benefits for the counter party, Porsche). The losses eroded – at least indirectly - the financial capacities of the major shareholder which resulted in Heidelberger Cement being in a difficult position in relation to negotiation with its creditors. During the latest annual meeting all resolutions were approved with more than 97 per cent of the votes. As one of these resolutions concerned the discharge of the members of the supervisory board, and as these supervisory board members had to abstain from casting shareholder votes in relation to this resolution (this abstention included all shares related to the Merckle family), there were almost no other large or small shareholders opposing.
4.7.4 Results of the activism

After the suicide of dr. A. Merckle the negotiations with the creditors continued. The creditors granted facilities for more than 400 mio. € to the major shareholder VEM which allowed the company to avoid its most serious financial troubles. In the mean time several buy-out private equity partners are in contact with the major shareholders of Heidelberger Cement. Among the interested parties the names of PAI Partners – the major investor in Atos Origin – TPG, Bain Capital and Goldman Sachs have been mentioned.

4.8 Volkswagen

Starting in 1934 with a project assigned to Ferdinand Porsche by the German government to design a ‘volkswagen’, the actual foundation of Volkswagen AG (hereafter: VW) was in Berlin in 1937. The company business concentrates on the manufacturing of nine car brands from seven European countries: Volkswagen, Audi, Bentley, Bugatti, Lamborghini, Scania, SEAT, Skoda and Volkswagen Commercial Vehicles. Each brand is a subsidiary of the Volkswagen Group and operates individually within the scope of a product portfolio ranging from low-consumption small cars, luxury class cars, pick-ups, busses and trucks.

At present, the Volkswagen Group is the leading carmaker in Europe and one of the largest in the world, given the fact that it is in charge of a 10.3 per cent share of the worldwide market for passenger cars. The Group’s operations are spread over 61 production plants and 21 countries in Europe, America, Africa and Asia where it engages nearly 37.000 people in its manufacturing and services units. The company has retail sales in 150 countries, altogether allowing VW’s car sales to mount to € 113.8 billion in 2008 from € 108.9 billion in 2007.

4.8.1 Development of the ownership structure

Table 4.16. provides an overview of the development of the ownership structure of Volkswagen between 1999 and 2008. In September 2005, Porsche announced its intentions of taking a 20 per cent equity stake in Volkswagen and becoming the largest shareholder in the company. Porsche proclaimed that the planned share acquisition was a reaction to the European Commission’s attempt in October 2004 to bring Germany to court over the elimination of the so-called VW-law, subordinating Porsche’s co-operations with VW to the potential threat of a hostile takeover. The VW-law, adopted in 1960, protected the company from hostile takeovers by (i) prohibiting investors from the acquisition of VW voting shares in excess of 20 per cent, regardless of the actual size of their stake in the company, and by (ii) providing a blocking minority for those shareholders having 20 per cent of the votes, by requiring a majority of 80 per cent plus one share to vote for important decisions at the general meeting.

As a step towards realizing its intentions, Porsche acquired a 10.3 per cent stake in VW in September 2005, and managed to increase its stake up to 35.14 per cent in September 2008. Shortly thereafter, however, the company announced that it controlled 74 per cent of VW shares through a 42.6 per cent direct holding and an indirect holding of 31.5 per cent through the use of options and derivatives. Porsche further illuminated its target of expanding its direct stake in VW to 75 per cent in 2009. At the start of 2009, Porsche had a direct stake in VW of 50.76 per cent.
Considering that the general meetings of VW are stated to be attended by barely more than 60 per cent of the company's shareholders, Porsche's 50.76 per cent stake in VW could initially have been assumed to provide the company with a sufficient level of control and the ability to get close to its target of acquiring a 75 per cent stake of VW. In addition, the European Court of Justice had already opened a door for a takeover of VW by Porsche in its decision of October 2007, stating that the VW-law was a violation of the principle of free movement of capital within the EU. Nevertheless, while the German legislator implemented the European Court decision by amending that part of the VW-law that provided for the 20 per cent voting cap, it preserved the supermajority requirement of 80 per cent for important decisions, providing the State of Lower Saxony, which holds 20.3 per cent of voting rights at present, with a controlling stake in VW. In fact, the 20.3 per cent stake of Lower Saxony is considered to be a poison pill preventing any takeover attempt for the company. In November 2008, the court in Hannover rejected a judicial appeal by Porsche to overrule the veto right of the State of Lower Saxony, after which the European Commission, again, notified Germany that it would start proceedings at the European Court of Justice if the country would not discharge the law.

After all, however, the VW-law appeared not to be the only impediment to Porsche's takeover attempt. In fact, Porsche's stake-building strategy resulted in a share shortage that led to an increase of VW share prices and a € 9 billion debt load that thwarted the company from closing its VW options so as to acquire its desired 75 per cent direct stake. In order to rescue the company from getting into more debt, VW and Porsche had started negotiations on a merger between the companies in May 2009, but VW withdrew shortly afterwards.

Table 4.16.: Development of ownership structure of Volkswagen (1999-2008)

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Porsche Holding SE</td>
<td>18,20%</td>
<td>18,20%</td>
<td>18,20%</td>
<td>18,20%</td>
<td>18,50%</td>
<td>27,40%</td>
<td>30,93%</td>
<td>50,76%</td>
</tr>
<tr>
<td>Land Niedersachsen</td>
<td>13,00%</td>
<td>13,00%</td>
<td>13,00%</td>
<td>13,00%</td>
<td>18,10%</td>
<td>20,26%</td>
<td>20,10%</td>
<td>20%</td>
</tr>
<tr>
<td>Volkswagen</td>
<td>13,00%</td>
<td>13,00%</td>
<td>13,00%</td>
<td>13,00%</td>
<td>10,70%</td>
<td>8,58%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brandes Investment</td>
<td>6,15%</td>
<td></td>
<td></td>
<td></td>
<td>3,50%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Partners</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Capital Group</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Companies</td>
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<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

Source: own research based on annual reports

4.8.2 Development of performance

Like many car-producing companies, Volkswagen' performance was excellent over the last few years, with profits rising from 0.7 bn. to 1.4 bn. between 2005 and 2008. At the end of 2008 Volkswagen experienced a significant drop in car sales, and its position further deteriorated in 2009. However, there are no signals that Volkswagen is experiencing the same kind of problems as many other car producers like General Motors. Over the period from 1999 to 2007 its return on assets and Tobin’s Q was somewhat lower than Volkswagen’s peers but return on equity was a little bit higher. The other variables show that Volkswagen had better returns on assets and returns on equity, although Tobin’s Q was significantly lower.
Table 4.17.: Summary of Volkswagen's performance (1999-2007)

<table>
<thead>
<tr>
<th></th>
<th>ROA avg</th>
<th>Q avg</th>
<th>ROE avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Volkswagen</td>
<td>2.98%</td>
<td>0.44</td>
<td>10.70%</td>
</tr>
<tr>
<td>Industry</td>
<td>5.34%</td>
<td>0.60</td>
<td>10.38%</td>
</tr>
<tr>
<td>Country</td>
<td>2.51%</td>
<td>1.53</td>
<td>-5.79%</td>
</tr>
<tr>
<td>Ownership type</td>
<td>1.31%</td>
<td>1.68</td>
<td>-6.51%</td>
</tr>
</tbody>
</table>

Source: own research based on datastream

4.8.3 Shareholder activism: activities

In 2005, Porsche started its stake-building strategy to takeover Volkswagen, acquiring shares of the company and holding them for an extended period of time. In September 2008, Porsche stated that it had increased its VW stock from 30.28 per cent to 35.14 per cent, which it intended to increase to over 50 per cent by November of the same year and to 75 per cent in 2009. Given the parallel connection between the share acquisitions by Porsche and the simultaneous increase of VW’s share value, Porsche’s stake-building strategy for acquiring control of VW did not just include the mere buying of shares at the stock exchange. In fact, Porsche was also active on the options market, where it traded in VW derivatives and call-options, to hedge against a rise in VW’s share value.

Unaware of Porsche’s derivatives trading, and believing that it only hold a 35 per cent stake in VW, market players, including hedge funds and other investors, had placed bets speculating that VW’s share value would fall into a decline. To the great astonishment of both investors and regulators, however, Porsche revealed in October 2008 that it controlled 74 per cent of VW shares through a 42.6 per cent direct holding and an indirect holding of 31.5 per cent through the use of options and derivatives.

4.8.4. Results of the activism

Porsche was reproached for having secretly built a controlling stake in VW, but one should not have been surprised at it since the company was not required to disclose its option positions. Porsche’s disclosure of its 74 per cent stake also revealed that the residual VW free float was only 6 per cent (the State of Lower Saxony owned 20.1 per cent of VW equity shares), leading to a strong rise in VW’s share value.

Market speculators who had bet that VW’s share value would fall endured heavy losses as a result of this stake-building strategy. In particular, many hedge funds and other investors started buying VW shares immediately after Porsche announced its 74 per cent dominating stake, in order to redeem their short positions. It was estimated that investors had gone short 13 per cent of the VW shares, leading them into a € 30 billion loss after the announcement. One example of such an investor is VEM, the German family-owned investment company of Mr. Merckle, who borrowed VW shares to sell them short in expectation of their price falling, and who lost out when Porsche revealed it had more VW shares than expected.
Porsche itself had realized a profit of €6.8 billion as a result of its VW options trading, after which the company was labelled a ‘speculator’ or a ‘hedge fund’ by many market players and analysts. Porsche rejected any such accusations, stating that it only used an industrial logic to accomplish a takeover by hedging against having to pay large amounts of capital for the rising share value of VW. The fact that investors started to immediately cover their bets led to an extraordinary ‘share price spike’, driving up VW's share value by nearly 400 per cent. In May 2009, Bafin, the German financial supervisory authority, started a market manipulation investigation into the Porsche’s trading in its takeover attempt for VW.

Figure 1: Stock price history of Volkswagen

![Stock price history of Volkswagen](image)

Source: Hoppenstädt Aktienführer.

4.9 Stork

Stork was founded in 1868 as a machinery manufacturing company. As early as the nineteenth century the company developed different kinds of machines and further expanded as a conglomerate after World War I with the production of pumps, machines, seagoing tugs, cranes and dredging machinery. In 1996 it included an aviation unit which was acquired from the bankrupt Fokker. In 2007 these different industries were structured in four divisions - Technical Services, Food Systems, Aerospace and Prints – and many subdivisions in more than 160 subsidiaries.

In February 2006 the board of directors announced the restructuring of the company via a divestment of one division and one important subdivision of the company and its intention to focus on the remainder of the parts (the first announcement regarding the divestment dated from 2003). The active policy of widening the shareholder base interested Centaurus and Paulson, which started to invest in 2004/2005. In 2006 Stork acquired Townsend in an effort to strengthen the Food Systems division. The shareholders were surprised as they considered this division as superfluous for Stork.
Centaurus and Paulson proposed that Stork divest completely and refocus on one division “Aerospace,” or go for a delisting and develop the three divisions as proposed by the board of directors. The delisting was considered as an acceptable solution for all corporate constituents and was studied over a number of months but the board and the supervisory board concluded that a successful public to private transaction was unlikely. The relationship with the aforementioned large shareholders soured.

### 4.9.1 Development of the ownership structure

The shareholder structure of Stork was relatively widely dispersed before the hedge funds Centaurus and Paulson started to build their positions: 76 per cent was held by institutional investors, the remainder being held by individuals and small institutional investors. This can be seen in the following table. A limited number of parties held significant stakes above 5 per cent, though there were no controlling shareholders.

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>LME Eignarhaldsfelag ehf</td>
<td>5,10%</td>
<td>43%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Centaurus Capital Ltd. &amp; Paulson &amp; Co Inc</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>31,40%</td>
<td>31,40%</td>
<td></td>
</tr>
<tr>
<td>Centaurus Alpha Master Fund Limited</td>
<td></td>
<td></td>
<td>5,39%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stork NV</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>5,05%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tweedy Browne Fund Inc.</td>
<td>5,24%</td>
<td>5,24%</td>
<td>5,24%</td>
<td>5,24%</td>
<td>5,24%</td>
<td>5,05%</td>
<td></td>
</tr>
<tr>
<td>Fidelity Funds, SICAV</td>
<td>5,02%</td>
<td>5,02%</td>
<td>5,02%</td>
<td>5,02%</td>
<td>5,02%</td>
<td>5,52%</td>
<td></td>
</tr>
<tr>
<td>Delta Deelnemingen Fonds</td>
<td></td>
<td>5,42%</td>
<td>5,42%</td>
<td>5,42%</td>
<td>5,42%</td>
<td>5,42%</td>
<td></td>
</tr>
<tr>
<td>Aviva PLC</td>
<td>6,54%</td>
<td>6,54%</td>
<td>6,54%</td>
<td>6,54%</td>
<td>6,54%</td>
<td>6,54%</td>
<td></td>
</tr>
<tr>
<td>HAL Holding</td>
<td>5,36%</td>
<td>5,35%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: own research based on annual reports, websites of the involved parties and the database of AFM.

During the dispute with Centaurus and Paulson, LME Eignarhaldsfelag ehf. started to acquire a large shareholder block of more than 43 per cent at the moment Stork agreed to a take-over offer from Candover.

### 4.9.2 Shareholder activism: activities

After the acquisition of a voting block of approximately 20 per cent and the announcement by the board of directors of their new strategy, Centaurus and Paulson were dissatisfied and required the company to add shareholder resolutions regarding the two options they considered as favoring shareholder value of which the latter – delisting – was considered acceptable. As previously mentioned, the shareholders Centaurus and Paulson were involved in private negotiations regarding this strategy for several months.
The board and supervisory board concluded that a successful execution of the public to private transaction was not feasible. Centaurus and Paulson required the calling of a general meeting which the board organized. The resolutions of the shareholders were approved with a large majority of 86 per cent of the 42 per cent votes that were present or represented. The board did not accept the voting results which resulted in a call for another meeting with a vote of no confidence in the board of directors. Given the uncertainty of the results of the vote, Stork Foundation acquired cumulative preference shares reducing the voting block of Centaurus and Stork to a mere 16 per cent. Centaurus and Paulson requested a court inquiry to investigate the policy of the company, asked for provisional measures and asked that the court cancel the new voting rights. The Court decided to prohibit voting on the agenda as set by the shareholders, but appointed three new supervisory board members as well as a committee of experts to investigate the business of Stork.

4.9.3 Results of the activism

While the investigation was ongoing, Stork announced that it had received a take-over offer from London Acquisitions BV, a subsidiary of the private equity fund Candover, to buy all outstanding shares for 47€. The hedge funds Centaurus and Paulson agreed to sell their 33 per cent stake in Stork. The extra-ordinary shareholders meeting which was organized after the announcement of the offer approved the proposals and the bid of London Acquisitions. However, LME, with a voting block of 43 per cent refused to sell its shares at the price of 47€. Due to this refusal Candover withdrew the bid but renegotiations started. LME wanted to acquire the Food Systems Divisions for the Icelandic food processor Marel. The negotiations resulted in an agreement and London acquisitions offered to buy all shares at a price of 48,40€. In February 2008 it was announced that Candover had acquired 99,5 per cent of the shares. In 2003 the shares were traded between 4,40€ and 16,50€. The hedge funds were able to sell their shares with a significant premium.

4.10 ASMI

ASM International N.V. (hereafter: ASMI) is a Dutch incorporated company that was founded in 1968 by Arthur del Prado – currently the company’s largest shareholder holding 21 per cent of shares – as a European manufacturing company of thermal-chemical wafer processing tools, which obtained listings on the Nasdaq and Euronext stock exchanges in 1981 and 1996 respectively. The business activities of ASMI are executed in the manufacturing and marketing of semiconductor process equipment, concentrating on both the wafer processing and assembly and packaging markets. Moreover, the business of ASMI is specialized in two distinct operative fields, being (i) the “front-end” division that contemplates the development and manufacturing of chip production equipment; and (ii) the “back-end” division of chip testing and packaging equipment (ASM Pacific Technology Ltd., hereafter ASMPT, in which the company has a stake of 53 per cent).
With sales and services divisions all over the world, the corporation’s manufacturing facilities cover the markets of Europe, the US (ASM America Inc.), Japan (ASM Japan K.K.), Hong Kong (ASM Pacific Technology Ltd.), China (ASM China Ltd.), Singapore (ASM Technology Singapore Pte, Ltd.) and Malaysia. In 2008, the company generated net retail sales of $747 million and employed over 10,000 employees worldwide.

4.10.1 Development of the ownership structure

Arthur del Prado, the founder of ASMI, is the largest shareholder of the company, owning 21.1 per cent of ASMI shares. In view of the voting policy of ASMI which requires a majority of 50 per cent of all outstanding shares rather than the legal threshold of a majority of 50 per cent of those present at the general meeting to vote on important corporate decisions, Del Prado is considered to have a blocking stake.

In early 2006, Fursa Alternative Strategies LLC (formerly known as Mellon HBV Alternative Strategies LLC) the third largest investor, holding an equity stake of 6.2 per cent in the company, started to express its dissatisfaction about ASMI’s front-end division and about the company’s corporate governance. The hedge fund increased its equity stake to just over 10 per cent at the beginning of 2008 when it confronted the ASMI board with a letter demanding that corporate changes be executed. Soon after, however, the fund decreased its shares to a level of 9.81 per cent while ASMI’s second largest investor, Hermes, increased its equity stake in the company to 15.1 per cent. In particular, Hermes started pressing the same activist objectives in March 2008 by putting items on the agenda of the subsequent general meeting. A few weeks after, Centaurus Capital – another activist investor – increased its stake in the company to 7.20 per cent. While Centaurus did not express its views on the objectives of Hermes and Fursa, it was assumed that the three largest shareholders after Del Prado, holding approximately 30 per cent of the shares, could gain sufficient support to force activist objectives through the general meeting. Yet, these prospects were disparaged after the announcement by the foundation Stichting Continuiteit ASMI just a week before the general meeting in May 2008, that it had exercised an option to buy preference shares in ASMI, acquiring 29.9 per cent of the company’s voting rights as a result.

Table 4.19.: Development of ownership structure of ASMI (2004-2009)

<table>
<thead>
<tr>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>May</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arthur H. del Prado</td>
<td>21,80%</td>
<td>21,70%</td>
<td>21,3%</td>
<td>21,30%</td>
<td>21,10%</td>
</tr>
<tr>
<td>Hermes Focus Asset Management</td>
<td>5,30%</td>
<td>10,0%</td>
<td>8,3%</td>
<td>9,90%</td>
<td>15,10%</td>
</tr>
<tr>
<td>Fursa Alternative Strategies LLC</td>
<td>12,9</td>
<td>10,90%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FMR Corp</td>
<td>7,70%</td>
<td>6,70%</td>
<td>1,30%</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Fidelity Management &amp; Research</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amaranth LLC</td>
<td></td>
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<td></td>
<td></td>
<td>5%</td>
</tr>
<tr>
<td>The Goldman Sachs Group</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4%</td>
</tr>
<tr>
<td>Centaurus Capital Ltd</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mellon HVB Alternative Strategies</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Tokyo Electron</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intel Capital</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: own research based on annual reports and AFM filings
4.10.2 Development of performance

In early 2006, Fursa (holding 6.2 per cent) declared its intention of forcing the company towards a spin-off. In particular, the fund stated that, as of 2002, ASMI had endured heavy losses of up to 1 billion euro owing to R&D investments in the company’s front-end division that were financed by capital from the company’s profit-making back-end manufacturing. The fact that the revenues deriving from the front-end division did not outweigh the costs of that division, and since the company’s annual margins remained significantly lower than the margins of its competitors (25 per cent vs. 45 per cent respectively), the activist fund demanded that the company separate its loss-running front-end business from its profit-making back-end business, ASM Pacific Technology, in order to enhance firm value.

4.10.3 Shareholder activism: activities

The attempts of Fursa to lead ASMI into a spin-off started in 2006 when the fund required the corporation to put an item on the agenda of the general meeting forcing a vote on the company’s separation. In addition, the fund demanded that the company amend its articles of association, which required a majority of 50 per cent of all outstanding shares, rather than the legal threshold of a majority of 50 per cent present, to vote on important corporate decisions, to align the company’s voting guidelines with the Dutch Corporate Governance Code. Since the company did not move toward Fursa’s demands that the company be split up, and as no steps were taken in the direction of the articles of association being amended in the subsequent period, the activist fund announced that it would take legal measures in order to enforce its right as a shareholder to put items on the agenda of the succeeding general meeting.

In August 2006, Fursa increased its stake in ASMI from 6.4 per cent to 7.8 per cent. The hedge fund was still heading towards a split up, but had not started legal proceedings given the announcement by ASMI that the spin-off was to be put on the agenda of the extraordinary general meeting to be held in November. Subsequently, Fursa proclaimed that it had set off a proxy solicitation among the company’s other large shareholders in order to gather support for its proposal to split the company. This was enervated by a statement by ASMI in October, however, indicating that Fursa had confirmed that it had received no support from other shareholders for its proposal to spin-off the company’s front-end business.

After the hedge fund’s proposal was voted down at the general meeting in November 2006, the activist fund restored its pressure on the company in January 2008. In particular, the fund raised its ASMI stock to just over 10 per cent and sent a letter to the board, once more with the intention of forcing a spin-off by demanding that the company’s board be replaced by a group of experts nominated by Fursa itself. The hedge fund threatened to make a hostile bid in the form of an exchange offer if the company would not concede to its demands.

Remarkably, Fursa lowered its ASMI shares to 9.81 per cent in March 2008, but did not renounce its activist targets. In particular, the fund persisted in its claim that the board be renewed and expressed its objections Chuck del Prado (the son of Arthur del Prado), the freshly appointed chief executive officer. In April, the company’s second largest investor, Hermes, raised its equity stake to 15.1 per cent and joined forces with Fursa in its battle with the board.
A month before, Hermes had announced its motions on board replacement to be put on the agenda of ASMI’s next general meeting to be held in May 2008. Meanwhile, activist fund Centaurus announced it owned a 7.2 per cent stake in the company, without venturing information on its position being in favour of ASMI or the activist investors.

The activist strategy and objectives of Hermes and Fursa, however, were put on ice by the poison pill defence deployed by the foundation Stichting Continuiteit ASMI just a week prior to the general meeting in May. The outcome of the poison-pill was that the activist group of Hermes and Fursa, together holding a quarter of the company’s shares, was dismantled. In particular, even if Centaurus was back the activists up at the general meeting, their accumulated stake of approximately 30 per cent would not meet the voting requirements of ASMI prescribing that a majority of the company’s issued shares had to be voted. Hermes, supported by Fursa, immediately started judicial litigation at the Dutch Enterprise Chamber of the Amsterdam court of appeal asking the court to initiate an inquiry procedure relating to the poison-pill action of ASMI.

4.10.4 Results of the activism

Concerning the demand of Fursa that ASMI be split up, the company stated that although it recognized the failings of its front-end business, the company would rather pursue other alternatives to generate higher margins, for instance by moving its front-end plants from the Netherlands to Singapore. In fact, the attempt by Fursa to put the split-up of the company on the corporation’s agenda for the general meeting in May 2006, was obstructed by Arthur del Prado, ASMI’s largest shareholder who believed that long-term value would be achieved by keeping the business units together. Conversely, ASMI did give in to the objections against the company’s articles of association by agreeing to align its voting rules with those of the Dutch corporate governance guidelines.

The proposal to split ASMI’s front-end and back-end businesses was put on the agenda of the extraordinary general meeting (EGM) in November 2006 as a ‘non-binding, advisory motion’. Preceding the general meeting, ASMI made concessions to its investors by proclaiming that it would amend the company’s dividend policy and that the front-end business would no longer be funded by capital streams from the back-end business. In addition, ASMI engaged in dialogues with its investors explaining the company’s stand against the proposal for a split-up. As a result of these concessions and dialogues, ASMI gained support from the company’s second largest investor Hermes (9.9 per cent of ASMI shares) in its resistance against the activist objectives of Fursa. At the EGM, 61 per cent of voting shares were represented: 21 million votes were cast against the motion to split the company as opposed to the 11.3 million votes cast in favour. Surprisingly though, Fursa withheld its vote, saying that it needed time to consider the concessions made by ASMI prior to the general meeting. The activist fund was planning to preserve its proposal until the next general meeting.

As to the letter Fursa sent to the ASMI board in January 2008, the company indicated that it did not have the intention to concede. In order to block any decision on restructurings or on board replacement being taken at the AGM in May 2008, ASMI deployed a poison-pill strategy via an independent foundation, Stichting Continuiteit ASMI. Only one week prior to the AGM, Stichting Continuiteit declared that it had exercised an option to buy preference shares in ASMI, acquiring 29.9 per cent of the company’s voting rights as a result.
In fact, starting 2008 the foundation’s articles of association were amended so as to confer upon the foundation the right to buy ASMI preference shares to be exercised in the event of any action that would affect the ‘identity’ of the company. ASMI made concessions to the activist shareholders indicating that it would carry out a spin-off and replace its board if the company failed to increase value by 2010, but the activists had already headed to the Dutch Enterprise Chamber in May 2008 challenging the poison-pill and the position of CEO Chuck del Prado.

Instead of annulling the preferred shares as demanded by the activists, the Enterprise Chamber on 20 May 2008 prohibited ASMI from taking decisions regarding the composition of the board at its AGM. The parties were forced to renegotiate on the other objectives of the litigation, which resulted in the judgment of the Enterprise Chamber being delayed. First, ASMI was confronted by its rival Applied Materials in June 2008, who made an offer to the company to buy two core units of its front-end division. While the offer had calmed both the activists and the company board for some time, the feelings started running high again when Applied Materials withdraw from the negotiations in November 2008. Subsequently, the parties made efforts to settle a gentleman’s agreement, but to no avail. The litigation between ASMI and its activist investors is still ongoing and a judgment by the Enterprise Chamber on the case is expected in June 2009.

4.11 Summary and interpretation of the main findings in the case studies

The case studies illustrate the wide variety of mechanisms of shareholder activism. Table 4.20 provides an overview of the types of shareholders and the types of instruments the shareholders used to influence corporate behavior. First it should be noted that shareholder activism by hedge funds is overrepresented in this table. This is due to the methodology of hedge fund activism. The funds contact the (board of directors of the) company to start negotiations but the hedge funds often consider the response of the board of directors insufficient. Their next step is an open confrontation. The financial press is eager to report details on the differences of opinion and the mechanisms that are used during the combat or to find a way out.

Two variables seem to be of importance in the assessment of the instruments used and the results of this activism. First, the size of the voting blocks of the shareholder activist is important. Calling a general meeting, submitting shareholder resolutions, and litigation all require minimum thresholds which not all activist pass. In general, the legal environment and the investor protection measures facilitate or discourage individual shareholder activism. Next, the structure of the ownership of the company influences the outcome and the intensity of the activism. Natixis is controlled by two large shareholders. The activism of a hedge fund via an open letter was set aside in the debate on the development of the strategy of the company. In the case of Stork, the hedge funds acquired the company.
Table 4.20.: Overview of the techniques of shareholder activism in the ten case studies

<table>
<thead>
<tr>
<th>company</th>
<th>shareh. type</th>
<th>Private negotiations</th>
<th>Open Letter</th>
<th>Voting</th>
<th>Call AGM &amp; Shareholder resolution</th>
<th>Litigation</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atos Origin</td>
<td>Hedge funds</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>+</td>
</tr>
<tr>
<td>Natixis</td>
<td>Hedge fund</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>(0)</td>
<td></td>
</tr>
<tr>
<td>Cadbury</td>
<td>Hedge fund</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>RBS</td>
<td>Government</td>
<td></td>
<td>X***</td>
<td>X***</td>
<td></td>
<td>control</td>
<td></td>
</tr>
<tr>
<td>LSE</td>
<td>Hedge fund</td>
<td>X</td>
<td>X**</td>
<td></td>
<td></td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Fortis</td>
<td>Concert parties</td>
<td>X*</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>(+)</td>
<td></td>
</tr>
<tr>
<td>Heidelberger</td>
<td>Individual</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>control</td>
<td></td>
</tr>
<tr>
<td>VW</td>
<td>Non-financial comp.</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>control</td>
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</tr>
<tr>
<td>Stork</td>
<td>Hedge fund</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>4****</td>
<td></td>
</tr>
<tr>
<td>ASMI</td>
<td>Hedge fund</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>?</td>
<td></td>
</tr>
</tbody>
</table>

*: after the distress started; **: in the hostile bid; ***: election of board members; ****: takeover

In other companies, shareholder activism is much more embedded in the internal corporate framework. Large shareholders often combine their position with board membership or are represented at the board of directors. Discussions regarding strategy take place in the board of directors or via other means which are not publicly disclosed. Different opinions are discussed and most often only the unanimous - at least in appearance - decisions are disclosed. Therefore, it does not come as a surprise that shareholder activism, in the second phase which begins when private negotiations do not provide the expected result, uses mechanisms to help with the election of a board representative (see for example in the case of Atos Origin or Fortis). It should be noted that in general, corporate law in different European countries offers much more power to shareholders to nominate and elect directors than the United States.\(^26\)

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In June 2009 the American Securities and Exchange Commission issued a proposal to facilitate shareholder director nominations and modify the shareholder proxy process thereto. In the US, many argue that “the election of directors is a self-sustaining process of the board determining its members, with little actual input from shareholders”. The SEC also eliminates the rule that allows broker-dealers to vote in corporate director elections on behalf of their clients without having received instructions, a rule activist shareholders blamed for making it difficult to oust directors. At the moment, under American law the technique of the proxy contest and shareholder proposals is considered to be too costly and it does not necessarily allow director elections while the other options not automatically result in a shareholder nomination election. Similar, the European legal frameworks also offer more opportunities to influence the remuneration schemes of executive directors than the United States framework. Via the Shareholder Approval of Executive Compensation of TARP Recipients proposed rule of July 1, 2009 the SEC requires American companies that have received governmental financial assistance to permit a separate shareholder advisory vote to approve the compensation of executives. These proposals have been issued after a long academic debate between several high level scholars that defended the ultimate control should be in hands of shareholders – Lucian Bebchuk – or in hands of boards of directors – Bainbridge. In many European countries, the executive remuneration schemes must be approved – an not only advised - by the general meeting of shareholders. For instance, in the UK the Directors’ Remuneration Report must be laid before the general meeting of the company before which the company’s account for the relevant financial year are to be laid, for the approval by the general meeting via an ordinary resolution. the Report This case report has been provided after the draft report was submitted individual directors’ remuneration as well as on general remuneration policy and performance standards. Disapproval of the report includes disapproval of the individual remuneration packages.

Large shareholders with board representatives make it almost impossible to measure "shareholder activism". It can result in a misrepresentation of “shareholder activism”, in particular in the reduction of shareholder activism to “board attacks by hedge funds”.

In many cases, this technique of the search of a board representation is less commonly used by different types of institutional investors. Many institutional investors are not interested in developing the strategic policies of the companies in which they invest, the borderline being the support for alternative strategic policies as provided by activist shareholders.

Note 35 of the aforementioned SEC proposal.
SEC, Release 34-60218 of July 1, 2009.
For a comparative analysis of the remuneration policies and disclosure regimes in 17 European countries, see http://www.ecgi.org/remuneration/questionnaire/index_2008.htm.
Conclusion

The case studies in this chapter illustrate the wide range of manifestations of shareholder activism in Europe. Table 4.20 provides an overview of the (i) types of shareholders; (ii) the types of instruments these shareholders use to influence corporate behaviour; and (iii) the result of their activism.

The study has shown that the ownership structure of the company is an important determinant for activism. In particular, 7 out of 10 companies that were analysed in this study had a widely-dispersed ownership structure. In the end of the activist involvement of their shareholders, only 3 of these companies remained widely-dispersed, while in the other cases the ownership structure of the companies changed with the activist shareholders laying the basis for their activities by increasing their stakes in the company. Stork, for example, was a widely-dispersed company before being acquired by the hedge funds.

The development of the company performance appears to be another key feature for activism to arise. The study shows that 7 out of 10 companies were either underperforming or had a downturn in their performance when the activist shareholders started imposing their strategies. Consequently, underperformance became the most important motive underlying the active involvement of the majority of activist shareholders in our case studies. In the case of Cadbury Schweppes, the company did not perform badly compared to its peers, yet the bad performance of a sub-division was the main reason for the activist hedge funds to push towards changes. LSE and Volkswagen did not underperform either, yet these companies were targeted for a takeover.

As regards the types of shareholders, it should be noted that activism by hedge funds is overrepresented in this study. In particular, 6 out of 10 case studies involve the activism by a hedge fund, which is characterized by a specific methodology of hedge fund activism. In particular, the funds contact the (board of directors of the) company to start negotiations, but the response of the company is often considered insufficient. Therefore, the next step in line for these hedge funds is a choice out of continuing the informal way, or employing the existing formal shareholder rights (see table 4.20.). As to the first, hedge funds have send open letters to the company in 3 cases, being successful in their demands in 2 out of these cases. The effect of such open letters is evident, since the financial press is eager to report details on the differences of opinion and the mechanisms that are used during the combat or to find a way out. Regarding the second choice, hedge funds have used their formal shareholder voice in the other 3 cases out of 6. Speaking in general terms, hedge funds have proven themselves to be thriving in their activist demands, since they have failed to force changes in the company in only 1 out of 6 cases.

Concerning the assessment of instruments used and the results they led to, two variables seems to be of importance. First, the size of the voting blocks of shareholder activists is important. Calling a general meeting, submitting shareholder resolution and litigation all require minimum thresholds which not all activists pass. In general, the legal environment and the investor protection measures facilitate or discourage individual shareholder activism. Natixis, for example, is controlled by two large shareholders resulting in the fact that the activism of a hedge fund via an open letter was set aside in the debate on the development of the strategy of the company.
Second, shareholder activism in other companies is much more embedded in the **internal corporate framework**. In our case studies we found that while the first phase of activism often takes an informal stance by the engagement of activists in private negotiations (7 cases), formal shareholder voice is employed as a first choice in 3 cases, whereas it is a follow-up on private negotiations in 4 cases. In particular, large shareholders often combine their position with board membership or are represented at the board of directors. Discussions regarding strategy take place in the board of directors or via other means which are not publicly disclosed. Different opinions are discussed and most often only unanimous – at least in appearance – decisions are disclosed. Therefore, it does not come as a surprise that shareholder activism, in the second phase which begins when private negotiations do not provide the expected result, uses mechanisms to help with the election of a board representative (see for example in the case of Atos Origin or Fortis). In many cases, this technique is less commonly used by different types of institutional investors. Many institutional investors are not interested in developing the strategic policies of the companies in which they invest, the borderline being the support for alternative strategic policies as provided by activist shareholders.

Large shareholders with board representatives make it almost impossible to measure shareholder activism. It can result in a misrepresentation of shareholder activism, in particular in the reduction of shareholder activism to board attacks by hedge funds.

**Recommendations**

In light of the findings in the report, legal rules to modify shareholder activism should be carefully considered. First and on an aggregate level, there are no indications that different shareholder structures relate to significantly different performance. The capital markets are sufficiently efficient to incorporate information about the shareholder structure. Therefore, **forbidding or excluding certain instruments of shareholder activism cannot be supported**. The findings of this study do not indicate that a complete prohibition of any of the instruments of shareholder activism would serve corporate performance. Similarly there are no results that support the view that some shareholder classes must be treated in a different way.

Second, however, different shareholder structures and their accompanying activist mechanisms have certain implications for the existing roles and responsibilities of a company’s organs towards the stewardship and resource dependence theory. In particular, European company laws and corporate governance codes cast the parts in a corporation by attributing the management board (executive directors) the responsibility to determine corporate strategy, while the supervisory board (non-executive directors) is entrusted with the responsibility of supervising their performance. While shareholders were considered rather passive actors in this division of roles, the prominence of large shareholders in European jurisdictions has given rise to an increasing attention on these shareholders, conferring upon them a monitoring role within a company’s system of checks and balances. **This monitoring role by shareholders is useful and clear legal devices should be provided for this monitoring role**, e.g. the right to attend and vote at general meetings, the right to submit shareholder resolutions and the right to file shareholder litigations.
Based on the findings of this study, it can be argued that on account of large shareholder activism, there is a perceptible shift in the governance structure of firms. A derived meaning of the governance structure as described above is to provide corporate boards a substantial level of discretion, and to preclude others, including shareholders, from interfering in the way the company is being managed. The discretionary powers of corporate boards run parallel with their fiduciary duties towards the corporation, including that the company is managed in the latter’s best interests. However, opposing the discretionary powers and fiduciary duties of corporate boards, large activist shareholders have proven themselves to be able to take it further than plain company monitoring as they engage in private negotiations with boards in order to influence the company on a strategic level. Moreover, in the majority of cases shareholders start their activism informally with private negotiations, even ending in positive outcomes without using any of the instruments formally provided for by the law. This is disquieting as fiduciary duties are only imposed on corporate boards and not on shareholders.

We therefore recommend that:

- corporate strategic matters put forward by activist shareholders using informal mechanisms like private negotiations or open letters are made subject to voting by all shareholders at the company’s general meeting; the vote is binding if there is sufficient support, measured by a combination of the relative attendance of shareholders and the relative approval rate;
- the participation of all shareholders should be supported. As technical modalities allow more and more to identify shareholders, the company should be informed of their identity and be required to invite shareholders to participate at the company’s general meeting. Record holders should inform the companies who the economic owners are;
- **Unregulated instruments** used by active shareholders or third parties, like “open letters” should indicate the position of the issuer of the letter (be they a shareholder or any other third party) vis-à-vis the company.32 Both their economic and their legal interest must be disclosed in the letter.33 This information on the writer’s economic and legal interest as disclosed in the unregulated activist mechanism must be updated. A system similar to the regime applicable to board members and other persons in Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) can serve as a guideline.
- **fiduciary duties are imposed on large shareholders of listed entities if the developments of shareholder activism are to be thus interpreted that shareholders can influence corporations on a strategic level.** When shareholders have controlling influence they must disclose important strategic information regarding the issuer, like operational and financial developments, financial and other risks, employee matters and significant divestments.34

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32 This supports the recommendation 7.3 of the study by the European Parliament’s Committee on Economic and Monetary Affairs on “Hedge Funds- Transparency and Conflict of Interest (IP/A/ECON/IC/2007-24)” but adds the mechanism through which it should be applied.
33 In academic papers often referred to as “empty voting” and “hidden ownership”.
In particular the recommendations can help to improve transparency regarding the economic interest of the activist shareholder and hence reduce the conflicts of interests which exist between shareholders and companies in case the shareholder enters into different contracts to shift economic risk of shareholding (short selling, etc.). The approach starts from the premise that an appropriate balance between the interests of the company and those of large shareholders is pivotal. Next, it is not the shareholder type that is regulated (as it is the case in the Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers) but the instrument itself, which is available to all shareholders. This will guarantee the equal treatment of shareholders. The European Commission’s consultation regarding stock lending found that the majority of the respondents support transparency enhancing measures. We believe that this approach which can be seen as a combination of transparency and “conflict of interests” approach might result in a better balance between the duties of board members and the obligations of shareholders vis-à-vis the company.

**BIBLIOGRAPHY**


Anabtawi, I., 2006. Some skepticism about increasing shareholder power. UCLA Law Review.


Ehrhardt, O., Nowak, E. 2003. Private Benefits and Minority Shareholder Expropriation (or what exactly are private benefits of control?), European Finance Association Conference Paper.


ANNEXES

Annex 2.1.: Number of companies and average size of the companies in the sample

<table>
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<tr>
<th></th>
<th>Listed entities in sample</th>
<th>Avg. market cap. 99 (mio. €)</th>
<th>Avg. market cap. 07 (mio. €)</th>
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</tbody>
</table>

*For the UK, the capitalisation was converted into €

Annex 2.2.: Average number of large shareholders in six European countries (voting block ≥ 5 per cent)

Source: own research
Annex 2.3.: The relative number of companies with a larger, equal or smaller number of large shareholders (>5%) in 2007 compared to 1999

Source: own research
Annex 2.4.: Relative number of large stakes held by different types of national shareholders (2007)

Source: own research
Annex 2.5.: Relative number of large stakes held by different types of foreign shareholders (2007)

Source: own research

Annex 2.6.: Average voting block of large (national) shareholders

Source: own research
Annex 2.7: Average voting block of the different types of foreign shareholders

Source: own research
Annex 2.8.: Shareholder structure of listed companies in six European countries (2007)

Source: own research
Annex 2.9.: The average voting block of the largest, second largest, third largest and summed stake of all large shareholders (2007)

Source: own research
Annex 2.10.: Descriptive statistics

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Source: own research
### Annex 2.11.: OLS-results for the dependent variables ROA, ROE and Tobin’s Q

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<th>ROA inc.</th>
<th>ROA incl.</th>
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<td>(0,383)</td>
<td>(0,384)</td>
<td>(-27,202)</td>
<td>(-27,202)</td>
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**Note:** All values are regression coefficients with standard errors in parentheses. Significant at the 5% level unless otherwise noted.
### Annex 2.11.: OLS-results for the dependent variables ROA, ROE and Tobin’s Q

<table>
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<td></td>
<td>-6,928 (-)</td>
<td>0,032</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 1</td>
<td>0,882)</td>
<td>(0,022)</td>
<td>(0,167)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-7,747 (-)</td>
<td>1,000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 2</td>
<td>0,994)</td>
<td>(0,690)</td>
<td>(0,128)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-4,979</td>
<td>0,276</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 3</td>
<td>(0,639)</td>
<td>(0,191)</td>
<td>(0,128)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-9,557 (-)</td>
<td>0,008</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 4</td>
<td>1,208)</td>
<td>(0,006)</td>
<td>(0,670)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-3,847 (-)</td>
<td>0,460</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 5</td>
<td>0,489)</td>
<td>(0,315)</td>
<td>(0,061)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-6,187 (-)</td>
<td>0,085</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 6</td>
<td>0,793)</td>
<td>(0,059)</td>
<td>(0,052)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-14,015 (-)</td>
<td>1,405</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 7</td>
<td>1,783)***</td>
<td>(0,963)</td>
<td>(1,059)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-8,182 (-)</td>
<td>0,491</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIC 8</td>
<td>1,022)</td>
<td>(0,330)</td>
<td>(0,278)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

adj. $R^2$: 0.106 0.11 0.155 0.092 0.003 0.002 0.035 0.006 0.049 0.068 0.098 0.053

$F$: 9,926* 7,378* 7,059* 9,249* 1,260 1,083 2,191* 1,468 4,786* 4,720* 4,544* 5,476*

*: significant at 1%; ** significant at 5%; *** significant at 10%
Annex 2.12.: Differences in performance between controlled and non-controlled companies

<table>
<thead>
<tr>
<th></th>
<th>Tobin's Q</th>
<th>ROA</th>
<th>ROE</th>
</tr>
</thead>
<tbody>
<tr>
<td>constant</td>
<td>1,357</td>
<td>-5,589</td>
<td>-27,972 (-5,996)*</td>
</tr>
<tr>
<td></td>
<td>(6,196)*</td>
<td>(-4,682)*</td>
<td>(-5,996)*</td>
</tr>
<tr>
<td>log avg. market cap.</td>
<td>0,087 (1,097)</td>
<td>3,128 (7,199)*</td>
<td>9,979 (5,891)*</td>
</tr>
<tr>
<td></td>
<td>-0,419 (-2,476)**</td>
<td>4,402 (4,728)*</td>
<td>(1,845)***</td>
</tr>
<tr>
<td>controlled</td>
<td>2,476**</td>
<td>4,402 (4,728)*</td>
<td>(1,845)***</td>
</tr>
<tr>
<td>dispersed</td>
<td>0,057 (0,314)</td>
<td>1,364 (1,364)</td>
<td>5,801 (1,488)</td>
</tr>
<tr>
<td>other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>adj. R²</td>
<td>0,008</td>
<td>0,09</td>
<td>0,048</td>
</tr>
<tr>
<td>F</td>
<td>3,294**</td>
<td>28,050*</td>
<td>14,678*</td>
</tr>
</tbody>
</table>

*: significant at 1%; **: significant at 5%; ***: significant at 10%

Source: own research
Annex 3.1.: Attendance at general meeting of shareholders (2007/2008)

Source: own research

Annex 3.2.: Summary overview of attendance at the general meetings of the sample of companies in the database.

<table>
<thead>
<tr>
<th>Country</th>
<th>N</th>
<th>Belgium</th>
<th>France</th>
<th>Germany</th>
<th>Spain</th>
<th>UK</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>avg size company (in mio €)</td>
<td></td>
<td>3522</td>
<td>21291</td>
<td>30421</td>
<td>6403</td>
<td>16068</td>
<td>13073</td>
</tr>
<tr>
<td>avg largest shareholder</td>
<td></td>
<td>30,38%</td>
<td>28,36%</td>
<td>17,18%</td>
<td>33,52%</td>
<td>11,94%</td>
<td>25,24%</td>
</tr>
<tr>
<td>average all large shareholders</td>
<td></td>
<td>42,36%</td>
<td>34,83%</td>
<td>23,83%</td>
<td>53,86%</td>
<td>23,10%</td>
<td>38,36%</td>
</tr>
</tbody>
</table>
Annex 3.3.: Relationship between the attendance at general meetings of shareholders and the summed voting blocks of all large shareholders.

Source: own research
Annex 3.3.A.: Relationship between the attendance at general meetings of shareholders and the summed voting blocks of all large shareholders (5 per cent)

**Belgium**

\[ y = 0.5688x + 27.768 \]
\[ R^2 = 0.4135 \]

**France**

\[ y = 0.5699x + 40.892 \]
\[ R^2 = 0.6475 \]

**Germany**

\[ y = 0.4004x + 46.75 \]
\[ R^2 = 0.3419 \]

**United Kingdom**

\[ y = 0.1385x + 54.877 \]
\[ R^2 = 0.0471 \]
Annex 3.4.: Relationship between the size of the company and the attendance at general meetings of large and small shareholders

![Graph showing the relationship between size of company and attendance]

Source: own research

Annex 3.5.: The distribution of different classes of companies in the different countries (absolute numbers)

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>10</td>
<td>18</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>38</td>
</tr>
<tr>
<td>France</td>
<td>14</td>
<td>12</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>9</td>
<td>40</td>
</tr>
<tr>
<td>Germany</td>
<td>10</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>6</td>
<td>22</td>
</tr>
<tr>
<td>Spain</td>
<td>7</td>
<td>28</td>
<td>2</td>
<td>28</td>
<td>2</td>
<td>11</td>
<td>78</td>
</tr>
<tr>
<td>UK</td>
<td>29</td>
<td>4</td>
<td>0</td>
<td>14</td>
<td>1</td>
<td>11</td>
<td>59</td>
</tr>
<tr>
<td>Total</td>
<td>70</td>
<td>65</td>
<td>8</td>
<td>46</td>
<td>7</td>
<td>41</td>
<td>237</td>
</tr>
</tbody>
</table>
Annex 3.6.: Relative attendance of large shareholders and small shareholders

Source: own research

Legend:

A  dispersed shareholders (all < 10 per cent)
    controlling shareholder (>30 per cent), which stake is larger than summed block of
B  other large shareh. and is MORE than 50 per cent of total attendance
C  controlling shareholder (>30 per cent), which stake is larger than summed block other
    large shareh. but is LESS than 50 per cent of total attendance
D  largest shareholder (> 10 per cent) but the summed block of other large shareholders
    is more than the voting block of the largest shareholder and largest shareholder has
    less votes than 50 per cent of the attendance
E  largest shareholder (10-30 per cent) which stake is larger than the summed block
    other large shareholders and MORE than 50 per cent of total attendance
F  largest shareholder (10-30 per cent) which stake is larger than the summed block
    other large shareholders but LESS than 50 per cent of total attendance
Annex 3.7.: Attendance policy in case of dispersed and concentrated ownership

![Bar chart showing attendance policy in different countries with legend:
- Red bars represent attendance of other shareholders (concentrated ownership)**
- Blue bars represent total attendance (distributed ownership)*

Source: own research

Legend:

* no shareholder holds more than 10%
*(Total attendance-stake largest)/(100-stake largest)
Annex 3.8.: Average approval ratios of resolutions at general meetings


Annex 3.9.: Approval of resolutions: minimum voting turnout per company

Source: own research
Annex 3.10.: Approval of resolutions: minimum voting turnout in controlled companies and companies with dispersed ownership

![Graph showing voting turnout in controlled companies and dispersed ownership."

Source: own research

Annex 3.11.: Resolutions with high levels of dissenting votes

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>Belgium</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>controlled companies</td>
<td>various topics</td>
<td>elect/discharge</td>
<td>issue shares in case of tender offer; issuing</td>
</tr>
<tr>
<td></td>
<td></td>
<td>director</td>
<td>shares to employees</td>
</tr>
<tr>
<td>companies with</td>
<td>approve remuneration</td>
<td>various topics</td>
<td>issuing shares to employees; different topics</td>
</tr>
<tr>
<td>dispersed ownership</td>
<td>report</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: own research
Annex 3.12.: Shareholder proposals in continental Europe

<table>
<thead>
<tr>
<th>Category</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asset restructuring</td>
<td>3</td>
<td>1</td>
<td>31</td>
<td>28</td>
<td>65</td>
</tr>
<tr>
<td>Corporate governance</td>
<td>(7,3%)</td>
<td>(39,4%)</td>
<td>(8,9%)</td>
<td>(18,8%)</td>
<td>(15,5%)</td>
</tr>
<tr>
<td>Corp. gov. loosening</td>
<td>2</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>CSR and stakeholder proposals</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>Elect/remove directors</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Pay-out policy</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Routine</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>6</td>
<td>50</td>
<td>38</td>
<td>95</td>
</tr>
</tbody>
</table>

Source: Cziraki, Renneboog, Szilagyi (2009)

Annex 3.13: Shareholder proposals in the UK

<table>
<thead>
<tr>
<th>Category</th>
<th>98-00</th>
<th>01-04</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>Asset restructuring</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Capital structure</td>
<td>(15,0%)</td>
<td>4 (9,6%)</td>
<td>(95,2%)</td>
<td>(66,0%)</td>
<td>(30,6%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporate governance</td>
<td>7</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>CSR and stakeholder proposals</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>Elect/remove directors</td>
<td>11</td>
<td>50</td>
<td>16</td>
<td>19</td>
<td>27</td>
<td>6</td>
<td>129</td>
</tr>
<tr>
<td>Pay-out policy</td>
<td>3</td>
<td>8</td>
<td>14</td>
<td>14</td>
<td>11</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Routine</td>
<td>(19,7%)</td>
<td>(14,1%)</td>
<td>(16,3%)</td>
<td>(16,3%)</td>
<td>(16,3%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>29</td>
<td>80</td>
<td>19</td>
<td>22</td>
<td>34</td>
<td>11</td>
<td>195</td>
</tr>
</tbody>
</table>

Source: Cziraki, Renneboog, Szilagyi (2009)


Annex 3.15.: Number of German rescission suits reported per year

<table>
<thead>
<tr>
<th>Year</th>
<th>Contested Shareholder meetings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>135</td>
</tr>
<tr>
<td>2007</td>
<td>164</td>
</tr>
<tr>
<td>2008</td>
<td>163</td>
</tr>
</tbody>
</table>

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Policy Areas

- Economic and Monetary Affairs
- Employment and Social Affairs
- Environment, Public Health and Food Safety
- Industry, Research and Energy
- Internal Market and Consumer Protection

Documents