

12-1-2019

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### Recommended Citation

Cossu, Monica (2019) "Financial and Industrial Investors: It Is Time for an Informal Voice," *Journal of International Business and Law*. Vol. 19: Iss. 1, Article 3.

Available at: <https://scholarlycommons.law.hofstra.edu/jibl/vol19/iss1/3>

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## FINANCIAL AND INDUSTRIAL INVESTORS: IT IS TIME FOR AN INFORMAL VOICE

Monica Cossu\*

**KEYWORDS:** Financial Intermediaries - Institutional Investors - Formal Activism - Informal Activism - Collective Informal activism - Individual Informal Activism.

### I. ABSTRACT

This article begins by distinguishing between financial intermediaries and institutional investors, and providing a taxonomy of the different types of active behaviours starting with the formal, more traditional and widely-known typologies of activism, then redirecting focus to other informal forms of activism, disentangling the “collective” from the “individual” ones. References will be made to American, British, French, German, Italian and Spanish contexts. Some limited remarks will be devoted to identifying the specifics aims and similarities of other international jurisdictions (for example to Icelandic one for its slate voting system for the appointment of directors, which is very similar to the Italian system).

### II. INTRODUCTION

In the current financial intermediation era, it is widely known that retail shareholders seldom manage their financial assets directly.<sup>1</sup> This shifts the focus to the shareholder’s power of financial intermediaries and institutional investors and highlights the discussion of their active participatory behavior in the subsidiary companies.<sup>2</sup> As the most representative and influential voice of the minority shareholders, financial intermediaries and institutional investors are privileged and authoritative counterparts of controlling shareholders.<sup>3</sup>

When financial intermediaries and institutional investors directly manage their shareholdings, retail shareholders offer the company an incomparable contribution, from a *qualitative* point of view contrary to financial intermediaries.<sup>4</sup> In addition, retail shareholders

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<sup>1</sup> See Anne M. Tucker, *The Outside Investor: Citizen Shareholders & Corporate Alienation*, 11 U. ST. THOMAS L. J. 99, 107-08 (2013).

<sup>2</sup> *Id.*

<sup>3</sup> See Robert Charles Clark, *The Soundless of Financial Intermediaries*, 86 YALE L. J. 1, 11 (1976).

<sup>4</sup> See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 47, (Routledge 2017) (1932) (highlighting the passivity of retail investors); see also Bernard S. Black, *Shareholder Passivity Re-examined*, 89 MICH L. REV. 520, 567-570 (1990) (highlighting the passivity of retail investors); see also Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. OF L. & ECON. 395, 402 (1983) (highlighting the passivity of retail investors); see also Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 UNIV. PA. L. REV. 1, 66 (1987) (highlighting the passivity of retail investors); see also Stephen M. Bainbridge, *Independence Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1055 (1993) (highlighting the passivity of retail investors); see also Roberta Romano,

play a pivotal role in financial terms as their stock investments bring liquidity to the corporation, and promote the “marketability” of the shares through the exercise of their right to exit.<sup>5</sup>

The only nexus among the characteristics of retail shareholders,<sup>6</sup> financial intermediaries, and institutional shareholders is that they neither aspire to become controlling shareholders nor assume control of the corporation when they purchase stock.<sup>7</sup> In other words, financial intermediaries, institutional investors, and retail shareholders are *usually* majority shareholders (with the exception of State-owned corporations in some jurisdictions).<sup>8</sup> This indicates that financial intermediaries and institutional investors are primarily interested in acquiring minority shareholder powers, and exercising these powers effectively<sup>9</sup> in continental systems such as France and Italy,<sup>10</sup> legal systems of Germany and Scandinavian,<sup>11</sup> as well as in the United States (“U.S”).<sup>12</sup>

However, turning to the “activism phenomenon” that characterizes the corporate engagement of financial intermediaries and institutional investors, these general categories of investors are too vague.<sup>13</sup> Either because the macro-categories of “financial intermediaries” and “institutional investors” are excessively broad and consist of actors whose behaviour are

*Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. OF REG. 174 (2001) (highlighting the passivity of retail investors); see also Anita Anand & Niamh Moloney, *Reform of the Audit Process and the Role of Shareholder Voice: Transatlantic Perspectives*, 5 EUR. BUS. ORG. L. REV. 223, 237 (2004) (highlighting the passivity of retail investors).

<sup>5</sup> See Tucker, *supra* note 1, at 99.

<sup>6</sup> See Niamh Moloney, *The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?*, 13 EUR. BUS. ORG. L. REV. 169, 170-175 (2012), showing a strong degree of “consumerisation” in European Union regulation, namely in Council Directive 2014/65, 2014 O.J. (L 173) (EU) (commonly referred to as “MiFID II”), Council Regulation 600/2014, 2014 O.J. (L 173) (EU) (commonly referred to as “MiFIR”), and Council Regulation 1286/2014, 2014 O.J. (L 352) (EU) (commonly referred to as “PRIIPs”).

<sup>7</sup> *Id.*

<sup>8</sup> See Sophia Dai & Christian Helfrich, *The Structure of Corporate Ownership and Control*, COMP. CORP. GOVERNANCE AND FIN. REG. 5-6, 8 (Spring 2016), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1003&context=fisch\\_2016](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1003&context=fisch_2016).

<sup>9</sup> See Alon Brav, Wei Jiang, Frank Partnoy, & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. OF FIN. 1729 (2008).

<sup>10</sup> See Dominique Plihon, Jean-Pierre Ponsard, & Philippe Zarlowski, *Quel scénario pour le gouvernement d'entreprise: une hypothèse de double convergence*, 63 REVUE D'ÉCONOMIE FINANCIÈRE 35 (2001); see also Nicolas Mottis & Jean-Pierre Ponsard, *L'influence des investisseurs institutionnels sur le pilotage des entreprises*, 28 REVUE FRANÇAISE DE GESTION 225 (2002).

<sup>11</sup> See Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. OF POL. ECON. 1113, 1116 (1998) (highlighting that institutional activism has always been more important in German and Scandinavian jurisdictions than in the other countries of continental Europe).

<sup>12</sup> See Jason M. Halper, Gillian Groarke Burns & Alisa Chau, *United States: Trends and Developments in Shareholder Activism*, MONDAQ (Jul. 18, 2018), <http://www.mondaq.com/unitedstates/x/719236/Shareholders/Trends+And+Developments+In+Shareholder+Activism> (highlighting that while shareholder activism is on the rise, the United States continues to be the leading arena of shareholder activism).

<sup>13</sup> See James Chen, *Financial Intermediary*, INVESTOPEDIA (last updated May 9, 2019), <https://www.investopedia.com/terms/f/financialintermediary.asp> (showing that there are many different forms of financial intermediaries); see also Barclay Palmer, *Introduction to Institutional Investing*, INVESTOPEDIA (last updated Sept. 25, 2019), <https://investopedia.com/articles/financial-theory/11/introduction-institutional-investing.asp> (showing that there are many different forms of institutional investors).

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not necessarily “active”, or because “activism” can include a vast number of different concepts.<sup>14</sup>

The present analysis is devoted to describing *the different kinds of active behaviours* of financial intermediaries and institutional investors. Section III reviews some recent data on the growth of active financial intermediaries and institutional investors as shareholders. Section IV examines the taxonomy of formal activism phenomena and its subparts describe the voting right policy in different jurisdictions, particularly for some ostensible voting obligation, by mentioning also the case of the new EU directive on shareholders’ rights which is directly intended for financial and institutional shareholdings. Section V is devoted to informal activism phenomena and describes the main typologies of *collective informal activism*. Section V’s subpart focuses the attention on *individual informal activism*. Section VI concludes.

### III. FINANCIAL INTERMEDIATION AND INSTITUTIONAL INVESTING – RECENT TRENDS

The steady growth of the equity stakes held by financial intermediaries and institutional investors is coherent with the typical phase of intermediated capitalism experienced by all systems. Most of the estimates on the increased percentage of capital held by institutional investors, and their activism, concern U.S. legal systems<sup>15</sup> and Great Britain.<sup>16</sup> United Kingdom (“UK”) data from 1975 to 1993 showed a steady growth of financial and

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<sup>14</sup> See Paula Loop, Catherine Bromilow & Leah Malone, *The Changing Face of Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 1, 2018), <https://corpgov.law.harvard.edu/2018/02/01/> (showing that the term “activism” in the corporate context can have multiple meanings).

<sup>15</sup> See, e.g., Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1047 (2007); see Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55, 60-4, (2007) (providing rich data referring to the 1987 – 2005 twenty-year period, categorized by type of active power exercised); see Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 J. CORP. FIN. 323, 323 (2008) (discussing the 1998-2005 period); see April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187, 187-88 (2009) (examining a champion which consists of 151 hedge fund activist campaigns conducted primarily between 2003 and 2005 and another one which consists of 154 other entrepreneurial confrontational activist campaigns through individuals, private equity funds, venture capital firms, and asset management groups for wealthy investors, over the same time period); see also Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV., 315, 345 (2008) (providing data on the initiatives supported by public U.S. pension funds, classified as litigation or non-litigation related fund activities, and data obtained from interviews with 124 public pension funds during the period 2005-2006); see Marcel Kahan & Edward B. Rock, *Embattled CEOs*, 88 TEX. LAW REV. 987, 996 (2008) (providing data on the 1965-2008 evolution); see also Nicole M. Boyson & Robert M. Mooradian, *Corporate Governance and Hedge Funds Activism*, 14 REV. DERIVATIVES RES. 170, 170 (2011) (providing data on the decade 1994-2005).

<sup>16</sup> See Marco Becht, Julian R. Franks, Colin Mayer & Stefano Rossi, *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund 5* (European Corp. Governance Inst. in Fin., Working Paper No. 138/2006, 2008), <http://ssrn.com/abstract=934712> (This study is focused on a single UK pension fund, the *Hermes U.K. Focus Fund (HUKFF)*. The case is special, for even though Hermes is an investor with several features in common with the hedge funds, it is a pension fund which was created through the joint venture between Lens Focus management LLP and Hermes, namely the public pension fund for employees of “British Telecom”. The Authors associate it with a hedge fund, but others correctly point out that, despite several similarities with the hedge funds, it is a *sui generis* investor, given its structural connection with the pension fund for employees of “British Telecom.”).

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institutional shareholders<sup>17</sup> was proportionally greater than the U.S. during the same period,<sup>18</sup> including a more concentrated ownership in the UK.<sup>19</sup> From 2005 to 2014 data reveals that 79% of the securities were held by financial and institutional investors, whereas 19.4% were held by retail customers and 1.7% from private investors.<sup>20</sup> Among these, pension funds represent the most important investor,<sup>21</sup> followed by the life insurance companies, whose portfolio largely consists of equity interests.<sup>22</sup>

Additionally, in the French system, the increase in financial and institutional shareholdings is constant, especially since late 1990s.<sup>23</sup> However, there has been a slight decrease in domestic investors and a visible increase in foreign investors.<sup>24</sup> Along with Italy, France holds the record of the highest percentage of non-resident institutional shareholders.<sup>25</sup> In both countries, the reason for the high number of non-resident investors is the need to attract foreign capital (often by means of privatisation processes) to fight against structural low-capitalization.<sup>26</sup>

In this context, collective *Organisme de Placement Collectif en Valeurs Immobilières* (“OPVCM”) managers represent the most important segment of institutional investors.<sup>27</sup> The “fonds d’investissement étrangers,” or the foreign investment funds, at the end of the millennium accounted for about 50% of the market capitalization of the CAC 40

<sup>17</sup> See John C. Coffec, Jr., *Liquidity versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1310 (1991) (discussing an overall increase of between 45% in 1975 to over 63% at the end of the 80’s).

<sup>18</sup> See *id.*

<sup>19</sup> See Bernard S. Black & John C. Coffec, Jr., *Hail Britannia? Institutional Investors Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997, 2002 (1994).

<sup>20</sup> See The Investment Association, *Asset Management in the UK 2014-2015*, 15 (Sept. 2015), <https://www.theia.org/sites/default/files/2019-05/20150914-ams2014-2015-fullsurvey.pdf> (it has to be noted that 39% of managed assets is non-resident in the UK.).

<sup>21</sup> See *id.* (Pension funds equity stocks represented almost 60% of UK total shareholdings already at the end of the 80’s).

<sup>22</sup> See Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORG. L. REV. 51, 55 (2010); see generally Mac Baker & Michael Collins, *The Asset Portfolio Composition of British Life Insurance Firms, 1900-1965*, 10 FIN. HIST. REV. 137 (2003).

<sup>23</sup> See Daniel Baudru & Med Kechidi, *Les investisseurs institutionnels étrangers: vers la fin du capitalisme à la française?*, 48 REVUE D’ÉCONOMIE FINANCIÈRE 93, 93-94 (1998); see also Esther Jeffers & Dominique Plihon, *Investisseurs institutionnels et gouvernance des entreprises*, 63 INVESTISSEURS INSTITUTIONNELS ET GOUVERNANCE DES ENTREPRISES 137, 139 (2001); see also Michel Dietsch, *Mondialisation et Recomposition du Capital des Entreprises Européennes*, 62 INT’L AND STRATEGIC REV. 53, 54 (2006).

<sup>24</sup> See Mottis & Ponsard, *supra* note 10; see also MICHEL AGLIETTA & ANTOINE REBERIOUX, *CORPORATE GOVERNANCE ADRIFT: A CRITIQUE OF SHAREHOLDER VALUE*, 6 (Edward Edgar Publishing 2005).

<sup>25</sup> See Edouard Dubois, *Shareholders’ General Meetings and the Role of Proxy Advisors in France and Japan*, 4 KYUSHU J. OF INT’L LEGAL STUD. 56, 71 (2011) (explaining that on December 31, 2010, over 40% of the shares listed on the French markets were held by non-resident shareholders, and among them the American public pension funds had the highest specific weight); see also Julien Le Roux, *La détention par les non-résidents des actions des sociétés françaises du CAC 40 à n 2010*, 180 BULL. DE LA BANQUE DE FRANCE 15 (2010), [https://publications.banque-france.fr/sites/default/files/medias/documents/bulletin-de-la-banque-de-france\\_180\\_2010-t2.pdf](https://publications.banque-france.fr/sites/default/files/medias/documents/bulletin-de-la-banque-de-france_180_2010-t2.pdf).

<sup>26</sup> See generally Marianne Rubinstein, *Le débat sur le gouvernement d’entreprise en France. État provisoire du droit positif*, 98 REVUE D’ÉCONOMIE INDUSTRIELLE 7 (2002) (at that moment the foreign investors covered around 30% of the total market capitalization).

<sup>27</sup> See Jeffers & Plihon, *supra* note 23, at 138.

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index.<sup>28</sup> The features of financial and institutional shareholders in Spain are similar to those in France, in that the two countries share the same structural low-capitalization, the limited presence of institutional investors,<sup>29</sup> and the growing importance of foreign investors.<sup>30</sup> While similar, the Spanish numbers are still lower than in France.<sup>31</sup>

Germany and Switzerland are also characterised by the presence of state pension funds and insurance companies.<sup>32</sup> Their systems were founded on a bank-like financial intermediation model.<sup>33</sup> This allows the international vocation of all financial intermediaries (holders of significant equity investments in major foreign intermediaries) to grow.<sup>34</sup> Italian data shows that institutional shareholdings are increasing, especially in the segment of mid-cap listed companies.<sup>35</sup> The trend is significant, considering that in Italy, as in Spain, the percentage of financial shareholdings is lower than other European countries.<sup>36</sup>

**IV. ACTIVISM PHENOMENA: THE “FORMAL ACTIVISM” OF FINANCIAL INTERMEDIARIES AND INSTITUTIONAL INVESTORS**

With limited exceptions, the U.S. scholars attribute, to financial intermediaries and institutional investors, a natural inclination to activism *in general*.<sup>37</sup> With a *caveat* that the concept is actually polymorphic and includes very different behaviours.<sup>38</sup> A recent frontier of financial and institutional activism is the say-on-pay decisions and votes on remuneration

<sup>28</sup> *Id.* at 141.

<sup>29</sup> See Ascensión Gallego Córcoles, *Proxy Advisors in the Voting Process: Some Considerations for Future Regulation in Europe*, 13 EUR. COMPANY AND FIN. L. REV. 109 (2016); see also Vicente Mambrilla Rivera, *Documento elaborado por el Grupo de Expertos para evaluar la actividad de los “proxy advisors” en relación con los emisores españoles*, 9 (Apr. 16, 2012), <http://www.cnmv.es/DocPortal/Publicaciones/Grupo/InformeProxyAdvisors.pdf>; see also Comisión Nacional del Mercado de Valores (CNMV), *Informe anual de la CNMV sobre los mercados de valores y su actuación*, [CNMV Ann. Rep. of the Sec. Mkt. & Their Actions] 22, 24 (2015) (Spain), <https://www.cnmv.es/DocPortal/Publicaciones/Informes/1A2015ENen.pdf>.

<sup>30</sup> See STEFANO MARINI ET AL, *EL GOBIERNO CORPORATIVO Y LOS INVERSORES INSTITUCIONALES*, 43 (Georgeson 2013).

<sup>31</sup> See generally CNMV, *supra* note 29.

<sup>32</sup> See Patrick C. Leyens, *Comply or Explain im Europäischen Privatrecht - Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 420 (2016).

<sup>33</sup> ROBERT J. BARRO & VITTORIO GRILLI, *EUROPEAN MACROECONOMICS* 275 (Macmillan 1994).

<sup>34</sup> See Holger Fleischer, *Zur Rolle und Regulierung von Stimmrechtsberatern (Proxy Advisors) im deutschen und europäischen Aktien- und Kapitalmarktrecht*, 57 ZEITSCHRIFT FÜR DAS GESAMTE AKTIENWESEN, FÜR DEUTSCHES, EUROPÄISCHES UND INTERNATIONALES UNTERNEHMENS- UND KAPITALMARKTRECHT 2 (2012) (Ger.).

<sup>35</sup> See Report on Corporate Governance of Italian Listed Companies, at 8, 10 (2017), <http://www.consob.it/documents/46180/46181/rcg2017.pdf/7846a42b-1688-4f45-8437-40aceaa2b0e3>.

<sup>36</sup> See Gallego Córcoles, *supra* note 29, at 109.

<sup>37</sup> See, e.g., Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L. J. 445, 455 (1991).

<sup>38</sup> Stuart L. Gillan & Laura T. Starks, *Corporate governance proposals and shareholder activism: the role of institutional investors*, 57 J. OF FIN. ECON. 275, 280, 283 (2000); see also Choi et al., *supra* note 15, at 326.

policies.<sup>39</sup> An increase is present in both in cases in which financial intermediaries and institutional investors vote against compensation decisions that are subject to their approval.<sup>40</sup>

As for the active actors, even the catalogue of active powers is affected by path dependencies.<sup>41</sup> As such, the shareholders' proposals, a standard for U.S. public pension funds activism, are almost completely absent among Italian and Spanish financial and institutional investors, given the lack of tradition in this field.<sup>42</sup> However, an exception exists of sporadic activism also referred to as some specific corporate transactions.<sup>43</sup> It is evident the legal landscape has partially changed over time, given the visible increase of minority shareholders remedies.<sup>44</sup> Yet, Italian active financial shareholders in wider terms - and with some relevant exceptions<sup>45</sup> - continue to prefer low-cost initiatives, resulting in the phenomenology of shareholders proposals to be almost insignificant.<sup>46</sup>

Another idiosyncratic form of activism, a typical Italian model, is slate voting, a semi-proportional voting system for the appointment of minority members in the corporate bodies.<sup>47</sup> It serves to increase the aptitude of administrative and control bodies to represent all

<sup>39</sup> See The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, pt. 4 (Eng.), <https://www.legislation.gov.uk/ukxi/2008/410/contents/made>; see also Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, as amended by Gesetz zur Angemessenheit der Vorstandsvergütung [VorstAG] [Law on the Appropriateness of Management Board Remuneration], Jul. 31, 2009, Der Bundestag at 22, §120, pt. 4 (Ger.) (introducing the consultative vote on the remuneration policy of directors); see also *SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act*, U.S. SEC. & EXCHANGE COMMISSION (Jan. 25, 2011), <https://www.sec.gov/news/press/2011/2011-25.html>; see also the Italian legislative decree 24 *Febbraio 1998*, no. 58, the so-called “*testo unico della finanza*” (hereinafter also “*TUF*”), in *CONSOB* Feb. 24, 1998, n. 52 at art. 123-ter; see also the British Companies Act 2006, c. 49, § 226 amended by Enterprise and Regulatory Reform Act 2013, c. 24, (Eng.), in <http://www.legislation.gov.uk/ukpga/2013/24/contents/>; see also the Spanish Ley de Sociedades Anónimas [Corporations Law], art. 529 (R.C.L. 1564, 1989) (Spain) amended by Companies Act 2006, Dec. 3, 2014, art. 529. (Spain).

<sup>40</sup> See Italian Commissione Nazionale per le Società e la Borsa [CONSOB] [National Commission for Companies and the Stock Exchange], *Report on corporate governance of Italian listed companies* 31 (2018), <http://www.consob.it/documents/46180/46181/rcg2018.pdf/549286f4-907e-427c-9fdf-926386140479.pdf>. See, for example, in Italy the Consob data updated on December 2016 and relevant to dissent-votes (including abstentions) in percentage of total votes.

<sup>41</sup> Klaus J. Hopt, *Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules?* 11 (Max Planck Inst. for Comp. & Int'l Priv. L. & ECGI, Working Paper No. 312, 2016), [https://ecgi.global/sites/default/files/working\\_papers/documents/SSRN-id2749237.pdf](https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id2749237.pdf).

<sup>42</sup> Massimo Belcredi & Luca Enriques, *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: the Case of Italy* 12 (Euro. Corp. Governance Inst., Working Paper No. 225, 2013), [https://ecgi.global/sites/default/files/working\\_papers/documents/SSRN-id2325421.pdf](https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id2325421.pdf) (as evidenced by the fact that in Italy the shareholders' activism phenomena all come from foreign or otherwise non-resident hedge funds).

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.* at 7, 9, 16.

<sup>45</sup> *Id.* at 16 (one exception being the case for “Assogestioni”, notoriously engaged in a constant lobbying activity, which mainly consists in the systematic recourse to the slate voting and in the support to specific corporate transactions).

<sup>46</sup> *Id.* at 12 (emphasizing that stake held by Italian mutual funds has steadily declined).

<sup>47</sup> Luca Enriques, *Modernizing Italy's Corporate Governance Institutions: Mission Accomplished?* 18 (U. of Bologna, CONSOB & ECGI, Working Paper No. 123, 2009), <https://ssrn.com/abstract=1400999.pdf>. See also Matteo Erede, *Governing Corporations with Concentrated Ownership Structure: Can Hedge Funds Activism Play Any Role in Italy?* 14, 17 (unpublished paper) (on file with the U. OF PA. L. SCH.),

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the constituencies, almost like cumulative voting.<sup>48</sup> The slate voting system leads to important results because institutional investors collect the votes of dispersed shareholders.<sup>49</sup> This can sometimes lead to a paradoxical result, when the number of directors appointed by such institutional investors exceeds the number of directors nominated and elected by the majority.<sup>50</sup> Although, financial intermediaries and institutional investors may not always be interested in leaving it up to using this *chance*.<sup>51</sup> Moreover, although the election of the members of administrative and control bodies in accordance with the slate voting is mandatory, not all companies listed on regulated markets have implemented the legal rule.<sup>52</sup> The only other example of slate voting, apart from Italy, can be found in the Icelandic legal system, which shares with the Italian one the clear aim to promote the presence of strong minority shareholders in the board.<sup>53</sup> Due to this limited number of cases the slate voting model does not fit in the classifications developed by the voting theory.<sup>54</sup>

The category of non-majoritarian voting systems includes, of course, the Spanish system of proportional representation which, unlike the slate voting, is a multiple-winner method based on a mechanism of proportional representation of minorities in the board, but of *all minorities*.<sup>55</sup> In this case the aim is to promote the activism both of institutional investors

<https://ssrn.com/abstract=1397562.pdf>; see generally Belcredi & Enriques, *supra* note 42, at 8; see generally Hopt, *supra* note 41, at 18.

<sup>48</sup> See Mario Stella Richter Jr, *Considerazioni preliminari in tema di corporate governance e risparmio gestito [Preliminary considerations on corporate governance and asset management]*, 1 GIURISPRUDENZA COMMERCIALE-GIUR. COMM., I, [COMMERCIAL JURISPRUDENCE] (2006) at 205 (according to ongoing analysis cumulative voting is mandatory only in 6 states of the federation, optional in 44, and banned in 1); see also Simone Alvaro, *Voto di lista per la rappresentanza di azionisti di minoranza nell'organo di amministrazione di società quotate*, CONSOB 2012 at 28; see, e.g., Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 79 U. OF PA. L.R. 1271, 1303 (2016) (the attitude of cumulative voting allowing greater representation for the administrative body was estimated to be less effective than the model that allows the largest of the minorities to express their own representation, like the Italian slate voting).

<sup>49</sup> See Belcredi & Enriques, *supra* note 42, at 21.

<sup>50</sup> Marco Ventoruzzo & Piergaetano Marchetti, *Italian Boards and the Strange Case of the Minority Becoming the Majority*, HARV. L. REV. FORUM ON CORP. GOVERNANCE AND FIN. REG. (May 23, 2016).

<sup>51</sup> CONSOB, *Incontro annuale con il mercato finanziario [Annual meeting with the financial market]*, 9-11 (2016), <https://www.consob.it/documents/46180/46181/discorso2018.pdf/03ba6653-2154-4dac-b5c4-6b145900c919.pdf>.

<sup>52</sup> See Decreto Legislativo, According to article 147, paragraph 1, and article 148, paragraph 2, legislative decree 24 febbraio 1998, n. 58, or *testo unico della finanza - TUF*, (*supra* note 39), at no. 52 at art. 123 (explaining that it is mandatory according to respectively for the election of a board of directors and the internal control of body members). *But see* Alvaro, *supra* note 48, at 23 (explaining how it has approximately only been activated, to date, by half of the listed companies).

<sup>53</sup> See Icelandic Company Act (Act No. 2/1995) (Ice.) (providing three voting systems: majority voting, cumulative voting and proportional voting as stated in Article 63); see also Aslaug Bjorgvinsdóttir, *Icelandic Company Law*, STOCKHOLM INST. FOR SCANDINAVIAN L. 45, 58 (2004) (“Under Article 63, paragraph 7, shareholders controlling at least 1/5 of the share capital can demand proportional voting or cumulative voting to elect directors. In companies with 200 or more shareholders, shareholders controlling at least 1/10 of the share capital are allowed to place such a demand.”).

<sup>54</sup> See Enriques, *supra* note 47; see also Belcredi & Enriques, *supra* note 42; see also Bjorgvinsdóttir, *supra* note 53.

<sup>55</sup> See Corporations Law (Spain), *supra* note 39 (“The election of the members of the Council shall be made by means of a vote. For these purposes, the actions that are voluntarily grouped together until constituting a figure of capital equal to or greater than that resulting from dividing the latter by the number of members of the Board, shall have the right to designate those which, surpassing entire fractions, are deducted from the



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and other minorities.<sup>56</sup> Apart from the above cases, in which the corporate law regulates the electoral system, many OECD legislations authorise the bylaws to provide for rules aimed at allowing the appointment of minority representatives in the corporate bodies.<sup>57</sup> It must be reiterated that the power to appoint a minority member in a corporate body does not necessarily imply the power to remove it, as is the case in Germany with regards to *Aufsichtsrat* components.<sup>58</sup>

Another frontier of shareholder activism concerns the administrative body structure,<sup>59</sup> especially for aspects related to composition, “gender quotas,”<sup>60</sup> the number of independent directors, the possibility to replace CEOs, managers and administrative officers,<sup>61</sup> and the opportunity to appoint one or more *institutional directors*.<sup>62</sup>

In the U.S. there has been a period of great institutional activism in regards to the appointment of directors and members of the internal control bodies from 1980-1990.<sup>63</sup> This was characterized by a strong increase in investments of nearly all financial and institutional investors and by frequent proxy fights.<sup>64</sup> In regards to proxy fights, the California Public Employment Retirement System (CALPERS), the nation’s largest public pension fund, along

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corresponding proportion. In the event that this power is used, the actions thus grouped will not intervene in the vote of the remaining members of the Council.”)

<sup>56</sup> *Id.*

<sup>57</sup> See Organization for Economic Co-Operation and Development (OECD), DIRECTORATE FOR FIN. AND ENTERPRISE AFF. CORP. GOVERNANCE COMMITTEE (2012) (analyzing that Australia, Belgium, Brazil, Czech Republic, Finland, Germany, Japan, Poland, Slovenia, Sweden and Turkey allow the introduction of a bylaw with “no quota limits”). *But see id.* (explaining that the following countries do not allow the introduction of the clause only in favor of minorities qualified by the possession of a certain shareholding: Canada (5%), Chile (1%), Estonia (5%), France (0.5 to 5%), Greece (5%), Hungary (1%), Indonesia (10%), Korea (3% for listed companies), Mexico (10%), Netherlands (1%), Portugal (2%), Singapore (5%), Switzerland (the minimum nominal value of the shareholding owned should not be less than one million Swiss francs)).

<sup>58</sup> See Aktiengesetz [AktG], *supra* note 39, at 1089 (last amended by [VorstAG], 10 May 2016, BGB1. I p. 1142, art. 103 (Ger.) (discussing how the members of the supervisory board who have been elected by the shareholders’ meeting without being bound by nominations may be removed pursuant to the resolution of the shareholders’ meeting prior to the expiration of their term in office, such resolution requires a majority of no less than three-fourths of the votes cast, and that companies’ charters may provide for a higher or lower majority).

<sup>59</sup> See Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA. L. REV. 811, 840 (1992).

<sup>60</sup> See Laura O’Neill & Jackie Cook, *Proxy Voting by Canadian Mutual Funds*, SHARE MUTUAL FUNDING REP., 46 (2008), [https://www.share.ca/files/MutualFund\\_Voting\\_Report\\_0607.pdf](https://www.share.ca/files/MutualFund_Voting_Report_0607.pdf) (regarding the resolutions on gender quotas used to create equal representation among genders for election of management bodies, the change (or update) in the definition of the independent director, and the definition of the maximum number of independent directors). On the first point, a number of proposals promoted by MEDAC aims to increase the number of women directors (like in Royal Bank of Canada, Toronto Dominion Bank, Bank of Nova Scotia, National Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Montreal, and Power Corporation of Canada).

<sup>61</sup> See Black, *supra* note 59, at 842.

<sup>62</sup> See *id.* (stating that the appointment of institutional directors was very much vogue in the United States especially in the 90’s where normally they “[we]re selected by a company’s institutional shareholders, either formally or through informal agreement with the managers”).

<sup>63</sup> See Gerald F. Davis & Tracy A. Thompson, *A Social Movement Perspective on Corporate Control*, 39 ADMIN. SCI. Q. 141, 142 (1994).

<sup>64</sup> *Id.* at 148.

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with other institutional investors, obtained a review of the federal rules on representation at meetings.<sup>65</sup>

In truth, it is well known that as a rule, proxy fights are a long and expensive form of activism.<sup>66</sup> Nevertheless, this kind of *operational activism*, pursue long-term goals, whose objectives are “capital related” or “governance related,” and primarily focus on changes in management and strategy and/or board representation,<sup>67</sup> now seem to be on the upswing again.<sup>68</sup> During the late 1990s, when activism was a very rare behaviour,<sup>69</sup> famous cases were represented by State and municipal public pension funds,<sup>70</sup> like the private retirement fund of American teachers, namely the Teachers Insurance and Annuity Association of America - College Retirement Equities Fund (TIAA-CREF), and to a less extent by the California State Teachers Retirement System (CALSTRS), the New York City Employees’ Retirement System (NYCER) and CalPERS.<sup>71</sup> The latter would rise to the top along with British and European public retirement funds, due to the rising costs for commissions.<sup>72</sup>

Recently, some empirical evidence related to the exercise of active powers<sup>73</sup> was found in terms of general governance standards, dual-class shares and financial/corporate disclosure issue resolutions, as well as in terms of Rule 14a-8 corporate governance proposals, and majority vote requirements for the election of directors’ proposals.<sup>74</sup> According to recent data, chair proposals have been less successful.<sup>75</sup>

<sup>65</sup> See Jean-Sebastien Lantz et al., *Activism of Institutional Investors, Corporate Governance Alerts and Financial Performance*, 15 INT’L J. OF BUS. 1, 2 (2010).

<sup>66</sup> See Loop et al., *supra* note 13.

<sup>67</sup> See Richard Reed & Susan F. Storrud-Barnes, *Increased Shareholder Activism and the Changing Landscape of Corporate Governance*, 30 AM. J. OF BUS. 1, n.1 (2015) (“That is not to say that larger dividend payments and stock repurchase programs are not included on their agendas, but they tend to be less prominent.”).

<sup>68</sup> See Andrew Bristingl & Michael Coronato, *2016 Shareholders Activism Review*, FACTSET (Feb. 1, 2017), [https://cdn2.hubspot.net/hubfs/1803721/Resources%20Section/Research%20Desk/Market%20Insight/FactSet’s%202016%20Year-End%20Activism%20Review\\_2.1.17.pdf](https://cdn2.hubspot.net/hubfs/1803721/Resources%20Section/Research%20Desk/Market%20Insight/FactSet’s%202016%20Year-End%20Activism%20Review_2.1.17.pdf); see also David Hunker et al., *The 2017 Proxy Season*, J.P. MORGAN (Jul. 2017), <https://www.jpmorgan.com/jpm/pdf/1320739681811.pdf>.

<sup>69</sup> See Black, *supra* note 4, at 534; see also Marcello Bianchi et al., *Gli investitori istituzionali italiani e la corporate governance delle società quotate dopo la riforma del 1998: un’analisi del ruolo potenziale dei gestori di fondi comuni*, BANCA IMPRESA SOCIETÀ 403 (2002).

<sup>70</sup> See Coffee, *supra* note 17, at 1280.

<sup>71</sup> *Id.*

<sup>72</sup> See Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and “Dominated Funds” in 401 (k) Plans*, 124 YALE L. J. 1479 (2015). But see, Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUMBIA L. REV. 795 (1993) (referencing the same problem in the UK, especially for the costs of defined contribution pension funds).

<sup>73</sup> See Mariarosaria Agostino, Annamaria Nifo, Francesco Trivieri & Gaetano Vecchione, *Total Factor Productivity Heterogeneity: Channelling the Impact of Institutions*, MPRA PAPER NO. 72759 (Jul. 31, 2016), [https://mpa.ub.uni-muenchen.de/72759/1/MPRA\\_paper\\_72759.pdf](https://mpa.ub.uni-muenchen.de/72759/1/MPRA_paper_72759.pdf).

<sup>74</sup> See Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Era of Intermediate Capitalism*, 87 SOUTHERN CAL. L. REV., 103 (2014); see also Yafit Cohn, *Special Meeting Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 2, 2016), <https://corpgov.law.harvard.edu/2016/09/02/special-meeting-proposals-2/> (Rule 14a-8 “is the rule to call a special meeting outside of the usual annual meeting. Among companies in the Russell 3000, approximately 1,300 provide their shareholders with the right to call special meetings. During the 2016 proxy season, 19 special meeting shareholder proposals went to a vote at Russell 3000 companies. Of these, five proposals sought to create the right, one of which received majority shareholder support to create the right for holders of 15% of the company’s outstanding common stock. The other 14 proposals sought to lower the ownership threshold with respect to an existing right, two of which received majority support; these proposals requested to

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Some isolated initiatives concern the proposal to hold shareholders' meetings in English on alternate years,<sup>76</sup> in different locations, proposals relating to the models of remuneration of the executive directors linked to the remuneration of employees,<sup>77</sup> or approved by the meeting.<sup>78</sup> Moreover, there is a considerable activism both in public pension funds and in Canadian hedge funds,<sup>79</sup> especially regarding the appointment of the administrative and internal control bodies and, to a lesser extent, the elimination of the slate voting for the appointment of directors<sup>80</sup> and the advisory vote for the remuneration of directors and executives.<sup>81</sup>

Regarding the UK activism of institutional investors is well known for initiatives aimed at causing the resignation of the directors, often accompanied by a strong media response.<sup>82</sup> More generally, there was an increased activism over time for British institutional investors compared to U.S. counterparts,<sup>83</sup> although the current phase is characterized by growing American institutional activism.<sup>84</sup> However, except for pension funds, in particular

lower the threshold of an existing right to 10% from either 25% or 50%. Overall, shareholder proposals relating to special meetings received average shareholder support of 41.5% this proxy season.”)

<sup>75</sup> Cohn, *supra* note 74 (the appointment of independent members in the board of directors, “during the 2016 proxy season, 47 shareholder proposals calling for independent board chairs reached a vote at Russell 3000 companies, all of which failed. This development reflects a decline from last year’s proxy season during which 62 independent chair proposals reached a shareholder vote and two passed.”).

<sup>76</sup> Holger Fleischer, *Europäische Methodenlehre: Stand und Perspektiven*, 75 RABELZ, 712 (2011) (The specific linguistic path dependence is particularly high in the European area, where there are 24 different official languages, apart from other languages commonly used such as Catalan).

<sup>77</sup> See generally Jean-Pierre Laporte, *Shareholder activism in the Canadian Banking Sector: A Look at Mr. Yves Michaud's Proposals for Reform*, MOUVEMENT D'ÉDUCATION ET DE DÉFENSE DES ACTIONNAIRES (Dec. 7, 1998), <https://medac.qc.ca/documentspdf/documentation/etudesrapports/Law-of-Corporate-Management-Jean-Pierre-Laporte-7-decembre-1998-texte-en-anglais.pdf>.

<sup>78</sup> *Id.*

<sup>79</sup> See Jeffrey G. MacIntosh, *The Role of Institutional and Retail Investors in Canadian Capital Markets*, 31 OSGOODE HALL L. SCH. 374 (1993) (the cases of the Ontario Municipal Employees Retirement Fund (Omerf) and the Ontario Teachers' Pension Plan Board (Otppb)).

<sup>80</sup> See Laura O'Neill & Jackie Cook, *Proxy Voting on Canadian Mutual Funds 2006-07: A Survey of Management and Shareholder Resolutions*, SHAREHOLDER ASS'N FOR RES. AND EDUC. 46 (2010) (references to the proposal for abolition of the slate voting for the election of directors).

<sup>81</sup> See Irish Stock Exchange and the Irish Association of Investment Managers, *Report on Compliance with the combined Code on Corporate Governance by Irish Listed Companies*, Dublin, Irish Stock Exchange at 4 (2010).

<sup>82</sup> See Vanessa Finch, *Companies Directors: Who cares about Skill and Care?*, 55 THE MODERN L. REV., 182 (1992). (Reference is made to the many initiatives by the Institutional Shareholders Committee in the 1970's, by pensions funds, insurance companies, unit trusts/investment trusts, in conjunction with the Bank of England.); see also Becht et al., *supra* note 16.

<sup>83</sup> Paul L. Davies, *Institutional Investors in the United Kingdom*, noted in D.D. Prentice & P.R.J. Holland, *Contemporary Issues in Corporate Governance*, Oxford, OXFORD UNIV. PRESS 69 (1993) (observing that both have similar conflicts of interest); see also Marcello Bianchi et al., *supra* note 69.

<sup>84</sup> Arthur F. Golden, *Shareholder Activism & Engagement 2016*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Mar. 14, 2016), <https://corpgov.law.harvard.edu/2016/03/14/shareholder-activism-engagement-2016/> (“In the past year, we have seen hedge fund shareholder activism reach new heights, both in the number of campaigns (estimated at the time of writing as more than 230 campaigns in the United States alone in 2015) to the size and iconic nature of the companies targeted (for example “American International Group, Inc.”AIG, “DuPont e Nemours and Company”, “General Electric Company” and “General Motors Corp.”).

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public pension funds,<sup>85</sup> and to a lesser extent, mutual fund<sup>86</sup> data on which the financial and institutional investors are truly active are largely controversial.<sup>87</sup> This is shown by recent studies on the activism behaviour of passive mutual funds and Exchange Traded Funds-Etf.<sup>88</sup> Yet, there are conflicts of interest that strongly influence corporate behaviour of the main investors, especially regarding multifunctional managers.<sup>89</sup> This may be due to the fear that similar initiatives can lead to a loss of consensus in subsidiaries.<sup>90</sup>

In general, *low-cost activism* prevails, namely proposals for resolutions and campaigns to promote negative resolutions that require little financial commitment and that can also be initiated by those holding a minority shareholding.<sup>91</sup> It has been said that pension funds, mutual funds and “traditional” financial intermediaries in general, have a defensive approach to activism, so that they usually act *ex post* when they realize that a company is underperforming, while hedge funds adopt normally an offensive activism, selecting *ex ante* a target to reach.<sup>92</sup>

On the other hand, also in terms of policy, only if there are large inefficiencies associated with the corporate governance mechanisms providing incentives for institutional investors to expand, their role becomes an attractive policy option.<sup>93</sup> In every other case, this “will not be costless for the market to provide a greater supply of institutional investor monitoring.”<sup>94</sup> Furthermore, premising that a great involvement in corporate governance asks for significant costs both in general and also in terms of new investments in human capital,<sup>95</sup> certain forms of *high-cost activism* and *strategic activism* arise from hedge funds almost everywhere.<sup>96</sup>

<sup>85</sup> Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 959-960 (2013) (“Large pension funds are likely to be more active because they have more predictable inflows and outflows, and because their portfolios inevitably mirror the economy as a whole, thus eliminating the exit option”).

<sup>86</sup> See Coffee, *supra* note 17.

<sup>87</sup> See Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors 1* (European Corp. Governance Inst., Working Paper No. 414/2018, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3192069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192069) (particularly on their increasing ability to exercise influence through voting).

<sup>88</sup> *Id.*

<sup>89</sup> Belcredi & Enriques, *supra* note 42, at 22.

<sup>90</sup> Bianchi et al., *supra* note 69, at 409.

<sup>91</sup> John Armour & Brian Cheffins, *The Rise and Fall of Shareholder Activism by Hedge Funds* (European Corp. Governance Inst., Working Paper No. 136/2009, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1489336](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1489336).

<sup>92</sup> See *id.* at 2.

<sup>93</sup> See Johnathan R. Macey, *Institutional Investors and Corporate Monitoring: A Demand-Side Perspective in a Comparative View*, in *COMPARATIVE CORPORATE GOVERNANCE. THE STATE OF THE ART AND EMERGING RESEARCH* 905 (Klaus Hopt et al. eds., 1999).

<sup>94</sup> Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 THE J. OF FIN. 737, 737 (1997).

<sup>95</sup> Macey, *supra* note 93, at 918.

<sup>96</sup> ETTORE CROCI, *SHAREHOLDER ACTIVISM: AZIONISTI, INVESTITORI ISTITUZIONALI E HEDGE FUND* 38 (Franco Angeli ed. 2011); see also Belcredi & Enriques, *supra* note 42, at 23 (“A typical, pro-active, high-cost form of engagement takes place where hedge funds push for changes in company strategy..., suggest a specific transaction, or press to alter the firm financial structure or its dividend policy”).

### A. The Ostensible Legal Hypothesis for Voting Obligations and the Case of the EU New Shareholders' Right Directive

After decades of debate devoted first to the role, the structure and the distribution of tasks within the administrative body, and then to the disclosure of fees, stock option plans and say-on-pay decisions,<sup>97</sup> the general attention is now focused on the disclosure of voting policies. As for Europe, The European Council on April, 3, 2017, adopted the EU Directive no. 2017/828, of the European Parliament and the Council, of May, 17, 2017, which amends European Parliament and Council Directive no. 2007/36/EC, of 11 July 2007, on the exercise of certain rights of shareholders in listed companies and EU Directive no. 2013/34 regarding certain elements of the corporate governance statement (Shareholder Rights Directive, SRD).<sup>98</sup>

In spite of the fact that it is qualified as an amendment of the 2007/36/EC Directive, the SRD II is actually a new Directive, that is clearly aimed at promoting the long-term commitment of non-controlling, organised and qualified shareholders of listed companies, large companies and large groups.<sup>99</sup> In this regard, Preamble no. 15 states that “institutional investors and asset managers are often important shareholders of listed companies in the Union and can therefore play an important role in the corporate governance of those companies, but also more generally with regard to their strategy and long-term performance.”<sup>100</sup> However, the same preamble notes that:

[I]nstitutional investors and asset managers often do not engage with companies in which they hold shares and evidence shows that capital markets often exert pressure on companies to perform in the short term, which may jeopardise the long-term financial and non-financial performance of companies and may, among other negative consequences, lead to a suboptimal level of investments, for example in research and development, to the detriment of the long-term performance of both the companies and the investors.<sup>101</sup>

To partially solve the problem, the Directive assigns a transparent role to minority shareholders and in particular to institutional investors.<sup>102</sup> For example, if investors were more involved and focused on the future, the company would prioritize long-term problems, to benefit end users of institutional investors, asset managers, and companies in general. To that end, the transparency on voting rights becomes crucial.<sup>103</sup>

The transparency on voting rights, as well as the European policy on voting rights in general, is strictly tied to the formal activism theme which has already been debated.<sup>104</sup> There is a strong push towards a valorisation of long-term shareholders, the so-called *patient*

<sup>97</sup> See Croci, *supra* note 96.

<sup>98</sup> European Union, Council Directive 2017/828, 2017 O.J. (L132) 1 (EU).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at, preamble no. (15).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 16.

<sup>103</sup> *Id.*

<sup>104</sup> See Samuel G. Hanson et al., *Banks as Patient Fixed-Income Investors*, 117 J. OF FIN. ECON. 449 (2019).

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investors.<sup>105</sup> The transparency of voting policies in financial intermediaries and institutional investors,<sup>106</sup> in their dual role as owners and equity managers is a recurring remark.<sup>107</sup>

Explicitly, the 17th Preamble provides that “institutional investors and asset managers should be more transparent regarding their approach to shareholder engagement or, conversely, explain why they have chosen not to do so.”<sup>108</sup> Also, “the policy on shareholder engagement should describe how institutional investors and asset managers integrate shareholder engagement in their investment strategy” and the engagement activities to be carried out.<sup>109</sup> The engagement policy should also include policies to manage actual or potential conflicts of interest, where the institutional investors, asset managers, or their affiliated undertakings have significant business relationships with the investee company. Furthermore, the engagement policy should be publicly available online.

However, it must be noted that the SRD and the SRD II enhance the role of long-term investors instead of hedge funds.<sup>110</sup> The aim of the Directive is to involve dynamically harmonized financial institutions for the corporate long term such as mutual funds, pension funds, insurance companies and credit institutions.<sup>111</sup> The Directive does not rely on the hedge funds to improve corporate governance mechanisms.<sup>112</sup> The fact that hedge funds are not allowed to raise the public savings and therefore are not classified as institutional investors, according to EU Directives, the misunderstanding inherent to the hedge funds bias is discussed below.<sup>113</sup>

Notwithstanding an individual who has proposed compulsory voting for all pooled investment funds (e.g. UCITS),<sup>114</sup> there is no provision on compulsory voting in the shareholders directive or in European company law. The revised SRD does not necessitate shareholder engagement, nor do shareholders have an obligation to engage effectively with investee companies or exercise the rights attached to their shares.<sup>115</sup> Specifically, the theoretical underpinning of the SRD II model does not provide that shareholders have any obligation to interact with investee companies.<sup>116</sup>

<sup>105</sup> *Id.* at 450.

<sup>106</sup> See Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585, 6 (Feb. 5, 2003); See also INTERNATIONAL CORPORATE GOVERNANCE NETWORK, ICGN CORPORATE GOVERNANCE PRINCIPLES 29-32 (5<sup>th</sup> ed., 2017), [http://icgn.flpbks.com/icgn\\_global\\_governance\\_principles/ICGN\\_Global\\_Governance\\_Principles.pdf](http://icgn.flpbks.com/icgn_global_governance_principles/ICGN_Global_Governance_Principles.pdf); see also EFAMA CODE FOR EXTERNAL GOVERNANCE, PRINCIPLES FOR THE EXERCISE OF OWNERSHIP RIGHTS IN INVESTEE COMPANIES 7 (Jun. 4, 2011), [https://www.efama.org/Publications/Public/Corporate\\_Governance/11-4035%20EFAMA%20ECG\\_final\\_6%20April%202011%20v2.pdf](https://www.efama.org/Publications/Public/Corporate_Governance/11-4035%20EFAMA%20ECG_final_6%20April%202011%20v2.pdf).

<sup>107</sup> See Klaus Ulrich Schmolke, *Institutional Investors’ Mandatory Voting Disclosure: The Proposal of the European Commission against the Background of the US Experience*, 7 EBOR 768 (2006).

<sup>108</sup> See European Union, Council Directive, *supra* note 98.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* at 5.

<sup>112</sup> *Id.*

<sup>113</sup> See Anne Riviere, *The Future of Hedge Fund Regulation: A Comparative Approach: United States, United Kingdom, France, Italy, and Germany*, 10 RICH. J. GLOBAL L & BUS. 263, 278 (2011).

<sup>114</sup> See François Passant, *Position on the Proposal for a Shareholder Directive COM (2014) 2013*, EUROSIF (Sept. 2014), <http://www.eurosif.org/wp-content/uploads/2017/12/Sep-2014-Eurosif-Position-on-the-Proposal-for-a-Shareholder-Directive-1.pdf>.

<sup>115</sup> See Hanne S. Birkmose, *Forcing Shareholder Engagement: Theoretical Underpinning and Political Ambitions*, 29 EURO. BUS. L. REV. 613, 614 (2018).

<sup>116</sup> See *id.*

Additionally, the impossibility for institutional investors to define a unique voting policy is a result of the strong differences among various investment vehicles.<sup>117</sup> In this scenario, there are some ostensible hypotheses of compulsory voting. For example, in France, article L533-22 *Code monétaire et Financier* requires transparency in the voting policy by the manager.<sup>118</sup> Further, article 314-100 of the *Règlement général de l'Autorité des marchés financiers* provides for what has often been described as a voting requirement that establishes an obligation to prepare a document on the *politique de vote*.<sup>119</sup> The French legislation, although seems to address the imposition of a legal duty to vote, in actuality it only contemplates an obligation to predefine voting policies.<sup>120</sup> This clearly does not imply a duty to vote from a formal legal point of view.<sup>121</sup> Instead, it establishes the principle that good management involves the choice to formalize and disclose the voting policy.<sup>122</sup>

The Italian legal system addresses compulsory voting in a similar way.<sup>123</sup> Italian law states that managers must formalize a voting policy (that again is not a voting obligation), at least with reference to the relevant shareholdings, which is understood as a fairness obligation towards the issuer and its shareholders.<sup>124</sup> However, the rule leaves room for technical discretion.<sup>125</sup> The same provision regarding the voting right ownership<sup>126</sup> is contained in article 46.1 and article 115.1 of the Spanish RLIIC.<sup>127</sup> These articles include the blank vote within the concept of the exercise of voting rights.<sup>128</sup> The French doctrine also supports the blank vote with article L533-22 *Code monétaire et Financier*.<sup>129</sup>

<sup>117</sup> See Passant, *supra* note 114, at 7 (explaining “various investment vehicles (e.g. pooled funds/collective undertakings) may have different engagement and voting policies and these policies may be different from the general policy developed by the asset manager/owner”).

<sup>118</sup> See French CODE MONETAIRE ET FINANCIER, art. 533-22.

<sup>119</sup> See *id.* at art. 314-100.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Decreto Legislativo, *supra* note 39, article 35-*decies* of the legislative decree 24 febbraio 1998, n. 58 (*testo unico della finanza - TUF*); see also Decreto Legge art. 137, par. 1, lett. b), *regolamento emittenti* (Listed Issuers’ Regulations), contained in *delibera Consob* no. 11971, of 14 May 1999, amended by *delibera Consob* no. 20250, of 28 December 2018, with reference to the (“[T]he information on the possible exercise of the voting rights relating to the financial instruments held in the portfolio.”).

<sup>124</sup> See Decreto Legislativo, article 35-*decies* of the *TUF*, *supra* note 123.

<sup>125</sup> *Id.*

<sup>126</sup> See article 69.7 Spanish *Real Decreto 20 de febrero 2004*, n. 304, on the *Regulación de los Planes y Fondos de Pensiones*, as subsequently amended and supplemented.

<sup>127</sup> See Collective Investment Solutions art. 46.1 (R.D. 2003, 35) (Spain); according to article 46.1, letra d), *de la Ley 35/2003, de 4 de noviembre, de instituciones de inversión colectiva*, article 115.1, letter b), *Real Decreto 13 de julio 2012*, n. 1082/2012 see also The Regulations for the Development of Law 35/2003, of November 4, on collective investment solutions art. 115.1(b) (R.D. 2012, 173) (Spain) (“[L]e sociedades gestoras de instituciones de inversión colectiva (SGIIC) ‘deberán . . . [e]jercer todos los derechos inherentes a los valores integrados en el fondo, en exclusivo beneficio de los partícipes.’”). According to article 46.1, letra d), *de la Ley 35/2003, de 4 de noviembre, de instituciones de inversión colectiva*. According to article 115.1, letter b), *Real decreto 13 de julio 2012*, n. 1082/2012, as modified by *Real decreto 83/2015, de 13 de febrero*, “le sociedades gestoras de instituciones de inversión colectiva (SGIIC) “deberán...[e]jercer todos los derechos inherentes a los valores integrados en el fondo, en exclusivo beneficio de los partícipes”.

<sup>128</sup> See CNMV, *supra* note 29; see also e.g., Decreto Legislativo 24 luglio 2019, n.141.3(b), D.Lgs. Jul. 24, 2019, n.21016 (It.) (“[T]he right holder who has cast his vote, may express its will in the event of amendments or additions to the proposed resolutions submitted to the meeting, choosing from: a) the confirmation of the vote already expressed; b) the amendment to the vote already expressed or the exercise of voting rights, by

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If looked at closely, all the cases examined above show that there is no voting obligation.<sup>130</sup> Instead, there is an obligation to get and disclose *ex ante* a voting policy, which includes non-voting options and blank votes, as long as these are justified by the interest of the owner of the managed assets.<sup>131</sup> There is also an obligation to report *ex post* on the voting activity.<sup>132</sup> In other cases, the obligation to explicitly provide for a voting policy is not provided by law but is required by market regulation; for example, as in the case of the British, Canadian, Luxembourgish, Dutch, and Swiss codes.<sup>133</sup> It is also required by international professional bodies that regulate the conduct of some institutional investors, such as the OECD Principles on Corporate Governance<sup>134</sup> as well as the asset management

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*abstaining*, voting against or vote in favor of the proposed resolutions expressed by an administrative body or other shareholders.”). Gallego Córcoles, *Asesores de Voto (Proxy Advisors) y el ejercicio del Derecho de Voto en las sociedades Cotizadas*, (above, note 20), 65, note 129. See, for example, article 143, paragraph 3, lett. b), of the Italian *regolamento emittenti* (Listed Issuers’ Regulations, *supra*, note 123), with regard to postal voting and electronic voting: “the right holder who has cast his vote, may express its will in the event of amendments or additions to the proposed resolutions submitted to the meeting, choosing from: a) the confirmation of the vote already expressed; b) the amendment to the vote already expressed or the exercise of voting rights, by *abstaining*, voting against or vote in favour of the proposed resolutions expressed by an administrative body or other shareholders”.

<sup>129</sup> See CODE MONETAIRE ET FINANCIER, *supra* note 118, at art. 533-22.

<sup>130</sup> See, e.g., CHRISTIAN STRENGER & DIRK A ZETZSCHE, HHL, CORPORATE GOVERNANCE, CROSS-BORDER VOTING AND THE (DRAFT) SECURITIES LAW DIRECTIVE – ENHANCING INVESTOR ENGAGEMENT THROUGH STANDARDIZATION 1, 18-19 (2012) (showing that in the few countries that require an obligation to vote characterize the obligation as an “implicit duty of vote,” or as an incentive that comes from the exercise of voting rights that derives from the fact that an exercise of voting rights is the fulfilment of an obligation to manage the investments in portfolios with professional diligence).

<sup>131</sup> See Mario Stella Richter Jr, *L’esercizio del voto con gli strumenti finanziari gestiti*, in I CONTRATTI DEL MERCATO FINANZIARIO 800 (Enrico Gabrielli & Raffaele Lener, 2d ed., 2011).

<sup>132</sup> See FINANCIAL REPORTING COUNCIL, *The UK Stewardship Code*, 2012, at Principle 7 (UK), [www.frc.org.uk](http://www.frc.org.uk).

<sup>133</sup> See Derek Higgs, *Review of the Role and Effectiveness of Non-Executive Directors* 79 (2003) ([I]nstitutional shareholders have a responsibility to make considered use of their votes); see also *id.*, at Principle 9 (UK); see also CANADIAN COALITION FOR GOOD GOVERNANCE, 2010 PRINCIPLES FOR GOVERNANCE MONITORING, VOTING AND SHAREHOLDER ENGAGEMENT (2010) (institutional investors generally should vote all the shares they own in a company where it is in the best interests of their beneficiaries or clients to do so); see also Irish Stock Exchange and the Irish Association of Investment Managers, *supra* note 81, at 3; see also THE X PRINCIPLES OF CORP., GOVERNANCE OF THE LUX. STOCK EXCH., at 8 (4th ed., Dec. 2017) (given the flexible ‘comply or explain’ approach advocated by the X Principles, shareholders, and institutional investors in particular, have a leading role to play in corporate governance of the company); see also Swiss Ass’n of Pension Fund Providers, *Guidelines for Institutional Investors Governing the Exercising of Participation Rights in Public Limited Companies*, at 6 (2013) (institutional investors are obliged to define the principles governing the exercising of their participation rights and voting rights..., as well as the process by which the decision regarding the exercising of participation rights is reached); see also Sonia Hierzig, SWISS PENSION FUNDS AND RESPONSIBLE INVESTMENT 2015/16 REPORT 39 (2016).

<sup>134</sup> See OECD, *OECD Principles of Corporate Governance*, at 16 (May 25, 1999) (“Shareholders, including institutional investors, should consider the costs and benefits of exercising their voting rights.”); see also OECD, *OECD Principles of Corporate Governance*, at 15-25 (Apr. 29, 2004). *But see* OECD, *G20/OECD Principles of Corporate Governance*, at 30 (2015) (focusing on the awareness that the framework of the professional and institutional shareholders is more complex as compared to the past and correctly assumes the fact that all professional and institutional investors adopt the same behaviour is methodologically incorrect, since they should reveal their investment model and their voting policy).



principles of the hedge funds, which have been established by their more relevant association.<sup>135</sup>

Therefore, the exercise of voting rights of financial intermediaries and institutional investors in the subsidiaries expresses a general professional diligence clause.<sup>136</sup> This translates into a technical rule of behaviour, where each legal system declines taking into account a minimum threshold for shares.<sup>137</sup> Professional managers, after a careful cost-benefit analysis, must occasionally choose whether or not to exercise the right to vote, in order to protect the interest of holders of assets under management as opposed to shareholders of subsidiaries.<sup>138</sup> Moreover, a legally binding voting obligation would deviate greatly from our market culture, and be defeated by the supervisory authorities.<sup>139</sup>

The belief that voting disclosure is the key to financial intermediaries and institutional investors' activism and the "panacea for all ills,"<sup>140</sup> is a beautiful dream,<sup>141</sup> like other myths that preceded it.<sup>142</sup> The road ahead, which is significantly more difficult, promotes the economic, political, and reputational incentives required to harmonize liquidity and share control.<sup>143</sup>

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<sup>135</sup> See generally HEDGE FUND WORKING GROUP, HEDGE FUND STANDARDS: FINAL REPORT 11, 113-114 (2008), [https://www.sbai.org/wp-content/uploads/2016/04/final\\_report.pdf](https://www.sbai.org/wp-content/uploads/2016/04/final_report.pdf) (revealing that many well-known hedge fund managers have participated in its formulation).

<sup>136</sup> See Strenger & Zetzsche, *supra* note 130; see also Richter, *supra* note 131 (citing Renzo Costi, *Risparmio gestito e governo e governo societario*, in GIUR. COMM. I, 317 (1988)).

<sup>137</sup> See, e.g. the Spanish *Ley de Instituciones de Inversión Colectiva* art. 9, 46 (B.O.E. 2003, 265) (Spain) (which demonstrates that not all legal systems establish the same threshold, illustrating that the Spanish legal system imposes a threshold solely on mutual funds when the shareholding ownership meets or exceeds 1% of the issuer's capital during 12 months); see also *Real Decreto* 1082/2012 art 115 (R.D.L. 2012, 173). (Spain).

<sup>138</sup> See Hossein Nabilou & Alessio M. Paccos, *The Hedge Fund Regulation Dilemma: Direct vs. Indirect Regulation*, 6 WM. & MARY BUS. L. REV. 183, 201 (2015).

<sup>139</sup> See Francesco Denozza, *Quale quadro per lo sviluppo della corporate governance?*, ORIZZONTI DEL DIRITTO COMMERCIALE (2015), <http://odc.seminabit.com/edizioni/2015/1/editoriale/quale-quadro-per-lo-sviluppo-della-corporate-governance/> (It.).

<sup>140</sup> See EUROPEAN SECURITIES AND MARKETS AUTHORITY, FINAL REPORT: FEEDBACK STATEMENT ON THE CONSULTATION REGARDING THE ROLE OF THE PROXY ADVISORY INDUSTRY 7, 23 (2013), <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-84.pdf>.

<sup>141</sup> Edward B. Rock, *Institutional Investors in Corporate Governance*, 2 (Fac. Scholarship at Pa. L., Paper No. 1458, 2015), [https://scholarship.law.upenn.edu/faculty\\_scholarship/1458/](https://scholarship.law.upenn.edu/faculty_scholarship/1458/) ("For a while in the 1980s, some thought that the hostile tender offer was that magic potion. Then, beginning in the late 1980s, attention shifted to institutional investors, where it has stayed, on and off, ever since. Noting that shares of publicly held corporations are largely held by institutions, and that shareholding among institutions is concentrated, some have viewed institutional investors as having the potential to act as the responsible owners that corporate law seems to presume...").

<sup>142</sup> *Id.* at 142 ("Like poets and revolutionaries, corporate law scholars and policy makers dream. If only we could find the silver bullet, the wonder drug, we could solve the manager-shareholder agency cost problem that is the focus of much of corporate law").

<sup>143</sup> See, e.g., Mariana Pargendler, *The Corporate Governance Obsession* 13-14 (J. of Corp. L., Working Paper No. 470, 2014), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/774608/doc/slspublic/Pargendler%20Corporate%20Governance%20Obsession%2014%20Oct%202014.pdf>.

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**B. Collective Informal Activism**

Many empirical investigations are left incomplete because they focus on *explicit shareholders activism*, without considering the *non-formalized voice*, indirect monitoring and informal communication initiatives,<sup>144</sup> not resulting in the exercise of a subjective right.<sup>145</sup> Beyond the powers and rights conferred by law or bylaw to shareholder minorities, there is an *informal institutional activism*.<sup>146</sup> This activism includes interviews that are held by one or more financial intermediaries, and includes the management and board of directors, with or without executives.<sup>147</sup> These interviews often have a profitable outcome on inter-organic dialectics,<sup>148</sup> with reference to long-term issues,<sup>149</sup> which also intend to identify the degree of satisfaction with the management.<sup>150</sup>

Beyond the powers and rights conferred by law or bylaw to shareholder minorities, there is an informal institutional activism.<sup>151</sup> This activism includes interviews that are held by one or more financial intermediaries, and will include the management and the board of directors, with or without executives.<sup>152</sup> These interviews often have a profitable outcome on inter-organic dialectics,<sup>153</sup> with reference to long-term issues,<sup>154</sup> which also intend to identify the degree of satisfaction with the management.<sup>155</sup>

Similarly, it is long known that directors send out pre-meeting *informal information* to financial and institutional investors, the contents of which are rarely addressed by a meeting.<sup>156</sup> The extent of the information flow is greater if the financial intermediary has its own representation at the meeting,<sup>157</sup> in which case the informal exchanges with the

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<sup>144</sup> See Black, *supra* note 59, at 830, 39, 45, 48 (discussing the distinctions between “indirect monitoring,” “formal communication” (through ballot boxes), and “informal communication”).

<sup>145</sup> Estimates on corporate behavior of professional and institutional long-term investors confirmed the importance of such initiatives. See, e.g., Joseph A. McCahery, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 *The J. of Fin.* 2905, 2906 (2016) (detailing a study conducted on a sample of 143 professional and institutional investors in which 45% of investors declared they have had informal discussions with the board, while 63% declared they have had private interviews with management).

<sup>146</sup> See GILE R. DOWNES, JR., EHUD HOUMNER & R. GLENN HUBBARD, *INSTITUTIONAL INVESTORS AND CORPORATE BEHAVIOR* 17 (1999).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see also Black, *supra* note 59, at 848 (explaining that activism is effective as long as it combines *formal shareholders power and informal action*).

<sup>150</sup> See Black, *supra* note 59, at 817.

<sup>151</sup> See Downes et al., *supra* note 146.

<sup>152</sup> *Id.* at 17.

<sup>153</sup> *Id.*

<sup>154</sup> See *id.*; see also Black, *supra* note 59, at 848 (explaining that activism is effective as long as it combines *formal shareholders power and informal action*).

<sup>155</sup> See Black, *supra* note 59, at 817.

<sup>156</sup> See Finch, *supra* note 82, at 182 (observing that “[d]irectors often court institutional shareholders with informal meetings and make them privy to information on company developments. Nearly all the larger public companies prepare sophisticated presentations for institutional shareholders and deliver these outside the formal meetings process.”).

<sup>157</sup> See *id.*

management and supervisory organs develop more frequently and completely.<sup>158</sup> Therefore, the collection of empirical data regarding shareholder conduct has a *purely anecdotal value*, which is not enough to completely retrace the phenomenon of activism.<sup>159</sup> In particular, collections of data are almost not able to provide information on *non-apparent activism*, which is the activism which occurs behind the scenes.<sup>160</sup> Conversely, as the U.S. experience shows, this model of activism is much more common, and often more effective, than public initiatives.<sup>161</sup> Among U.S. investors, the importance of informal and communicative activism is well known.<sup>162</sup> Moreover, the so-called “activism behind closed doors” is undoubtedly a typical characteristic of British financial and institutional shareholders.<sup>163</sup>

Communicative activism does not mean a mere acquisition of information. While communication is closely related to active behaviour initiatives, we cannot say that communication with management is a behaviour uniquely addressed to activism initiatives because communication is for the trading management of financial instruments.<sup>164</sup> This form of communicative activism seems to be limited for several reasons.

The first reason is that most stakeholders have little expertise in the business management field. Because this topic is objectively delicate, there is a general sense of embarrassment when asking about the other’s expertise, which often creates a barrier.<sup>165</sup> The second reason is that many empirical analyses focus exclusively on the voting proposals *submitted by* institutional investors. These analyses do not consider the voting proposals *withdrawn before* the meeting as a result of formal and informal contacts between one or more institutional investors and management.<sup>166</sup> The third reason is that many surveys focus on proposals that affect the price of financial instruments, but not all proposals have this effect.<sup>167</sup> In contrast, there are forms of indirect and informal activism that affect the price of financial instruments even where these forms concern routine matters that do not translate into shareholders’ resolution proposals.<sup>168</sup> The fourth reason is that official surveys do not

<sup>158</sup> See *id.*; see also Francesco Bordiga, *Partecipazione degli investitori istituzionali alla s.p.a. e doveri fiduciari*, *RTV. SOC.* 204, 212 (2013).

<sup>159</sup> See Black & Coffee, *supra* note 19.

<sup>160</sup> *Id.*

<sup>161</sup> See Melissa Sawyer, Lauren S. Boehmke & Nathaniel R. Ludewig, *Review and Analysis of 2018 U.S. Shareholder Activism*, *HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG.* (Apr. 5, 2019), <https://corpgov.law.harvard.edu/2019/04/05/review-and-analysis-of-2018-u-s-shareholder-activism/>.

<sup>162</sup> See Black & Coffee, *supra* note 19.

<sup>163</sup> *Id.* (highlighting that “to understand the behavior of British institutional investors, we relied partly on traditional written sources. But British institutions typically act behind closed doors. Only a handful of exceptional cases degenerate into a public battle between shareholders and managers. To probe this hidden world of informal monitoring, we conducted a series of interviews with senior officers in major British institutions.”).

<sup>164</sup> See Bianchi et al., *supra* note 69, at 397, 410.

<sup>165</sup> See E.S. HERMAN, *CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY*, 47 (Cambridge University Press, 1981) (explaining “it is difficult for outsiders to pose questions of a challenging nature to knowledgeable persons without appearing superficial or incompetent. It is also considered bad form to ask questions that imply doubts about motives (and) competence”).

<sup>166</sup> *E.g.*, Black, *supra* note 59; see also Romano, *supra* note 4, at 180.

<sup>167</sup> See Luc Renneboog & Peter G. Szilagy, *The Success and Relevance of Shareholder Activism through Proxy Proposals*, (ECGI – Finance Working Paper No. 252/2009), <https://ecgi.global/sites/default/files/The%20Success%20and%20Relevance%20of%20Shareholder%20Activism%20through%20Proxy%20Proposals%20.pdf>.

<sup>168</sup> See Black, *supra* note 59.

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consider the support of institutional investors to initiatives by other shareholders. In these surveys, empirical evidence is significant<sup>169</sup> and also encouraged by soft law,<sup>170</sup> or the cases in which they favour jointly actions and proxies simply making available to other shareholders their shareholder internet forum.<sup>171</sup>

Generally, all informal monitoring initiatives share one common feature: they are functional to activism because they are not ritualized.<sup>172</sup> Therefore, under this form of activism, there is no such need to institutionalize the pre-meeting informal meeting formula turning it into an official meeting on management decisions.<sup>173</sup> This is because value of extra-meeting communicative activism is found “behind the scenes”.<sup>174</sup> Several corporate governance codes, including those in Britain, Japan, Luxembourg and Spain appropriately refrain from specifying their form and content in hopes that directors and major non-controlling shareholders entertain reciprocal stable relationships.<sup>175</sup> Rather, the aim of these meetings is a mutual understanding of objectives.<sup>176</sup> The goal is to promote a continuous extra-meeting dialogue between the company and its financial intermediaries, in particular with the board, the senior management and the executives, which would represent a growth driver for the company.<sup>177</sup> This would also be an opportunity for assessing corporate decisions.<sup>178</sup> As such, this should lead to the development of an official communication

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<sup>169</sup> See Martin Lipton, *Dealing With Activist Hedge Funds*, CLS Blue Sky Blog Colum. L. Sch’s Blog on Corp.’s & Cap. Mkt.’s (June 21, 2013), <http://clsbluesky.law.columbia.edu/2013/06/21/dealing-with-activist-hedge-funds/>; see also Suraj Srinivasan, *Shareholder Proposals Contested by Firm Management*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (June 6, 2016), <https://corpgov.law.harvard.edu/2016/06/06/shareholder-proposals-contested-by-firm-management/> (“[W]e explore proposals that managers seek to exclude from their firms’ proxy statements. We find that managers often seek to exclude shareholder proposals from the proxy. Over four thousand proposals, or nearly 40% of all proposals received during 2003-2013 were contested by management. These proposals covered a wide range of issues including executive compensation, antitakeover measures, voting procedures, environmental issues, and social policy. The SEC allows firms to exclude from the proposals that manager’s contest. Specifically, 72% of all proposals that managers seek to exclude from the proxy are allowed by the SEC (i.e. SEC provides firm a ‘no action’ opinion letter.)”); see also Belcredi & Enriques, *supra* note 42, at 21 (referencing the frequent support of hedge funds to the appointment of candidates of other institutions).

<sup>170</sup> See e.g., UK Stewardship Code 2012 (“Institutional investors should be willing to act collectively with other investors where appropriate.”).

<sup>171</sup> *Corporate Governance Commentary: A Practitioner’s Guide to Electronic Shareholder Forums*, LATHAM & WATKINS LLP, at 3 (Jan. 2008), <https://corpgov.law.harvard.edu/wp-content/uploads/2008/02/january.2008.pdf>.

<sup>172</sup> Moshe Pinto, *The Role of Institutional Investors in the Corporate Governance*, at 5 (2005) (unpublished EMLE thesis, University of Hamburg and University of Bologna), available at <https://pdfs.semanticscholar.org/50d7/8f42142fc2466b7a67ae2dbd480fb3d86f87.pdf>.

<sup>173</sup> Paolo Montalenti, *Investitori istituzionali e amministratori nelle societa quotate: problemi e proposte*, RIVISTA TELEMATICA, in ODC, at 7 (2016).

<sup>174</sup> Doron Levit, *Soft Shareholder Activism 2*, (May 31, 2017) (unpublished working paper) (can be found at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1969475](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969475)).

<sup>175</sup> See Higgs, *supra* note 133, at 69.

<sup>176</sup> *Id.* at 78.

<sup>177</sup> See TOKYO STOCK EXCHANGE, JAPAN’S CORPORATE GOVERNANCE CODE at 27 (June 1, 2018), available at [https://www.jpx.co.jp/english/news/1020/b5b4pj000000jvxx-att/20180602\\_en.pdf](https://www.jpx.co.jp/english/news/1020/b5b4pj000000jvxx-att/20180602_en.pdf); see also UK Stewardship Code 2018, at Principles 4-5.

<sup>178</sup> BOURSE DE LUXEMBOURG, GOUVERNANCE D’ENTREPRISE: LES X PRINCIPES DE GOUVERNANCE DE LA BOURSE DE LUXEMBOURG, 3 edition-version revise, at 8 (Dec. 2017), available at [https://www.bourse.lu/documents/legislation-GOVERNANCE-ten\\_principles-FR.pdf](https://www.bourse.lu/documents/legislation-GOVERNANCE-ten_principles-FR.pdf) (“les actionnaires, et plus

policy,<sup>179</sup> in turn structuring a permanent form of constructive debate.<sup>180</sup> All of this leads to sustainable activism.<sup>181</sup>

The era of formal meetings, which more often than not are meaningless and useless containers, is over, and the era of informal meetings and long-life communication strategy has begun.<sup>182</sup> Those proposals that aim at grading the right to attend the general meeting based on the share as well as to increase the quality of shareholder meetings can have only a relative impact, since most of active behaviour initiatives are not addressed in the company meetings.<sup>183</sup> This renewed interest in the external dialectic between outside directors and institutional shareholders is due to the fact that in many cases the exit strategy is inconvenient.<sup>184</sup> Another reason is due to the lack of viability stemming from an inefficient capital market.<sup>185</sup> Either of these reasons, among others, may lead to a preference of either active behaviour, participation in meetings, or the activation of judicial control.<sup>186</sup>

Finally, private negotiation actions undertaken by institutional investors, mainly in the form of lawsuits, belong to the forms of informal and pre-meeting negotiation.<sup>187</sup> Moreover, the activism is difficult to estimate because there are no official data. Within the debate of informal relationships between corporate management and financial intermediaries, the usefulness of “relational investing,” has long been investigated.<sup>188</sup> The dialogue of the board and its chairman with investors is an established practice in many countries.<sup>189</sup> Another established practice is the dialogue of non-executive directors, in particular the senior independent director, with the main or important shareholders.<sup>190</sup> Nonetheless, the empirical

particulièrement les investisseurs institutionnels, ont un rôle prépondérant à jouer dans l'évaluation de la gouvernance d'entreprise de la société.”).

<sup>179</sup> COMMISSION NACIONAL DEL MERCADO DE VALORES, CODIGO DE BUEN GOBIERNO DE LAS SOCIEDADES COTIZADAS, at 19 (Feb. 2015), available at [https://www.cnmv.es/docportal/publicaciones/codigogov/codigo\\_buen\\_gobierno.pdf](https://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf) (“las sociedades cotizadas deben contar con una política pública de comunicación y contactos con accionistas, inversores institucionales y asesores de voto.”).

<sup>180</sup> Karina Litvack, *Constructive Dialogue – Not Confrontation*, IPE (May 2006), <https://www.ipe.com/analysis/analysis/constructive-dialogue-not-confrontation/18912.article>.

<sup>181</sup> See German Corporate Governance Code 2017 (“[i]nstitutional investors are of particular importance to companies. They are expected to exercise their ownership rights actively and responsibly, in accordance with transparent principles that also respect the concept of sustainability.”).

<sup>182</sup> *Contra* Montalenti, *supra* note 173, at 6 (suggesting that the relationship between shareholders and directors should be the subject of self-regulatory codes).

<sup>183</sup> See *id.* at 6-7.

<sup>184</sup> *Id.*

<sup>185</sup> See Bianchi et al., *supra* note 69.

<sup>186</sup> The latter is a purely formal activism index, while it is not known for sure whether it effectively involves an active behavior.

<sup>187</sup> See Palmer Pantev, *Negotiating in the Balkans: The Prenegotiation Perspective*, 1 Nat'l Security and the Future 53 (2000).

<sup>188</sup> See Ian Ayres & Peter Cramton, *Relational Investing and Agency Theory*, 15 CARDOZO L. REV. 1033, 1034 (1994).

<sup>189</sup> See Klaus J. Hopt, *The Dialogue between the Chairman of the Board and Investors: The Practice in the UK, the Netherlands and Germany and the Future of the German Corporate Governance Code Under the New Chairman 1* (Eur. Corp. Governance Inst., Law Working Paper No. 365/2017, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3030693&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030693&download=yes).

<sup>190</sup> See *id.* at 4.

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findings about the effectiveness of this approach are ambivalent and it still entails some troublesome effect.<sup>191</sup>

In particular it has been noted that this dialogue, which may also take place between the chairman of the supervisory board and institutional investors,<sup>192</sup> presents three main limits: insider trading and market abuse, company secrets, and equal treatment of the shareholders.<sup>193</sup> Nevertheless, the practice of relational investing is increasingly taken up by many corporate governance codes.<sup>194</sup> Additionally, the involvement of financial and institutional investors in the development of self-regulatory codes precisely belongs to relational investing.<sup>195</sup>

### V. INDIVIDUAL INFORMAL ACTIVISM

It has been observed that in order to maintain a long term relational investment may be too costly and require sacrificing liquidity.<sup>196</sup> Institutional investors engage in (official) relational investing if they are given special benefits which they are unlikely to receive.<sup>197</sup> Moreover, any form of collaborative practice focused on pooling the sensitive information among all (or part of) institutional investors may be very complex and the sharing model definitively reduces its fringe benefits.<sup>198</sup>

Thus, it is important to underline that relational activism goes not only through different dialogues from shareholders annual meetings, but it is characterized by a certain degree of formality.<sup>199</sup> For example, analysts' meetings, analysts' presentations, presentations to institutional or other investors, and press conferences normally devoted to all (or to a significant component of) institutional investors.<sup>200</sup> Also, this includes a communication totally deformalized, non-official and individual, according to the mentioned model of long life communication.<sup>201</sup>

Moreover, apart from the collective informal reunions, such as roadshows or a press conference, "single-handedly" meetings count.<sup>202</sup> Although some corporate governance codes prescribe the transparency of all types of meetings,<sup>203</sup> it would be unrealistic to suppose that

<sup>191</sup> See Black & Coffee, *supra* note 19, at 2071.

<sup>192</sup> See Hopt, *supra* note 189.

<sup>193</sup> *Id.* at 2.

<sup>194</sup> See REPORT ON COMPLIANCE WITH THE COMBINED CODE ON CORPORATE GOVERNANCE BY IRISH LISTED COMPANIES, <http://www.iaim.ie/wp-content/uploads/2018/07/Report-on-Compliance-with-the-Combined-Code-2010.pdf> (last visited Nov. 1, 2019).

<sup>195</sup> *Id.*

<sup>196</sup> See Coffee, *supra* note 17, at 1338.

<sup>197</sup> See Jill E. Fisch, *Relationship Investing: Will It Happen? Will It Work?*, 55 OHIO ST. L. J. 1009, 1011 (1994).

<sup>198</sup> See James Chen, *Pooled Funds*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/pooledfunds.asp> (last visited Oct. 27, 2019).

<sup>199</sup> See Hopt, *supra* note 189, at 12 (defining this classification of informal, but official, meetings).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See *id.* at 15.

<sup>203</sup> See in Netherland Corp. Governance Code, 4.2.2 (defining "Policy on bilateral contacts with shareholders," according to which "the company should formulate an outline policy on bilateral contacts with the shareholders and should post this policy on bilateral contacts with the shareholders and should post this policy on its website"); see also Corp. Governance Code, 4.2.3 (Neth.) (defining "Meetings and Presentations," according to

informal meetings, as well as “single-handedly” communication, might be shared.<sup>204</sup> This kind of communication focused on a single investor may be particularly useful and valuable, providing a mutual improvement of competence and therefore, better decision-making.

## VI. CONCLUSION

Among the formal activism tools and instruments, voting rights occupy a crucial space both in the US and the EU regulation perspective of the Shareholders Rights Directive II (“SRD II”).<sup>205</sup> Even though the SRD II imposes on financial intermediaries and institutional investors a transparent voting policy, there is not European jurisdiction where the voting right is compulsory.<sup>206</sup>

Among the formal and more traditional kinds of institutional activism, *operational activism*, which pursues long-term goals whose objectives are “capital related” or “governance related”, and primarily focused on changes in management and strategy, board representation, or both.<sup>207</sup> It is rather expensive, also in terms of new investments in human capital.<sup>208</sup> For this reason, in general, low-cost activism prevails, whereas certain forms of *high-cost activism* and *strategic activism* arise from hedge funds almost everywhere.<sup>209</sup> Some other forms of formal institutional activism are rather idiosyncratic, such as slate voting in the Italian context and shareholders’ proposals in the US context.<sup>210</sup>

Turning to tools and instruments for collective informal activism, relational activism has increased.<sup>211</sup> But the phenomenon is largely underestimated because many empirical analyses focus exclusively on the voting proposals *submitted* by institutional investors, rather than considering the voting proposals *withdrawn* by the major shareholder *before* the meeting.<sup>212</sup> This disparity is the product of formal and informal contacts between one or more institutional investors and management (or the major shareholder).<sup>213</sup>

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which “analyst meetings, analyst presentations, presentations to institutional or other investors and press conferences should be announced in advance on the company’s website and by means of press releases”); see also Hopt, *supra* note 189, at 15; see also Corp. Governance Code, 4.2.5 (Neth.) (discussing the policy on managers’ contacts with press and financial analysts).

<sup>204</sup> See Hopt, *supra* note 189, at 15.

<sup>205</sup> See *A Focus on Regulation Readiness*, BNY MELON, <https://www.bnymellon.com/emca/en/our-thinking/shareholder-rights-directive-ii.jsp> (last visited on Oct. 27, 2019); see also 12 C.F.R. § 239.26 (2011).

<sup>206</sup> See INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (IDEA), *What is Compulsory Voting?*, <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting> (last visited Oct. 21, 2019).

<sup>207</sup> See Loop et al., *supra* note 13.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*; see also Croci, *supra* note 96.

<sup>210</sup> See Ekaterina Andreitichikova, *Appointment of Directors in Italy “Voto di Lista.” Proxy Access in Italy: It Works! How the Institutional Investors Protect Their Interests in Italian Public Companies*, TREVISAN & ASSOCIATI (Sept. 16, 2011), <https://www.trevisanlaw.it/wp-content/uploads/misc/attachments/Appointment%20of%20directors%20in%20Italy%20-%20Voto%20di%20lista.pdf>; see also Craig McGuire, *What is a Shareholder Proposal?*, THE SHAREHOLDER ACTIVIST.COM, <https://theshareholderactivist.com/shareholder-activism-spotlight/what-is-a-shareholder-proposal/> (last visited Oct. 21, 2019).

<sup>211</sup> See Coffee, *supra* note 17, at 1338; see also Hopt, *supra* note 189, at 12.

<sup>212</sup> See Black, *supra* note 59, at 829.

<sup>213</sup> *Id.*

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Moreover, the most part of the surveys focus only on proposals that affect the price of financial instruments, while not all proposals have this effect.<sup>214</sup> Finally, official surveys do not consider the support of institutional investors to initiatives carried by other shareholders, for which the empirical evidence is significant.<sup>215</sup>

Relational activism goes beyond annual shareholders meetings and develops itself through different dialogues (also those in any case characterized by a certain degree of formality) such as analysts' meetings, analysts' presentations, presentations to institutional or other investors and press conferences normally devoted to all or a significant component of institutional investors.<sup>216</sup> Moreover, any form of cooperative and collaborative practice focused on pooling the sensitive information among all, or part of, institutional investors may be complex and the sharing model reduces its fringe benefits.<sup>217</sup>

For this reason, that kind of relational activism, which is focused on a communication totally deformed, individual and non-official, namely a model of long life communication, should be explored.<sup>218</sup>

The long life communication model is the more promising kind of informal activism. If it is not always convenient for an institutional investor to exercise a shareholder right, conversely, any time is good to informally contact a manager, or a general director.

Whatever model chosen, collective or individual relational investing, it is quite definite that the era of official meetings, which are more often meaningless and useless containers, is over, and the era of informal meetings and long-life communication strategy has begun.<sup>219</sup>

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<sup>214</sup> See Renneboog & Szilagyi, *supra* note 167.

<sup>215</sup> See Lipton, *supra* note 169.

<sup>216</sup> See Hopt, *supra* note 189, at 9.

<sup>217</sup> See Chen, *supra* note 198.

<sup>218</sup> See Montalenti, *supra* note 173; see also Hopt, *supra* note 189.

<sup>219</sup> See Montalenti, *supra* note 173 at 7.