Loyalty Voting Structures: A Better Dual Class?

Law Working Paper N° 769/2024
May 2024

Marco Becht
Solvay Brussels School of Economics and Management, Université libre de Bruxelles, CEPR and ECGI

ECGI Working Paper Series in Law

Loyalty Voting Structures: A Better Dual Class?

Working Paper N° 769/2024
May 2024

Marco Becht

Helpful comments from Maribel Saez (discussant), Bernie Black, Luca Enriques, Beni Lauterbach, Geneviève Helleringer, Ed Rock, Fred Samama, participants at the Theoretical Inquiries in Law Conference on Controlling Shareholders and Control-Enhancing Mechanisms held on 4-5 January 2023 at Tel Aviv University's Buchmann Faculty of Law and the editors are gratefully acknowledged.

Abstract

Loyalty voting structures (LVS) are designed to provide registered shareholders with multiple voting rights following a specified holding period. In theory, this concept strikes a balance between dual-class structures (DCS), which enshrine founder control, and open structures that allow for control challenges. LVS entail a single class of shares, enabling all shareholders to possess multiple votes without incurring additional costs, while also limiting the privilege through a transfer sunset provision. Notably, LVS also preserve a key control advantage of DCS for founders, as they minimize the likelihood of control challenges through contested board elections. However, in practice LVS distinguish between bearer shares that are fully fungible and registered shares that allow the company to verify the holding period. Institutional shareholders often find it impossible to register their shares, thereby being deprived of multiple voting rights. Consequently, LVS effectively function as a mechanism to enhance control akin to dual-class structures. Transforming loyalty voting structures into a better dual class for institutional shareholders would require some legal and significant procedural modifications.

Keywords: Loyalty Voting Structures, Dual-Class Shares, Corporate Governance, Shareholder Rights, Institutional Investors, Voting Mechanisms, Equity Structure, Shareholder Democracy, Control-Enhancing Mechanisms, Corporate Law.

JEL Classifications: G32, G34, G38, K22

Marco Becht
Goldschmidt Professor of Corporate Governance
Université Libre de Bruxelles
42 Avenue F. D. Roosevelt
1050 Brussels, Belgium
phone: +32 2650 4466
e-mail: marco.becht@ulb.ac.be

LOYALTY VOTING STRUCTURES: A BETTER DUAL CLASS?

*Marco Becht**

Loyalty voting structures (LVS) are designed to provide registered shareholders with multiple voting rights following a specified holding period. In theory this concept strikes a balance between dual-class structures (DCS), which enshrine founder control, and open structures that allow for control challenges. LVS entail a single class of shares, enabling all shareholders to possess multiple votes without incurring additional costs, while also limiting the privilege through a transfer sunset provision. Notably, LVS also preserve a key control advantage of DCS for founders, as they minimize the likelihood of control challenges through contested board elections. However, in practice LVS distinguish between bearer shares that are fully fungible and registered shares that allow the company to verify the holding period. Institutional shareholders often find it impossible to register their shares, thereby being deprived of multiple voting rights. Consequently, LVS effectively function as a mechanism to enhance control akin to dual-class structures. Transforming loyalty voting structures into a better dual class for institutional shareholders would require some legal and significant procedural modifications.

Introduction

The use of control-enhancing mechanisms (CEMs), legal devices that separate voting rights from cash flow rights, has received considerable attention from practitioners, policymakers and scholars. In the simplest case, companies issue ordinary shares with one vote per share and a second class of nonvoting shares. As the name suggests, the latter provide the holder with cash-flow rights but no voting rights. More commonly companies issue multiple share classes where each class has a different number of votes. For example, Class A could have one vote and Class B ten votes, with identical cash-flow rights (dual class). It is also possible for shareholders to obtain multiple votes after they have held the shares for a certain period; this arrangement is referred to as time-phased or tenure voting.[1]

---

* Professor of Finance and Goldschmidt Chair Professor of Corporate Governance and Stewardship at the Solvay Brussels School for Economics and Management at Université libre de Bruxelles. Acknowledgements: Helpful comments from Maribel Saez (discussant), Bernie Black, Luca Enriques, Beni Lauterbach, Geneviève Helleringer, Ed Rock, Fred Samama, participants at the Theoretical Inquiries in Law Conference on Controlling Shareholders and Control-Enhancing Mechanisms held on 4-5 January 2023 at Tel Aviv University's Buchmann Faculty of Law and the editors are gratefully acknowledged.

1 CEMs can also operate inversely and deprive large shareholders of voting rights, for example through a provision in the company statutes that limits voting rights of a single shareholder or group of shareholders to five or ten percent.

Critics argue that CEMs distort incentives and prevent challenges to incumbent control through proxy contests and hostile takeovers. Dual-class structures are seen as particularly egregious, and some authors have argued that they should be banned or at least limited in time.[2] This view is echoed by institutional investors who actively oppose dual class and promote the adoption of sunset clauses. Loyalty voting structures have been presented as an attractive alternative. They feature a single share class, and all long-term holders can obtain multiple voting rights, effectively limiting the unwelcome influence of short-term speculators. This Article sets out the theoretical differences between tenure voting and dual-class share structures and explores how tenure voting works in practice by presenting case studies from the United States, France, Belgium, and the Netherlands. It shows that tenure voting in practice is functionally equivalent to dual class, but less transparent and more difficult to operate. To understand how this seeming paradox came about, it is necessary to briefly review the recent history and legal geography of CEMs in Europe.

In Europe the debate around CEMs had been rather muted since a contractarian consensus emerged that there is no market failure at the EU level, that the principle of subsidiarity applies, and that it is within the competence of member states to make control-enhancing mechanisms available through national company law, or not. In parallel, the European court confirmed that entrepreneurs are free to choose the place of incorporation separately from their preferred place of business, firmly establishing corporate mobility in Europe. Institutional shareholders continue to favor control structures with voting rights proportional to cash-flow rights, an attitude that is reflected in voting policies, position papers, and public pronouncements of shareholder associations,[3] proxy advisers,[4] and large beneficial owners.[5]

The policy consensus emerged after the European Commission retained Institutional Shareholder Services (ISS), Sherman Sterling, and the European Corporate Governance Institute (ECGI) in 2006 to prepare a report on the "proportionality principle" in the European Union.[6] The report was to inform a debate about "shareholder democracy"[7] that followed from an earlier discussion about a "breakthrough rule" and a desire to establish an EU-wide market for corporate control.[8] "Shareholder

2 Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Va. L. Rev. (2017).

3 ICGN, ICGN Viewpoint: Stewardship Does Not Benefit from Differential Ownership Rights (2015), https://www.icgn.org/sites/default/files/2021-06/Stewardship%20does%20not%20benefit%20from%20differential%20ownership%20rights.pdf.

4 ISS Global Voting Principles clearly state that "shareholders' voting rights should be proportional to their economic interest in the company; each share should have one vote"; *See*, *ISS Global Voting Principles*, Institutional S'holder Servs. (2023), https://www.issgovernance.com/policy-gateway/iss-global-voting-principles/ (last visited Mar 21, 2023).

5 *Multiple Share Classes*, Norges Bank Inv. Mgmt (2020), https://www.nbim.no/en/the-fund/responsible-investment/our-voting-records/position-papers/multiple-share-classes/ (last visited Mar 21, 2023).

6 ISS et al., Report on the Proportionality Principle in the European Union, (2007), https://www.ecgi.global/sites/default/files/final_report_en.pdf.

7 Peter Montagnon & Roderick Munsters, *One Share, One Vote Is the Way to a Fairer Market*, Fin. Times (Aug. 13, 2006), https://www.ft.com/content/121d5182-2aeb-11db-b77c-0000779e2340.

8 Rolf Skog, *Takeover Directive, the Breakthrough Rule and the Swedish System of Dual Class Common Stock, The*, 15 Eur. Bus. L. Rev. 1439 (2004).

democracy" refers to the principle in corporate governance whereby shareholders influence a company's decisions based on their ownership stake, often embodied by the "one share, one vote" rule. This concept allows shareholders to participate in major decisions, such as board elections and policy direction, proportional to their number of shares. The "breakthrough rule" proposed by the High-Level Group of Company Law Experts (often referred to as the "Winter Group") aimed to address structural barriers in takeover bids. Specifically, the rule would have rendered certain defensive measures and share restrictions inapplicable during a takeover, allowing the bid to proceed based on the "one share, one vote" principle.

The report documented substantial differences in the availability and use of "control-enhancing mechanisms" (CEMs) across EU member states. Dual-class share structures were available in Nordic countries and widely used. Typically, companies issue two classes of shares, A-Shares and B-Shares. A-Shares typically carried 10 votes per share, while B-Shares carried 1 vote per share.[9] In France the dominant CEM was tenure voting, the archetypal loyalty voting structure. Typically, holders of ordinary shares were granted double voting rights after holding ordinary shares for two years continuously. In the Netherlands most CEMs were available and widely used; in the United Kingdom CEMs were equally available but largely excluded by the London Stock Exchange's listing requirements. The report also set out the costs and benefits of CEMs, both theoretically and empirically.[10] In 2007 the European Commission decided that the provision of control-enhancing mechanisms is the domain of EU member states.[11] CEMs only played a minor role in the period that followed, even during the global financial crisis; it is only recently that the topic has reemerged as a major subject of debate.

The EU, post-Brexit Britain, and the United States are each considering the relative benefits of dual-class structures and tenure voting, but with different emphasis and outcomes. In the United States dual-class IPOs continue to dominate tech IPOs and find increasing use among special purpose acquisition companies (SPACs). Tenure voting (or phased voting) was under consideration by the Long-Term Stock Exchange (LTSE) but remains an exception.[12] In the European Union, Italy[13], Belgium and Spain have introduced tenure voting, while dual class remains the purview of the Nordic countries. In contrast, post-Brexit Britain allows issuers with dual-class share structures (DCSS) to list on its standard listing segment. Germany, which banned

---

9 Per Lekvall et al., *The Nordic Corporate Governance Model* (Nordic & Eur. Co. L., Working Paper No. 14-12, 2014), https://papers.ssrn.com/abstract=2534331.

10 Renée Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 Rev. Fin. 51 (2008); Mike Burkart & Samuel Lee, *One Share – One Vote: The Theory*, 12 Rev. Fin. 1 (2008).

11 Andrew Bounds & Kate Burgess, *Brussels Drops 'One Share, One Vote' Plan*, Fin. Times (Oct. 4, 2007), https://www.ft.com/content/ca06c13e-71e4-11dc-8960-0000779fd2ac (last visited May 31, 2021).

12 Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 Del. J. Corp. L. 541 (2015); David J. Berger, Steven Davidoff Solomon & Aaron Benjamin, *Tenure Voting and the U.S. Public Company*, 2 Bus. Law. 295 (2017); Paul H. Edelman, Wei Jiang & Randall S. Thomas, *Will Tenure Voting Give Corporate Managers Lifetime Tenure Essay*, 97 Tex. L. Rev. 991 (2018).

13 Emanuele Bajo et al., *Bolstering Family Control: Evidence from Loyalty Shares*, 65 J. Corp. Fin. 1 (2019).

multiple voting shares in 2008, is reintroducing dual class.[14] The Netherlands is attracting incorporations by allowing dual class and tenure voting with large vote multipliers and holding periods.[15] Finally, Italy is planning to boost its tenure voting scheme from two to ten times voting right multiples.[16]

Several factors are driving the renewed interest in CEMs. The main international driver is competition for listings and bargaining between institutional investors and issuers. The continuous growth in index investing and the opposition of major institutional clients to CEMs has led major index providers to review their index rules and some now exclude dual-class issuers.[17] Companies with tenure voting are exempt because, in theory, all investors can potentially acquire multiple voting rights. Italy introduced tenure voting to prevent an exodus of Italian issuers to the Netherlands. In the United States, institutional investors are pushing for the adoption of "sunset clauses" that limit dual-class structures after a set period of time. Hong Kong started to allow dual-class listings with sunsets in 2018 and the U.K. has similar plans.[18]

In the European Union, the debate is framed in terms of "short termism" and an integral part of the ambition to be a policy leader in sustainable finance.[19] Loyalty voting structures, which usually rely on ordinary shares with a tenure voting provision, are loosely referred to as "loyalty shares." They promise to provide long-term shareholders with more influence, which is considered beneficial. In France, the French government sought to encourage the adoption of tenure voting by switching the default rules from one-share-one-vote. The implementation measure, the *Loi Florange*, applied to newly listed companies and, controversially, to the stock of listed companies.[20]

CEMs remain controversial with institutional investors. Institutional Shareholder Services (ISS) recommend voting against both structures in its North American and EMEA proxy voting guidelines. The recommendation is mirrored in the voting

---

14 Presse Release, German Ministry of Finance, Financing for the Future (Nov. 17, 2023), https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Priority-Issues/Growth-opportunities/financing-for-the-future.html.

15 In 2020 the Campari Group reincorporated from Italy to the Netherlands and has four classes of shares with different voting rights. The number of votes is dependent on the number of years the shares have been held. *Campari Group Announces the Transfer of Registered Office of Davide Campari-Milano S.p.A to the Netherlands*, Campari Grp. (Feb. 18, 2020), https://www.camparigroup.com/en/pressrelease/2020-02-18/campari-group-announces-transfer-registered-office-davide-campari-milano.

16 Giuseppe Fonte & Valentina Za, *Italian Lawmakers Seek 10 Times Voting Rights for Listed Firms*, Reuters (Aug. 3, 2023), https://www.reuters.com/world/europe/italian-lawmakers-seek-10-times-voting-rights-listed-firms-2023-08-03/.

17 Scott Hirst & Kobi Kastiel, *Corporate Governance by Index Exclusion Symposium: Institutional Investor Activism in the 21st Century: Responses to a Changing Landscape*, 99 B.U. L. Rev. 1229 (2019).

18 Min Yan, *The Myth of Dual Class Shares: Lessons from Asia,* CLS Blue Sky Blog, https://clsbluesky.law.columbia.edu/2021/02/16/the-myth-of-dual-class-shares-lessons-from-asia/ (last visited May 31, 2021).

19 Mark J. Roe & Roy Shapira, *The Power of the Narrative in Corporate Lawmaking*, 11 Harv. Bus. L. Rev. 233 (2021).

20 Marco Becht, Yuliya Kamisarenka & Anete Pajuste, *Loyalty Shares with Tenure Voting: Does the Default Rule Matter? Evidence from the* Loi Florange *Experiment*, 63 J. L. & Econ. 473 (2020). The paper showed that most listed companies with a one-share one-vote structure reverted even though a supermajority was required; the exception were companies where the French state held a blocking minority.

policies of major institutional investors. Major asset managers like BlackRock and pension funds like Norges Bank Investment Management (NBIM) have consistently voted against the introduction of tenure voting through statute modifications in Italy, Belgium, and Spain. In late 2022 ISS announced a major revision of its standard voting policy that amounts to an escalation in institutional investor opposition to dual class and tenure voting. ISS will systematically vote against the discharge of directors of companies with multiple voting rights.

The case for tenure voting as an attractive compromise between dual-class and open structures has been made for the United States, combining legal analysis with calibration.[21] The background was an attempt by Silicon Valley investors to create a new stock exchange, the "Long-Term Stock Exchange" (LTSE) where all companies would have been required to use tenure voting systems. Edelman, Jiang and Thomas (2018) show that tenure voting can ensure that corporate management maintains control of the company, provided they hold a large block of company stock before its implementation and retain at least 20-30% of the total number of company shares on a long-term basis. However, if corporate management sells off its holding over time and most of the shares come to be held by institutional shareholders, then the use of the tenure voting system does little to protect management control in a proxy contest for corporate control. The authors conclude that tenure voting represents an intermediate form of voting control from a manager's perspective and is likely to be seen as an improvement over dual-class stock structures in terms of giving institutional investors corporate governance rights, although it is less advantageous to these shareholders' rights than a one share/one vote voting system.

This view assumes that loyalty voting structures benefit voting institutional investors in the same way as insiders with the same holding period. The statement "indexed investors [..] would automatically qualify for the loyalty-share voting boost in an evenhanded set-up for loyalty-vote bonuses" is correct when the set-up is "evenhanded"; in this Article I show that it is not. In reality, only insiders and blockholders that can afford to forego stock market liquidity can obtain multiple voting rights. The implementation of tenure voting in France, Italy, Belgium, the Netherlands, Spain, and the United States today is rather different from what was envisaged by the LTSE. Institutional shareholders must register their shares to obtain multiple voting rights. Most institutions cannot register, including index funds. In the presence of a blockholder with tenure voting, such long holding institutions end up with fewer voting rights than cash-flow rights.

The case studies presented in the body of the paper suggest that the inability of institutional investors to register is deliberate. Tenure voting is designed to provide a substitute for dual class that is more palatable politically by drawing on the "short-termism" narrative promoted by the European Commission and certain member states. Turning loyalty voting structures into the compromise mechanism would require mechanisms akin to those that were envisaged by the Long-Term Stock

21 Paul H. Edelman, Wei Jiang & Randall S. Thomas, Will Tenure Voting Give Corporate Managers Lifetime Tenure Essay, 97 TEX. L. REV. 991 (2018).

Exchange (LTSE). The underlying technology would allow the exchange to measure the holding period of each share from the moment it was acquired, and thus the attached voting rights could be augmented without the need to block the shares. In this case, long-term institutional shareholders would automatically obtain multiple voting rights. It would be a different system from what is practiced in Europe today, and even it if were available, it might never be adopted.

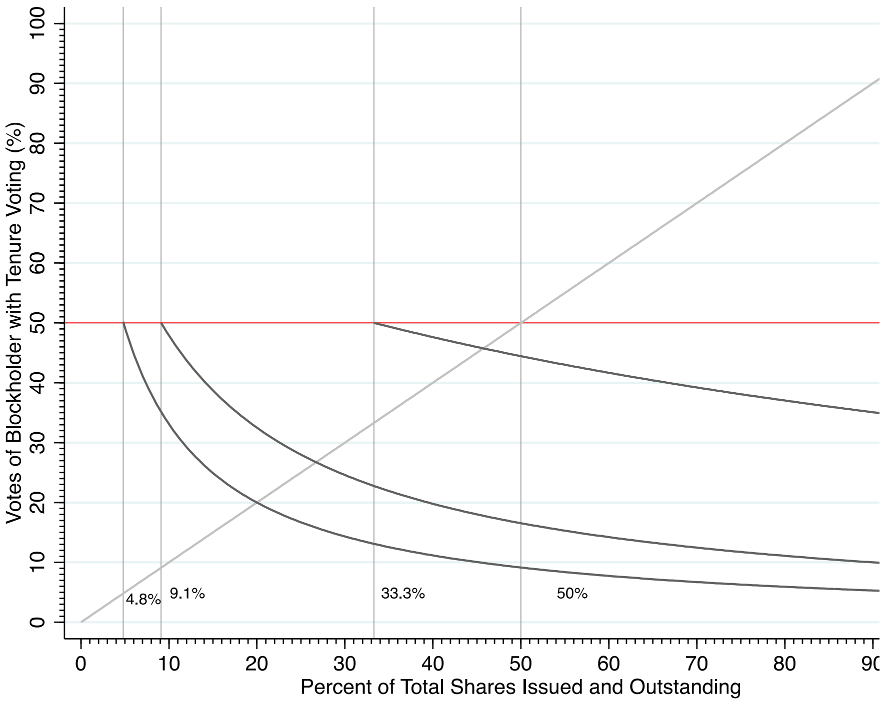
I. Loyalty Voting Structures

Loyalty voting structures give shareholders multiple voting rights after a certain holding period. The system only requires one class of ordinary shares with "tenure voting" rights. In France, tenure voting typically gives double voting rights after two years. The French system has been copied by Italy, Belgium, and France. Time-phased voting is a variant found in the United States, where shareholders are given voting rights proportional to the length of the holding period. In the Netherlands, certain companies award a certain number of special voting shares for each ordinary share that has been held for a predefined period. Ordinary shares that have tenure voting rights are often referred to as "loyalty shares." Strictly speaking, this is a misnomer because they remain ordinary shares.[22] The multiple voting rights stem from corporate law, the bylaws, or the company statutes. Hence the adoption of tenure voting is relatively simple because it merely requires a modification of the articles of association.

Loyalty voting structures have specific features that differentiate them from other multiple voting right arrangements. Most importantly, the voting power of individual shareholders is not fully predictable because it depends on the holding period of the shareholder but also the holding period of all other shareholders. Figure 2 shows the voting leverage of a blockholder who owns shares that gain double voting rights after a two-year holding period. The point to the left of each line shows the leverage if no other shareholder has held shares beyond the tenure voting threshold. In this case, a shareholder who owns 30% of the cash-flow rights has 46.2% of the voting rights. If other shareholders also obtain double voting rights by holding their shares for more than two years, the leverage effect is reduced. In the extreme case, all shareholders hold their shares for more than two years and they all double their voting rights; for the individual shareholder, voting leverage disappears.

22 The use of the term "loyalty shares" also leads to confusion with systems that grant additional holding period related cash flow rights, for example through warrants. See: Patrick Bolton & Frédéric Samama, Loyalty-Shares: Rewarding Long-Term Investors, 25 J. APPLIED CORP. FIN. 86 (2013).

Figure 2. Loyalty Shares with Tenure Voting Cash-Flow and Voting Rights



The number of total voting rights will also change when a long-term holder sells to a third party; the tenure clock is reset to zero. Under time-phased voting, leverage builds up proportionally over time; under tenure voting, one share entitles the new holder to one vote until the holding period threshold is reached, for example, two, four, or ten years.[23] This property of tenure voting is equivalent to a transfer sunset clause in dual-class structures.

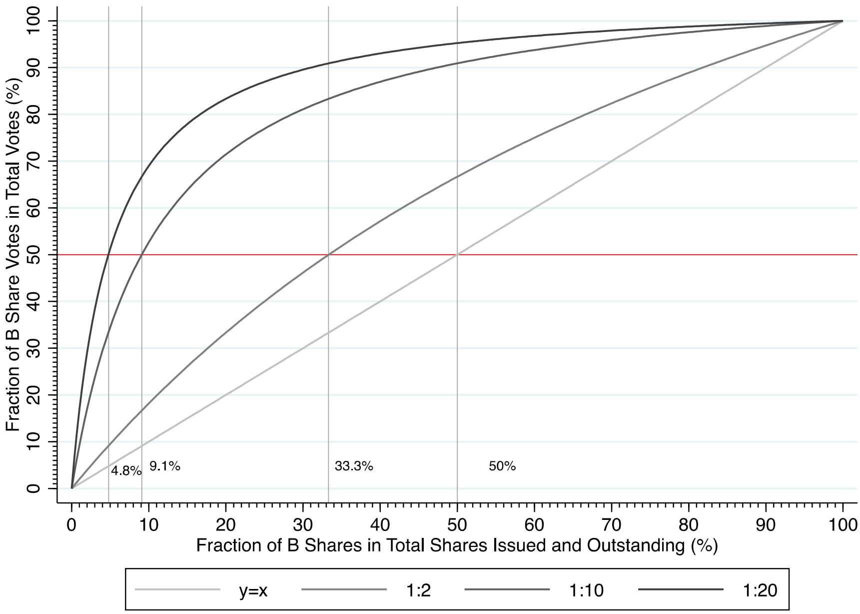
Consequently, companies with tenure voting must regularly report the total number of voting rights, otherwise shareholders cannot calculate their voting power as a fraction of total votes. Shareholders must monitor these disclosures so they can compute the fraction of votes they have at any moment in time. The latter is particularly important when the holding is sufficiently large to bring the shareholder into the proximity of a notification thresholder that is expressed as the fraction of total votes, for example the notification of significant holdings.[24]

In contrast, dual-class structures are more static and predictable. The voting leverages that a founder obtains from a dual-class structure only depends on the proportion of B-Shares relative to A-Shares that are issued and outstanding and the relative voting rights, not on the behavior of other shareholders. Figure 1 shows

23 Exceptions are typically granted for share transfers within the same family or to decedents.
24 Mandatory bid and poison pill threshold are also expressed as fractions of total votes.

the voting leverage that a blockholder obtains from owning different proportions of B-shares in three typical U.S. dual-class share structures where Class A shares are the "low vote" class with one vote per share and the B shares are the "high vote" shares with 2, 10, and 20 votes per share respectively. With a ratio of 2:1, a founder holding 33.3% of the shares in the company, all as B-shares, can obtain 50% of the voting rights; with 10:1, the required holding is 9.1% and with 20:1, only 4.8%. The proportion only changes if the company issues new shares, and does not depend on the behavior of the other shareholders.

Figure 1. Dual Class Mapping of Cash-Flow to Voting Rights



II. Tenure Voting in Practice

Loyalty voting structures also differ from other systems in two important practical aspects. First, companies or stock exchanges implementing tenure voting must accurately determine the number of shares eligible for multiple voting rights. Second, they are responsible for calculating and publicly disclosing the total number of votes. In Europe, these challenges have been addressed through specific measures. Companies are required to publish the total vote count monthly, while multiple voting rights are exclusively granted to registered shareholders. Unregistered shareholders, even if they have held shares for longer than the required holding period, do not have the privilege of multiple voting. This Part comprises a collection of case studies that depict how the practical implementation of tenure voting in France, Italy, Belgium, and the Netherlands diverges from the underlying theory.

The case studies reveal a notable implication of the registration requirement: in practice, multiple voting rights are only available to insider shareholders, families, and other blockholders. Institutional shareholders, on the other hand, seldom fulfill the registration criteria, resulting in a proportional reduction of their voting rights. This reduction applies even if they have maintained their share stake beyond the stipulated holding period.

A. The United States: Smucker Inc.

The J.M. Smucker Company is one of the few companies that adopted time-phased voting in the United States.[25] [26] The company is listed on the New York Stock Exchange and does not benefit from the innovations in tracking holding periods that lay at the heart of the Long-Term Stock Exchange (LTSE) project. The holder of each outstanding common share is entitled to cast one vote per share except on certain decisions, for example any matter that might result in the dissolution of the company. On these matters, common shares that have been held for more than four years by the same beneficial owner are entitled to ten votes per share.

It is not possible to easily find out which holders can cast ten shares because, as the 2021 proxy statement explains,

> [U]nder the Articles, shareholders may be entitled, on certain matters, to cast ten votes per share with regard to certain common shares and only one vote per share with regard to others, there may not be a correlation between the percentage of outstanding common shares owned and the voting power represented by those common shares. The total voting power of all the common shares can be determined only at the time of a shareholder meeting due to the need to obtain certifications as to beneficial ownership of common shares not held as of record in the name of individuals.

As a result, the proxy statement reports the number of common shares beneficially owned by the largest owners but not their voting power for ordinary and for special decisions. On June 22, 2020, the largest shareholders were the Vanguard Group with 11.3%, BlackRock the second largest with 8.5%, and State Street Corporation the third largest with 7.3%. The largest family shareholders were Richard K. Smucker and Timothy P Smucker, with joint beneficial ownership of 4.0%.

Item 4 on the 2020 annual meeting agenda was the J. M. Smucker Company 2020 Equity and Incentive Compensation Plan, which gave effect to the ten-votes-per-share provisions of the Articles. The board recommended voting "for" the resolution. The total number of votes cast was 200,843,800. The total number of shares owned by Richard K. Smucker and Timothy P Smucker was 4,533,588. Assuming that all shares were held for more than four years, and all votes were cast, the Smucker

---

25 Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 Del. J. Corp. L. 541 (2015).

26 *Id.*

family cast 45,335,880 votes or 22.6% of all votes with their 4% stake. Vanguard and BlackRock jointly held 22,569,931 shares. Since there are only 155,507,920 votes that were not cast by the Smucker family, a maximum of 15,550,792 shares could have been voted with ten votes, less than the holding of the two largest index-tracking funds. In addition, Vanguard and BlackRock held more than 19,000,000 Smucker shares every year since 2017 so it is unlikely that they might have exercised ten votes per share and other shareholders did not cast a vote.

Hence, the most plausible conclusion from the Smucker example is that in practice index investors in the United States cannot avail themselves of multiple voting rights they should have based on their holding period. In Europe, the disclosure of capital and voting rights is more transparent for tenure voting structures, especially in France.

B. France: Pernod Ricard SA

Pernot Ricard SA is a wine and spirits company that has adopted tenure voting by not opting out of Article L. 22-10-46 of the French Commercial Code, which makes tenure voting the default voting rule for French companies.[27] It states that

> In companies whose shares are admitted to trading on a regulated market, the double voting rights provided for in the first paragraph of Article L. 225-123 are automatic, unless a clause to the contrary is included in the articles of association adopted after the enactment of Act No. 2014-384 of March 29, 2014 to win back the real economy, for all fully paid-up shares that have been registered for two years in the name of the same shareholder. The same applies to the double voting right conferred from their issue on registered shares allocated free of charge pursuant to the second paragraph of Article L. 225-123.

The Pernod Ricard articles of association modify the law and change the default rule from a two year to a ten-year holding period:[28]

> Voting rights double those granted to other shares, on the basis of the portion of share capital they represent, shall be granted to all shares that are fully paid up and that can prove registration as registered shares in the name of the same shareholder for at least ten years as from 12 May 1986 inclusive. (Article 33, III(2))

Crucially, to allow shareholders "to prove registration in the name of the same shareholder," the Articles distinguish between registered and bearer shares. These are defined in Article 10 "Form of Shares" ("*Shares that are fully paid up shall be registered or bearer shares, at the shareholder's discretion*") and the relevant difference is set out in Article 11 "Transfer of Shares":

27 In the law, double voting rights after two years is the default rule. Tenure voting became the default rule through the Law n° 2014-384 of 29 March 2014, which intended to "reconquer the real economy"; it is also known as the "*Loi Florange*." *See* Becht, Kamisarenka, and Pajuste, *supra* note 18.

28 Pernod Ricard, Memorandum & Articles of Association (2019), https://assets.pernod-ricard.com/archives/pernod_ricard_articles_of_association_2011_07_20_19.pdf.

> Article 11.I Registered Shares
> All transfers of registered shares shall be carried out by a transfer from one shareholder account to another in accordance with the conditions prescribed by law, and shall be recorded in a special register with numbered and initialed pages.
> All gratuitous transfers or transfers by death of registered shares shall be carried out upon proof that the transfer has taken place in accordance with statutory requirements.

The practical implementation is set out on the investor relations pages targeted at individual shareholders.[29] Pernod Ricard encourages individuals to become direct registered shareholders through Société Générale, which is authorized by Pernod Ricard to manage the shares. To purchase and register the shares, the individual has to contact Société Générale Securities Services, which will then send them the required documents by post, including the "Direct-Registered" Share Account Agreement and a share purchase order form. Upon receiving the documents, the individual must complete them accurately, sign and date them, and return them to Société Générale. Additionally, they need to make a 50% down-payment in euros through a bank transfer or by sending a cheque. Société Générale will verify the application and the receipt of funds. Once the verification is complete, they will place the order on the stock market. After the order is executed, the individual will receive a registered account transaction statement indicating any outstanding balance. Payment for the outstanding balance is required upon receipt of the statement. There are no service charges or running costs.

Alternatively, individuals and institutions can acquire intermediary registered shares through their own financial intermediary at their own expense. In the externally administered share process, an individual's shares are maintained under the custody and management of their financial intermediary. This arrangement allows for the consolidation of all shares into a single portfolio, like shares in bearer form. To transfer administered registered shares, the shareholder needs to make a formal request to their financial intermediary. Subsequently, the intermediary is responsible for notifying Société Générale Securities Services about the conversion of the securities to externally administered registered shares.[30] The service is not limited to Pernod Ricard but offered more widely to French issuers. The crucial question then becomes if it is and can be used by institutional shareholders as well as by individuals.

In contrast with registered shares, holders of Pernod Ricard bearer shares cannot "prove registration in the name of the same shareholder" and thus they cannot acquire multiple voting rights. Bearer shares are defined as follows:

> Article 11.II — Bearer Shares:
> The transfer of bearer shares shall be carried out by a transfer of shares from the transferor's account to the transferee's account using the services of an approved

29 Pernod Ricard, *Individual Shareholders | Pernod Ricard*, https://www.pernod-ricard.com/en/investors/individual-shareholders (last visited May 17, 2023).

30 *The Various Ways of Holding Securities*, Société Générale, https://sharinbox.societegenerale.com/en/shareholders/understanding-the-shareholding/the-various-ways-holding-securities/ (last visited May 17, 2023).

> financial intermediary. All gratuitous transfers or transfers by death of bearer shares shall be carried out upon proof that the transfer has taken place in accordance with statutory requirements.

Bearer shares are "normal" shares held and traded by any financial agent operating on the Euronext market. Bearer shares are freely transferable, and the transfer does not involve Société Générale Securities Services.

The final element is a transfer sunset clause that is contained in Article 33.III, with an exemption for family members:

> All shares converted into bearer shares or sold lose their double voting rights. However, transfers of shares by inheritance, the liquidation of marital property held by spouses or an inter vivos gift to a spouse or relative within the line of succession does not cause the shares to lose their double voting rights and does not suspend the ten-year period described hereinabove.

The first sentence of the clause also stipulates that registered shares that are converted to bearer shares will lose their voting rights, even when they are not sold. The question then arises: which shareholders of Pernod Ricard have acquired multiple voting rights by holding registered shares for more than ten years? Also, which shareholders see their proportional influence diminished, either by having a holding period inferior to ten years or by holding bearer shares? Table 1 shows the breakdown of the fraction of share capital and voting rights held by significant shareholders on 30 June 2022. The largest shareholder is Société Paul Ricard, which is wholly owned by the Ricard family; it owned 13.93% of the share capital and commanded 20.09% of the voting rights. A second large block was held by Groupe Bruxelles Lambert (Belgium), a listed holding company controlled by two families. GBL also uses LSV and is discussed further below. It held 7.71% of the capital and 12.8% of the voting rights.

Table 1. Pernod Ricard – Major Shareholders, Ownership and Voting Rights

	Position on 30.06.2022			Position on 30.06.2021			Position on 30.06.2020		
Shareholders	Number of shares	% of share capital	% of voting rights*	Number of shares	% of share capital	% of voting rights*	Number of shares	% of share capital	% of voting rights*
Société Paul Ricard(1)	35,939,659	13.93	20.09	34,630,930	13.22	19.43	41,303,024	15.56	21.30
Mr Rafaël Gonzalez-Gallarza(2)	1,477,603	0.57	0.95	1,477,603	0.56	0.94	1,477,603	0.56	0.93
Directors and Management of Pernod Ricard	208,387	0.08	0.07	362,973	0.14	0.16	323,330	0.12	0.15
Shares held by Pernod Ricard employees	3,567,721	1.38	1.77	3,328,778	1.27	1.65	3,132,107	1.18	1.57
Groupe Bruxelles Lambert (Belgium)(3)	19,891,870	7.71	12.80	19,891,870	7.60	12.65	19,891,870	7.49	12.45
MFS Investment Management (USA)(4)	12,994,021	5.04	4.18	15,698,042	5.99	4.99	24,035,625	9.06	7.57
BlackRock Investment Management Limited (UK)(5)	12,002,224	4.65	3.86	13,130,591	5.01	4.18	11,849,009	4.46	3.73
Invesco (UK)(6)	6,598,665	2.56	2.13	2,646,623	1.01	0.84	1,316,178	0.50	0.41
La Caisse des Dépôts et Consignations(7)	6,376,245	2.47	2.05	6,061,268	2.31	1.93	6,543,422	2.47	2.06
FIL Fund Management Limited (Ireland)(8)	4,551,211	1.76	1.46	3,974,614	1.52	1.26	-	-	-
Amundi Asset Management(9)	3,965,340	1.54	1.28	2,675,786	1.02	0.85	2,644,214	1.00	0.83
Norges Bank Investment Management (Norway)(10)	3,917,610	1.52	1.26	-	-	-	-	-	-
Alecta(11)	1,399,000	0.55	0.45	-	-	-	-	-	-
Threadneedle Asset Management Holdings Ltd(12)	1,376,315	0.54	0.45	-	-	-	-	-	-
Allianz Global Investors GmbH(13)	1,318,122	0.51	0.43	-	-	-	-	-	-
American Century Investments Management, Inc.(14)	1,315,136	0.51	0.42	-	-	-	-	-	-
Capital Group Companies (USA)(15)	-	-	-	13,254,986	5.06	4.22	15,736,495	5.93	4.96
WCM Investment Management, LLC (USA)(16)	-	-	-	5,220,603	1.99	1.66	-	-	-
Citigroup Global Markets Limited (UK)(17)	-	-	-	4,221,764	1.61	1.34	-	-	-
Credit Suisse Group (UK)(18)	-	-	-	1,810,840	0.69	0.58	1,613,803	0.61	0.51
Aviva plc(19)	-	-	-	1,550,453	0.59	0.49	1,353,465	0.51	0.43
Jupiter Asset Management Limited(20)	-	-	-	-	-	-	1,733,757	0.65	0.55
La Française Investment Solutions(21)	-	-	-	-	-	-	1,482,844	0.56	0.47
Abu Dhabi Investment Authority(22)	-	-	-	-	-	-	1,378,176	0.52	0.43
Select Equity(23)	-	-	-	-	-	-	1,342,526	0.51	0.42
Treasury shares:									
• Shares held by affiliates	-	-	-	-	-	-	-	-	-
• Treasury shares	979,454	0.38	0.00	965,483	0.37	0.00	4,747,588	1.79	0.00
Others and public	140,068,772	54.30	46.33	130,973,353	50.01	42.82	123,516,556	46.54	41.22
Total	**257,947,355**	**100.00**	**100.00**	**261,876,560**	**100.00**	**100.00**	**265,421,592**	**100.00**	**100.00**

Source: Pernod Ricard Universal Registration Document 2022 (pg. 298/299)

The largest institutional blocks were held by MFS Investment Management, BlackRock Investment Management Limited, and Invesco. In each case, the share of voting rights was lower than the share of capital. In each case, the block had been held for more than two years but might have been held for less than ten years. Hence it is not possible to tell from the table whether the absence of multiple voting rights results from a shorter holding period or a failure to hold registered shares. In the next case from France, shareholders acquire double voting rights after two years, which makes it easier to distinguish between these possibilities.

C. France: Engie SA

ENGIE SA is a French utilities company and Article 2.1 of its Articles of Association states that its purpose "is to act to accelerate the transition to a carbon-neutral economy, through low-energy solutions that are more respectful of the environment."[31] ENGIE issues registered or bearer shares (Article 8). The voting rights attached to the shares are identical for all shareholders, unless otherwise laid down by law.

> Article 11 – Voting Rights Attached to Shares
> Unless otherwise laid down by law, each shareholder shall have the number of voting rights and shall be able to cast the number of votes in the General Meeting of Shareholders corresponding to the number of paid-up shares that the shareholder owns.

The provision "unless otherwise laid down by law" is crucial because ENGIE has not opted out of Articles L.22-10-46 and L. 225- 123 of the French Commercial Code, hence "all registered and fully paid-up shares registered in the name of the same beneficiary for at least two years are automatically entitled to a double voting right."[32] Bearer shares are not entitled to a double voting right because the holding period is not known. ENGIE, like Pernod Ricard, relies on the services of Société Générale to manage the registration of shares.[33]

Table 2 shows the major shareholders in ENGIE between 2020 and 2022. The French state held 23.64% of the capital in all three years as registered shares with double voting rights; this resulted in 33.19%, 33.20%, and 33.56% of the theoretical voting rights.[34] The small degree of fluctuation in the fraction of votes shows that hardly any other shareholders acquired or lost their double voting rights. The CDC Group (Caisse des Dépôts et Consignations + CNP Assurances) held a stable ownership stake of 4.6%. In 2020 not all the shares had double voting rights and the block's voting power was only 3.83%; in 2021 the theoretical voting rights had increased to 4.28% for the same ownership block. This implies that CDC could hold registered shares and some of them had been held for more than two years. In contrast, BlackRock held share capital of approximately 4.4% in all three years,

31 ENGIE Article of Association, (2020), https://www.engie.com/sites/default/files/assets/documents/2020-06/GB%20-%20Statuts%20ENGIE%202020%2005%2014%20web-converti.pdf.

32 ENGIE, Universal Registration Documents 2022, 210 (2022), https://www.engie.com/en/investors/registration-documents (last visited May 18, 2023).

33 *Securities Holding*, Engie.com, https://www.engie.com/en/shareholders/shareholder-guide/securities-holding (last visited May 18, 2023).

34 As footnote one of the table explains, "Pursuant to Article 223-11 of the AMF General Regulations, the number of theoretical voting rights is calculated on the basis of all shares to which voting rights are attached, including shares held by the Group, from which voting rights have been removed."

yet its theoretical voting power was consistently around 3.4%. This implies that BlackRock did not hold registered shares.

In the case of France, loyalty voting structures do not use two different share classes but rely on two different types of shares: registered shares, and bearer shares. The (in)ability of institutional shareholders crucially depends on the services provided for purchasing, holding, and selling registered shares.

Table 2. ENGIE – Major Shareholders, Ownership and Voting Rights

	12/31/2022				12/31/2021		12/31/2020	
	Number of shares	% of share capital	% of theoretical voting rights (1)	% of exercisable voting rights	% of share capital	% of theoretical voting rights (1)	% of share capital	% of theoretical voting rights (1)
Public	1,414,239,687	58.07	49.82	50.04	58.50	50.28	63.35	54.71
French State	575,693,307	23.64	33.56	33.71	23.64	33.20	23.64	33.19
The Capital Group Companies	117,733,578	4.83	3.79	3.81	5.02 (2)	4.00 (2)	-	-
CDC group	112,201,739 (3)	4.61	4.24	4.26	4.59 (4)	4.28 (4)	4.59 (4)	3.83 (4)
BlackRock	106,479,528	4.37	3.32	3.34	4.47 (5)	3.46 (5)	4.46 (6)	3.43 (6)
Employee shareholding	94,406,745	3.88	4.82	4.84	3.16	4.31	3.20	4.26
Treasury stock	14,530,427	0.60	0.45	0.00	0.62	0.47	0.76	0.58
Management	NS	NS	NS	NS	NS	NS	NS	NS
TOTAL	**2,435,285,011**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

(1) Pursuant to Article 223-11 of the AMF General Regulations, the number of theoretical voting rights is calculated on the basis of all shares to which voting rights are attached, including shares held by the Group, from which voting rights have been removed.
(2) Information not available on December 31, 2021 (data on November 16, 2021 from the disclosures threshold notification).
(3) Shares allocated in the following way: CDC (directly) holds 88,303,888 shares (3.63% of the share capital and 3.50% of theoretical voting rights) and CNP Assurances hold 23,897,851 shares (0.98% of the share capital and 0.74% of theoretical voting rights).
(4) CDC Group (Caisse des Dépôts et Consignations + CNP Assurances).
(5) Information not available on December 31, 2021 (data on December 30, 2021 from the disclosures threshold notification).
(6) Information not available on December 31, 2020 (data on December 07, 2020 from the disclosures threshold notification).

Source: ENGIE Universal Registration Document 2022 (pg. 221)

D. Belgium: Groupe Bruxelles Lambert (GBL)

Groupe Bruxelles Lambert (GBL) is a listed holding company. In Belgium, a prohibition of multiple voting rights, excluding cooperative companies, had been in place since 1934, ensuring that one share equals one vote. This also applied to GBL. On June 4, 2018, a draft law called the "New Companies Code" was submitted to the Belgian parliament for review. This proposed legislation aimed to substantially reform the Belgian Companies Code, with a focus on enhancing flexibility and competitiveness for Belgian companies. One significant change introduced by the New Companies

Code was the provision for an optional double-voting right for loyal shareholders of listed companies. The law was adopted, and existing listed companies could adopt the double-voting right starting from January 1, 2020, by incorporating tenure voting into their articles of association.[35]

GBL introduced double voting rights at a special shareholder meeting held on April 28, 2020.[36] Item 2.1.1. on the agenda pertained to this matter, and a two-thirds majority of votes was required for its adoption. The modification of Article 11 of the company statutes (previously Article 12) was proposed. The voting outcome revealed that 108,583,231 votes (85.73%) were in favor of the modification, while 18,071,749 votes (14.27%) were against it.

> GBL Articles of Association. Article 11.
> A double voting right compared to other shares representing the same share of the capital is granted to fully paid-up shares of the company that have been registered for at least two years without interruption in the name of the same shareholder in the register of registered shares. […] Any share converted into dematerialised share or the ownership of which is transferred loses the double voting right as from its dematerialisation or entry of its transfer in the company's share register.

The Articles distinguish between registered shares and "dematerialized shares," the Belgian equivalent of bearer shares in France. Only registered shares can benefit from the double voting right.

GBL publishes the total number of securities with voting rights and the total number of voting rights monthly. The statements provide further details on how the shares and votes are counted:[37]

> In accordance with Article 7:53 of the Code on companies and associations and Article 11 of the Articles of Association, shares with double voting rights are registered shares that have been registered in the name of their holder for at least two consecutive years. The method used by GBL to calculate the holding period of two consecutive years is the LIFO ("last in, first out") method, i.e.: for the same registered shareholder, the shares that the latter has most recently acquired are the first shares that will be deducted from his registered "basket of shares" if he/she sells shares to a third party.

Finally, the investor relations page provides information for individual shareholders on registering the shares. Investors are invited to contact their financial intermediary with a request to convert dematerialized GBL shares into registered shares. Following registration, GBL will send a certificate confirming the registration in the share register to the shareholder. Similarly, investors are invited to send a signed letter to GBL's Legal Department indicating the number of the securities account to which

---

35 Aurélie Cautaerts, Matthieu Duplat & Thomas Flament, *Loyalty Shares in Belgian Listed Companies*, (2018), https://www.jonesday.com/en/insights/2018/06/loyalty-shares-for-belgian-listed-companies-fundam (last visited May 19, 2023).

36 In November 2022 there were ten other companies that had successfully adopted a loyalty share structure in Belgium. *See* Steven Declercq et al., *Loyalty Voting Rights in Belgium: Nothing More than a Control-Enhancing Mechanism?*, 20 Eur. Co. & Fin. L. Rev. 27 (2023).

37 *Voting Rights and Denominator*, Groupe Bruxelles Lambert (GBL), https://www.gbl.be/en/voting-rights-and-denominator (last visited May 20, 2023).

the registered GBL shares must be transferred, if they wish to convert them into dematerialized shares.

Which shareholders had double voting rights? The GBL Annual Report (p. 298) shows that Pargesa SA, a Swiss holding company, held 29.77% of the capital and 44.29% of the voting rights on 31 August 2022. The monthly vote declaration for the same day shows that the total number of shares granting voting rights was 153,000,000, the total number of votes was 205,692,771, and the total number of securities with double voting rights was 52,692,771. This implies that Pargesa SA held 45,548,100 with 91,096,200. The balance, 14,289,342 votes (7,144,671 shares), was held by other shareholders. In total, 55,883,247 shares (36.52% of the capital) were held by a concert party around Pargesa SA, but not all were entitled to vote because the relevant entities were controlled by GBL.[38] In conclusion, it is fair to assume that very few shareholders other than the controlling shareholders held registered shares for longer than two years and thus had double voting rights. Again, the distinction between illiquid registered shares and fully fungible dematerialized (bearer) shares is crucial.

E. Netherlands: The Campari Group

The final case is the Campari Group that reincorporated from Italy to the Netherlands. The move was implemented through a shareholder vote and did not require a takeover bid for the shares of the Italian group. The case illustrates a deliberate preference for a loyalty voting structure over dual class, which is also available in the Netherlands. It also shows a three-step system that results in ten votes per share after a holding period of ten years. The company explicitly acknowledges that its Dutch loyalty share structure relies on different types of shares: ordinary shares (OS) with one vote per share and special voting shares (SVP), which grant voting but no economic rights. Again, the crucial feature are the terms and conditions for obtaining special shares.

The company has established a special register called the loyalty register to manage the allocation of special voting shares. Shareholders who wish to receive special voting shares need to complete and sign an election form. This form must be submitted to the company through the intermediary with which their ordinary shares (regular shares) are registered. By submitting the completed election form, the shareholder requests the registration of the ordinary shares in the loyalty register. The allocation of special voting shares does not limit the transferability of the ordinary shares to which the special voting shares are connected. However, if a shareholder wants to transfer their ordinary shares, they need to request the removal of those shares from the loyalty register. This is done by submitting a de-registration form. After a transfer of ordinary shares or in the event of a change of control for a shareholder, the voting rights associated with the special voting shares are immediately suspended. The

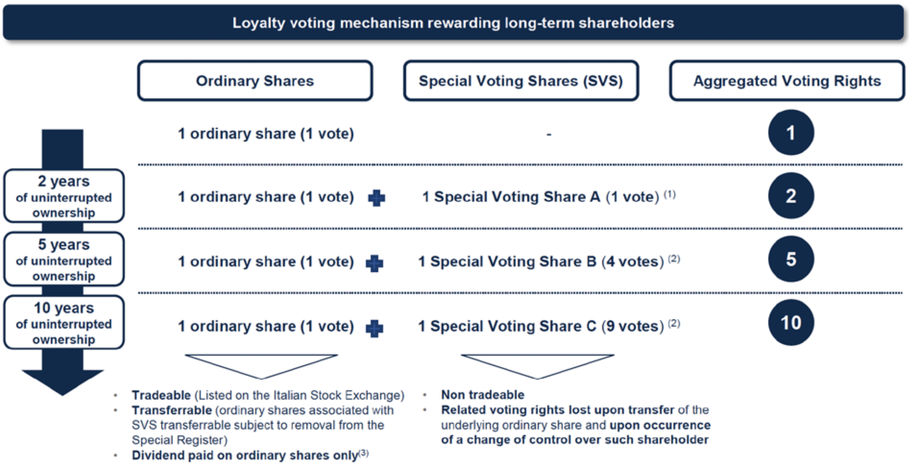
38 Groupe Bruxelles Lambert (GBL), Notification in Accordance with the Legislation on Takeover Bids (2022), https://www.gbl.be/en/media/3835/Déclaration%20OPA%201er%20septembre%202022%20ENG.pdf.

special voting shares are then transferred back to the company (Campari) without any payment or consideration.

Figure 3 illustrates the allocation of special voting rights as a function of the holding period, provided the ordinary shares were entered into the loyalty register. Long-term loyal shareholders are assigned with special shares, namely special voting shares A, B, and C, which grant them additional voting rights based on the duration of uninterrupted ownership of ordinary shares. Ordinary shares and special shares are allocated as follows:

- For shareholders who hold ordinary shares continuously for two years, they will be assigned two votes for each ordinary share. This allocation is accomplished through the assignment of special voting shares A.
- For shareholders who hold ordinary shares continuously for five years, they will be assigned five votes for each ordinary share. This allocation is achieved through the assignment of special voting shares B.
- For shareholders who hold ordinary shares continuously for ten years, they will be assigned ten votes for each ordinary share. This allocation is carried out through the assignment of special voting shares C.

Figure 3. Loyalty Voting Mechanism at the Campari Group



Source: Investor Presentation, 18 February 2020

The articles of association contain a further provision that foresees the conversion of ordinary shares and special voting shares C into special ordinary shares. Campari's extraordinary general meeting authorized the exchange of one special voting share C and its corresponding qualifying ordinary share C for a special ordinary share, granting 20 votes. Shareholders must hold the special voting share C during the designated conversion period to be eligible for the exchange. The special ordinary shares have equal economic rights to existing ordinary shares and are not listed on a regulated market. This would constitute a hybrid between a dual class and a tenure voting structure.

Table 3 shows the shareholder structure of Campari Group NV on 23 April 2023. Lagfin S.C.A. holds 630,131,132 ordinary shares of which 624,116,000 were registered in the loyalty register for more than two years; an identical number of special voting shares were allocated with one vote per share, resulting in 1,254,247,132 votes. Accordingly, Lagfin S.C.A. commands 68.6% of the theoretical votes with 54.1% of the capital. Unspecified other shareholders owned 494,725,731 of which 5,310,391 were entered in the loyalty register. The latter represent 0.46% of all ordinary shares and could obtain double voting rights. The remaining 489,415,340 shares have single voting rights. They represent 42.1% of the capital and have 26.8% of the voting rights.

Table 3. Campari Group NV Shareholding Structure

Shareholding in Campari Group NV as of 30 April 2023

SHAREHOLDERS	ORDINARY SHARES (1)	% OF ORDINARY SHARES	SPECIAL VOTING SHARES A (2)	ORDINARY SHARES + SVS A	% OF ORDINARY SHARES + SPECIAL VOTING SHARES A
Lagfin S.C.A.	630,131,132	54.20%	624,116,000	1,254,247,132	68.60%
Other Shareholders	494,725,731	42.60%	5,310,391	500,035,922	27.40%
Treasury shares (3)	36,743,337	3.20%	36,291,951	73,035,288	4.00%
Total	1,161,600,000	100.00%	665,718,342	1,827,318,342	100.00%

1. Ordinary shares are listed, freely transferable, and each of them confers the right to cast one vote.
2. Special voting shares do not confer an economic right, are not listed, and are not transferable. Each special voting share A confers the right to cast one vote.
3. Includes special voting shares A transferred to the company upon the sale of qualifying ordinary shares by the selling shareholder in accordance with clause 11.5 of the SVS Terms.

Source: Campari Group (https://www.camparigroup.com/en/page/investors/shareholder-centre)

III. The Loyalty Pretense

If loyalty voting structures are functionally equivalent to dual class but less transparent, more difficult to operate, and less reliable for controlling shareholders, why are they so popular in Europe? Why have EU member states that do not offer dual-class structures decided to offer loyalty voting? A plausible explanation is political expediency embedded in the "short-termism narrative,"[39] competitive pressure from other European countries analogous to "charter competition" in the United States, and a desire to stimulate initial public offerings. The latter is based on casual empiricism and the observation that most IPOs in the United States use dual class. However, since the latter is controversial and not supported by a "long-term" narrative, functionally equivalent tenure voting is preferable.

There is some evidence to support this view. The law that introduced tenure voting in Italy, Belgium, and Spain transposed Directive (EU) 2017/828 of the European Parliament and Council of 17 May 2017 amending Directive 2007/36/EC "as regards the encouragement of long-term shareholder engagement." The directive itself is mute on tenure voting, which is why it was not introduced in every member state. However, it is possible to argue that the introduction of tenure voting supports the directive's general policy thrust, over and beyond the minimum standard.

In Spain, the argument that introducing loyalty shares has the potential to facilitate initial public offering (IPO) induced the Spanish National Securities Market Commission (Comisión Nacional del Mercado de Valores) to actively support the introduction of loyalty shares.[40] There was concrete hope that the introduction of tenure voting would influence the listing decision of large, privately held corporations with founder-controlled shareholdings like Cepsa, the banks Ibercaja and WiZink, and the retailers El Corte Inglés, Mercadona, and Antolín. The CNMV also argued that loyalty shares should be considered as an option and that any conversion to tenure voting requires a qualified majority and quorums from shareholders to pass and could be revoked once adopted.[41]

The Spanish financial press also speculated about ulterior motives.[42] In France, the switch in the default rule from one-share one-vote to tenure voting was used by the French state to increase its own voting power. The Spanish government held some blocks in listed companies with single voting rights, and it is a longer-term holder and does not require liquidity. Hence the Spanish state could register and obtain double voting rights. However, the adoption of tenure voting would require a supermajority, and adoption driven by the state as a shareholder has not been observed in Italy.[43]

Proxy advisers correctly distinguish between dual-class structures and loyalty voting structures as separate legal constructs. They also understand that equal access to multiple voting rights is a pretense. ISS also correctly identifies DCS and LVS as being functionally equivalent. The ISS proxy voting guidelines, for example, contain

---

39 Roe & Shapira, *supra* note17.

40 Carlos Tornero, *Spanish Loyalty Shares Proposal Progresses despite Opposition*, Responsible Investor (Oct. 22, 2019), https://www.responsible-investor.com/spanish-loyalty-shares-proposal-progressing-despite-opposition/.

41 *Id.*

42 José Antonio Navas, *Las Nuevas "Acciones con Ginsenc" y sus Extrañas Propiedades Medicinales*, La Información (Jun. 15, 2019), https://www.lainformacion.com/opinion/jose-antonio-navas/las-nuevas-acciones-con-ginsenc-y-sus-extranas-propiedades-medicinales/6504064/.

43 Emanuele Bajo et al., *supra* note 13..

a general recommendation to vote for one-share one-vote and against any type of unequal voting right structure:

> General Recommendation: Vote for resolutions that seek to maintain, or convert to, a one-share, one-vote capital structure. Vote against requests for the creation or continuation of dual-class capital structures or the creation of new or additional super voting shares.[44]

Starting from February 1, 2024, for meetings at widely held companies in Continental Europe, ISS will further step up its opposition to DCS and LVS.[45] ISS will generally recommend voting against directors or the discharge of nonexecutive directors if the company has a stock structure with unequal voting rights. This applies to situations where certain classes of common stock have more votes per share compared to other shares, where some classes of shares are not allowed to vote on certain ballot items or nominees, or when there are stocks with tenure voting rights (or any other loyalty voting structure). The vote recommendations are mainly directed towards the nominees who are primarily responsible for or benefit from the unequal voting structure.[46]

ISS also opposes tenure voting in its U.S. proxy guidelines. This suggests that institutional shareholders equally oppose time-phased voting structures in the United States, as they are currently practiced:

> Unequal Voting Rights: Generally vote withhold or against directors individually, committee members, or the entire board (except new nominees, who should be considered case-by-case), if the company employs a common stock structure with unequal voting rights. [footnote] This generally includes classes of common stock that have additional votes per share than other shares; classes of shares that are not entitled to vote on all the same ballot items or nominees; or stock with time-phased voting rights ("loyalty shares").[47]

The new policy is controversial and has been opposed by several European industry associations. The thrust of the argument is that the discharge of directors is a vote on the fulfilment of their fiduciary duties, which in Europe do not include capital structure. This argument seems perfectly reasonable and valid, but the debate about the legitimacy of the use of the discharge of director vote is orthogonal to the

---

44 ISS, Continental Europe: Proxy Voting Guidelines 20 (2022), https://www.issgovernance.com/policy-gateway/voting-policies/.

45 *Id*..

46 There are certain situations where these recommendations may not apply. These include newly public companies with a sunset provision that limits the unequal voting rights to no more than seven years from the date of going public. Additionally, if the difference between voting and economic power does not exceed 10 percent, calculated relative to the entire share capital for multiple share classes or on an individual shareholder or concert level in the case of loyalty share structures, the unequal voting rights may be considered de minimis. Furthermore, if the company provides sufficient protections for minority shareholders, such as allowing them to have a regular binding vote on whether the capital structure should be maintained or committing to abolishing the structure by the next annual general meeting (AGM), the vote recommendations may not be applicable. Id. at 14.

47 ISS, United States: Proxy Voting Guidelines, 14 (2022), https://www.issgovernance.com/policy-gateway/voting-policies/.

argument presented here. ISS's indiscriminate opposition to DCS and LVS shows that ISS and its clients perfectly understand that LVS is not a better dual class, but dual class in disguise.

Conclusion

Tenure voting is often presented as a compromise between dual-class and open structures. It offers founders and families the ability to maintain control if they hold a significant block of company stock before implementation and retain a substantial percentage of shares in the long term. Institutional investors that hold shares over a longer period can acquire disproportional influence without having to purchase additional shares or higher voting shares, which often trade at a premium. In theory, the system is less predictable than dual class because the voting boost for insiders depends on the number of outside shareholders that acquire multiple voting rights. Theoretically the total number of votes can change dramatically over time.

In practice, tenure voting is functionally equivalent to dual class because it distinguishes between bearer shares that are fully fungible and registered shares that allow the company to verify the holding period. Institutional shareholders are usually unable to hold registered shares and thus they are deprived of multiple voting rights, irrespective of the holding period. The exclusion of institutional investors from registering for multiple voting rights is intentional.

Transforming loyalty voting into an evenhanded setup that allows index investors and other shareholders that buy and sell infrequently to acquire multiple voting rights would require a major overhaul of the system, as it is practiced today. Stock exchanges would have to introduce clearing and settlement systems that allow companies or trusted intermediaries to track the holding period of bearer shares in real time. The law would have to be adapted accordingly, so that index funds and other long-term holders see their voting rights boosted and not diminished. The alternative is to acknowledge that tenure voting is not a better, but a different type of dual class.

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html