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# Adaptive Advocacy: The Reinvention of Shareholder Activism

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## Abstract

This contribution traces the evolution of shareholder activism, examining its transformation from the 1980s era of "corporate raiders" to the sophisticated hedge funds of today, who strategically exploit opportunities within varying regulatory and business environments. It explores the global expansion of activism and analyzes how ownership structures in the US, UK, and Europe shape activist tactics, particularly in navigating the challenges posed by controlling shareholders. Modern activists employ increasingly nuanced strategies—including private negotiations, media leverage, and alliances with institutional investors—to advance their objectives. The paper also highlights the growing importance of coalition-building, which not only enhances activists' influence and credibility but also helps balance short-term financial gains with long-term corporate value creation. Hedge funds, in particular, have demonstrated remarkable adaptability in shifting market conditions. Emerging stronger from the 2008 global financial crisis than before, they subsequently positioned themselves at the forefront of the climate movement by capitalizing on ESG and sustainable investing—while also exploiting crises such as the Covid-19 pandemic and the oil shock following the war in Ukraine. Today, they are once again adjusting to a changing economic and political landscape, adeptly navigating the new era of protectionist policies and deregulation.

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Keywords: shareholder activism, corporate raiders, coalition-building, activist, institutional investors, corporate value, regulatory constraints, ESG

JEL Classifications: G34, G38, K22

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# ADAPTIVE ADVOCACY:

# THE REINVENTION OF SHAREHOLDER ACTIVISM

WOLF-GEORG RINGE*

forthcoming in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE
(Jeffrey N. Gordon & W. Georg Ringe, eds., 2nd edition 2025)

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# 1. INTRODUCTION

When considering shareholder activism, the likes of Chris Hohn, Carl Icahn, Bill Ackman, Nelson Peltz, T. Boone Pickens, CalPERS, and Atticus are still at the forefront of people's minds. As minority shareholders they commonly use their equity stakes in targeted corporations to sway management, promising efficiency gains but facing the critique of favoring short-term value enhancement.[1]

In recent years, shareholder activism has reinvented itself to become a mainstream business.[2] This has happened along several dimensions. First, activism has become a global business, no longer confined to widely held public firms in the US, but expanding to jurisdictions worldwide with controlled ownership—showing success in Europe and in Asia, but also targeting controlled and large firms in the US market. Relatedly, activist investors have honed their tactics.[3] Their strategy no longer is set on vociferous interventions, seeking board representation with the help of a traditional proxy fight. Instead, modern campaigns often happen behind closed doors or, quite the opposite, use support from the media or public sentiment. Thirdly, activists have demonstrated remarkable adaptability in responding to emerging trends. In the early 2020s, they capitalized on the growing focus on climate change and sustainability, launching campaigns that championed environmental and social causes, including pressing issues such as climate action and the ethical use of AI. However, when public interest in climate change waned, they swiftly shifted their attention to other causes, ensuring their messaging remained aligned with prevailing societal concerns. Finally, perhaps the most important trend is the increasing importance of teambuilding, where activists form coalitions—either with other activist funds, or in partnership with a more passive institutional investor who gives support to their campaign. This last point is very important as it gives activism support and credibility, and at the same time operates as a built-in control mechanism.[4]

This paper takes stock of the phenomenon of shareholder activism and evaluates its importance for the shape of today's debate on shareholders and shareholder empowerment. My main focus will be on the evolution of activist shareholder structures in the US, the UK, and

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[1] Bill George & Jay Lorsch, *How to Outsmart Activist Investors*, HARV. BUS. REV., May 2014.

[2] Kevin Chuah, Mark R. Desjardine, Maria Goranova & Witold J. Henisz, *Shareholder Activism Research: A System-Level View*, 18 ACAD. MGMT. ANNALS 82 (2024).

[3] Dan McCrum & David Gelles, *Stirrers and Shakers*, FIN. TIMES, Aug. 22, 2012, at 7; *Anything You Can Do, Icahn Do Better*, ECONOMIST, Feb. 15, 2014, at 51.

[4] See in more detail *infra* section 4.5.

continental Europe. This paper covers historical developments, the guises and traits of shareholder activism, regulatory constraints, and finally the exceptional talent at reinventing itself – for example, the transformation of many hedge funds from arch capitalists to "climate saviors," and – in recent times – back again.

I proceed as follows. Section 2 explores the concept of shareholder activism and emphasizes the importance of the shareholder structure under which it operates. Section 3 establishes the key determinants of shareholder activism through a historical analysis of activism and activists, mostly focusing on the US, UK, and continental Europe. This allows us to discuss the various methods that are used by activists in section 4 and the corresponding regulatory constraints (section 5). Finally, section 6 demonstrates that activist shareholders are constantly reinventing themselves, discussing current trends such as sustainability and portfolio engagement. Section 7 concludes.

## 2. Shareholder Activism in Context

In its most general form, shareholder activism means nothing more than an active, engaging shareholder who does not simply consider the investment made as purely financial, but as strategic. The most obvious way in which shareholders may voice their demands is to exercise the voting rights associated with share ownership. One of the main problems of shareholder voting is that small shareholders generally have weak incentives to exercise their voting rights: the well-known phenomenon of "rational apathy".[5] The relationship between vote and benefit is usually so unfavorable for retail investors that the rational investor will not seriously engage in the business strategy to make an informed decision or to vote. Activist shareholders, by contrast, overcome this passivity—for various reasons—and actively monitor the company's strategy and management's decisions.

Activism comes in many different shapes. During the 1980s, it appeared in the form of "corporate raiders" dictating company policies, or as leveraged buyout funds taking public companies private in order to change corporate policy. Also, some pension funds like California Public Employees' Retirement System (CalPERS), the largest pension fund in the US, have exerted pressure on management in publicly listed companies, often in the form of behind-the-

[5] Kenneth J. Arrow, The Limits of Organization (1974). *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 Colum. L. Rev. 10 (1991); Bernard S. Black, *Shareholder Passivity Reexamined,* 89 Mich. L. Rev. 520 (1990).

scene negotiations. Since the turn of the century, hedge funds have discovered corporate activism as their business model and have evolved to the forefront of activism.[6] Current activist campaigns are noticeably affected by global macroeconomic events such as the climate crisis, the Covid-19 pandemic, and the 2022 Russian invasion of Ukraine. In this context, many activists turned towards impact investing, with an increased focus on improving environmental, social, and governance (ESG) policies[7] as well as towards coalition-building between different stakeholders.[8] In any case, it is important to bear in mind that each shareholder activist pursues their own style of trading and methods for engaging with the corporate management, within the relevant legal and regulatory environments.[9] Without doubt these varying facets accord a degree of complexity to the meaning of shareholder activism.

In general terms, early forms of shareholder activism encompassed all forms by which shareholders engaged with targeted corporations on matters of company policy. This broad meaning was subsequently broken down into formal and informal activism.[10] Shareholder activism of a formal nature takes place in the public domain, for example at annual general meetings. Gillan and Starks consider there to be three residual categories to formal shareholder activism: namely, "transacting" shareholders, whereby shareholders voice their views on the performance of the targeted corporation by purchasing or selling shares; "activist blockholders" who focus on influencing decision making by gaining a minority control in the targeted corporation and voicing their views; and finally shareholders who seek to implement their changes by gaining control of the company, availing themselves of a (hostile) takeover.[11] Informal shareholder activism, in contrast, occurs in private, behind closed doors, and away from the prying eyes of the public. It therefore rarely attracts any media attention, rendering it

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[6] *See* below section 3.3.3.

[7] Catherine Howarth, *Pension funds join impact investing campaign for a better world*, FIN. TIMES (Jul. 8, 2019), *available at* https://www.ft.com/content/ecfc64c0-aee6-3458-b9d7-bbcc7895ab96; Melissa Sawyer, Lauren Boehmke & Susan Lindsay, *2022 U.S. Shareholder Activism and Activist Settlement Agreements,* Harvard Law School Forum on Corporate Governance, Jan. 5, 2023.

[8] Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance*, 7 ANNALS CORP. GOVERNANCE 93 (2022), at 121 ff.

[9] Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPL. CORP. FIN. 55 (2007).

[10] LAUREN TALNER, THE ORIGINS OF SHAREHOLDER ACTIVISM (1983), quoted in R. FRANKLIN BALOTTI, JESSE A. FINKELSTEIN & GREGORY P. WILLIAMS, MEETINGS OF STOCKHOLDERS (1996), at para 5.4; HENRY SCHÄFER & CHRISTIAN HERTRICH, SHAREHOLDER ACTIVISM IN GERMANY: THEORETICAL CONSIDERATIONS AND EMPIRICAL EVIDENCE (2011), at 5.

[11] Stuart L. Gillan & Laura T. Starks, *A Survey of Shareholder Activism: Motivation and Empirical Evidence*, 2 CONTEMP. FIN. DIG. 10 (1998).

near impossible to prove unless one has access to an activist's private database.[12] Although the above goes some way in defining the generalist traits of shareholder activists, the evolution of shareholder structures, regulatory regimes, and stock markets in the UK, US, and continental Europe have played a crucial role in influencing activist engagements. Shareholder activism in other parts of the world has been less pertinent and will be discussed in this chapter only occasionally.[13]

## 2.1 Shareholder Activism and Ownership Structure

Diversified shareholder structures are the natural habitat for shareholder activism to flourish. This is typically the case in the US and the UK where, traditionally, most public firms are widely held, although they have historically evolved into this ownership structure for differing reasons.[14] In contrast, ownership patterns in most other countries around the world tend to be more concentrated. However, such a binary account runs the risk of being overly simplistic. Today, an increasingly large number of public firms in Europe or Asia are also held by a large number of atomistic shareholders.[15] Conversely, there certainly are some, even large, US- or UK-based firms that have powerful voting blocks, and many firms in the US in the tech sector reinforce their founders' position with dual-class share structures.[16] As we shall see below, in such a setting, shareholder activism is an entirely different animal.

In an environment of dispersed ownership patterns, activist shareholders are seen as those amongst the vast, anonymous shareholder body who actually take an interest in the company's affairs and in monitoring the management, contrary to what an ordinary small

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[12] *See, e.g.*, Willard T. Carleton, James M. Nelson & Michael S. Weisbach, *The Influence of Institutions on Corporate Governance Through Private Negotiations: Evidence from TIAA-CREF*, 53 J. FIN. 1335 (1998); Marco Becht et al., *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes U.K. Focus Fund*, 22 REV. FIN. STUD. 3093 (2009).

[13] For a broader perspective, *see* Ruth V. Aguilera, Ryan Federo & Yuliya Ponomareva, *Gone Global: The International Diffusion of Hedge Fund Activism*, in THE OXFORD HANDBOOK OF HEDGE FUNDS 318 (Douglas Cumming et al. eds., 2021).

[14] For the UK, *see* BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESSES TRANSFORMED (2008); for the US, *see* John C. Coffee, *Dispersed Ownership: The Theories, the Evidence, and the Enduring Tension between "Lumpers" and "Splitters"*, in THE OXFORD HANDBOOK OF CAPITALISM (Dennis C. Mueller ed., 2012) 463, 474; MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) at 102 ff.

[15] *See, e.g.*, concerning Germany, Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493 (2015).

[16] On the renaissance of dual-class shares in the US, *see* Fisch & Solomon in this volume.

shareholder would do. Activist shareholders are largely associated with a positive contribution to the business of the company, since they invest time and resources to make informed decisions and to engage in corporate strategy. Mostly, the realization of their plans will depend on the support of larger institutional investors.[17] In this case, activist shareholders act as governance intermediaries, actively monitoring company performance and then presenting concrete visions for business strategy to companies and institutional investors. Moreover, activists can help to fill the accountability gap created by rationally apathetic retail investors, by providing closer monitoring control over management action. To its critics, shareholder activism—in particular when carried out by hedge funds—may be motivated by idiosyncratic, typically short-term motives of the activist, resulting in value-decreasing activities that may be beneficial for the activist but result in a decline of long-term growth. Overall, however, empirical evidence on the effects of activism refutes those claims.[18] Seen from a positive viewpoint, in the dispersed ownership scenario, activists can serve to reduce the market's undervaluation of voting rights to the advantage of all shareholders.[19]

From a global perspective, the widely held firm is an exception. In most countries around the world, including Europe, Asia, and Latin America, companies have historically been dominated by controlling shareholders and arguably continue to be so despite an increase in foreign and institutional ownership.[20] Family ownership, industrial firms, and the influence of large financial institutions remain characteristic for many corporations in continental Europe.[21] However, boundaries are increasingly becoming fluid: where ownership in some European firms today is becoming very dispersed,[22] the opposite is happening on the other side where the US is currently seeing a certain re-concentration of ownership.[23]

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[17] Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013). *See* this concept in more detail *infra* section 4.5.
[18] *See* below section 3.3.3.
[19] Gilson & Gordon, *supra* note 17.
[20] MARCO BECHT & COLIN MAYER, *Introduction,* in THE CONTROL OF CORPORATE EUROPE (Fabrizio Barca & Marco Becht eds., 2001).
[21] The Kay Review of UK Equity Markets and Long-Term Decision Making, Final Report (July 2012), paras 2.29 and 8.16.
[22] *See* Ringe, *supra* note 15.
[23] Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POLITICS 298 (2017); ADRIENNE BULLER & BENJAMIN BRAUN, UNDER NEW MANAGEMENT: SHARE OWNERSHIP AND THE RISE OF UK ASSET MANAGER CAPITALISM (July 2021), https://www.common-wealth.co.uk/publications/under-new-management-share-ownership-and-the-growth-of-uk-asset-manager-capitalism.

Where they exist, blockholding shareholders are commonly able to exert a high degree of control with additional features such as pyramid structures, dual class shares, cross shareholdings, and differential voting shares.[24] For example, a pyramidal structure can enable a family to gain control of a corporation via a small outlay that enables them to establish a chain of ownership relations.[25] As an illustration, if a family directly owns 50% of a corporation, which itself has a 50% stake in another corporation, the family will indirectly gain a 25% controlling interest in the latter corporation from their initial outlay.[26] In the alternative, the industrial success experienced in Germany was attributed in part to a system of cross-shareholdings and interlocking directorates between banks, insurance companies, and institutional firms. This web of mutual participations appears to be eroding in recent years.[27] Historically, however, these cross-shareholdings were credited for having protected German companies from hostile takeovers due to the stability of ownership and continuity that they provided.[28]

In such a business environment of concentrated ownership, shareholder activism necessarily has an entirely different role and meaning than in a dispersed system. One aspect is that other stakeholders carry out the monitoring duties in such countries—typically controlling shareholders, families, or banks; but recent years have also seen a rise of visional founders who cement their influence with the help of dual-class shares and related techniques. In a stable and solid corporate environment, the symbiotic relationship between company and controller can continue for a long time. Activists are then smaller shareholders who rebel against the controlling shareholder and attempt to bring about change, usually acting or purporting to act on behalf of all *other* shareholders.[29] This markedly differs from the classic

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[24] Randall Morck, Daniel Wolfenzon & Bernard Yeung, *Corporate Governance, Economic Entrenchment, and Growth*, 43 J. ECON. LIT. 655, 688 ff. (2005). For the legal framework in Europe, *see* ISS, Shearman & Sterling LLP & ECGI, Report on the Proportionality Principle in the European Union, May 18, 2007, *available at* https://www.ecgi.global/sites/default/files/final_report_en.pdf; Shearman & Sterling LLP, Proportionality between Ownership and Control in EU Listed Companies: Comparative Legal Study (May 2007).

[25] Heitor V. Almeida & Daniel Wolfenzon, *A Theory of Pyramidal Ownership and Family Business Groups*, 61 J. FIN. 2637, 2657 ff. (2006).

[26] *Id.* at 2638.

[27] Ringe, *supra* note 15.

[28] Alberto Onetti & Alessia Pisoni, *Ownership and Control in Germany: Do Cross-Shareholdings Reflect Bank Control on Large Companies?*, 6 CORP. OWNERSHIP & CONTROL 54, 57 (2009). The German AG (Aktiengesellschaft) is a "public" corporation that is not necessarily (but can be) listed on a stock market.

[29] European Corporate Governance Network, Preliminary Report—The Separation of Ownership and Control: A Survey of 7 European Countries (1997), Volume 1, p. 13. *See also* Matteo Erede, *Governing Corporations with*

activism leitmotif, where activists typically understand themselves as advocates of shareholders generally, and their opponent would be the corporate management.

Where a dominant or even controlling shareholder is present, the strategies and tactics pursued by activist shareholders need to be fundamentally different from an activist operating in a widely held system, and their task is probably more difficult as a controlling shareholder may block any unwanted minority intervention.[30] Such campaigns might nevertheless be successful, as the strong increase in shareholder activism in continental Europe over the recent several years shows.[31] In other countries like Brazil[32] or Japan[33] they are also gaining ground. In this context of corporate governance conflict between dominant blockholders and minority shareholders, institutional investors are considered to usefully exploit shareholder activism techniques in order to build an opposition and a counterbalance to controlling shareholders. They thereby strengthen and support the voice and the position of minority shareholders.[34]

To illustrate, consider the example of the merger between VW and Porsche, which was proposed in 2009. Both companies were dominated by family and state ownership, and Porsche already owned 53% of VW at the time. Minority shareholder Norges Bank Investment Management was the only investor to voice early concerns, stating that the proposed transactions were "unacceptable" as they "leave the impression of being designed to suit the needs of the Porsche controlling families."[35] They also accused VW chairman and Porsche co-owner Ferdinand Piëch of being exposed to heavy conflicts of interest and of violating principles of good corporate governance.[36] Even though the merger was eventually

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*Concentrated Ownership Structure: An Empirical Analysis of Hedge Fund Activism in Italy and Germany, and Its Evolution*, 10 EUR. COMPANY & FIN. L. REV. 328, 346 ff. (2013).

[30] Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, COLUMBIA BUS. L. REV. 60, 74 ff (2016).

[31] Marco Becht et al., *Returns to Hedge Fund Activism: An International Study*, 30 REV. FIN. STUD. 2933 (2017).

[32] Marta Viegas & Oduvaldo Lara Júnior, *Activism Gains Ground in Brazil*, INT'L FIN. L. REV., Sept. 2014; Paula Guimaraes et al., *Shareholder activism impact on efficiency in Brazi*, 19 CORP. GOVERNANCE 141 (2019).

[33] Stuart L. Gillan, Nga Nguyen & Takeshi Nishikawa, *Heterogeneity in shareholder activism: Evidence from Japan*, 77 PAC. BASIN FIN. J. 101891 (2023).

[34] José M. Garrido & Angel Rojo, *Institutional Investors and Corporate Governance: Solution or Problem?*, in CAPITAL MARKETS AND COMPANY LAW 427, 437, 447 (Klaus J. Hopt & Eddy Wymeersch eds., 2004); in a similar vein, *see* Jaap W. Winter, *Cross-border Voting in Europe*, in CAPITAL MARKETS AND COMPANY LAW 387, 388 ff. (Klaus J. Hopt & Eddy Wymeersch eds., 2003).

[35] Norges Bank Investment Management, *Letter to VW's Supervisory Board*, Oct. 7, 2009, https://www.nbim.no/globalassets/documents/news/2009/2009-10-07_nbim_letter_volkswagen.pdf.

[36] Christoph Ruhkamp, *Norwegens Ölfonds attackiert VW-Aufsichtsratschef Piëch*, FRANKFURTER ALLGEMEINE ZEITUNG, Oct. 8, 2009, at 15.

consummated, the example illustrates that "activism" in this context does not simply mean shareholder engagement—rather, it may be understood as a rebellion of minority investors against an unrestrained reign by the controlling shareholders.

How can minority shareholder activism work where a controlling shareholder is present? A recent study shows that activists avail themselves of a broad range of different legal mechanisms to achieve their objectives.[37] In some situations, they may seek to elect a minority director to the board where that possibility exists. Another strategy is to veto certain M&A transactions that were initiated by the controller, or to challenge shareholder resolutions.[38] Importantly, minority activists frequently conduct activism in the shadow of litigation, which allows them to exert pressure on a controller. And finally, minority shareholders may try to leverage on the company's or country's "reputation" to bolster their claims, which is exemplified by Elliott's 2015 campaign against Korea-based business conglomerate Samsung.[39]

The phenomenon of targeting controlled companies has also expanded on its "home market", the US, as recent examples illustrate: tech giants such as Meta, Alphabet, Salesforce, and Adobe have all become targets of activist campaigns despite being extremely large and despite featuring control mechanisms and multiple voting shares.[40] Activism campaigns here commonly seek to improve efficiency through cost-cutting rather than control through board representation.

One could argue that, despite these differences in shareholder structure, activism in all of these situations follows a similar structure: the common element is always an initiative against the "controller"—whether the controller is the board or a dominant shareholder, or both. However, it is important to appreciate that shareholder activism is a heterogenous subject that occurs in various types, sometimes with fundamental differences. These types not only heavily

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[37] Kastiel, *supra* note 30, at 89 ff.

[38] This possibility exists notably under German law. *See* Ringe, *supra* note 15, at 505–06.

[39] *Elliott demands $770m from Korea over Samsung merger fallout*, BLOOMBERG, Jul. 13, 2018, https://www.thenationalnews.com/business/markets/elliott-demands-770m-from-korea-over-samsung-merger-fallout-1.749984.

[40] Carleton English, *Activist Investors Zero In on Big Tech's Stumble*, BARRON'S, Nov. 18, 2022, https://www.barrons.com/articles/big-tech-alphabet-meta-stock-51668790593; Jon Swartz, "*No one is immune": Activist Investors Target Tech Companies after Stocks Dive*, MARKETWATCH, Feb. 8, 2023, https://www.marketwatch.com/story/no-one-is-immune-tech-companies-targeted-by-activist-investors-after-stocks-dive-11675876101.

depend on the targeted controller and the archiving outcomes but also on aspects such as the shareholder structure and the (regulatory) environment in which it is operating.

The means of activism also depend on the shareholders' position within the company. For minority shareholders in a controlled firm, it is more difficult to push through activist initiatives, since the "controller" as a (dominant) shareholder normally has the voting power to sanction the incriminated act or behavior. Likewise, the minority activist will usually find it more difficult to argue their case, and to show that their own ideas will benefit all shareholders, not just the majority.

## 2.2 Jurisdictional Influences on Shareholder Activism

The extent to which a shareholder activist can exert influence on their targeted corporation is often constrained by the prevailing laws and realities of the country within which they are operating. This naturally adds to the complexity of comparing shareholder activism between nations. For example, it has been argued that the right to vote is often one of the most effective modes of activism for shareholders. However, with fluctuating threshold requirements at general meetings, the scope for activism by voice is often inherently facilitated or hindered when acting in one nation or another.[41] Also, regulatory systems vary with regard to the ease of calling a shareholder meeting and the possibility of adding items on the agenda of such meetings. And other features, such as the formal influence of shareholders vis-à-vis the board and the structure of the board will matter.

The combination of a low voting threshold, recourse to proxy voting by a dispersed shareholder structure, and certain regulatory requirements has unquestionably facilitated shareholder activism in the US and enabled the emergence of adversarial voting against the boards of targeted corporations in comparison to the preference for informal activism in the UK.[42] With regard to continental Europe, voting patterns of shareholder activists vary from one jurisdiction to another, reflecting differences in the legal framework. It appears that shareholder activism is more adversarial in nature in nations that offer minority shareholder protection against managerial and controlling shareholder influences.[43] This is the case in

[41] SCHÄFER & HERTRICH, *supra* note 10, at 12.

[42] Paolo Santella, Enrico Baffi, Carlo Drago & Dino Lattuca, *Legal Obstacles to Institutional Investor Activism in the EU and in the US*, 23 EUR. BUS. L. REV. 257 (2012).

[43] *Id.*

France, Greece, Belgium, and Sweden, where the voting patterns of activists are decidedly confrontational in nature.[44] In contrast, shareholder activists in Italy and Germany often opt for more subdued activist strategies.[45] This is particularly so in Germany where shareholder activists have limited room for maneuver due to the historical existence of cross-shareholdings, the two-tier board structure, and the presence of employee representatives on supervisory boards, irrespective of the trend towards a market-orientated system.[46] With ownership patterns in Germany shifting, however, hedge-fund activism may find new investment opportunities in Germany too.[47]

In summary, it can be argued that the voting patterns of shareholder activists in continental Europe are influenced by national laws and regulations, shareholder structures, and the existence of control enhancing mechanisms (CEMs).[48] However, whilst the UK's legal and cultural environment supposedly fosters activism, there is relatively little evidence of actual shareholder activism. This could in part be due to the fact that the vast majority of shareholder influence is exerted behind closed doors in the UK.[49] Informal talks between institutional investors and management are common, supported by a low removal threshold of corporate directors.[50] The US market, however, remains at the forefront of activist engagement and has experienced the greatest volume of successful shareholder activism to date.

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[44] *Id.*

[45] Massimo Belcredi & Luca Enriques, *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: The Case of Italy*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 383 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Massimo Belcredi, Stefano Bozzi & Carmine di Noia, *Board Elections and Shareholder Activism: The Italian Experiment*, in BOARDS AND SHAREHOLDERS IN EUROPEAN LISTED COMPANIES 365 (Massimo Belcredi & Guido Ferrarini eds., 2013); Erede, *supra* note 29.

[46] Santella et al., *supra* note 42; Onetti & Pisoni, *supra* note 28, at 73.

[47] For recent evidence of shareholder activism in Germany, *see* Ann-Kristin Achleitner, André Betzer & Jasmin Gider, *Do Corporate Governance Motives Drive Hedge Fund and Private Equity Fund Activities?*, 16 EUR. FIN. MGMT. 805 (2010); Christian Thamm & Dirk Schiereck, *Shareholder Activism in Deutschland—Eine Bestandsaufnahme*, 1 CORP. FIN. 17 (2014); Wolfgang Bessler, Wolfgang Drobetz & Julian Holler, *The Returns to Hedge Fund Activism in Germany*, 21 EUR. FIN. MGMT. 106 (2015); Andreas Engert, *Shareholder activism in Germany*, in GERMAN AND EAST ASIAN PERSPECTIVES ON CORPORATE AND CAPITAL MARKET LAW: INVESTORS VERSUS COMPANIES 3 (Holger Fleischer et al., eds., 2019).

[48] Santella et al., *supra* note 42. Typical CEMs are shareholder agreements, cross-shareholdings, multiple voting rights, pyramid structures, etc.

[49] Becht et al., *supra* note 12.

[50] Companies Act 2006, s. 168 states that directors can be removed at any time, without cause, by a simple 50% majority.

# 3. DETERMINANTS OF SHAREHOLDER ACTIVISM

A close nexus between stock-market trading and corporate ownership was originally established during the Gilded Age and the takeover wave of the 1980s in the US.[51] In considering the determinants of shareholder activism, it is beneficial to take into consideration the impact that regulation and ownership structures had on the development of shareholder activism, in addition to the evolution of shareholder activism from its origins in the US stock market to subsequent developments seen elsewhere.

## 3.1 US: Influence of Regulation

The enactment of regulation by lawmakers and market conditions have often had a twofold impact on shareholder activism; namely either acting as a deterrent, by, for example, erecting obstacles with the purpose of hindering investors from gaining majority holdings in companies, or alternatively facilitating shareholder activism, by for example, deregulating fixed commission rates and thus increasing the incentives for fund managers to maximize returns for investors. If one takes the US as an illustration, it becomes evident that regulations have often been enacted in response to developments on the stock market.[52] For example, the Buttonwood Agreement of 1792[53] was a response to a market crash at the time and the virtual cessation of credit, trading, and liquidity. The agreement itself set minimum stockbroking commissions and was in force until the 1970s upon which commission rates became fully negotiable as fixed commission rates were abolished completely.[54] It has been argued that a combination of the deregulation and the technological advances at the time, such as the arrival of the personal computer, facilitated the ease in which stocks were traded on the stock market for the first time.[55]

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[51] Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977, 978 (1993). The Gilded Age spans from circa the end of the Civil War to the beginning of World War I and was marked by a lack of government regulation of the economy and rapid industrialization. The Merger Wave of the 1980s in contrast was fueled predominantly by junk bonds and driven by corporate raiders.

[52] Gilson & Gordon, *supra* note 17.

[53] The Buttonwood Agreement in essence led to the investment community on Wall Street and the creation of the New York Stock Exchange.

[54] Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 72 (2011).

[55] *Id.* at 71–72.

The enactment of the Glass–Steagall Act in 1933[56] was furthermore a response to market events and in this particular case a direct response to the 1929 stock market crash, a nationwide commercial bank failure, and the Great Depression. The Act itself led to a clear demarcation between the activities of investment and commercial banking as it was considered that the overzealous investment strategies of commercial banks were directly responsible for the 1929 stock market crash. In particular, it has been argued that the Glass–Steagall Act contributed towards a rapid decline in shareholder activism.[57] However, subsequent legislation such as codification of shareholder entitlement by the Securities and Exchange Commission (SEC) in 1942 yet again facilitated shareholder activism. This instance marked the advent of the first shareholder proposal rule.[58] The rule enabled shareholders to submit proposals for vote at (annual) general meetings and facilitated the predominant means by which shareholders could actively participate in postwar company life. The rationale behind the rule, as stated by Commissioner O'Brian in 1943, was to reincarnate the widely attended meetings that were characteristic of the times when companies were geographically limited and locally owned.[59] The rule arguably paved the way for shareholder engagement and activism, which is illustrated by the fact that a mere 50 proposals were recorded annually in the 1940s whilst an average of 220 proposals were recorded by 1969, and circa 650 proposals were recorded annually by 1979.[60]

The abolition of the Glass–Steagall Act in 1999 and subsequent deregulations played a prolific role in fueling competition in the American financial landscape and arguably triggered an increase in the exploitation of investment banking opportunities by, inter alia, engaging in risk-averse investment strategies during mergers and acquisitions.[61] However, the Bull Market of the late 1980s and early 1990s saw a downturn in shareholder activism as investors took a

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[56] The Glass-Steagall Act, also known as the Banking Act of 1933, inter alia created the Federal Deposit Insurance Corporation (FDIC) and imposed conditions on the banks that received its protection.

[57] Santella et al., *supra* note 42, at 258.

[58] For (sparse) data on shareholder activism between 1900 and 1950, *see* John H. Armour & Brian R. Cheffins, *Origins of "Offensive" Shareholder Activism in the United States*, in ORIGINS OF SHAREHOLDER ADVOCACY 253 (Jonathan G.S. Koppell ed., 2011).

[59] Bevis Longstreth, SEC Commissioner, in a speech entitled *The S.E.C. and Shareholder Proposals: Simplification in Regulation*, Dec. 11, 1981, *available at* www.sec.gov/news/speech/1981/121181longstreth.pdf, at 3.

[60] *Id.*

[61] Michael Galanis, *Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re) Balancing?*, 31 OXF. J. LEG. STUD. 327 (2011).

step back and relied on the gadflies to uphold shareholder rights.[62] Nevertheless, subsequent financial disasters, such as those seen at Enron and Tyco, in addition to the credit bubble of the mid-2000s, presented the ideal platform for a re-emergence of shareholder activism as hedge funds took center stage.[63] With an availability of cheap debt, market conditions were ripe for activists to lobby their targeted corporations for the distribution of cash to shareholders or for the sale of the corporation itself.[64] Paradoxically, the financial crisis that plagued the global economy from 2007 to 2011 marked a downturn in shareholder activism. This also stands in contrast to the more recent macroeconomic developments, including the continuing impacts of Covid-19 such as global supply chain issues and the 2020 stock market crash.[65] In this environment, activists saw depressed stock prices and struggling companies as an investment opportunity.[66]

## 3.2 UK and Germany: Impact of Ownership Structures

As we saw above, ownership patterns may prompt the emergence of rather different types of activism. If one takes the UK as an illustration, it becomes apparent that a dispersed ownership structure and an emergence of shareholder activism were in essence driven by policy. In contrast, the domination of controlling shareholders in corporate Germany fueled shareholder activism as minority shareholders rebelled against their controlling influence.

In the first instance, the dispersion of ownership in England only emerged after World War II as families began to unwind their controlling stakes in companies to benefit, inter alia, from tax incentives that favored diversification and the managerial revolution.[67] Furthermore, legal reforms gave minority shareholders a voice for the first time.[68] However, despite being relatively groundbreaking in nature as they represented the first statutory remedy for

[62] James Surowiecki, *To the Barricades*, THE NEW YORKER, Jun. 9, 2003, *available at* http://www.newyorker.com/magazine/2003/06/09/to-the-barricades.
[63] John Armour & Brian Cheffins, *The Rise and Fall (?) of Shareholder Activism by Hedge Funds*, 14(3) J. ALTERNATIVE INV. 17, 20 (2012).
[64] Cheffins & Armour, *supra* note 54, at 91–92.
[65] World Bank, World Development Report 2022, Finance for an Equitable Recovery, *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/36883/9781464817304.pdf.
[66] Sawyer et al., *supra* note 6.
[67] CHEFFINS, *supra* note 14, chs. 2–4.
[68] In particular, the Companies Act 1948.

shareholders in England, they proved relatively inadequate in reality.[69] Lord Hoffman shed further light on the matter by stating that it was not until 1980 that Parliament gave the unfairly treated minority shareholder the power to "slay the dragon" by passing into law the "unfair prejudice" remedy, which is now found in section 994 of the Companies Act 2006.[70] Thus, despite reforms occurring in 1948 it was only in 1980 that minority shareholders finally gained a voice in the UK stock market. For various reasons, however, they did not take up the legal instruments that were available to them. The "unfair prejudice" remedy ultimately only really applies to small, quasi-partnership companies, and is unsuitable for large public companies.[71] The other minority shareholder activism tool, the derivative claim, suffered a setback in the famous decision *Prudential Assurance v Newman*, the only reported case where a UK institutional investor brought a derivative suit against directors of a portfolio company.[72] Despite the codification and extension of this remedy in the 2006 Act,[73] it has not gained great prominence for activist investors to date.

So, in sum, although shareholder rights became enforceable by law, many investors, and especially institutional investors, were cautious about engaging in activism. This was also due to fears of either being found guilty of market abuse because of potentially being privy to insider information or being considered to be acting in concert within the definition of the UK Takeover Code.[74] As such, activism per se did not materialize in full until the UK's 2008 banking crisis led to a call on institutional investors to take a more proactive approach in the

[69] Lord Hoffman as cited in the foreword to the first edition to ROBIN HOLLINGTON, SHAREHOLDERS' RIGHTS (now 10th ed., 2024). Section 459(1) Companies Act 1985 (now section 994 Companies Act 2006) enables a shareholder to apply to the court by petition for an order on the ground that the company's affairs were being or had been conducted in a manner which was unfairly prejudicial to the interests of some members of the company.

[70] Lord Hoffman as cited in the foreword to Hollington. *See supra* note 69.

[71] Academic studies show that there are only six unfair prejudice petitions involving publicly traded companies that resulted in a judicial decision between 1998 and 2006, three of which involved allegations of misfeasance by the company's directors. *See* John Armour, *Enforcement Strategies in UK Company Law: A Roadmap and Empirical Assessment*, in RATIONALITY IN COMPANY LAW: ESSAYS IN HONOUR OF D.D. PRENTICE 71 (John Armour & Jennifer Payne eds., 2009).

[72] *Prudential Assurance Co. Ltd v. Newman Industries Ltd* [1982] Ch 204. *See* on this Brian R. Cheffins & Bernard Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385, 1407 (2006); Armour, *supra* note 71, at 115; also GEOF P. STAPLEDON, INSTITUTIONAL SHAREHOLDERS AND CORPORATE GOVERNANCE 132 (1996).

[73] The derivative claim is now restated in ss. 260 ff. Companies Act 2006.

[74] IRIS CHIU, THE FOUNDATIONS AND ANATOMY OF SHAREHOLDER ACTIVISM 29 (2010). The aim of the Takeover Code is to ensure fair and equal treatment of all shareholders during takeovers and furthermore provide a framework for the manner in which takeovers are to be conducted.

enforcement of corporate governance. Consequently, shareholder activists began to gain a reputation for overcoming apathy and actively engaging in the strategies of their targeted corporations.

In the second instance, the ownership structure of the "Germany AG," which was characterized by a concentration of ownership due to extensive cross-shareholding networks, and long-term relational financial ties between banks, insurance companies, and institutional firms, guaranteed not only ownership stability and continuity but also acted as a shield against hostile takeovers.[75] With blockholders dominating the shareholder community and, to a degree, the supervisory board, minority shareholders were left with no other option but to engage in activism in order to maximize the returns on their investments. In any case, the abolishment of the capital gains tax on the sale of cross-shareholdings in early 2002 marked a pivotal change in Germany's former low-liquidity insider market.[76] The removal of capital gains tax on the sale of cross-shareholdings opened the floodgates to foreign investors who had previously only held circa 18% of German stocks.[77] As foreign investors arrived on the German market so too did shareholder activists. This pivotal change undermined the ownership networks that had shielded German corporations from takeovers for decades.

In summary, it becomes evident that regulatory changes have not only been influential on the extent of shareholder activism but that developments in global markets and ownership structures have played an equally influential role on the commonality of shareholder activism.

## 3.3 Origins and Evolution of Activists

Turning to the identity and characteristics of the activists themselves, these have also undergone dramatic changes over time. As mentioned above, a close nexus between corporate ownership and stock-market trading was first established during the Gilded Age and the takeover wave of the 1980s in the US. This time became synonymous with corporate raiders buying shares to gain control of their targeted corporations. However, the primary goal of

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[75] John Cioffi, *Corporate Governance Reform, Regulatory Politics, and the Foundations of Finance Capitalism in the United States and Germany*, 7 GERMAN L. J. 533, 540 (2006); Onetti & Pisoni, *supra* note 28, at 72; Ringe, *supra* note 15.

[76] Nigel Holloway, *The End of Germany AG*, FORBES, Jun. 11, 2001, *available at* http://www.forbes.com/global/2001/0611/024.html. *See* in more detail Ringe, *supra* note 15.

[77] Holloway, *supra* note 76.

gaining control of their targeted corporations was not in pursuit of making returns from the corporation's operational profits but to raise the firm's listed value to maximize the returns as shares were subsequently sold at peak prices.[78] Buying or selling businesses, or threatening to do so, became more lucrative than actually running a company, and consequently led to the takeover wave of the 1980s.

### *3.3.1 Corporate Raiders and the Takeover Wave of the 1980s*

The takeover wave of the 1980s was characterized by daring takeover bids that were engineered by corporate "raiders" on the basis of aggressive and innovative financial techniques.[79] An activist cohort subsequently established itself in the US which specifically targeted underperforming corporations in the hope of improving operational performance before exiting. Amongst others, the operating performance of a targeted corporation was often improved by initiating changes to the firm's strategy. The cohort included renowned raiders such as Carl Icahn, the Bass Brothers, and Coniston Partners. However, despite their apparent success, it remains undisputed that the purchase of these shareholdings was financed predominately out of debt with limited equity which generated short-term gains and left no company safe from a hostile bid.[80] In consequence of their aggressive strategies, opposition to corporate raiders soon mounted, not only on the part of the targeted corporations themselves via the implementation of defense strategies but also on the part of the government, which took action to protect the interests of targeted corporations. Although takeover defense strategies became plentiful, the most successful was colloquially known as the "poison pill" defense.[81] The "poison pill" strategy can either come in the form of a flip-in or flip-over but fundamentally allows the target corporation to reduce the value of or dilute its stock in order to ward off a hostile bid.[82]

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[78] Boyer, *supra* note 51, at 978.
[79] Cheffins & Armour, *supra* note 54, at 75–76.
[80] Michael R. Patrone, *An International Comparison of Corporate Leeway to Ward Off Predators*, 25 BUTTERWORTHS J. INT'L. BANKING & FIN. L. 355, 355 (2010).
[81] The "poison pill" defense was developed by Martin Lipton, a New York attorney, in order to help El Paso Co. fend off a hostile takeover bid. *See id.*
[82] A flip-in poison pill is the more frequently used out of the two and enables existing shareholders to purchase further stock at a discount when the poison pill is activated by a hostile bidder. This has the effect of diluting the would-be acquirer's stock in the target and thus deters a hostile acquisition. In contrast, a flip-over enables

By the early 1990s, however, the reception of the poison pill made classical "raider" tactics unworkable. The pill had fundamentally changed the distribution of hostile takeovers in favor of target shareholders, at the expense of returns to acquirer shareholders. While they remained socially efficient (this is just the slicing up of the pie), a business model of engaging in "raiding" by acquiring companies, implementing changes, and then exiting, became less appealing. Moreover, once a takeover attempt became public, event-driven traders would rapidly bid the price up to the highest expected price that will be offered in the tender offer, reverse engineering any gains from the transaction. This means that the acquirer really only made money on the first toehold of 5%, before the initial disclosure obligation is triggered.

### *3.3.2 Institutional Investors*

The decline of the classical "raider" was paralleled by the rapid growth of institutional investors during the 1980s. This was primarily a response to an increased proportion of household savings being invested directly in equity and corporate bonds via private-funded pension schemes and life-insurance policies as the longevity of the aging population increased.[83] Larger portfolios meant that many institutional investors could no longer dispose of large blocks of stock on the market at any one time and were thus forced to alter their strategies from one centered on exit to one that advocated activist engagement in pursuit of profit maximization.[84] Additionally, the disposal of large stocks on the market at any one time was no longer an option as it risked triggering sharp falls in stock valuation, a market crash, and a probable reduction in the value of portfolios.[85]

Although the rapid growth and subsequent increase in institutional investor portfolios forced investment strategies to be altered, the rise of institutional shareholder activism in the UK was predominantly driven by policy. Policymakers in the UK were the driving force in advocating that institutional shareholders engage in activism in response to wider corporate governance concerns and the social good.[86] The policy-led drive for engagement in the UK

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shareholders to purchase the acquirer's shares at a discounted price but only after the merger has taken place. In the last 15 years the poison pill has only been triggered intentionally twice. *Id.*

[83] *Id.*

[84] Jason M. Loring & C. Keith Taylor, *Shareholder Activism: Directorial Responses to Investors' Attempts to Change the Corporate Governance Landscape*, 41 WAKE FOREST L. REV. 321, 324 (2006).

[85] *Id.*

[86] CHIU, *supra* note 74, at 18.

was more in keeping with a shareholder's responsibility and accountability to the market at large as opposed to promoting investment strategies tailored towards profit maximization. Scholars further argue that this policy-led drive for activism in pursuit of greater corporate governance was also widespread in continental Europe and was subsequently embodied in regulations and corporate governance codes.[87] It is argued that institutional investors are best placed to enforce corporate governance as, unlike individual investors, they are operating within a professional capacity and thus have the necessary expertise to manage the investment funds within their portfolios.[88] Irrespective of the origins in the surge of activist engagements, it should be noted that institutional investors are often constrained in their ability to partake in shareholder activism due to their own conflicts of interests.

Conflicts of interests usually derive from the business relationships between the target corporation and the institutional investor, which often compels the latter to concur with management even if this were to conflict with their fiduciary duties.[89] As an illustration, a US mutual fund that is associated with a financial institution may err on the side of caution when engaging in shareholder activism so as not to jeopardize the business relationships between present or future clients of their parent company.[90] In other words, it has been argued that conflicts of interests arise between banks and insurance companies due to their day-to-day business dealings with corporate management, between private pension funds and their governing corporate managers, and with public pension funds due to external political influences.[91]

In summary, the extent to which institutional investors engage in shareholder activism, and thus utilize the power granted to them by laws and regulations, is constrained by the eventual occurrence of conflicts of interests.[92] Moreover, institutional investors are also limited

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[87] Christoph van der Elst, *Revisiting Shareholder Activism at AGMs: Voting Determinants of Large and Small Shareholders*, ECGI Finance Working Paper No. 311/2011, *available at* http://ssrn.com/abstract=1886865, at 12.
[88] *Id.*
[89] Santella et al., *supra* note 42; Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1285 ff. (2008).
[90] Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1054 ff. (2007).
[91] Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 826 ff. (1992).
[92] Assaf Hamdani & Yishay Yafeh, *Institutional Investors as Minority Shareholders*, 17 REV. FIN. 691 (2013).

in their penchant towards activism by rules mandating certain diversification requirements of their holdings.[93] Both points distinguish them from hedge funds, to which we now turn.

### *3.3.3 Hedge Funds*

Nearly two decades after corporate raiders dominated stock markets, hedge funds began to re-emerge, filling the gap that had been left by institutional investors due to their concerns over conflicts of interests and regulatory constraints.[94] Despite re-emerging in the 1990s it was only in the twenty-first century that hedge funds took center stage.[95] Their ability to take the stock market by storm with currently over $4 trillion under management,[96] a cutting-edge investment strategy which centered on corporate activism, and a cut-throat "do what it takes" mentality were arguably in part a result of their organizational structure and the subsequent lack of regulation governing their operations.[97] Many activist hedge funds are run by similar figures that had already been active as "raiders" during the 1980s, but now using different tactics: after full control contests had become too expensive, they felt able to achieve their goals just as effectively without actually following through with a full seizure of control. Today, they frequently take a small stake in their target, combined (potentially) with a proxy fight to deliver changes in corporate governance or operational strategy—very much along the lines of a classic disciplinary takeover. Alternatively, they could use the stake to agitate for a merger with a strategic partner that would unlock synergies—and a payday for target shareholders.

By comparing hedge funds with institutional investors, it is possible to shed some light on their unique business structure that has enabled them to pursue a strategy of corporate

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[93] For example, European UCITS (mutual funds) are subject to the so-called "5/10/40 rule", which means that a maximum of 10 % of a UCITS fund's net assets may be invested in securities from a single issuer, and that investments of more than 5 per cent with a single issuer may not make up more than 40 per cent of the whole portfolio. *See* Directive 2009/65/EC (as amended), Article 52.

[94] On hedge fund activism generally, *see* EVELINE HELLEBUYCK, *Activist Hedge Funds and Legal Strategy Devices*, in LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE 277 (Antoine Masson & Mary Shariff eds., 2009); SEAN GERAGHTY & HARRIET SMITH, *Shareholder Activism as a Strategy for Hedge Funds*, in HEDGE FUNDS AND THE LAW ch. 8 (Peter Astleford & Dick Frase eds., 2010); MIHAELA BUTU, SHAREHOLDER ACTIVISM BY HEDGE FUNDS: MOTIVATIONS AND MARKET'S PERCEPTION OF HEDGE FUND INTERVENTIONS (2013); Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 BOSTON U. L. REV. 971 (2019).

[95] Cheffins & Armour, *supra* note 54, at 80.

[96] Jeff Cox, *Hedge fund assets soar to record high amid boom in trading profits*, CNBC, Jun. 2, 2021, *available at* https://www.cnbc.com/2021/06/02/hedge-fund-assets-soar-to-record-high-amid-boom-in-trading-profits.html.

[97] Paul Crowney, *Proxy Warriors, Institutional Investor*, Dec. 31, 2002, *available at* https://www.institutionalinvestor.com/article/2btgjg8p0a1uihjxcf9xc/corner-office/proxy-warriors.

activism away from the prying eyes of the public and policy makers. Although hedge funds are commonly managed from the US or the UK, they are typically incorporated in offshore jurisdictions and are thus subjected to a minimal degree of public oversight and regulation.[98] An intrinsic lack of regulation and public oversight has enabled hedge funds to increase their market power whilst diversifying their risks by benefiting, inter alia, from the use of derivatives contracts, from overweighing target stock, and from high levels of leverage.[99]

Furthermore, unlike institutional investors, hedge funds are not constrained by potential and/or actual conflicts of interests in pursuing their investment strategies. This is predominately due to the fact that they avoid investing in large entities where wider interests can often conflict with a duty towards their investors.[100] By rather opting to invest in corporations that enable them to make trading-induced profits with a quick turnaround, hedge funds do not run the risk of being confronted with potential conflicts of interest.[101] Targeted corporations are frequently undervalued, presenting the ideal opportunity for profit maximization via shareholder activism.

Their often aggressive tactics in the pursuit of profit maximization in the short term can be attributed to the performance-based compensation schemes for hedge fund managers which contrast greatly with the fixed compensation fees earned by institutional investors.[102] This compensation scheme typically comprises of an annual fixed fee that ranges from 1–2% of portfolio assets in addition to a performance-based fee ranging from 15–25% of the profits earned annually.[103] This arguably aligns the interests of fund managers and investors in generating maximum returns on investments. Thus, shareholder activism is purely an element

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98 European Parliament, The Economic Consequences of Large Shareholder Activism, Study No. IP/A/ECON/IC/2009-004, at 23.

99 *Id.*

100 European Parliament, Hedge Funds: Transparency and Conflict of Interest, Study No. IP/A/ECON/IC/2007-24 (2007), at 26.

101 *Id.*

102 Mark Mietzner, Denis Schweizer & Marcel Tyrell, *Intra-Industry Effects of Shareholder Activism in Germany: Is There a Difference between Hedge Fund and Private Equity Investments?*, 63 SCHMALENBACH BUS. REV. 151, 156 (2011).

103 William N. Goetzmann, Jonathan E. Ingersoll, Jr. & Stephen A. Ross, *High-Water Marks and Hedge Fund Management Contracts*, 58 J. FIN. 1685 (2003). The typical arrangement is a “2 and 20” standard. It consists of a 2% management fee on assets under management and a 20% performance fee; the latter of which is only charged when the fund’s profits exceed prior levels. THE OXFORD HANDBOOK OF HEDGE FUNDS (Douglas Cumming, Sofia Johan & Geoffrey Wood eds., 2021), at 38.

of a hedge fund's investment strategy as opposed to the concurrent enforcement of corporate governance that is pursued by many other institutional investors today.[104]

As such, markets fully anticipate that the engagement by a hedge fund in a targeted corporation will undoubtedly lead to an improvement in the target's operational performance.[105] It is therefore common to witness steep increases in stock prices as hedge funds make their initial stock purchase in the target. Empirical data from the US and Europe illustrate that hedge fund engagement mostly involves advantages for other target shareholders. According to these studies, the initial investment decision by an activist hedge fund is usually related to a substantial increase in their returns.[106] For what we know, these increased returns are apparently real long-term returns,[107] and they appear as a consequence of real improvements and reliable profits, and not a mere redistribution to the detriment of debtholders and other stakeholders.[108] Also, research has documented a positive impact of hedge fund engagement on corporate innovation.[109] Further, the holding periods of hedge funds are much longer than previously anticipated.[110]

Regulatory strategies following the financial crisis targeted hedge funds in particular.[111] It is notable, however, that none of these regulatory instruments targeted the implications of hedge fund activity for the functioning of traditional corporate governance mechanisms. It is clear that hedge funds' sophistication in exploiting the traditional categories and tools of corporate governance poses significant challenges for regulators and lawmakers.[112] For

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[104] Kahan & Rock, *supra* note 890, at 1028. *See also* Andreas Engert, *Transnational Hedge Fund Regulation*, 11 EUR. BUS. ORG. L. REV. 329 (2010).
[105] *See* the overview provided by Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty years of shareholder activism: A survey of empirical research* 44 J. CORP. FIN. 405 (2017).
[106] Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729 (2008); April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187 (2009); Becht et al., *supra* note 12. *See also* Becht et al., *supra* note 31; Marco Becht, Julian Franks & Jeremy Grant, *Hedge Fund Activism in Europe*, ECGI Finance Working Paper 283/2010.
[107] Lucian Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015); Ed deHaan, David Larcker & Charles McClure, *Long-Term Economic Consequences of Hedge Fund Activist Interventions*, 24 REV. ACC. STUD. 536 (2019).
[108] Brav et al., *supra* note 106.
[109] Alon Brav et al., *How Does Hedge Fund Activism Reshape Corporate Innovation?* 130 J. FIN. ECON. 237 (2018).
[110] Bidisha Chakrabarty, Pamela C. Moulton & Charles Trzcinka, *Institutional Holding Periods*, Working Paper 2013, *available at* http://ssrn.com/abstract=2217588.
[111] *See infra*, section 5.4.
[112] On this, Wolf-Georg Ringe, *Hedge Funds and Risk-Decoupling: The Empty Voting Problem in the European Union*, 36 SEATTLE U. L. REV. 1027, 1033 (2013).

example, the EU AIFM Directive and the US Dodd-Frank Act limit themselves to certain rules on the registration and supervision of hedge fund managers, and do not pursue an activities-based approach.[113]

### 3.3.4 Private Equity Funds

The twenty-first century also marked the emergence of private equity funds which have frequently been compared with hedge funds due to their innate similarities. Nevertheless, despite their concurrent reputations for activist engagement and similar remuneration structures for fund managers, they arguably deploy different investment strategies. As opposed to the short-term investment strategies of hedge funds, private equity funds will typically focus on longer-term investments which are innate to closed-end funds. Investments of a closed-end fund in targeted corporations will usually last five years, at which point in time the fund will exit passing the proceeds to their investors.[114] Adopting a long-term investment strategy with a corporation arguably implies that a private equity fund will be inclined to adopt a "hands-on approach" with the board as they are of the opinion that this method is the most effective in generating value before the firm is either sold or rejoins the market.[115] This contrasts greatly with the strategies deployed by hedge funds as they typically avoid majority or sole ownership, preferring to reap rewards as minority shareholders.[116] With a long-term outlook, it is more common for private equity funds to actively engage in the strategy and management of their targets; an engagement policy which is argued to be pivotal in generating shareholder wealth and enabling a fund to exit with profit.[117] A study conducted by Acharya and co-authors revealed that private equity funds play an active role in the strategy of the targeted firm, with 89% of interviewees citing value creation and 56% of interviewees citing exit as their principal priorities.[118]

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[113] *See* HOUSE OF COMMONS, TREASURY COMMITTEE, BANKING CRISIS: INTERNATIONAL DIMENSIONS (HC 615, 2009), p. Ev 90f. There are just a few such abstract provisions, in particular on risk and liquidity management, *see* Arts. 12 ff. of the AIFM Directive. More on both pieces of regulation below section 5.4.
[114] European Parliament, *supra* note 98, at 25.
[115] Cheffins & Armour, *supra* note 54, at 59.
[116] *Id.*
[117] CHIU, *supra* note 74, at 98 ff.
[118] Viral V. Acharya, Oliver F. Gottschalg, Moritz Hahn & Conor Kehoe, *Corporate Governance and Value Creation: Evidence from Private Equity*, 26 REV. FIN. STUD. 368 (2013).

## 4. METHODS OF SHAREHOLDER ACTIVISM

The basic business model of activists has frequently been described as playing the market by purchasing undervalued shares which they subsequently sell at abnormal prices after having improved the operational performance of their targeted corporation.[119] But what techniques do activists use to achieve this? Empirical evidence suggests that activism (in particular by hedge funds) encompasses a wide range of activities, from the subtle pressure on the incumbents through letters, other communications, and meetings, to the requisition of a shareholder meeting, possibly involving the drama of a management change, or the commencement of litigation or a takeover bid from the activist.[120] Practitioners report an even more diverse set of tactics.[121] Recognizing that activism involves an evolutionary decision-making behavior, researchers have provided empirical evidence on activism in the US by modelling activism as involving four distinct phases: demand negotiations, board representation, threat of proxy fight, and proxy contest.[122]

### 4.1 "Voting with the Feet"

"Voting with the feet" or the "Wall Street Rule" is a traditional form of shareholder activism whereby activists opt to sell their stock rather than partaking in often costly and futile efforts of reform in pursuit of increasing the value of their investments.[123] However, in today's economy this method of exit can be both complex and costly for an activist. An increase in the size of shareholdings, especially in relation to those held by institutional investors, has rendered this form of activism more hazardous due to the risks posed by disposing of large volumes of stock on the equity markets at any one time. The risks can be threefold in nature, triggering a sharp fall in the valuation of the stock, a stock market crash, or a reduction in the overall value

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[119] Boyer, *supra* note 51, at 990.

[120] William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L. J. 1375 (2007); Brav et al., *supra* note 106.

[121] Martin Lipton, *Dealing with Activist Hedge Funds*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Oct. 6, 2021, *available at* https://corpgov.law.harvard.edu/2021/10/06/dealing-with-activist-hedge-funds-and-other-activist-investors-4.

[122] Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610 (2013).

[123] Jayne W. Barnard, *Shareholder Access to the Proxy Revisited*, 40 CATH. U. L. REV. 37, 45 (1990).

of the investor's portfolio.[124] Therefore, modern-day activists generally acquire small quantities of stock in a targeted corporation to minimize their risk exposure and remain anonymous to management by not exceeding the disclosure thresholds.[125]

## 4.2 Communication

The present trend to purchase small quantities of stock enables shareholder activists to seek not only the most opportune moment for action but also support from other activist investors before striking with an element of surprise to gain the upper hand in communications with the targeted corporation. This strategy often improves the success rate of their interventions as, on the one hand, targeted corporations are by default left with a limited time period within which to prepare defense strategies. On the other hand, the activist can carefully select support from fellow activist investors whilst mitigating the likelihood of freeriding. A case in point was Knight Vinke's target of HSBC in 2007, which was successful with support from six of the world's largest institutional investors. This was a success for an activist with a minority holding that deployed informal methods of activism, but it is worth bearing in mind that little evidence is commonly available on private negotiations between shareholders and companies as and when they actually occur.[126] An exception to this is the clinical study[127] of the Hermes UK Focus Fund where the authors were granted access to the fund's private databases and were able to ascertain that focused engagements with the support of other institutional investors, on private meetings and letters, etc., generated substantial returns on investments and especially so when changes to the structure of the board and the target's strategy were demanded.[128] Had the authors relied on public information alone they would have been unaware of at least 12 out of the 30 reported engagement cases.[129] A further study[130] concluded that private interventions generated higher returns than those conducted in the public domain but were also more

[124] Loring & Taylor, *supra* note 84, at 324.
[125] According to recent research, the median stake of activist hedge funds at the beginnings of an activist campaign is only 6.3%. *See* Alon Brav, Wei Jiang & Hyunseob Kim, *Hedge Fund Activism: A Review*, 4 FOUNDATIONS & TRENDS IN FIN. 185 (2009).
[126] Van der Elst, *supra* note 87, at 4.
[127] Becht et al., *supra* note 112.
[128] Van der Elst, *supra* note 87.
[129] Becht et al., *supra* note 12.
[130] Becht et al., *supra* note 106.

expensive to run.[131] Accordingly, "voice" and participation at general meetings are often a popular strategy for activist engagement.

## 4.3 "Voice"

"Voice" is arguably one of the most common methods of shareholder activism and as such has often been cited as a distinguishing feature of shareholder activism. Shareholder activists are commonly referred to as investors who via voice aim to alter the status quo of a targeted corporation without altering the manner in which the firm is controlled.[132] The activist method of "voice" itself encompasses a broad spectrum of activities including shareholder proposals, proxy contests, influencing the strategy of targeted corporations, seeking board representation, and voting at shareholder meetings. A shareholder activist will attempt to persuade the board of their targeted corporation to pursue certain strategies via the private communication of information in the hope that this will enable returns on investments to be maximized.[133] However, the effectiveness of the use of "voice" as a method of shareholder activism is dependent on the degree of publicity used and the credibility of the actual message.[134] For example, CalPERS has long campaigned for shareholders to have a greater say on the election of directors.[135] It has been very successful with this campaign, highlighting the effectiveness of a credible and public message in instigating desired changes in a targeted corporation. However, it is also worth bearing in mind that the legal environment within which a shareholder activist operates can also play a pivotal role in facilitating or restraining their recourse to "voice." This is particularly so in relation to their ability to vote on certain matters at the general meeting.

The participation of shareholder activists at general meetings is historically low in Europe and highly dependent on regulatory constraints pertaining, inter alia, to conflicts of interest, national and cross-border proxy voting, and the separation of ownership.[136] In contrast, the US has always experienced a considerably higher degree of participation. Still,

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[131] Gantchev, *supra* note 122.
[132] Gillan & Starks, *supra* note 11.
[133] Doron Levit, *Soft Shareholder Activism,* 32 REV. FIN. STUD. 2775 (2019).
[134] *Id.*
[135] Dan McCrum, *Apple Yields to Governance Reform Call*, FIN. TIMES, Feb. 23, 2012, *available at* https://www.ft.com/content/01566c76-5e39-11e1-85f6-00144feabdc0.
[136] Santella et al., *supra* note 42.

the legal environment in the US has established numerous barriers for shareholder activists that sought to influence the target management by "voice."[137] For example, despite the fact that the former proxy regulation Rule 14a-8 enabled a selection of shareholder proposals, it neither allowed director nominations nor objections to be made against management's proposals—arguably impeding the influence of shareholder activists.[138] Nevertheless activist engagements have become an inherent part of corporate governance in the US.[139] With the 2022 introduction of the universal proxy regime, that trend is expected to grow in importance;[140] others point to the fact that there may be at least a stronger case to settle.[141]

Shareholder voting through "voice" is of course not always free from problems. Hedge funds and other activists are becoming increasingly creative to harness the influence that voting rights grant them, to their own advantage. For example, they may exploit corporate governance regimes in target firms through the use of financial derivatives to strip voting rights of their economic risk, a technique known as "empty voting".[142] This would make them immune to the development of the share price and, in an extreme version, even profiting from a decline in the share price.[143]

## 4.4 Litigation

Litigation is often considered to be the last resort for a shareholder activist due to its unpredictable nature and the fact that it rarely leads to immediate results. Not only does its use hinge on the substantive laws and regulations of the jurisdiction within which a shareholder activist is operating, but a shareholder activist will also have recourse to different forms of litigation dependent on where they are operating. For example, litigation can include the pursuit of damages against the directors of targeted corporations, injunctive relief for the enforcement of inquiry requests, the contestation of resolutions passed at general meetings, or derivative actions whereby the shareholder activist brings an action on behalf of the targeted corporation

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[137] Gillan & Starks, *supra* note 11.
[138] *Id.*
[139] *Id.*
[140] FTI, The Activism Vulnerability Report (Mar. 29, 2023), at 7.
[141] Insightia and Olshan Frome Wolosky, The Shareholder Activism Annual Review 2023.
[142] Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006).
[143] For a detailed treatise, *see* Wolf-Georg Ringe, THE DECONSTRUCTION OF EQUITY—ACTIVIST SHAREHOLDERS, DECOUPLED RISK, AND CORPORATE GOVERNANCE (2016).

in order to uphold the firm's rights if the directors cannot or will not enforce them.[144] As an illustration, in contesting resolutions made at general meetings, actions are often brought in the name of the actual shareholder in Germany, whereas shareholder activists have typically used legal loopholes to sue in France.[145] An extreme version of activism is the newly popular climate litigation, which is pursued especially by NGOs and environmental groups and exemplified by the 2021 Dutch landmark ruling, where a court instructed Shell to accelerate its energy transition and include tougher emissions targets.[146] Nevertheless, although shareholders have the ability to bring a civil action on behalf of the company against a director (or against a third party) in the UK, shareholders rarely do so, and the courts have the ultimate right to refuse the claim. The 2006 reform has led to an uptick in the number of derivative actions coming before the courts, but judges have been careful not to allow the floodgates to open. For example, the abandoned *Equitable Life* litigation is illustrative of the hurdles that are faced in reality when seeking legal redress for acts that amount to a director's legal breach of their duties in the UK.[147] Despite the varying use of litigation in Europe, full proxy fights and threats to litigate are commonly used by shareholder activists in the US. The broad availability of document discovery rights for litigants in the US is a major driver to facilitate activism, which is absent in Europe.[148] Litigation is especially popular with hedge funds as they commonly have the financial means to pursue the matter to the end should they wish to do so. In light of this, corporations in the US will more often than not concede to the demands of hedge funds before class actions and less common derivative actions are even made.[149]

## 4.5 Teambuilding

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[144] Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63 (2006).

[145] Van der Elst, *supra* note 87, at 7: in Germany "approximately 12 per cent of general meeting resolutions are contested every year"; Carine Girard, *Comparative Study of Successful French and Anglo-Saxon Shareholder Activism*, Working Paper 2009, at 28.

[146] *Milieudefensie et al. v. Royal Dutch Shell plc*, decision of May 26, 2021. An English translation is available at http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/. The decision was partly reversed on appeal but arguably still represents a pivotal victory for climate litigation.

[147] CHIU, *supra* note 74, at 23.

[148] Alexandros Seretakis, *Document Discovery: The Achilles' Heel of Shareholder Activism in Europe*, Oxford Business Law Blog, Nov. 13, 2024, https://blogs.law.ox.ac.uk/oblb/blog-post/2024/11/document-discovery-achilles-heel-shareholder-activism-europe.

[149] CHIU, *supra* note 74, at 88.

Techniques of shareholder activism are always adapting to new developments. Along with new technological advantages come broader alliances that activists are seeking to build with traditionally passive institutional investors. In most cases, the realization of activists' plans (in particular in large target companies) will depend on the support they get from larger institutional investors.[150] As a consequence, hedge funds may seek to form coalitions with these institutions, sometimes even before they invest. Scholars such as Ronald Gilson and Jeffrey Gordon have argued that the ultimate solution to shareholder passivity may be a new breed of activist shareholder—those who do not bring about change themselves, due to the small stakes they hold, but who can pressure for change by teaming up with normally rather passive institutions such as pension funds and mutual funds.[151] According to this view, such activist investors, in particular hedge funds, fill a vacuum that is created by the increased remoteness of investment and shareholder apathy.[152]

Recent research confirms this trend, documenting the importance of "activism-friendly" institutional investors.[153] Moreover, practitioners support the view that activists are now receiving greater support from traditional institutional investors, including those that might not themselves agitate for change.[154] This development goes hand in hand with the feeling that activists (and supporting them) have largely lost the stigma that they used to have among traditional investors, which once may have viewed activists as a disruptive influence acting contrary to the long-term interests of the company.[155] Other institutions are following this trend: for example, sovereign wealth funds such as the Norwegian Norges Bank Investment

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[150] Stephen Foley, *Activist Hedge Fund Managers Get Board Welcome*, FIN. TIMES, Dec. 23, 2013 ("Activists also have the ear of the traditional large fund management groups, which are themselves pressing management to be more responsive to shareholder concerns.").

[151] Gilson & Gordon, *supra* note 17. *See also* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987 (2010).

[152] Gilson & Gordon, *supra* note 17, at 896 ff.

[153] Simi Kedia, Laura Starks and Xianjue Wang, *Institutional Investors and Hedge Fund Activism* (2021) 10 REV. CORP. FIN. STUD. 1.

[154] Svea Herbst-Bayliss, *Activist Investors Get More Respect amid Strong Returns*, REUTERS, Nov. 17, 2013, *available at* https://www.reuters.com/article/us-investment-summit-activism-idINBRE9AH02K20131118; Charles Nathan, Debunking Myths about Activist Investors, Harvard Law School Forum on Corporate Governance and Financial Regulation, Mar. 15, 2013, *available at* https://corpgov.law.harvard.edu/2013/03/15/debunking-myths-about-activist-investors; David Bernstein, *Do Investors Want to Vote?*, IFLR.com, Dec. 9, 2014, *available at* http://www.iflr.com/Article/3400945/Do-investors-want-to-vote.html; Stephen F. Arcano & Richard J. Grossman, Activist Shareholders in the US: A Changing Landscape, Skadden, Arps, Slate, Meagher & Flom LLP Insight, Jun. 17, 2013, *available at* https://corpgov.law.harvard.edu/2013/06/28/activist-shareholders-in-the-us-a-changing-landscape.

[155] Arcano & Grossman, *supra* note 154.

Management are now openly supporting activist campaigns,[156] and shareholder activists are now even joining forces with private equity firms.[157]

Related strategies for activists include the possibility of convincing proxy advisors such as ISS to support their campaigns[158] or to team up with other activists, building a "wolf pack."[159] According to some, institutional shareholders are even reportedly encouraging activists to agitate at underperforming companies in their portfolio.[160] Yet another pattern is that hedge funds are seeking the support of another activist fund, with the ultimate objective of convincing a more passive fund to give support to its campaign.[161]

As these different examples illustrate, the "teaming up" phenomenon seems to be developing into a broader market trend, and a positive one, since the support by conventional investors or proxy advisors serves as an additional check on the validity and long-term viability of the activists' plans.[162] Activists are viewed as suitable governance intermediaries, actively monitoring company performance and then presenting to companies and institutional investors concrete visions for business strategy. The institutional investor's support gives them additional credibility, both in relation to the target company and to the wider market, and may discredit the common complaint about activists' short-term perspectives.[163] The collaboration between a passive investment fund and an activist investor can thus be understood as a win-win scenario in three ways: It bolsters the position of the activist, giving them more influence and credibility. At the same time, activist influence is welcome support for large institutional investors who do not need to invest their own resources in detecting strategic investment possibilities. Finally,

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[156] Richard Milne, *Norway's oil fund sides with climate activists against ExxonMobil and Chevron*, FIN. TIMES, May 25, 2023, https://www.ft.com/content/ad012975-0c77-4aba-b0b5-4174290dd2a7.
[157] Sherman & Sterling, *Corporate Governance & Executive Compensation Survey 2021*, at p. 18–19, https://digital.shearman.com/i/1425392-corporate-governance-and-exec-compensation-2021/.
[158] *See, e.g.*, the initiative by Hermes campaigning against the proposed chairman at Infineon, the German semiconductor manufacturer. Hermes succeeded in convincing both Glass Lewis and RiskMetrics to support them. *See* Richard Milne & Daniel Schäfer, *Activists Draw Blood in Fight for Infineon*, FIN. TIMES, Jan. 28, 2010.
[159] Alon Brav, Amil Dasgupta & Richmond Mathews, *Wolf Pack Activism*, 68 MGMT. SCI. 5557 (2022); Yu Wong, *Wolves at the Door: A Closer Look at Hedge Fund Activism*, 66 MGMT. SCI. 2347 (2020).
[160] Arcano & Grossman, *supra* note 154.
[161] Dan Bernhardt & Shaoting Pi, *Delegated Shareholder Activism*, Warwick Economics Research Paper No. 1502 (2024).
[162] *See* for further detail David Gelles & Michael J. de la Merced, *New Alliances in Battle for Corporate Control*, N.Y. TIMES, Mar. 19, 2014, at 1.
[163] Ronald Orol, *Teaming Up with CalSTRS Helps Activist Funds Get Their Way*, TheDeal.com, Aug. 4, 2014, *available at* http://www.thedeal.com/content/consumer-retail/teaming-up-with-calstrs-helps-activist-funds-get-their-way.php.

such joint initiatives may serve as an inbuilt "screening" process or control mechanism to give other investors or the wider market an indication of which activist projects are legitimate for the shareholder body as a whole—the support by the traditional investor promises an increased likelihood of long-term orientation and value creation. Taking all of these points together, the teaming-up strategy holds great promise—and activists can effectively serve to reduce the market's undervaluation of voting rights to the advantage of all shareholders.[164] It should be noted that the "teaming-up" concept needs to be seen within the respective regulatory framework, and existing legal barriers—for example, as discussed, on "acting in concert"—should be reconsidered in the light of these positive market trends.[165]

Modern hedge fund activism can thus be said to be an improved, more sophisticated version of its predecessors. The "teaming-up" concept has a double advantage: hedge funds cannot do it alone; they must convince fellow shareholders that their ideas are beneficial for the entirety of the shareholders, including the typically long-term oriented pension funds. This amounts to a de facto "vetting process," whereby checks and balances are created: if and insofar as activists need to convince other funds that their strategic plans are beneficial for the company as such (and do not create idiosyncratic benefits for the hedge fund), this process mitigates the potential extraction of short-term private benefits and ensures that activism is channeled into mutually beneficial activities.

In summary, shareholder activists engage in various methods of activism in pursuit of realizing their ultimate goals. However, the prevailing regulatory regimes can often facilitate or hinder their activist strategies. It is common for targeted corporations opting to ignore activist demands to receive negative press. These firms are often relegated on governance ratings whilst their directors diminish their chances for re-election.[166]

## 5. Regulatory Constraints

To its critics, shareholder activists are merely opportunists: shareholders with a short-term horizon who take temporary ownership in a target to push through changes or lobby for a quick sale to realize short-term increases in stock price without regard to long-term value creation. It

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[164] Gilson & Gordon, *supra* note 17.

[165] On acting in concert *see infra* section 5.2.

[166] Luc Renneboog & Peter G. Szilagyi, *Shareholder Activism through the Proxy Process*, ECGI Finance Working Paper No. 275/2010, *available at* http://ssrn.com/abstract_id=1460578, at 5.

is therefore no wonder that shareholder activism has repeatedly experienced strong pushbacks, both in public campaigns and in regulation.[167] Corporate directors and executives lobbying organizations, for example, have long asked for tougher regulation seeking to deter activism. In addition, long-standing legacy obstacles from other parts of corporate law, frequently previous legislation, may continue to exist.

As the current most prominent regulatory constraints on shareholder activism concern proxy access, acting in concert, and insider dealing, these will form the focus of this section of the chapter.

## 5.1 Proxy Access

Shareholder activism through the proxy process has always been subject to considerable debate amongst regulators and academics. On the one hand, it is argued that proxy access is an inherent right of shareholders and places them in a better position to monitor the performance of corporations and corporate governance. On the other hand, it is argued that by giving shareholders greater access to the boards of corporations they will pursue changes for personal benefit at the cost of the firm's long-term future. Additionally, the laws and regulations that govern proxy access by shareholders vary considerably from one nation to another often constraining their use by activists.

Although the majority of European jurisdictions recognize the benefits of affording minority shareholders rights to protect their interests, the laws and regulations governing proxy access remain stringent when compared to those that are currently in place in the US.[168] For example, in the UK, under the Companies Act 2006, shareholders may submit proposals for vote at general meetings provided they own at least 5% of the corporation's issued stock, whilst ownership of 5% of the corporation's stock also enables shareholders to requisition an extraordinary shareholder meeting and propose their own nominees to the board.[169] The

[167] This has been especially true in the wake of scandal or crisis. For example, after the 2008 financial crisis policy makers united behind the idea to regulate hedge funds much stricter than before, *see* Larry Elliott, Global Financial Crisis: Five Key Stages 2007–2011, Guardian, Aug. 7, 2011, available at http://www.guardian.co.UK/business/2011/aug/07/global-financial-crisis-key-stages.
[168] Peter Cziraki, Luc Renneboog & Peter G. Szilagyi, *Shareholder Activism Through Proxy Proposals: The European Perspective,* 16 EUR. FIN. MGMT. 738 (2010).
[169] *See* Companies Act 2006, s. 303.

situation is similar in Germany where the German Stock Corporation Act[170] decrees that new agenda items and extraordinary meetings can be demanded by shareholders that own at least 5% of the corporation's voting capital.[171] Therefore, it would appear that shareholders in the UK and Germany, amongst other European nations, are in a strong position to engage in activism if they are of the opinion that the boards of their targeted corporations are not addressing their concerns in an adequate manner.[172] Nevertheless, the logistics of national and cross-border proxy voting and the ability to meet quorum requirements have often acted as a barrier to the use of the proxy process by activists in Europe. According to Manifest, with the increased dispersion of ownership in Europe and an unduly cumbersome system of proxy voting due to the need for cross-border chains of intermediaries, the ability to vote and satisfy quorum requirements became both time-consuming and prone to errors.[173] The 2007 EU Shareholder Rights Directive I was designed to remove these hurdles to the proxy process for shareholders by facilitating the exercise of basic shareholders' rights and enabling national and cross-border proxy voting.[174] The Directive, in essence, provides shareholders with the tools needed to not only monitor management boards but also to facilitate their involvement in the corporation's activities via, inter alia, advanced access to information ahead of general meetings.[175]

By comparison, the current situation in the US is arguably more conducive to the submission of proxy proposals by shareholders at general or annual general meetings. In 2021, the SEC adopted "universal" proxy rules mandating the use of a joint proxy card that lists all nominees in non-exempt, contested director elections, regardless of the source of their nomination (board or shareholders). Thus, activists are free to use the "notice and access"

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[170] Amongst others, the German Stock Corporate Act (Aktiengesetz) determines the powers of the corporate bodies of a German public company (Aktiengesellschaft). The corporate bodies of a German public company are the Management Board and the Supervisory Board.

[171] In fact, these thresholds have been harmonized by the European Shareholder Rights Directive: Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies, [2007] OJ L184/17.

[172] Peter Baldwin, John Phillips, Lizanne Thomas & Jennifer Lewis, *Anything You Can Do . . . How the Dodd-Frank Act Might Influence Further Reform of UK Corporate Governance*, 26 BUTTERWORTHS J. INT'L. BANKING & FIN. L. 153, 154 (2011).

[173] Santella et al., *supra* note 42, at 267, with reference to Manifest, Cross-Border Voting in Europe: A Manifest Investigation into the Practical Problems of Informed Voting across EU Borders (May 2007).

[174] Santella et al., *supra* note 42. *See also supra* note 171.

[175] Marco Scalera, *Investor Engagement in Europe in the Wake of the Shareholder Rights Directive Implementation*, Apr. 7, 2010, *available at* https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=1773, at 2.

model for the distribution of proxy materials to shareholders if their campaign solicits a minimum of 67% of the company's voting power.[176] However, this has not always been the case as significant barriers used to exist for shareholders seeking proxy access, for example, to monitor the performance of the board of a company in the US. In particular, as mentioned, the former proxy regulation Rule 14a-8 on the submission of proxy proposals by shareholders excluded areas of fundamental importance such as the ability to make director nominations.[177] The 2007–09 financial crisis and subsequent calls for greater accountability of corporate boards by, for example, the Dodd–Frank Act[178] led to the SEC's proposal of rules that would enable shareholders with access to the proxy statements of companies to nominate directors. The proposals were subsequently enacted under Rule 14a-11 permitting shareholders satisfying certain requirements to include director nominees on the proxy materials of a corporation that are distributed to shareholders.[179] Further amendments were also made to Rule 14a-8(i)(8) in narrowing the types of shareholder proposals that could be excluded under the "election exclusion." The rationale behind the amendments lay in the need to empower shareholders to hold boards to account for their actions by, inter alia, facilitating communication between shareholders in the proxy process and improving corporate suffrage.[180] More recently, the SEC has further narrowed down the scope for companies to exclude items from the proxy statement on substantive grounds.[181] Under the second Trump administration, however, the SEC seems to moving back into the opposite direction.[182]

[176] David M. Silk, Carmen X. W. Lu & Sabastian V. Niles, *Preparing for the 2023 Proxy Season in the Era of Universal Proxy*, Harvard Law School Forum on Corporate Governance, Nov. 14, 2022, *available at* https://corpgov.law.harvard.edu/2022/11/14/preparing-for-the-2023-proxy-season-in-the-era-of-universal-proxy. So far, first experiences with the universal proxy card show mixed results: see Killian Moote, *Considerations for the 2025 Annual Meeting Season*, 197 BOARD LEADERSHIP 5, 7–8 (2025).
[177] Gillan & Starks, *supra* note 11.
[178] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376 (2010) ("Dodd–Frank Act") is a US federal statute that was passed following the 2007–09 financial crisis with the aim of making the US financial system more transparent and accountable ultimately protecting taxpayers' money.
[179] A part of Rule 14a-11 has however been declared unlawful, *see Business Roundtable and Chamber of Commerce v. US Securities and Exchange Commission*, D.C. Cir., No. 10-1305, Jul. 22, 2011.
[180] Securities and Exchange Commission, *Facilitating Shareholder Director Nominations, available at* http://www.sec.gov/rules/final/2010/33-9136.pdf, at 1.
[181] In November 2021, the SEC clarified approaches to the application of two of the more commonly relied upon bases of substantive exclusion: the "ordinary business" and "economic relevance" grounds for exclusion. In July 2022, the SEC proposed amendments to Rule 14a-8 that would further limit the ability of a company to exclude shareholder proposals on the grounds of "substantial implementation," "duplication," and "resubmission."
[182] SEC, Staff Legal Bulletin No. 14M (Feb. 12, 2025), *available at* https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf?.

A study on shareholder activism through the proxy process found that proxy proposals were generally targeted at underperforming corporations and/or those with a poor governance structure.[183] Specifically, the authors ascertained that it was more likely for proposals to be submitted against corporations that have ineffective and entrenched CEOs and management that lacks the incentive to act in the best interests of the firm.[184] This conclusion was supported by the fact that out of their sample the majority of proposals made were in relation to takeovers, the removal of the management board, and poison pills.[185] However, it is worth noting that the sample period ranged from 1996 to 2005 and thus occurred during a time when greater regulatory constraints existed on proxy access.

## 5.2 Acting in Concert

Cooperation between shareholders is not uncommon if one considers that a shareholder activist will usually hold a minority shareholding and will thus commonly hold insufficient stock to realize their goals.[186] However, a greater degree of strategic care is currently required not to fall foul of the laws and regulations that govern acting in concert, which could in certain jurisdictions even risk triggering a mandatory bid for the targeted corporation.

The EU Directive on Takeover Bids defines acting in concert as cooperating under the guise of an agreement with the offeror or the offeree corporation to either acquire control of the offeree corporation or hinder the bid that has been made.[187] Under the rules of the Directive, those found to be acting in concert are required to make a mandatory offer to the other shareholders of the targeted corporation if together they surpass a "control" threshold, usually fixed at about 30% of the voting rights.[188] The same concept of acting in concert is also relevant for the block disclosure rules under the EU Transparency Directive.[189] Depending on the

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[183] Renneboog & Szilagyi, *supra* note 166.
[184] *Id.* at 3.
[185] *Id.* at 9, 10.
[186] *See* above section 4.5. Empirical material at Rafel Crespi & Luc Renneboog, *Is (Institutional) Shareholder Activism New? Evidence from UK Shareholder Coalitions in the Pre-Cadbury Era,* 18 CORP. GOVERNANCE: INT'L. REV. 274 (2010). *See* further, Ian MacNeil, *Activism and Collaboration Among Shareholders in UK Listed Companies,* 5 CAP. MARKETS L. J. 419 (2010).
[187] Articles 2(1)(d) and 5 of Directive 2004/25/EC.
[188] For Germany, see for example § 35(2) and § 29(2) Wertpapiererwerbs- und Übernahmegesetz [WpÜG] (German Takeover Law).
[189] Article 10 of Directive 2004/109/EC.

context and depending on the jurisdiction, the precise definition of "acting in concert" has been implemented in different ways.[190] The resulting legal uncertainty has prompted the European Securities and Markets Authority (ESMA), on the request of the European Commission, to publish a White List of "innocent" activities.[191] The concept of "acting in concert" and its divergent interpretations may chill shareholder activism, a development which policy makers may or may not welcome.[192]

The situation is slightly more complex in the US where there are numerous barriers to prevent acting in concert.[193] For example, section 13(d) of the Exchange Act[194] requires a shareholder or group owning more than 5% of a listed company's shares to file a "Schedule 13D" publicly. A "Schedule 13D" discloses all parties involved in addition to their intended aims in relation to the targeted corporation. However, it was clarified that shareholders are able to communicate, plan, and even act together to effect policy changes without disclosing their affiliation under section 13(d) of the Exchange Act.[195] It is only on the grounds of acquiring, holding, voting, or disposing of their shareholdings that they must disclose their group arrangement in a Schedule 13D filing.[196]

The above clearly outlines the complexity of acting in concert and the restrictive effect it can have on activist engagement. It should, however, be noted that the fundamental aim behind the laws and regulations on acting in concert is to protect the interests of minority shareholders by granting them the right to exit on fair terms when the controlling shareholders change.[197]

## 5.3 Market Abuse and Insider Dealing

[190] Leading to proposals for greater harmonization in the EU. *See* European Securities Markets Expert Group, *Preliminary Views on the Definition of Acting in Concert between the Transparency Directive and the Takeover Bids Directive*, Nov. 2008.

[191] European Securities and Markets Authority (ESMA), Information on Shareholder Cooperation and Acting in Concert Under the Takeover Bids Directive, ESMA/2013/1642 (Nov. 12, 2013).

[192] On the topic generally, *see* Martin Winner, *Active Shareholders and European Takeover Regulation*, 11 EUR. COMPANY & FIN. L. REV. 364 (2014).

[193] Santella et al., *supra* note 42.

[194] The Securities Exchange Act of 1934 governs the trading of stocks, bonds, and debentures in the US.

[195] Clarification given in Second Circuit's July 2011 Opinion: *CSX Corp. v. The Children's Investment Fund Management*.

[196] *Id.*

[197] Santella et al., *supra* note 42.

Many of the activities that activists are pursuing touch on the limits of legally permissible market behavior. For example, in circumstances in which the activist shareholder has engaged in previous communication with the target company's board, it is possible that inside information has been divulged, which would restrict the shareholder from being able to deal in the company's shares. Moreover, in some instances it is possible that the actual strategy being pursued by the activist shareholder is itself inside information, thus requiring disclosure to the market as a whole.

Insider dealing not only risks undermining the shareholder voting process but also has negative repercussions on timing paramount for the proper functioning of the stock markets.[198] By trading on inside information, investors are selling and buying at the most opportune moment in time but are breaching their fiduciary duty or other relationship of trust and confidence whilst they are in possession of stock information that is not publicly available. These actions ultimately undermine confidence in the integrity and fairness of stock markets.[199]

In establishing the cause of the 1929 financial crash, US Congress ascertained that widespread insider dealing had played a pivotal role and so enacted the Securities Exchange Act of 1934 with the principle aim of deterring unfair transactions.[200] With an increase in corporate takeovers and coincidental abuses of cash tender offers, the Williams Act of 1968 was passed to make full and fair disclosure a mandatory requirement. This legislation ultimately enabled the SEC to fine and prosecute offenders like corporate raider Ivan Boesky. Boesky was fined $100 million in 1986 for having launched takeover bids on the basis of information that was obtained illegally. By acting on inside information, he was able to purchase stock in his targeted corporations before his takeover bid went public.[201] This enabled him to reap rewards as the stock's value subsequently rose.

In the UK, dealing on insider information was considered legitimate and widespread until the late 1950s when it began to be considered an unethical practice. Nevertheless, the

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[198] Laurie B. Smilan, David A. Becker & Dane A. Holbrook, *Wolf Pack Attacks and Williams Act Protections: What Every Company Should Know about Shareholder Activist Hedge Funds*, in SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 235 (Bruce D. Angiolillo ed., 2006); Boyer, *supra* note 51, at 1033.
[199] Securities and Exchange Commission, *Insider Trading*, *available at* http://www.sec.gov/answers/insider.htm.
[200] William R. McLucas, John H. Walsh & Lisa L. Fountain, *Settlement of Insider Trading Cases with the SEC,* 48 BUS. LAW. 79 (1992).
[201] Stephen Chapman, *Drawing the Wrong Lesson from the Ivan Boesky Affair*, CHICAGO TRIBUNE, Dec. 5, 1986, *available at* https://www.chicagotribune.com/news/ct-xpm-1986-12-05-8604010030-story.html.

practice was as widespread as ever in the 1960s and 1970s and was even being depicted as the crime of 'being something in the City'.[202] It was only in 1980 that insider trading became a criminal offence in the UK and is currently enforceable under the Criminal Justice Act 1993.[203] However, as cases are rarely prosecuted under this Act, the Financial Service and Markets Act 2000[204] subsequently came into force, giving the FCA wide-ranging powers to prosecute offenders for insider dealing.[205] Between 2003 and 2020, insider dealing was subject to the EU instruments of the Market Abuse Directive and (later) the Market Abuse Regulation.[206] Since Brexit, the UK has its own regime, which is however closely modelled on its EU predecessor.[207]

With the identities of shareholder activists constantly evolving, hedge funds have become a focal point for regulators in many jurisdictions as the inherent nature of their operations often makes them vulnerable to involvement in market abuse, advertently or inadvertently.[208] As pointed out by a former Chairman of the SEC, William H. Donaldson, hedge funds present a unique challenge as the vast majority are not registered with the SEC, which limits the SEC's ability to detect matters such as fraud before stock markets or investors are affected.[209] Inherently, this would arguably also be applicable to other regulators and governing bodies due to the tendency for hedge funds to register offshore in order to benefit from lighter regulatory oversight and weaker control environments.[210] However, as market dynamics and investor strategies continue to evolve, regulators and governing bodies have to constantly respond and adapt in order to maintain the fairness and integrity of the equity markets.

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[202] Margaret Cole, *Insider Dealing in the City*, speech by Margaret Cole, then Director of Enforcement, Financial Services Authority, at the London School of Economics, Mar. 17, 2007.
[203] The Criminal Justice Act 1993 governs all criminal law in the UK.
[204] The Financial Service and Markets Act 2000 established the former Financial Services Authority (FSA), which regulated insurance, investment corporations and banking.
[205] Cole, *supra* note 202.
[206] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) [2014] OJ L173/1.
[207] UK MAR, *see* https://www.fca.org.uk/markets/market-abuse/regulation.
[208] Financial Services Authority, *Hedge Funds: A Discussion of Risk and Regulatory Engagement*, Discussion Paper DP 05/4, June 2005, at 54.
[209] William H. Donaldson, *Testimony Concerning the Long and Short of Hedge Funds: Effects of Strategies for Managing Market Risk, US Securities and Exchange Commission*, *available at* http://www.sec.gov/news/testimony/052203tswhd.htm.
[210] Financial Services Authority, *supra* note 208, at 14.

## 5.4 Supervisory constraints

The 2007–09 financial crisis saw a debate on the respective contribution of the hedge fund industry to the near meltdown. It led to new regulation on both sides of the Atlantic, mostly confined to regulatory oversight rules. The two most important legal consequences of this were the US Dodd–Frank Act of 2010 and the EU Directive on Alternative Investment Fund Managers.[211]

### *5.4.1 US Dodd–Frank Act of 2010*

The Dodd–Frank Act was the main US regulatory response to the global financial crisis. It arguably represented one of the most significant changes to the US financial regulatory system since the Great Depression.[212] The fundamental aim of the Act was to prevent another financial crisis by reining in the activities of Wall Street and abolishing the bailout of institutions that were argued to be too large to fail. The principal changes that affected the scope of shareholder activism were those that were related directly to hedge funds, the SEC, and the strengthening of shareholder rights.

As part of the "shadow banking system," hedge funds have traditionally been largely exempt from the scope of regulators. This exemption from regulatory oversight has enabled hedge funds to operate freely, transferring vast volumes of capital and risk on equity markets in the pursuit of maximizing their investments. This operational freedom has often risked the stability of financial markets or damaged trade execution and settlement processes.[213] Thus, Title IV of the Act (or the "Private Fund Investment Advisers Registration Act" of 2010) requires hedge funds managing over $100 million to register as investment advisors with the SEC and disclose the requisite financial data required for monitoring risk and protecting

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[211] Long Titles: Restoring American Financial Stability Act of 2010 and Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.
[212] John G. Finley, *How Financial Reforms Will Impact Private Equity Hedge Funds*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Jun. 8, 2010, *available at* https://corpgov.law.harvard.edu/2010/06/08/how-financial-reforms-will-impact-private-equity-hedge-funds.
[213] Financial Services Authority, *supra* note 208, at 18.

investors.[214] The hope was, on the one hand, that the disclosure of financial information would mark an end to the "shadow" financial system within which hedge funds had previously operated. On the other, it was hoped that the requirement to register with the SEC would enable the assessment of systemic risk and thus help maintain the stability of the financial market.

In parallel, by strengthening a shareholder's ability to influence matters such as executive pay and the enforcement of greater accountability, legislators hoped to curtail the realization of short-term gains.[215] This should in theory give board members the incentive to minimize taking risks with excess leverage which inherently had a detrimental effect on the long-term performance of their firms and negatively affected the stability of the economy as a whole.[216] Whether the Act does indeed transform the stability of the US economy remains to be seen, as it does not appear to have the same far-reaching consequences as the Glass–Steagall Act did.

### *5.4.2 AIFM Directive*

The European Directive on Alternative Investment Fund Managers ("AIFM Directive"), which came into force in 2011, had the aim of rectifying the regulatory gaps and inconsistencies that had previously governed the operations of collective investment undertakings over the value of €100 million, such as hedge funds and private equity funds.[217]

The Directive not only applies to the worldwide activities of EU-based alternative investment fund managers but also the activities conducted inside the EU by third-country AIFMs. By stipulating that an alternative investment fund manager will need to obtain prior authorization from national authorities to operate, the Directive created a "passport system" under which AIFMs have the authority to market alternative investment funds across the EU.[218] Once a "passport" has been obtained, the AIFM will need to satisfy additional requirements,

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[214] Senate Committee on Banking, Housing, and Urban Affairs, Chairman Chris Dodd (D-CT), Summary: Restoring American Financial Stability—Create a Sound Economic Foundation to Grow Jobs, Protect Consumers, Rein in Wall Street, End Too Big to Fail, Prevent Another Financial Crisis, May 28, 2010, *available at* https://www.banking.senate.gov/imo/media/doc/RAFSASummary_UpdateMay28revised.pdf, at 7.
[215] *Id.* at 9.
[216] *Id.*
[217] The AIFM Directive had to be implemented into local law of Member States by Jul. 22, 2013.
[218] Eilís Ferran, *After the Crisis: The Regulation of Hedge Funds and Private Equity in the EU*, 12 EUR. BUS. ORG. L. REV. 379, 399ff (2011); Dan Awrey, *The Limits of EU Hedge Fund Regulation*, 5 L. & FIN. MARKETS REV. 119 (2011).

namely the preparation of an annual report, the disclosure of specific information such as a description of their investment strategy, and reporting to regulatory authorities on a regular basis on matters such as liquidity, risk management arrangements, and leverage. Furthermore, the Directive also exerts a degree of influence on the pay and bonus schemes of an AIF's personnel by, for example, stipulating that 40% of bonuses must be deferred for at least three to five years with the potential for earlier recovery should relevant investments perform badly.

Despite its purported aim, the Directive has come under heavy criticism from the beginning. Many have urged that the Directive was not a proportionate response to the 2007–09 financial crisis, having targeted hedge funds despite major reports, such as the de Larosière Report[219] and the Turner Review,[220] which concluded that hedge funds did not play a significant role in the crisis.[221] Furthermore, the Directive in part went against the advice set out in the G20's 2009 Global Plan for Recovery and Reform. The G20's Global Plan not only advocated a supervisory and regulatory framework that was more globally in sync but also encouraged regulators and supervisors to reduce the capacity for regulatory arbitrage and resist protectionism in pursuit of promoting global trade and investment.[222] Due to these ongoing criticisms,[223] the EU adopted a reform directive in 2024, called AIFMD II.[224] The reform directive addresses weaknesses in the previous regime while strengthening the uniform regulatory and supervisory framework.

### *5.4.3 Assessment*

[219] High Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, Report, Feb. 25, 2009, *available at* https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf.
[220] *The Turner Review: A Regulatory Response to the Global Banking Crisis*, Mar. 2009, *available at* https://webarchive.nationalarchives.gov.uk/ukgwa/20090320232953/http://www.fsa.gov.uk/pubs/other/turner_review.pdf.
[221] Louise Armitstead, *European Commission Unveils Tough Hedge Fund Directive*, Telegraph, Apr. 29, 2009.
[222] *G20 Global Plan for Recovery and Reform*, Apr. 2, 2009, *available at* https://g7g20-documents.org/database/document/2009-g20-united-kingdom-leaders-leaders-language-london-summit-leaders-statement, at paras 13, 14.
[223] Report on the operation of the alternative investment fund managers directive (AIFMD), Jan. 10, 2019, *available at* https://finance.ec.europa.eu/publications/report-operation-alternative-investment-fund-managers-directive-aifmd_en.
[224] Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds, [2024] OJ L927.

Despite these concerns, it is submitted that regulatory efforts overall have been relatively modest, and for good reason.

Both the AIFMD and the Dodd–Frank Act limit themselves to certain rules on the supervision of hedge fund managers, and do not pursue an activities-based approach that would address specific corporate governance methods used by activists.[225] Given that potential pathologies of corporate governance—such as empty voting, for example—can be pursued by any investor (and not just hedge funds), it would appear pointless to regulate such behavior on an individual, hedge fund basis. Insofar as these tactics pose governance problems, these problems are best dealt with by (corporate) law of more general application.

Broader hedge fund market regulation can be meaningful, instead, in addressing market concerns such as market stability and integrity, that is, a more macroprudential-oriented approach. In this context, the regulatory framework can contribute to a smooth functioning of the market and strengthen market oversight powers for regulators.

## 6. New Ground: ESG, Cyclicality, and More

Global trade agreements since the 1960s have facilitated the liberalization of worldwide capital flows and contributed to the denationalization of the corporate and financial landscape.[226] The free flow of financial capital within and across national borders not only altered the power dynamics between governments, shareholders, and corporations but also facilitated the realization of abnormal returns on investments by shareholder activists. This was particularly the case for hedge funds that were able to reap returns by deploying activist strategies. Nevertheless, as the market facilitated the realization of activist strategies it also restricted their reach, as illustrated by the 2007–09 financial crisis and the initial demise of private equity and hedge fund activity. In short, activists (hedge funds) are heavily pro-cyclical.[227] Over the past several years, activists have demonstrated remarkable flexibility and adaptability to shifting trends. Not only did they emerge from the financial crisis stronger than before, but they also

[225] On this, Ringe, *supra* note 112, at 1033; House of Commons, Treasury Committee, *Banking Crisis: International Dimensions* (HC 615, 2009), p. Ev 90f. There are just a few such abstract provisions, in particular on risk and liquidity management. *See* Arts. 12 ff. of the AIFM Directive.
[226] Galanis, *supra* note 61, at 358.
[227] Mike Burkart & Amil Dasgupta, *Activist Funds, Leverage, and Procyclicality*, SRC Discussion Paper No 40, July 2015, *available at* http://eprints.lse.ac.uk/65095/1/LEQSPaper16.pdf.

capitalized on subsequent crises. They leveraged the climate crisis and the ESG investing boom of the late 2010s and early 2020s just as effectively as they exploited the Covid-19 pandemic and the oil crisis following Russia's attack on Ukraine. This ability to align with the prevailing zeitgeist underscores their exceptional skill in seizing business opportunities under all conditions.

## 6.1 Overcoming the Financial Crisis

During the financial crisis, the outlook for activists, in particular hedge funds and private equity firms, was bleak. A reduction in available liquidity, private companies seeking a quick exit from their private equity shareholders, and potential targets shying away from listing on the main markets due to costs and regulatory obligations seemed to create the advent of a "buyer's strike" or the end of the locust era.[228] Faced with higher startup costs and an increasingly competitive market, private equity and hedge funds were perceived to be finding it ever more difficult to amass sufficient returns to remain profitable.[229] Some scholars even heralded the near "eclipse" of private equity.[230]

However, it is now evident that shareholder activism has not just survived but dramatically prospered over the years since the crisis. During crisis times, falling profits and dividends will force boards to be more responsive to demands for disposals by shareholders.[231] For example, Chris Hohn, the founder of The Children's Investment Fund Management (TCI), gained notoriety in 2005 after having succeeded in removing Rolf Breuer and Werner Seifert from the board of Deutsche Börse and in stopping attempts to acquire control of the London Stock Exchange.[232] Following heavy losses of 43% in 2008, and the departure of various founding partners, little was heard of the fund on the market. However, recent figures on the global hedge fund industry indicate that activist hedge funds have doubled their assets under

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[228] *The Kay Review of UK Equity Markets and Long-Term Decision Making,* February Interim Report (2012), at 26. For evidence on the decline of shareholder activism during the financial crisis, *see* Becht et al., *supra* note 31.

[229] Financial Services Authority, *supra* note 208, at 34.

[230] Brian R. Cheffins & John Armour, *The Eclipse of Private Equity*, 33 DEL. J. CORP. L. 1 (2008).

[231] *Long Live Activism,* FIN. TIMES, Nov. 4, 2008, at 8.

[232] Ivar Simensen, *Activist Investors Seek Success in Germany,* FIN. TIMES, Dec. 6, 2007, *available at* https://www.ft.com/content/11940e52-a440-11dc-a28d-0000779fd2ac; William Hutchings, *Where are They Now? Chris Hohn,* FIN. NEWS, Jul. 9, 2010, *available at* https://www.fnlondon.com/articles/fn100-where-are-they-now-chris-hohn-20100709.

management from $ 66 billion in 2013[233] to an estimated sum of more than $ 130 billion in 2021, after years of macroeconomic turbulences and record profits in 2021.[234] As a note of caution, however, the future success of shareholder activism looks likely to be constrained with new regulations coming into force over the next few years and the support of large asset managers.

The 2007–09 global financial crisis has intensified the debate about the role that investors play or should play in corporate governance. To some, increasing shareholder influence and facilitating shareholder intervention when necessary is part of the essential reforms; activism in particular is often hailed as the solution for effectively monitoring management. To others, activism by shareholders who potentially have short-term interests is part of the problem, not a solution. Lawmakers are still undecided to what extent (and when) shareholder activism can improve firm value and performance or to what extent (and when) shareholder activism can produce distortions that make matters worse.

In any case, following the struggle of hedge funds and private equity funds during the financial crisis, the ensuing recession and more market developments have undoubtedly played a role in the rise of more targeted and more focused shareholder activism.[235] For many investors, voting their shares has become a legitimate method to express dissatisfaction with the performance of a specific board member. In addition, the weak stock market performance since 2007 has increased the clout of activist investors, and low interest rates have given hedge funds record investment volumes. At the same time, the economic recovery since 2009 has given companies time to reduce debt and to build cash piles which make them interesting targets for activists.[236] This may help explain why shareholder activists have also begun targeting larger and blue-chip companies such as Apple, Procter & Gamble, and Sony,

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[233] Stephen Foley, *Activist Hedge Funds Increase Corporate Bond Risk, says Moody's*, FIN. TIMES, Mar. 10, 2014.
[234] Steve Klemash & David A. Hunker, *What Boards Need to Know about Shareholder Activism*, Mar. 16, 2021, *available at* https://corpgov.law.harvard.edu/2021/04/03/what-boards-need-to-know-about-shareholder-activism/.
[235] McCrum & Gelles, *supra* note 3, at 7; ECONOMIST, *supra* note 3, at 51; Joseph Cyriac, Ruth De Backer & Justin Sanders, *Preparing for Bigger, Bolder Shareholder Activists*, Insights & Publications, Mar. 2014, *available at* https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/preparing-for-bigger-bolder-shareholder-activists.
[236] Paul Parker, head of global corporate finance and M&A at Barclays Capital, is cited as saying "The percussive theme song is unmistakable; use it or lose it. Excess capital must be used or returned to shareholders." *See* McCrum & Gelles, *supra* note 3.

generating a profound echo in the corporate world and in the media.[237] It is said that activism has outpaced any other hedge fund strategy performance over the past years.[238]

Advances in technology have surely helped foster this development. The rise of information technology, along with greater disclosure obligations, has made it easier to access information about target companies, board members, and financial data.[239] It has further encouraged greater shareholder collaboration. Shareholder activism can therefore be said to have become more targeted in character.[240]

## 6.2 Sustainability and ESG

Around the late 2010s, when the climate crisis was in full swing, ESG investing (for environmental, social, and governance criteria) and sustainability in capital markets became an important policy concern.[241] Activists were quick to sense the potential in such sentiment and adjusted accordingly. Therefore, recent years have seen a rise in specific activism for sustainability and ESG objectives. On the face of it, such activism seemed to differ markedly from classical activism which is pursued mostly for financial gains. Instead, campaigns put environmental goals such as curbing climate change or social issues like racial equity center stage. Asset managers may even picked up very recent phenomena such as the ethical use of artificial intelligence.[242] However, hedge funds and other activists were and still are profit-seeking vehicles that put financial returns above everything else: ESG investing and other green and social policies were nothing else than a golden business opportunity at the time.

There were mostly two distinct types of players in this area: newly set-up vehicles that were expressly created for activist campaigns; and secondly, traditional hedge funds that turned their attention towards sustainability goals.

As an example for the first category, the most prominent story of ESG activism was that of Engine No. 1, an "impact-focused fund" which launched an activist campaign at US oil

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[237] Arcano & Grossman, *supra* note 154.
[238] Stephen Foley, *Activist Investors' Success Owes Much to Wider Bull Run*, FIN. TIMES, Mar. 2, 2015.
[239] Justin Fox, *Ackman, Icahn and their Pals Are Keepers*, BLOOMBERG VIEW, Jan. 12, 2015.
[240] Dunstan Prial, *Shareholder Activism More Focused, Targeted*, FOX BUSINESS, May 25, 2012, *available at* https://www.foxbusiness.com/features/shareholder-activism-more-focused-targeted.
[241] *See* Ringe, *supra* note 8.
[242] Kenza Bryan, *Asset managers pressure tech companies over possible AI misuse*, FIN. TIMES, June 20, 2023.

giant ExxonMobil. Starting in December 2020, the tiny hedge fund initiated a proxy contest at ExxonMobil for its alleged failure to adequately respond to evolving energy needs and emissions standards. The following months saw increasingly strong pressure from Engine No. 1, which had urged Exxon to cut capital spending and to focus on accelerating rather than on deferring the transition to cleaner energy. This culminated in an epic shareholder meeting in May 2021, where Engine No. 1 was successful in installing three of its director nominees on the Exxon board—which, in effect, was a major defeat for the incumbent management.[243]

As an example for the second type of activist, the hedge fund TCI also shifted its attention to ESG objectives. In 2020, TCI launched a "say on climate" campaign, calling for a shareholder vote on climate policy.[244] They filed resolutions at several US-listed issuers to annually disclose their greenhouse gas emissions, to produce a plan to manage those emissions, and to hold an annual advisory vote on the plan. In the case of Spanish airport operator Aena, TCI was successful in pushing for the introduction of the world's first "say on climate" vote.[245] This push for an advisory vote on the climate plan was supported by BlackRock, which said in a voting bulletin it would be "beneficial at Aena given the material risk to its business model and its need to accelerate its efforts."[246]

The motivations for such ESG activism follow very heterogeneous patterns. They may be either motivated by the traditional pursuit of financial gains, as sustainable business decisions may be considered as a more profitable long-term strategy, or may at least provide a hedge against social and, in particular, climate change-related long-term risk.[247] Seen from this perspective, climate change was viewed as a significant source of financial risk, reflected in a return premium on assets with high climate risk exposure.[248] Relatedly, activists also cared about the transition risks of stranded assets in individual firms.

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[243] Derek Brower, *ExxonMobil shareholders hand board seats to activist nominees*, FIN. TIMES (May 26, 2021), https://www.ft.com/content/da6dec6a-6c58-427f-a012-9c1efb71fddf.

[244] Tim Human, *TCI goes global with "say on climate" campaign* (Dec. 2, 2020), *available at* https://www.corporatesecretary.com/articles/esg/32358/tci-goes-global-%E2%80%98say-climate%E2%80%99-campaign.

[245] Tim Human, *Aena adopts annual advisory vote on climate plan*, IR MAGAZINE (Nov. 5, 2020), https://www.irmagazine.com/reporting/aena-adopts-annual-advisory-vote-climate-plan.

[246] BlackRock Investment Stewardship Group, *Voting Bulletin: Aena S.M.E. SA*, *available at* https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-aena-oct-2020.pdf.

[247] Philipp Krueger, Zacharias Sautner & Laura Starks, *The Importance of Climate Risks for Institutional Investors*, 33 REV. FIN. STUD. 1067 (2020).

[248] Robert Engle et al., *Hedging Climate Change News*, 33 REV. FIN. STUD. 1184 (2020); Stefano Giglio, Bryan Kelly & Johannes Stroebel, *Climate Finance*, 13 ANN. REV. FIN. ECON. 15 (2021).

In the alternative, ESG activism may simply follow other, non-financial preferences and be motivated by the nonpecuniary goal of pursuing social, not necessarily profit-driven preferences. For example, the motivation of activists may be intrinsic, such as the pursuit of sustainability goals, frequently reflected in the preferences of specific wealthy individuals, pressure groups, NGOs, and other interest groups.

Both strategies may come under pressure in market turmoil or uncertainty: for example, 2022 saw the Russian invasion of Ukraine, soaring oil and gas stocks and many green stocks underperforming—accordingly, the success rates of many ESG campaigns declined as shareholder support for them dropped.[249] Instead, ESG activism may morph into so-called "trojan horse" campaigns, where an ESG initiative is combined with traditional activism objectives such as a breakup or sale of a company, or the replacement of corporate directors.[250] By combining both issues, a campaign can appeal to a larger group of supporters, including those who are increasingly growing wary of ESG matters. A recent example of this is Third Point's campaign against Shell, where the fund called for the breakup of the oil company into two stand-alone companies, one of which, Third Point argued, could make more aggressive investments in renewables and other carbon-reduction technologies.

The ESG orientation may also, however, come under pressure for purely political reasons. Whereas the Biden administration sought to facilitate ESG investing,[251] the SEC under new President Trump has moved quickly to implement new rules that seek to rein in the power of large fund managers and to "crack down on ESG."[252] These reforms aim at larger and more traditional fund managers and not directly at hedge fund activism. They may nevertheless

[249] Rebecca Sherratt, *Tough times for ESG activism*, in: INSIGHTIA/OLSHAN SHAREHOLDER ACTIVISM ANNUAL REVIEW 2023, at p. 15.

[250] Richard J. Grossman et al., *Activism Landscape Continues To Evolve*, SKADDEN'S 2022 INSIGHTS, Jan. 19, 2022, https://www.skadden.com/insights/publications/2022/01/2022-insights/corporate/activism-landscape-continues-to-evolve.

[251] For example, the US Department of Labor (DOL) under Biden clarified the ability of retirement plan fiduciaries to invest in ESG funds in the retirement plans that they sponsor under the US ERISA framework. See Department of Labor, Employee Benefits Security Administration, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 29 CFR Part 2550, 87 Fed. Reg. 73,822 (Dec. 1, 2022).

[252] See, for example, SEC, Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting (Feb. 11, 2025); and SEC, Staff Legal Bulletin No. 14M (Feb. 12, 2025), which addresses an issuer's ability to exclude shareholder proposals under Rule 14a-8. *See* Patrick Temple-West, Amelia Pollard & Eric Platt, *BlackRock and Vanguard Halt Meetings with Companies After SEC Cracks Down on ESG*, FIN. TIMES (Feb. 19, 2025).

herald a new, broader political backlash against the industry. In fact, few things have become so politicized in corporate America in recent years as ESG investing.[253]

One thing is clear, however: ESG activism is often nothing else than the pursuit of financial gains. Firms like Engine No 1 and TCI are not environmentalists, nor would they ever "sacrifice profit for the planet." Nowhere is this more evident as is the case of Engine No 1. Just one year after its widely celebrated "climate victory" against Exxon, it voted against a resolution proposed by climate advocacy group Follow This, which called on Exxon to reduce its so-called scope 3 emissions. Then, in 2023, all three of its board picks supported Exxon's acquisition of hydrocarbon exploration firm Pioneer Natural Resources Co.—a deal that propelled Exxon's oil production to the highest in 140 years.[254] This unanimous support underscores how significantly the ESG investing movement has changed under different circumstances, and how little Engine may genuinely care about climate change.

These developments vividly illustrate activists' chameleon-like nature and their remarkable talent to "reinvent themselves." Depending on the political zeitgeist, they adopt the role of either aggressive capitalists, saviors of the planet, or both. During the 2024 election campaign, numerous activist investors openly endorsed Trump, contributing tens of millions of dollars to his campaign and affiliated political action committees.[255] By the start of Trump's second administration in early 2025, little was left of ESG activism (except, perhaps, NGOs and pressure groups), while hedge funds refocused on their "true" mission of pursuing financial returns above everything else; many are moving back to traditional M&A.[256] Today, activist investors are buoyant about the potential for increased opportunities in their traditional domains under an economic landscape shaped by Trump's signature mix of tax cuts, deregulation, lighter antitrust scrutiny, and pro-business rhetoric.[257] Ironically, many secretly continue to use ESG

[253] David A. Cifrino, *The Politicization of ESG Investing*, Jan. 24, 2025, *available at* https://www.sir.advancedleadership.harvard.edu/articles/politicization-of-esg-investing.
[254] Kevin Crowley & Saijel Kishan, *Why One-Time Exxon Adversary's Board Picks Backed Mega Deal*, BLOOMBERG (Oct. 12, 2023), https://www.bloomberg.com/news/articles/2023-10-12/exxon-s-one-time-adversary-engine-no-1-unanimously-backed-deal.
[255] Kai H. E. Liekefett & Derek Zaba, *Shareholder Activism under Donald Trump*, Harvard Law School Forum on Corporate Governance, Nov. 8, 2024, *available at* https://corpgov.law.harvard.edu/2024/11/08/shareholder-activism-under-donald-trump/.
[256] Diligent Market Intelligence, Olshan & Sidley, *Shareholder Activism Annual Review 2025*, at p. 3.
[257] Crystal Partners, *Why Activist Investors Are Excited for Four Years of Trump* (Jan. 31, 2025), https://www.crystalfunds.com/insights/why-activist-investors-are-excited-for-four-years-of-trump; Antoinette Giblin, *Shareholder activists pivot to focus on CEOs and M&A*, Diligent (Feb. 20, 2025), https://www.diligent.com/resources/blog/shareholder-activists-pivot-to-focus-on-ceos-and-m-and-a.

factors or sustainable investing, but are now changing their rhetoric, officially framing investment decisions on "risk, opportunities and profitability" instead.[258]

## 6.3 Portfolio Engagement

Traditional institutional investors, such as pension funds, mutual funds,[259] and index funds, are historically more passive vis- à-vis their investee companies, for the most part due to a lack of resources, incentives to free-ride, and the remuneration of their fund managers. Recent years have seen a tremendous growth of passive investing. The "Big Three" institutional investors, BlackRock, Vanguard, and State Street Global Advisors now control about 80 percent of all global indexed money, making them a dominant force in the governance of public companies around the world.[260] Despite their traditionally passive role, these funds do play an important role in the engagement and activism context.

The most important reason for this lies in the phenomenon of "universal" or "common" ownership. Over the past several years, this term has come to describe the phenomenon where a number of large diversified institutional investors dominating today's corporate landscape, such as the Big Three, are holding significant stakes in the vast majority of firms in many economies.[261] This trend has given universal owners greater incentives to favor policies and initiatives that support are "systemic" or affect the system as a whole, rather than the fate of one single isolated company. The reason is that funds that have invested in virtually every firm in the market are less concerned with the performance of individual portfolio companies, and more interested in the state of whole economies, if not the world economy. Against this backdrop, scholars have argued that the trend towards universal ownership would increase their incentives to push for example for greater ESG commitment in investee firms, or at least favor

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[258] Mike Scott, *ESG Watch: New SEC rules under Trump turn up the heat for sustainable investors*, REUTERS (Mar. 17, 2025), https://www.reuters.com/sustainability/sustainable-finance-reporting/esg-watch-new-sec-rules-under-trump-turn-up-heat-sustainable-investors-2025-03-17/.

[259] Regulated by the UCITS Directive in the EU.

[260] John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve, available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_1001.pdf. *See also* David McLaughlin & Annie Massa, *The Hidden Dangers of the Great Index Fund Takeover*, BLOOMBERG BUSINESSWEEK (Jan. 9, 2020), https://www.bloomberg.com/news/features/2020-01-09/the-hidden-dangers-of-the-great-index-fund-takeover. *See also* Lund and Robertson in this volume.

[261] *See, e.g.*, Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 735, fig. 1 (2019).

general policies that support such efforts.[262] Seen in this light, funds that "own the market" appear to be the ideal conduits for the internalization of a large fraction of the negative externalities caused by environmental damage and social disparities. This prospect is even more promising in the ESG field than in the context of traditional corporate governance engagement, which predominantly relies on firm-specific analysis.[263]

As we saw above, activism benefits from collaboration between different institutional investors who engage in coalition-building.[264] Likewise, portfolio-oriented institutional investors lend their support to campaigns that they believe will be system-stabilizing.[265] First observed in the context of traditional shareholder activism, the collaboration model has become increasingly important in the context of green activism.[266]

To illustrate, Engine No. 1 when taking on ExxonMobil was only successful due to coalition-building with institutions such as US pension funds CalSTRS, CalPERS, New York State Common, and the Church of England. Blackrock and Vanguard, two of the largest Exxon shareholders, also voted to support at least three of the four director nominees on Engine No. 1's slate.[267] Together, this alliance proved critical in the campaign's victory and may herald a new era for shareholder activism.[268] The coalition of investors was therefore not only successful in shaking up ExxonMobil, but it also handed a major victory to the ESG movement as a whole. Other pertinent examples of shareholder team-building abound. They have been documented

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[262] *See, e.g.*, Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 17–18 (2020).
[263] *See* Michal Barzuza, Quinn Curtis & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).
[264] *See supra* section 4.5.
[265] William McNabb, Vanguard Chairman and CEO, stated that "To understand the full picture, we often also engage with other investors, including activists and shareholder proponents": *see* Vanguard, "*An Open Letter to Directors of Public Companies Worldwide* (August 31, 2017), *available at* https://global.vanguard.com/documents/investment-stewardship-mcnabb-letter.pdf.
[266] For shareholder proposals with a focus on environmental issues, *see* Robert Monks, Anthony Miller & Jacqueline Cook, *Shareholder activism on environmental issues: A study of proposals at large US corporations (2000–2003)*, 28 NAT. RES. FORUM 317 (2004); Giovanna Michelon & Michelle Rodrigue, *Demand for CSR: Insights from Shareholder Proposals*, 35 SOC. & ENVTL ACCOUNTABILITY J. 157 (2015); Erwin Eding & Bert Scholtens, *Corporate Social Responsibility and Shareholder Proposals*, 24 CSR & ENV'TAL MGMT 648 (2017); Viju Raghupathi, Jie Ren & Wullianallur Raghupathi, *Identifying Corporate Sustainability Issues by Analyzing Shareholder Resolutions: A Machine-Learning Text Analytics Approach*, 12 SUSTAINABILITY 4753 (2020).
[267] Alastair Marsh & Saijel Kishan, *Engine No. 1's Exxon Win Provides Boost for ESG Advocates*, BLOOMBERG (May 27, 2021), https://www.bloomberg.com/news/articles/2021-05-27/engine-no-1-s-exxon-win-signals-turning-point-for-esg-investors; Bernice Napach, *BlackRock and Vanguard Played Key Roles in Exxon's Shareholder Proxy Vote*, THINKADVISOR (May 27, 2021), https://www.thinkadvisor.com/2021/05/27/blackrock-and-vanguard-played-key-roles-in-exxons-shareholder-proxy-vote/.
[268] Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 11, 2021).

in campaigns against Evergy[269] or Procter & Gamble.[270] Even IT giants such as Apple have become the target of shareholder coalitions, led by activist fund Jana Partners.[271]

Coalition-building in this field has extended way beyond just bilateral or ad-hoc coalitions, though. The ESG field, which is rich in advocacy groups, NGOs, and other specific vehicles, sees many institutionalized platforms which support activism. For example, the initiative Climate Change 100 + brings together more than 570 investors, responsible for over $54 trillion in assets under management. The United Nations operates its own platform known as "Principles for Responsible Investment," promoting the integration of ESG issues within the investment industry and coordinating engagements.[272] Such networks allow for easier interaction between investors, identifying lead investors, spreading information, and helping to share the costs of engagement.[273]

## 7. Conclusion

This paper paints a largely positive picture of activist investors' engagement in corporate governance while highlighting their exceptional flexibility and adaptability. Exploring the historical roots, methods and varied contexts of shareholder activism, I argue that shareholder activism masterfully and continuously reinvents itself, responding to the shifting political climates and industry dynamics under which it operates. As we have seen, its meaning varies depending on the shareholder structure it encounters, and it has shown remarkable resilience over the decades. Activists rebounded from the financial crisis stronger than before; they not only survived, but positioned themselves at the forefront of the climate crisis by capitalizing on ESG and sustainable investing. Today, they are readily adapting to a new zeitgeist, which is shaped by climate denial, protectionist politics, and deregulation. None of this should be

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[269] David French, *US utility Evergy adds directors in new agreement with activist firm Elliott*, REUTERS (Feb. 26, 2021), *available at* https://www.reuters.com/article/us-evergy-elliott-idUSKBN2AQ294.

[270] Alistair Gray & Patrick Temple-West, *Investor rebellion at Procter & Gamble over environmental concerns*, FIN. TIMES (Oct. 14, 2020), https://www.ft.com/content/1dd92502-e95b-4c21-be1c-c18a598acf1a.

[271] Robert G. Eccles, *Why an Activist Hedge Fund Cares Whether Apple's Devices Are Bad for Kids*, HARVARD BUS. REV. (Jan. 2018), https://hbr.org/2018/01/why-an-activist-hedge-fund-cares-whether-apples-devices-are-bad-for-kids.

[272] *See* https://www.unpri.org/.

[273] For a detailed analysis, *see* Elroy Dimson, Oğuzhan Karakaş & Xi Li, *Coordinated Engagements*, ECGI Finance Working Paper No. 721/2021, *available at* http://ssrn.com/abstract_id=3209072.

surprising. Activists, particularly hedge funds, have repeatedly shown their ability to navigate evolving market conditions and to exploit shifting regulatory landscapes.

On a positive note, the growing trend of coalition building and collaborative engagement is emerging as an important market practice. It increases engagement opportunities and enhances investor influence, while at the same time serving as a built-in screening mechanism, helping to filter out abusive campaigns.

In sum, there is still plenty of life in the old dog. Whilst some predicted the end of hedge funds and private equity a few years ago, they have instead emerged from successive crises stronger than ever. Having honed their tactics and enhanced their credibility, they are here to stay—constantly reinventing themselves. “Locust” was the wrong animal to describe them. A “chameleon” would have been more accurate.

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