

# Shareholder Activism and Short-Termism

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# Overview

- I. Defining Short-Termism and Activism
- II. Relationship Between Activism and Short-Termism
- III. Adding the Agency Perspective (Again)
- IV. Differences Between the US and Europe
  - Affecting levels of activism
  - Affecting choice of activist tools and impact



# I. Defining Short-Termism and Activism

- Short-Termism
  - Who is short-termist?
    - Investor short-termism vs managerial short-termism (Vos 2023)
  - For whom is it short-termist?
    - For the specific corporation: Type A short-termism vs. type B problem (Roe 2022)
    - For society: some type B problems can be seen as short-termism at society level
      - Not with regard to interests of employees, customers
      - But with regard to climate, environment and biodiversity
- Shareholder Activism
  - Attempts by shareholders to influence corporate decision-making
  - Not: speculative trading (incl. high frequency trading)

## II. Relationship Between Activism and Short-Termism

- Conceptual link is two-directional
  - Activism as a cause of corporate short-termism
    - Channel for investor short-termism
    - E.g. SEC, Facilitating Director Nominations, 2010; loyalty voting rights in Europe
  - Activism as a cure for corporate short-termism
    - Strategy to deal with managerial short-termism
    - E.g. Kay Review; Shareholders Rights Directive II
- Empirical evidence is mixed
  - Mostly on activism as a cause
    - Finding evidence of short-termist activism: Cremers, Giambona, Sepe & Wang, 2020
    - Finding no evidence of short-termist activism: Roe 2022; Bebchuk et al. 2015
  - Sometimes on activism as a cure: Flammer & Bansal 2017
  - See presentation Zacharias Sautner

# III. Adding the Agency Perspective (Again)

- Activist investor 'short-termism' as a cure for first agency conflict
    - E.g. dividends instead of investments
      - = Decision rights strategy
      - Cf. free cash flow hypothesis (Jensen 1986), overinvestment, empire building
    - E.g. replacing directors
      - = Appointment rights strategy
  - Managerial short-termism as a consequence of agency strategies
    - E.g. boosting stock price when equity vests
      - > Reward strategy
    - Agency strategy causing new agency conflict → activism as a cure
- How does regulation of these agency strategies influence short-termist activism?

# IV. Differences Between the US and Europe (1)

- Differences influencing levels of activism
  - Stock ownership structures
    - Controlling shareholders more common in continental Europe
      - Blockholders mitigate both activism as a cause and activism as a cure
      - But less need for a cure, because less short-termism (Vos 2023)
  - Ownership disclosure obligations
    - Longer time for notification in the US
    - Wolf packs easier in US; risk of 'acting in concert' in Europe
      - Limitations on stakebuilding hinder activist campaigns
  - Company size
    - Fewer large cap corporations in Europe
      - Fewer likely targets

# IV. Differences Between the US and Europe (2)

- Differences influencing choice of activist tools and impact
  - Thresholds for submission of shareholder proposals
    - US: at least \$2,000, \$15,000 or \$25,000 for at least 3, 2 resp. 1 year(s)
    - BE-NL: 3%; FR: between 0.5% and 5%; DE: 5% or 500.000 EUR; EU: maximum 5%
  - Authority to declare a dividend
    - Board in US; shareholder meeting in Europe
  - Authority to appoint and remove directors
    - US: shareholder proposal not for director elections → proxy access or proxy contest
    - Europe: at will removal toned down recently
  - Say on pay
    - US: non-binding vote on the remuneration policy at least every 3 years
    - BE-FR-DE-NL: shareholder meeting determines remuneration of (supervisory) directors
    - EU: advisory vote on the remuneration report on a yearly basis and a binding or advisory vote on the remuneration policy every 4 years

# IV. Differences Between the US and Europe (3)

- Interference in the board's strategic competence (Cools 2023)
  - Board can exclude proposals on the grounds of lack of authority (Europe) or for relating to 'ordinary business' (US)
  - Solutions for activists:
    - UK: Binding instructions
    - Implicit requests in disclosure requests: hard for short-termist actions
    - Advisory votes ('precatory proposals')
      - US, FR and likely BE
      - NL: shareholders cannot oblige the board to hold a vote, but can add a 'discussion item'
      - DE: shareholders cannot oblige the board to hold a vote or add a discussion item
  - Amending the articles of association: hard for short-termist actions



# Thank you!

See Sofie Cools, Climate Proposals: ESG Shareholder Activism Sidestepping Board Authority, in RESEARCH HANDBOOK ON ENVIRONMENTAL, SOCIAL, AND CORPORATE GOVERNANCE (Thilo Kuntz ed., forthcoming 2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4377030](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4377030)

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