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TOWARDS A POLITICAL CORPORATION? NGOS AS ESG SHAREHOLDER ACTIVISTS AND LITIGATORS INFLUENCING CORPORATE STRATEGIES IN CONTINENTAL EUROPE

WP 2023-12

Hans De Wulf

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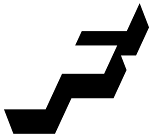

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Abstract

Non-governmental non-profit organisations (NGOs) that try to influence ESG strategies of corporations, especially climate strategies, have recently, after buying a very limited number of shares in target companies, begun to pursue their campaigns through the use of shareholder activist techniques, such as submitting shareholder proposals and using the right of shareholders to ask questions of the CEO and give speeches at the annual general meeting. At the same time, some investment funds, especially pension funds, have in a limited number of cases engaged in "halo activism" i.e. shareholder activism campaigns that cannot be explained by a desire to increase investment returns. These organisations represent the interests of truly external stakeholders; their efforts go beyond trying to force companies to internalize their negative externalities. The article incorporates empirical research by Michael Bakker (University of Amsterdam) on the use of E&S shareholder proposals in European companies. Recent French, German and EU sustainability due diligence legislation creates leverage for such stakeholder organisations to influence corporate policies by forcing European companies to enter into a dialogue with these organisations. The French due diligence legislation in particular encourages general interest litigation by NGOs's as the continuation of activism with other means, this has led to 10 pending court cases against French corporations. These new stakeholder tactics (shareholder proposals, climate/ESG litigation) are hard to reconcile with legal doctrines in certain European countries, especially the Netherlands and Germany, that hold that determining a corporation's strategy should be the exclusive preserve of the (executive) board. Such a stance can be justified because the NGOs are not really shareholders: they buy a few shares for purely instrumental reasons and their interests diverge from those of shareholders. Nevertheless I argue that the Netherlands and Germany should loosen their restrictions on shareholder proposals by only outlawing shareholder proposals that are too prescriptive on strategy, e.g. proposals that want to impose a specific quantitative emissions reduction schedule on companies. This would allow NGOs and halo activists to use the AGM as a transmission mechanism for the expression of the views of stakeholders and ESG-minded investors. Shareholder proposals are in any case a more appropriate channel through which to allow external, not financially invested stakeholders to influence corporate strategy than strategic ESG/climate litigation against companies, which is undesirable, and should in fact be inadmissible if it wants to impose strategic measures on companies that do not flow directly from binding, precise regulation but are based on the tort law concept of duty of care. Inconsistently, however, several European jurisdictions ban shareholder proposals on corporate climate strategies, while simultaneously enabling general interest climate strategy litigation against such companies. Everywhere, the new stakeholder tactics make life more difficult for boards, who have to balance incommensurable conflicting interests and values, thus taking the kind of decision that until recently was the preserve of politicians. At the end of the article, I will venture to suggest that these developments could have a negative impact on the board's role in setting corporate strategy, that this problem may be made worse by the installation of another extra board committee (e.g. sustainability committee) and that probably, the new "political" and oversight roles of boards are more efficiently handled in a dual board system, with a "political" supervisory board that concentrates on oversight (risk management, compliance) and internalizing stakeholder interests, and a relatively small, coherent and insulated executive board that determines corporate strategy and executes it. But I would be the first to admit that on this last topic- implications for the board's strategy role and the board's ideal structure- far more research by specialists in board dynamics is needed.

The author welcomes your comments at hans.dewulf@ugent.be

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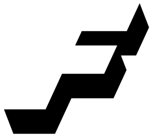

TOWARDS A POLITICAL CORPORATION? NGOS AS ESG SHAREHOLDER ACTIVISTS AND LITIGATORS INFLUENCING CORPORATE STRATEGIES IN CONTINENTAL EUROPE

Hans De Wulf[1]

Draft of book chapter forthcoming in A. van Hoe and T. Vos, *Shareholder activism in Belgium*, Larcier Intersentia, September2023.

Abstract

Non-governmental non-profit organisations (NGOs) that try to influence ESG strategies of corporations, especially climate strategies, have recently, after buying a very limited number of shares in target companies, begun to pursue their campaigns through the use of shareholder activist techniques, such as submitting shareholder proposals and using the right of shareholders to ask questions of the CEO and give speeches at the annual general meeting. At the same time, some investment funds, especially pension funds, have in a limited number of cases engaged in "halo activism" i.e. shareholder activism campaigns that cannot be explained by a desire to increase investment returns. These organisations represent the interests of truly external stakeholders; their efforts go beyond trying to force companies to internalize their negative externalities. The article incorporates empirical research by Michael Bakker (University of Amsterdam) on the use of E&S shareholder proposals in European companies. Recent French, German and EU sustainability due diligence legislation creates leverage for such stakeholder organisations to influence corporate policies by forcing European companies to enter into a dialogue with these organisations. The French due diligence legislation in particular encourages general interest litigation by NGOs's as the continuation of activism with other means, this has led to 10 pending court cases against French corporations. These new stakeholder tactics (shareholder proposals, climate/ESG litigation) are hard to reconcile with legal doctrines in certain European countries, especially the Netherlands and Germany, that hold that determining a corporation's strategy

[1] Professor of company law, Ghent University, Financial Law Institute. The complete article was written by Hans De Wulf, but the empirical data discussed in section IV.2 were provided by Michael Bakker, Ph.D. candidate and lecturer at the University of Amsterdam (UvA). Bakker's empirical study of shareholder proposals is also discussed in his research article "Shareholder Proposals and Sustainability: An Empirically-based Critical Reflection" (accepted by ECFR and on file with author) as well as in the already published article on shareholder proposals in the 2021 AGM season: M.H.C. Bakker, "Aandeelhoudersvoorstellen en duurzaamheid: een verkenning", Ondernemingsrecht 2022, 241-255. The empirical data input of Michael Bakker provides important insights for this chapter's research but all interpretations and therefore also all mistakes in the article are my own, for which I bear sole responsibility. All internet sources in this article were last consulted on April 19 2023 unless otherwise mentioned.

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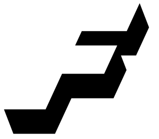

should be the exclusive preserve of the (executive) board. Such a stance can be justified because the NGOs are not really shareholders: they buy a few shares for purely instrumental reasons and their interests diverge from those of shareholders. Nevertheless I argue that the Netherlands and Germany should loosen their restrictions on shareholder proposals by only outlawing shareholder proposals that are too prescriptive on strategy, e.g. proposals that want to impose a specific quantitative emissions reduction schedule on companies. This would allow NGOs and halo activists to use the AGM as a transmission mechanism for the expression of the views of stakeholders and ESG-minded investors. Shareholder proposals are in any case a more appropriate channel through which to allow external, not financially invested stakeholders to influence corporate strategy than strategic ESG/climate litigation against companies, which is undesirable, and should in fact be inadmissible if it wants to impose strategic measures on companies that do not flow directly from binding, precise regulation but are based on the tort law concept of duty of care. Inconsistently, however, several European jurisdictions ban shareholder proposals on corporate climate strategies, while simultaneously enabling general interest climate strategy litigation against such companies. Everywhere, the new stakeholder tactics make life more difficult for boards, who have to balance incommensurable conflicting interests and values, thus taking the kind of decision that until recently was the preserve of politicians. At the end of the article, I will venture to suggest that these developments could have a negative impact on the board's role in setting corporate strategy, that this problem may be made worse by the installation of another extra board committee (e.g. sustainability committee) and that probably, the new "political" and oversight roles of boards are more efficiently handled in a dual board system, with a "political" supervisory board that concentrates on oversight (risk management, compliance) and internalizing stakeholder interests, and a relatively small, coherent and insulated executive board that determines corporate strategy and executes it. But I would be the first to admit that on this last topic- implications for the board's strategy role and the board's ideal structure- far more research by specialists in board dynamics is needed.

I. *Introducing the main themes of this Chapter: There's a tension resulting from contradictory regulatory choices in company law in the EU*

This Chapter focuses on the use of shareholder activism tactics and strategic litigation by NGOs that represent the interest of external stakeholders in order to try and influence corporate ESG policies. Belgium has seen little shareholder activism and even less ESG activism, with a few notable exceptions discussed below and in other chapters of this book. For that reason, this Chapter focuses on developments in France, Germany, the Netherlands and at the EU level. But the increased activity and leverage over corporate policies of organisations acting in the interest of external stakeholders rather than (current) shareholders, is a phenomenon that surely will also affect Belgian listed companies, at the latest when Belgian companies will become subject to sustainability due diligence legislation.

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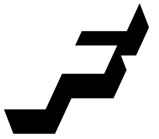

Shareholder activism is a prominent feature of the European corporate landscape[2], and will not go away anytime soon. It takes many forms[3] and uses a variety of tactics. In Europe, private activism and engagement probably play a more significant role, whereas public activism is more common in the US.[4] At the level of tactics, it is clear a that shareholder proposals play a more limited role in Europe than in the US.[5] Over the past few years – essentially since about 2016 – ESG considerations have become prominent in corporate life, also with regards to strategy development, disclosure practices, and funding as part of the sustainable finance movement that has had a huge impact on the investment fund and asset management industry and on bank lending.[6] This is also reflected in the rise of ESG shareholder activism.[7] The new

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[2] Just consult the annual Lazard reports, e.g. *Lazard's Review of shareholder activism 2022* at https://www.lazard.com/research-insights/lazard-s-review-of-shareholder-activism-2022/. The Lazard report on the first quarter of 2023 saw more new activist campaigns than ever in Europe (21) , but with a heavy concentration on the UK and Germany, and a slight decline of activism in the US, see https://www.lazard.com/research-insights/shareholder-activism-update-early-look-at-2023-trends/.

[3] E.g. defensive versus offensive, private versus public. The distinction between defensive and offensive activism is taken from J. Armour and B. Cheffins, "The rise and fall(?) of shareholder activism by hedge funds", *Journal of Alternative Investments* Vol. 14 (3), 2012, 27.

[4] On private activism in Europe*, see e.g.* M. Becht, J. Franks and C. Mayer, "Returns to shareholder activism: evidence from a clinical study of the Hermes UK Focus Fund", *Review of Financial Studies* Vol. 22 (8), 2009, 3093-3219; G. Strampelli, "Private Meetings Between Firm Managers and Outside Investors: The European Paradigm", *Hastings Business Law Journal* 2022, 242; M. Becht, J. Franks and H. Wagner, "The Benefits of Access: Evidence from Private Meetings with Portfolio Firms", ECGI Working Papers Series in Finance No. 2021/751, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3813948. See also J. Mccahery, Z. Sautner and L. T. Starks, "Behind the Scenes : The Corporate Governance Preferences of Institutional Investors", *The Journal of Finance* 2016, Vol. 71(6), 2906.

[5] This is discussed infra, in section IV. See already A. Taleska *Hedge Fund Activism in Europe,* (Ghent University Law School Ph.D. thesis) 2020, at 26 and 38 and A. Taleska, "Shareholder proponents as control acquirers : a British, German and Italian perspective on the regulation of collective shareholder activism via takeover rules" *EBOR*, *19*(4), 2018, 797–851.

[6] It would be futile to try and cite the enormous literature at the intersection of ESG and corporate law. I presented a broad introductory overview of ESG policy developments and developments in corporate and disclosure regulation and corporate governance practices in the EU in H. De Wulf , "ESG en vennootschapsrecht: innig verbonden maar ook duurzaam ?" in H.J. de Kluiver (ed.) *Duurzaam Ondernemen en sustainable transport. Preadviezen van de Koninklijke Vereeniging Handelsrecht* 2021, Zuthpen, uitg. Paris, 2021, 29-103. For a brief but good introduction to the fundamentals of sustainable finance (not to related regulatory initiatives), see E. Bueren, 'Sustainable Finance', *ZGR* 2019, p. 813-875. D. Busch, G. Ferrarini & S. Grünewald, *Sustainable Finance in Europe*, Palgrave Macmillan 2021 presented the state of the art in 2020 for European regulation and policy. Important collections of essays published as books include L. Enneking et al. (eds.), *Accountability, International Business Operations, and the* Law, Routledge 2020, 301 p; B. Sjafjell & C. Bruner, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, Cambridge University Press 2020, 737 p.; Th. Kuntz (ed.), *Research Handbook on Environmental, Social, and Corporate Governance*, Edward Elgar, forthcoming 2023, and in Dutch and French and focusing on European, Dutch and Belgian developments H.J. de Kluiver (ed.) *Duurzaam Ondernemen en sustainable tran sport. Preadviezen van de Koninklijke Vereeniging Handelsrecht* 2021, Zuthpen, uitg. Paris, 2021, 287 p. and A. van Hoe and G. Croisant, *Recht en Duurzaamheid/Droit et durabilité*, Brussels, Larcier, Intersentia, 2022.

[7] See, e.g. as a general introduction W.-G. Ringe, "Investor-led Sustainability in Corporate Governance", *Annals of Corporate Governance* 2022, 93-151 or H. De Wulf and L. Van Marcke, "Duurzaamheid en vennootschapsrecht : ESG-aansprakelijkheid en de invloed van institutionele aandeelhouders" in A.

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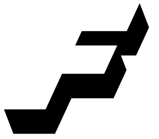

aspect of this type of activism is not governance activism (focusing on such things as board composition, executive pay, payout policy and M&A transactions) but "E&S" (environmental and social) activism. E&S activism focuses, for example, on the impact firms have on global warming, their environmental track record, and their respect for the human rights of their workers and of local communities in developing countries affected by the activities of multinational corporations throughout their value chain.[8] LIn France (2017) and Germany (2023) global supply chain due diligence legislation[9] is already effective, and this will be supplemented by the EU's Corporate Sustainability Due Diligence Directive (CSDDD).[10] Such due diligence legislation will – and in the case of the French legislation, already has[11] – created leverage for non-shareholder stakeholders, mostly climate and human rights NGOs, to influence corporate strategy, a major theme of this chapter.

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van Hoe and G. Croissant (eds.) *Droit et Durabilité/Recht en Duurzaamheid*, Larcier/Intersentia, 2022, pp. 349–431; focusing on the European regulatory framework: G. Balp and G. Strampelli, "Institutional investor ESG engagement: the European experience", 23 *EBOR* 2022, 869-904; Describing the global stewardship ecosystem: T. Bowley and J. Hill, "The global stewardship ecosystem", 7 October 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4240129; focusing on the forms of collaboration between ESG shareholder activists: P. Mülbert, A. Sajnovits, "Emerging ESG-Driven Models of Shareholder Collaborative Engagement", ECGI Working Paper Series in Law No. 668/2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4297434. See also A. Christie, "The Agency Costs of Sustainable Capitalism" 55 *UC Davis Law Review* 2021, 875-954 on different actors in ESG activism and how they "support" each other.

[8] For instance, farmers who are expropriated to make room for palm oil or soybean plantations or whose crops are damaged by oil leak pollution.

[9] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, inserted into Art. L225-102-4 Code de commerce ; Gesetz über die unternehmerischen Sorgfaltsplichten in Lieferketten, *Bundesgesetzblatt* Jahrgang 2021 Teil I Nr. 46, 22 July 2021, 2959.

[10] The officially published EU Commission proposal of 23 February 2022 is Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, available at www.ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en. My analysis of the draft in this Chapter is based on later versions, namely a comparison of the "general approach" text adopted by the European Council on December 1, 2022 and the text voted by the JURI committee of the European Parliament on April 24 2023 (documents on file with Ghent University law school). After this text had been written, the plenary session of the European Parliament adopted what is in effect its final negotiation version ("first reading" text) on June 1, 2023, see https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.These texts will be the basis for further negotiations ("trilogue") between Commission, Parliament and Council, with a view to the final adoption of the Directive, probably in the first half of 2024.
There is a wealth of blogposts (see especially the series on the Oxford Business Law blog) on the draft CSDDD; from the article-length literature, I want to draw special attention to the special issue (exceptionally in English) of Dutch law review *Ondernemingsrecht*, 2023/5, completely devoted to the draft CSDDD, with excellent contributions by Hijink, Lambooy, Robé, Garcia Nelen, Lafarre, Lieverse, Lokin, Lennarts, Pacces, Olaerts and Dumoulin. See also H.-J. de Kluiver, "Towards a framework for effective regulatory supervision of sustainability governance in accordance with the EU CSDD Directive. A comparative Study", forthcoming *ECFR* 2023 (on file with the author).

[11] See infra , section VI.2.b., where I discuss the 10 court cases and 5 additional "notices of breach" that have been launched by NGOs against French corporations, based on the "Vigilance Act".

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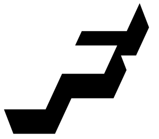

But while shareholder activism is here to stay, it has never been loved by policymakers at the level of the EU. Influential voices within the European Parliament and the European Commission at least until recently seemed to believe that most activism is marred by short-termism.[12] While it is more likely that any form of short-term pressure European companies might be under is caused by leveraged private equity acquisitions – a topic that after 2000 has remained under-researched by economists[13]- EU policy-makers preferred to try and create a counterbalance against activism by exhorting, through SRDII[14], longer-term shareholders including index and pension funds to increase their shareholder engagement[15], understood as major longer term investors talking to corporate leadership (top management and the board) about the long-term strategy of companies. Shareholder engagement is also encouraged by the

[12] See considerations 2 and 15 of SRD II, where combating short-termism is explicitly mentioned as a goal of the shareholder engagement rules in SRD II. See also C. Van der Elst, "Shareholder engagement duties : the European move beyond stewardship" in H. Birkmose en K. Sergakis (eds.), *Enforcing shareholders' duties*, Cheltenham, Edward Elgar, 2019, 7. The excessive fear of the EU Commission about alleged shareholder short termism was also apparent from, among many other documents, its April 2011 *Green paper: The EU corporate governance framework*, COM(2011) 164, at 13 , and from its commissioning of and its first reactions to the notorious report by EY, *Study on Directors' Duties and Sustainable Corporate Governance. Final Report*, July 2020, available at https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en. For criticism of the EY report that was as convincing as it was scathing, see M. Roe, H. Spamann, J. Fried & Ch. Wang, 'The European Commission's Sustainable Corporate Governance Report: A Critique', 14 October 2020, available at https://ssrn.com/abstract=3711652 and ECLE (European Company Law Experts) available at https://europeancompanylawexperts.wordpress.com/publications/european-commission-study-on-directors-duties-and-sustainable-corporate-governance/.

[13] An overview of research mainly from the 1980s and 1990s some of which focused on whether private equity gains are made at the expense of other stakeholders is S. Kaplan and P. Strömberg, "Leveraged Buyouts and Private Equity" *Journal of Economic Perspectives*, Winter 2009, 121-14, but after 2000 – in general, a boom era for private equity- economists seem to have focused on studying e.g. the question whether PE generates acceptable returns for other investors than general partners (for whom PE is a "billionaire factory", see L. Phalippou, "An Inconvenient Fact: Private Equity Returns & The Billionaire Factory" (June 10, 2020). available at: https://ssrn.com/abstract=3623820), as well as the contracting practices of private equity investors, but I can find very little empirical research on the impact of private equity M&A on other stakeholders than shareholders.

[14] The second, amended version of the Shareholder Rights Directive: Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] *OJ* L132/1-25.

[15] See esp. art. 3g of SRDII (previous footnote). It is true that the Directive contained no incentives for institutional investors or asset managers to actively engage with investee companies, nor did it change their business model in order to encourage shareholder engagement. But one can hardly doubt that shareholder engagement by institutional investors other than activist hedge funds has increased over the past ten years or so. On shareholder engagement and the policy considerations behind SRDII in this regard, see L. Van Marcke, "Shareholder engagement (SRD II) : zin en onzin : aandeelhoudersbetrokkenheid als regelgevend antwoord op bekommernissen van short-termism", *TRV/RPS* 2021, p. 829–856. On engagement generally see the country and comparative reports in H. Kaur, Ch. Xi, C. Van der Elst and A. Lafarre (eds), *Shareholder Engagement and Voting*, Cambridge University Press, 2022, 559 p.

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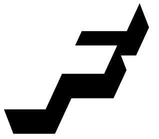

current versions of European corporate governance codes, which have moved from promoting a shareholder value model to encouraging a stakeholder orientation for companies and their boards.[16] This came on top of stewardship codes[17], which have been prominent in some -but by no means all- European countries[18] like the Netherlands[19] (with its huge pension funds industry)and the UK[20]. These stewardship codes encouraged investment funds to act as investment stewards, which essentially means they try to take into account the preferences of their investors and transmit these to the companies they invest in through shareholder engagement practices.

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[16] For the stakeholderist and sustainability flavor of the new, December 2022 version of the Dutch Corporate Governance Code, see *e.g.* M. van Olffen, "De corporate governance code 2022: een duurzame actualisatie?", *Ondernemingsrecht* 2023, 319 ff. For the stakeholderist evolution in the UK corporate governance code, see B. Cheffins and B. Reddy, "Thirty Years and Done – Time to Abolish the UK Corporate Governance Code (June 9, 2022). European Corporate Governance Institute - Law Working Paper No. 654/2022, available at https://ssrn.com/abstract=4132617. For the sustainability-orientation in the 2022 version of the German Corporate Governance Kodex, see S. Mock and P. Velte, "Nachhaltigkeit im (neuen) Deutschen Corporate Governance Kodex", *Die Aktiengesellschaft* 2022, 885. For France, see the 2022 *Code de gouvernement d'entreprise des sociétés côtées*; section 1.1 states that the board should promote long term value creation, taking into account the social and environmental impact of the company. This is in fact a mere copy of article 1833 of the Civil Code as amended by the 2019 "Loi Pacte" (Loi nr. 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises), containing the definition of the company's interest under French law.

[17] For an analysis of shareholder stewardship, see D. Katelouzou and D. W. Puchniak (eds.), *Global Shareholder Stewardship*, Cambridge University Press, 2022, 520 p. For a typology of stewardship codes worldwide (differentiating between different types of stewardship that are stressed in different codes), see A. Klettner, "Stewardship codes and the role of institutional investors in corporate governance: An international comparison and typology" *British Journal of Management*, Vol. 32, 2021, 988–1006.

[18] The stewardship code developed in 2011 and revised in 2018 by EFAMA, the European Federation of Asset Managers, served as a model for several national asset management organisations in Europe, see https://www.efama.org/sites/default/files/files/EFAMA%20Stewardship%20Code_FINAL.pdf. See on why stewardship codes may be less important or even be a "legal transplant misfit" in jurisdictions outside the US and UK where controlling shareholders are prevalent and institutional investors own a smaller percentage of shares in listed companies, E. Lim, and D.W. Puchniak, "Can a Global Legal Misfit be Fixed? Shareholder Stewardship in a Controlling Shareholder and ESG World" in D. Katelouzou and D. W. Puchniak (eds.), *Global Shareholder Stewardship*, Cambridge University Press, 2022.

[19] The first Dutch Stewardship Code -the official title is "Responsible and Engaged Shareholdership"- was adopted in 2018 by Eumedion, a private organization "that represents the interests of institutional investors in the field of corporate governance and sustainability. All institutional investors that hold shares in Dutch listed companies can become a member of Eumedion" (https://en.eumedion.nl/About-Eumedion.html). The Dutch pension funds, some of the largest in the world, are important and influential members of Eumedion. For the text of the stewardship code, see https://www.eumedion.nl/nl/public/kennisbank/best-practices/2018-12-servicedocument-nederlandse-stewardship-code.pdf and see a brief discussion in D.A.M. Melis, "De Nederlandse stewardship code", *Maandblad voor Ondernemingsrecht*, 2019, 128-135.

[20] See P. Davies, "The UK Stewardship Code 2010-2020. From Saving the Company to Saving the Planet?", in: S. Grundmann/H. Merkt/P.Mülbert (eds.), *Festschrift für Klaus J. Hopt zum 80. Geburtstag*, 2020, pp. 131-150, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553493.

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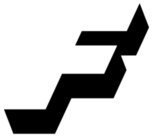

I believe two forms of shareholder activism that are important in Europe have not received enough scholarly attention: shareholder activism by NGOs[21]; and the usually discreet, private (behind closed doors) defensive activism -in fact: engagement- by shareholder and retail investor advocacy groups such as Dutch VEB, French ADAM or Belgian Deminor. These are not advocacy or industry groups of the asset management industry, such as Italian Assogestioni or indeed Dutch Eumedion, but organisations that try to defend the interests of retail and minority investors in listed companies, for profit (as in the case of Deminor) or not for profit. They do so through engagement with company management, but if they feel it is necessary in the interest of their members, also through more public shareholder activism and litigation. However, I keep a closer look at these organisations for future research and in this article focus on NGOs' ESG activism.

Indeed, NGOs that represent non-shareholder stakeholders or even non-stakeholders ("society at large"), but that have acquired a symbolic number of shares in listed companies, increasingly use shareholder activism tactics to influence corporate ESG policies. At the same time, some investment funds and asset managers engage in forms of shareholder activism that cannot readily be explained by the pursuit of financial returns, but only by a desire to do good, i.e. by a desire to influence corporate ESG policies to make them more ethical or climate-friendly, which (following Armour/Enriques/Wetzer)[22] I will call "halo activism".[23]

In continental Europe, this NGO and halo activism clashes with corporate law rules that squarely put the competence to determine corporate strategy with the board.[24] This is

[21] Non-governmental non-profit groups. Some of these NGOs buy a few shares in the companies they target in their campaigns, or transform themselves into "shareholder advocacy groups", but that should not distract from the fact that they remain e.g. climate or social activists, whose primary goals have nothing to do with defending shareholder interests. Organisations like As You Sow or Follow This only acquire shares for instrumental reasons, i.e. in order to be able to use shareholder activism tactics to pursue their campaigns, not as an investment.

[22] I believe the term "halo activism" was coined by these authors in a presentation they gave about their paper J. Armour, L. Enriques, and T. Wetzer, "Green Pills: Making Corporate Climate Commitments Credible" (December 1, 2022). European Corporate Governance Institute - Law Working Paper No. 657/2022, available at: https://ssrn.com/abstract=4190268 even though the paper itself does not use the expression. It was in any case from listening to that presentation that I got the expression.

[23] For the US, R. Tallarita, "Stockholder Politics", 73 *Hastings Law Journal*, 2022, 1697-1760 has produced an important empirical study on shareholder proposals on ESG matters that cannot readily be explained by the pursuit of an investment return. In the Article, Tallarita makes one of the points that I will also make here, namely that boards subject to such "stockholder politics" are in a difficult spot, as they do not get any guidance on how to rationally rank the conflicting preferences of various stakeholders.

[24] On the limits of the general meeting's powers concerning corporate strategy in various Western-European jurisdictions, and the implications this has for shareholder proposals, see also S. Cools, "Climate Proposals: ESG Shareholder Activism Sidestepping Board Authority" (March 2, 2023), forthcoming in Thilo Kuntz (ed.), *Research Handbook on Environmental, Social, and Corporate Governance*,

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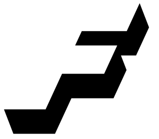

especially the case in the Netherlands and Germany, two stakeholder-oriented company law jurisdictions with a dual board system[25], where this exclusive *executive* board competence for strategy is interpreted radically, and in the case of the Netherlands is also protected by court decisions (in Germany, a first case is pending at the time of writing)[26]. This means it is difficult for shareholders, including NGOs and halo activists, to submit (ESG) shareholder proposals, even for non-binding votes or even mere discussion.

This in turn drives NGOs representing stakeholders to strategic litigation about corporate ESG policies. This is and will be stimulated by French, German and the future EU human rights/corporate sustainability due diligence legislation. This forces companies to enter into a dialogue with stakeholders - which in practice mainly means NGOs - when developing and implementing their ESG strategy and policies. French experiences in the 10 court cases that so far have been launched on the basis of the French supply chain due diligence Act (hereafter: "Vigilance Act") are illustrative of the potential leverage this due diligence legislation can create for NGOs and non-shareholder stakeholders[27]. Strategic litigation by NGOs is also enabled by the separate trend of changes to civil procedure legislation in some western European jurisdictions that enable general interest litigation by NGOs, originally mainly to allow for the private enforcement of human rights and environmental rules and concerns.[28]

Edward Elgar, 2023, available at https://ssrn.com/abstract=4377030. But I believe Cools attaches too much importance to the legal rule (common to most European jurisdictions) that boards have all decision-making powers that are not expressly assigned by statute to other corporate bodies, especially the general meeting of shareholders. Deducing from this uncontested rule that the general meeting should not try to influence corporate strategy (since statute does not allocate that power to the general meeting, and it should consequently be deemed a competence of the board) is in my view both wrong from a technical-legal perspective and blind to the realities of corporate life and the role that shareholders (especially blockholders and controlling shareholders) play in it in Europe.

[25] In the Netherlands, the one tier board has been regulated in public companies (*NV*) as of January 1 2013, as a result of the "Wet bestuur en toezicht", *Stb.* 2011, 275, thus confirming its legitimacy, even though it had always been used at a limited number of public companies. But two tier boards still dominate at large Dutch firms, certainly at listed ones and is as a rule mandatory at some of the large firms (about 500) who are subject to the "structuurregime" where the composition of supervisory boards is influenced by the works council, which also has employee representatives as members of course. In Germany a two tier board is mandatory in all public (*AG*) companies. I have to thank Harm-Jan de Kluiver and Joti Roest (both University of Amsterdam) for their insights into Dutch corporate governance, certainly not only on this point of board structure, but the usual disclaimers most emphatically apply.

[26] Discussed *infra*, section V.

[27] French scholar T. Sachs has written that the French Vigilance Act indicates a move away from self-regulation of companies as far as their corporate social responsibility is concerned, to a system of "co-regulation by stakeholders", see T. Sachs, "Loi sur le devoir de vigilance des sociétés-mères et donneuses d'ordres,: les ingrédients d'une corégulation" *Revue du Droit de Travail* 2017, 380.

[28] See M. Kruithof, "Privaatrechtelijke facetten van algemeenbelangacties bij de justitiële rechter" *Tijdschrift voor privaatrecht*, Vol. 59(1–2), 2022, 21–129. In addition to a technical description of general interest litigation in Belgium, this article also contains an analysis of the appropriateness and suitability of tort-based general interest claims that has general validity. See also the other reports of the annual meeting of the Association for the Comparative Study of Dutch and Belgian Law published in the same

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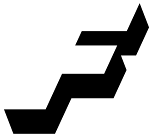

Taken together, these trends make life more difficult for boards at listed or large companies. In the recent past in Europe, they were left relatively free to approve or determine corporate strategy at the suggestion of the top executives who had initially developed that strategy (though clashes about strategy sometimes occurred between non-executive board chairs and the CEO); or at least boards could implement a strategy the major lines of which were to a large extent designed by one coherent stakeholder group only, namely controlling shareholders. These days, boards increasingly are under pressure from various sides when determining corporate strategy, also from NGO shareholder activism and strategic litigation. This sometimes -in particular when activists try to influence a company's climate strategy- puts boards in the same spot as politicians who have to balance incommensurable competing interests and values and cut to a decision, unguided by any framework that would allow a rational ranking or balancing of these competing interests.[29]

On top of this potential "politicization" of boards comes their increasing transformation from potentially decisive strategy-decisionmakers and setters of firm culture into oversight bureaucracies. The monitoring function of the board these days entails at least three rather different types of activity, namely *selecting* and remunerating *top executives* and setting budgets for their departments; offering *strategy* advice and in the end actually deciding on the major lines of the company's strategy; and finally *oversight* of top management with a view to the development of a sound internal control, risk management and corporate compliance system. I argue that the increasing importance that has been attached to the board's oversight function since the 1990s, as reflected in board composition (more independent directors) and structure (more committees, including these days sustainability or ESG committees) has led to a balkanization of one tier boards, making a mockery of the idea that this is a coherent small body that takes collegial consensus decisions and where everybody has the same responsibilities and represents only the corporate interest, not the interests of a specific stakeholder group. I venture to suggest that these developments - where the board's oversight duties threaten to overwhelm or at least decrease the efficiency of its other monitoring functions and in particular its role in strategy-setting- are perhaps better handled by dual board systems than by one tier boards. Dual board systems allow for a relatively clear separation between the "political" supervisory board where oversight functions are concentrated and an executive board that is left relatively free to determine corporate strategy,

volume of *TPR* namely A. Wirtgen on the compatibility of general interest litigation for injunctive relief with the constitutional balance of powers (*trias politica*), and and R. Schutgens/ J. Sillen on general interest litigation in the Netherlands. On Germany, see from a normative perspective e.g. B. Hess "'private law enforcement' und Kollektivklagen. Regelungsbedarf für das deutsche Zivilprozessrecht?" *JZ* 2011, 66-74 and H. Roth, "Private Rechtsdurchsetzung im Zivilprozess", *JZ* 2016, 1134-1140. An excellent comparative law introduction to the large literature on the constitutionality (mainly from a *trias politica*-perspective) of climate litigation is F. Lange and M. Lippold, "Höchstrichterliche Klimaentscheidungen und Demokratieprinzip -eine rechtsvergleichende Betrachtung", *JZ* 2022, 685-694.

[29] A point also stressed by R. Tallarita, "Stockholder Politics", *Hastings Law Journal* 2022, at 1733-34.

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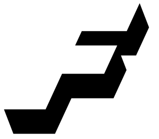

taking into account but not being bound by the preferences expressed by the supervisory board that is in turn exposed to shareholder but also other stakeholder pressures. The supervisory board thus somewhat insulates top executives from stakeholder pressures while leaving the executives, as a coherent small group, to get on with strategy development and only intervening when things go seriously wrong.

An increased attention at board level for ESG concerns and increased shareholder and stakeholder engagement of boards are in my opinion both inevitable and as such desirable evolutions. The leverage of stakeholder NGOs over corporate ESG strategies has been and is increasing. This does not only follow from increased shareholder activism. The regulatory framework (hostility in some major jurisdictions to shareholder proposals, while legislation on sustainability due diligence and on general interest litigation facilitates stakeholder litigation) is leading to ESG litigation against listed companies. But courts, and boards acting under pressure from litigation that is aiming to change corporate strategies, are not suitable to help companies develop a coherent ESG strategy.My feeling therefore is that continental European policymakers should consider enabling shareholder resolutions as a channel for dialogue between stakeholders and companies. Even though this will indeed lead to an increase of "political" shareholder proposals, it is a better way of involving stakeholders than driving them to litigation. Admittedly it is highly uncertain that such a regulatory strategy would stop undesirable ESG strategy litigation in its tracks. My final recommendation or rather hope therefore is that the CSDD Directive that will probably be adopted shortly after the publication of this book, will not copy the French enforcement model that encourages NGOs to litigate against companies about their ESG strategies.

The rest of this chapter is organized as follows. Section II discusses three court cases that neatly illustrate the trends and topics of this chapter. Section III explains how as part of the surge in ESG shareholder activism, some NGOs have turned themselves into shareholder activists, while some investment funds, mostly pension funds, engage in "halo activism", namely activism that is inspired by E&S considerations but cannot be explained by the pursuit of a financial return. Section IV, based on Michael Bakker's research, offers empirical data on the use of E&S shareholder proposals in Europe (as well as in the US, where Roberto Tallarita has done important research on this[30]). Section V explains that in the Netherlands and Germany, and to a lesser extent France, the dominant opinion is that shareholder proposals that touch upon a corporation's strategy cannot be put on the general meeting's agenda, because that would violate the executive board's exclusive competence to determine corporate strategy. Section VI explains how sustainability due diligence legislations has created leverage for NGOs that represent stakeholder interests to influence corporate strategies and how some of these NGOs engage in strategic litigation, especially on climate issues. Section VII argues that the combination of NGO shareholder activism, litigation about corporate climate strategies and enforced stakeholder dialogue as a result of due diligence legislation, threatens to

[30] R. Tallarita, "Stockholder Politics", *Hastings Law Journal* 2022, 1697-1760.

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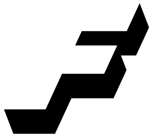

politicize boards in Europe, and that that is undesirable. At the same time, however, it argues that German and Dutch law should evolve to allow shareholder proposals that touch upon strategy, as long as they are not too prescriptive. Section VIII argues that installing an extra ESG committee within one tier boards, and/or designating a lead ESG director, could be detrimental to the effectiveness of the boards role in offering strategic advice. Section IX concludes.

II. Three court cases to illustrate current trends

1. ClientEarth v. Shell directors

Around 9 February 2023 ClientEarth, an NGO, filed a derivative action under Part 11 of the UK Companies Ac with the English High Court against eleven directors of Shell plc.[31] Substantively, the plaintiffs claim that the Shell directors breached their fiduciary duties to the company because, allegedly, the energy transition strategy that the directors developed and approved for Shell is "fundamentally flawed". ClientEarth was supported by several investment funds[32] who did not, however, become joint plaintiffs. Collectively, ClientEarth and the funds hold about 12 million shares in Shell, amounting to 0.17% of the total number of Shell shares. Under English law, there is no ownership threshold for bringing a derivative claim, contrary to what is the case in many continental European jurisdictions[33]. But a UK court must give permission for the case to proceed.[34]In the Netherlands, to which Shell also has

[31] Information on the case is available at ClientEarth's website, esp. the FAQ on the case, see https://www.clientearth.org/media/lf4mcv3v/shell-directors-case-faq-2023.pdf. For a good introduction to the case, see Shearman & Sterling, "Personal liability of directors for climate strategy: landmark case against energy company board", 27 February 2023, available at https://www.shearman.com/en/perspectives/2023/02/personal-liability-of-directors-for-climate-strategy--landmark-case-against-energy-company-board.

[32] These funds included the British governmental pension fund Nest UK, Swedish state pension fund AP3 (also one of the plaintiffs in the litigation against Volkswagen discussed elsewhere in this chapter), Danske Bank Asset Management and Danica Pension. See B. van Dijk, "Shell bestuurders voor rechter gesleept om klimaatbeleid", *Financieel Dagblad* 10 February 2023.

[33] On the derivative action in the UK, see P. Davies, S. Worthington, E. Micheler, *Gower's Principles of Modern Company Law*, Londen, Thomson Reuters, 2016, 591-613. On the ownership thresholds as one of the reasons for the raeness of derivative actions in Europe, see the still valid analysis in M. Gelter, " Why do Shareholder Derivative Suits Remain Rare in Continental Europe?", 37 *Brooklyn Journal of International Law*, 2012, 843-892.

[34] See s. 260 (3) CA 2006. The judge in ClientEarth v Shell Plc & Ors (Re Prima Facie Case) [2023] EWHC 1137 (Ch) (12 May 2023) case (see next footnote), indicated that the substantive analysis of whether to allow the case to proceed should be based on, among other things, the follwing considerations: " s.263(2) provides that an application for permission must be refused if the court is satisfied (a) that a person acting in accordance with his duty to promote the success of the company would not seek to continue the claim (…) s.263(3) makes provisions for a number of discretionary factors which the court must take into account in reaching its decision - they are (a) whether the member concerned is acting in good faith in seeking to continue the claim (b)(…) the court is also required by section 263(4) of CA 2006 to have

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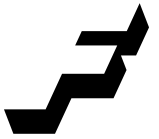

important links and where it indeed had its head office until December 2021, derivative shareholder suits against directors are next to impossible and in any case not enabled or regulated in statute, which remains completely silent on them.[35] The filing of a derivative claim in London had been preceded, about a year earlier (March 2022) by a so-called pre-action letter by ClientEarth to Shell. It cannot be seriously argued that plaintiffs in this case were pursuing damages from the defendant directors (or their insurers). The clear goal of the suit was to put pressure on Shell's directors to change Shell's corporate strategy, namely speeding up the transition into renewables and the exit from fossil fuel products.

On May 12 2023[36] The High Court of England and Wales ruled that permission to proceed with the derivative claim could not be granted. We cannot here summarize and discuss the fine and fine-grained analysis of the judge in the case. But it is clear that a central part of the judge's reasoning was based on the thought expressed by Lord Wilberforce in another case, that "*There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at*"[37] and that "*the evidence* (presented by ClientEarth -hdw)*does not engage with the issue of how the Directors are said to have gone so wrong in their balancing and weighing of the many factors which should go into their consideration of how to deal with climate risk, amongst the many other risks to which Shell's business will inevitable be exposed, that no reasonable director could properly have adopted the approach that they have. This is a fundamental defect in ClientEarth's case because it completely ignores the fact that the management of a business of the size and complexity of that of Shell will require the Directors to take into account a range of competing considerations, the proper balancing of which is classic management decision with which the court is ill-equipped to interfere*". In other words, as the judgement further explains, it is up to the board to weigh competing interests to determine what the best interest of the company requires, and as long as it acts in good faith in doing so, little judicial review is possible; ClientEarth wanted to replace the board's judgement with its own, but that is not something that a derivative action should enable.[38]The

particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter."

[35] See the policy-oriented analysis in M. J. Kroeze, *Afgeleide schade en afgeleide actie*, Deventer, Kluwer, 2004, 430 p; for the state of the law on derivative actions in the Netherlands, see Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II* 2009, nr. 451 and nr. 216 (on the question when negligence towards the company can be regarded as negligence specifically towards shareholders, so that these could claim damages from the director). The *Hoge Raad* has developed a jurisprudence about the limited cases where third parties including potentially individual shareholders can claim "reflective damages" from the corporation or sometimes its directors (the leading case is Poot/ABP from 1994). The most recent important case is HR 20 June 2008, *NJ* 2009/21 (Willemsen/NOM). But these cases have not created a functional equivalent of the derivative shareholder action as developed in Delaware or in legislation in the UK and (for instance) Belgium.

[36] ClientEarth v Shell Plc & Ors (Re Prima Facie Case) [2023] EWHC 1137 (Ch) (12 May 2023), available at https://www.bailii.org/ew/cases/EWHC/Ch/2023/1137.html.

[37] Lord Wilberforce in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821 at 832E/F.

[38] See also the judgement (Fn.36) at para 65 : "In short, there is substance in Shell's submission that ClientEarth's motivation is driven by something quite different from a balanced consideration as to how

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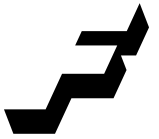

court also attached importance to the fact that ClientEarth and its supporters represented a very small part of the members (ClientEarth itself owned 27 shares in Shell) and that voting records seemed to support that a majority of members did not share the views of ClientEarth on climate policy.

2. NGO due diligence litigation against TotalEnergies

In the same month that the derivative suit against the Shell directors was filed, on February 28 2023, the civil court of first instance in Paris ruled that a claim launched against the French energy company TotalEnergies SE ("Total"), brought on the basis of the *Loi sur le devoir de vigilance* ("Vigilance Act")[39] was inadmissible.[40] Three NGOs had sued Total in relation to a

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best to enforce the multifarious factors which the Directors are bound to take into account when assessing what is in the best interests of Shell. It seems to me that ClientEarth has adopted a single-minded focus on the imposition of its views and those of its supporters as to the right strategy for dealing with climate change risk, which points strongly towards a conclusion that its motivation in bringing the claim is ulterior to the purpose for which a claim could properly be continued."

[39] "Loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", integrated into the French "Code de commerce" as articles L. 225-102-4 and-5. For information in English on the Act, including a summary of the 10 pending cases, see A. Pietrancosta, "Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives", July 20, 2022, European Corporate Governance Institute - Law Working Paper No. 639/2022, available at https://ssrn.com/abstract=4083398. For some of the first articles in French literature discussing the final version of the Act, see Ch. Hannoun, "Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017", *Dr. soc.* 2017. 806; J. Heinich, "Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : une loi finalement adoptée, mais amputée," *Dr. sociétés* 2017, Comm. 78; B. Parance, "La consécration législative du devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", *Gaz. Pal.* 18 April 2017, nº 15, p. 16: S. Schiller, "Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre," *JCP* 2017. Doctr. 622; J.-B. TAP, "La vigilance, un nouvel horizon", *RJ com*. 2018, nº 1.; G. Viney et A. Danis-Fatôme, "La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", *D.* 2017, 1610; M. Lafargue, "Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : l'entrée dans une nouvelle ère ?" : *JCP S* 2017, nº 1169. For an early analysis of the Vigilance Act by a prominent French collective of activist lawyers and attorneys, Sherpa, who work together with NGOs "to combat new forms of impunity" of corporations, see M.-C. Caillet, M.-L. Guislain, and T. Malbrand, *La vigilance sociétale en droit français*, Paris, December 2016,105 p. available at https://www.asso-sherpa.org/vigilance-societale-droit-francais. In January 2020, a government-commissioned report on the evaluation of the new legislation was published: A. Duthilleul & M de Jouvinel, *Evaluation de la mise en oeuvre de la loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, available at vie-publique.fr/sites/default/files/rapport/pdf/275689.pdf.

[40] Tribunal judiciaire de Paris, 28 February 2023, no. 22/53942. The case has already been commented upon in French scholarship, see e. g. A.M. Ilcheva,"Quelle application du devoir de vigilance après les jugements du 28 février 2023 ?", *Dalloz* issue 13, April 2023 (also available at https://www.dalloz-

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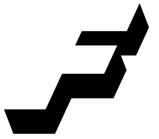

large oil exploration project in Uganda and Tanzania called "Eacop/Tilenga" that, according to the NGOs, created unacceptable environmental risks, had led to allegedly unlawful expropriation of more than 100.000 people and contributed to the suppression of freedom of speech in the two African countries. Under the applicable French legislation, large French companies have to draft and disclose a "plan de vigilance" or supply chain due diligence plan, i.e. a kind of supply chain risk management plan identifying the ESG risks they and their subsidiaries and "established business partners" create, worldwide. The plan must include structural measures to mitigate those risks and the adverse impacts the company or parts of its supply chain might create. The law gives standing to certain NGOs to first send a "notice of breach" ("mise en demeure") to companies if the company's due diligence plan does not, in the view of the NGO, meet the requirements of the Vigilance Act. If the company does not react in a satisfactory way within three months, the NGO has standing to sue the company both for an injunction but possibly also for damages based on tort. The Vigilance Act provides that plaintiffs can choose between "regular" court proceedings or summary proceedings. The case against Total had been launched in 2018, based on its due diligence plan for 2018, but after a long fight before four courts on jurisdiction[41] and a 2021 Act that changed the rules by giving exclusive competence (for the whole of France) to a Paris court for claims based on the Vigilance Act[42], the case morphed into a claim about deficiencies in the 2021 due diligence plan of Total. This claim was thrown out as inadmissible by the Paris court on procedural grounds (Plaintiffs had brought the case in summary proceedings but had failed to show the conditions for such proceedings had been met; and their complaints pertained to the 2021 "plan de vigilance" of Total, but they had not sent a notice of breach concerning that plan, only about Total's 2018 plan).

The ruling most certainly did not mean Total was immediately freed from pressure to change its climate transition strategy. At the beginning of April 2023, Dutch climate NGO Follow This announced it intended to submit a shareholder proposal to the May 26 annual general meeting of Total, calling on the company to do more to cut back its CO2 emissions by 2030 by rolling back some gas projects and moving more quickly into renewable energies.[43] The NGO in particular wanted Total to increase its efforts to cut back its scope 3 emissions, namely those caused by its clients when using Total products[44]. The shareholder proposal was said to be

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actualite.fr/flash/quelle-application-du-devoir-de-vigilance-apres-jugements-du-28-fevrier-2023#.ZGIsFqXP2Uk).

[41] The main question was whether a regular civil court or rather a commercial court was competent to hear cases based on the Vigilance Act. After the court of cassation had decided that plaintiffs suing a commercial company like Total could choose whether to bring such a claim before a commercial or a civil court (see Cass. (fr.) Com. 15 December 2021, n° 21-11.882, *D.* 2022, 826), the French legislator intervened with a 2021 act giving exclusive competence to hear such cases to the Paris civil court of first instance.

[42] See Loi n° 2021-1729 22 December 2021 "pour la confiance dans l'institution judiciaire" codified in Code Judiciaire art. L. 211-21.

[43] Follow This had submitted such shareholder proposals at TotalEnergies in the two preceding years as well. The first time Total refused to put the proposal on the AGMs agenda, arguing it encroached on the board's competence to determine corporate strategy, see the discussion below at V.3.

[44] S. White "Investors to pressure TotalEnergies over climate goals", *Financial Times* April 6 2023.

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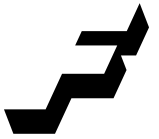

supported by investors holding about 1% of Total.[45] The vote on the proposal would not be binding. Interestingly, the founder of Follow This declared: "The strategy is totally up to the board", continuing "We're dealing with companies[46] that don't want to change. Of course, they want to invest a bit in renewable energy but the bulk is in fossil fuels and they want to remain oil and gas companies as long as possible".[47] This statement takes away any doubt that the aim of Follow This was to influence Total's strategy. Would the Dutch founder of Follow This have been familiar with the ruling from the Dutch Hoge Raad ruling that corporate strategy is the exclusive competence of the executive board, and not of the general meeting?

3. Boskalis/Fugro: the Dutch don't like shareholder proposals

Indeed, several years earlier, on April 20 2018, the Dutch *Hoge Raad*[48] had issued a ruling ("Boskalis/Fugro") that is of great importance for shareholder activism and engagement at Dutch companies.[49] The court ruled that since Dutch law vests the exclusive competence to decide on "strategy and corporate policy" in the executive board[50], the general meeting of shareholders cannot be forced to organize a vote, not even a non-binding vote,[51]on matters of corporate strategy. The case arose as a result of the attempt of Boskalis to acquire Fugro through a public takeover bid. As is not uncommon in Dutch companies, the Fugro group of companies had three types of take-over defenses in place, one including the award of call-options to a Curaçao-based foundation ("stichting") that gave that foundation a conditional claim to "anti-takeover preference shares"[52]. Boskalis wanted the Fugro boards (executive and supervisory) to dismantle this anti-takeover mechanism. In order to put pressure on the boards to do so, Boskalis (which at one stage owned 28% of Fugro) wanted to submit a shareholder resolution to Fugro's general meeting calling on the boards to do away with the mechanism. Boskalis desired a vote on that resolution, as a way of "sounding out" the other shareholders. Since Boskalis was aware that under Dutch law installing or removing such a poison pill-like

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[45] That is, they issued statement of support before the proposal was officially launched. In an important development, ISS declared it would support the Follow This proposal around May 12 2023, see S. White "Proxy adviser backs climate activist shareholder proposal at Total", *FT* 15 May 2023.

[46] Follow This would launch similar campaigns at BP, Shell, Chevron and ExxonMobil in the 2023 AGM season, the shareholder proposals to be submitted by Follow This can be consulted at www.follow-this.org/resolutions-2023/ (last consulted on April 6 2023).

[47] Ibidem.

[48] Highest court in the Netherlands, court of cassation; the Netherlands do not have a constitutional court.

[49] I must thank the various speakers at the conference on "Shareholder activism in the Netherlands" on 9 February 2023 jointly organized by Clifford Chance Amsterdam and Radboud (Nijmegen) University's Van der Heijden Institute. Without this conference, my insight into Dutch law and attitudes among the Dutch legal and investor community about the role of shareholder proposals in Dutch governance would be far smaller.

[50] Although this is no longer mandatory -as it was until 2001- most large or listed Dutch companies operate with a dual board system, with an executive board ("raad van bestuur") and a supervisory board ("raad van commissarissen").

[51] US corporate law lawyers would call this a "precatory" vote.

[52] In Dutch: "preferente beschermingsaandelen".

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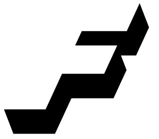

mechanism was a competence of the board, not of the general meeting, it "merely" asked for a non-binding vote. Fugro refused to organize any form of vote on the resolution, indeed refused to add the resolution to the general meeting's agenda. Before the courts, Boskalis argued that its proposed shareholder resolution concerned the structure and governance of the company, and not its strategy or corporate policy. It also argued that Dutch legislation had wanted to correctly implement the EU's Shareholder Rights Directive, which in the reading of Boskalis allowed 3% shareholders in listed companies to put a resolution on the agenda and to the vote, even in cases where the general meeting was not competent to take a binding decision on the matter broached in the resolution.

The Hoge Raad ruled that insofar as a resolution pertains to matters of governance and company structure on which the board has legal competence to decide, these are matters of strategy and corporate policy. Unless the companies act or the articles provide otherwise for specific such matters, the general meeting is free to discuss such matters, but the company (board) cannot be forced, if it does not want to, to submit such matters to a vote at the general meeting, even if this vote is presented as non-binding or as a mere poll of shareholder opinion. All the more so since on matters of strategy and policy, the board has no duty to consult shareholders or the general meeting before deciding on these matters and thus deciding what is "in the interest of the company and the firm connected to it"[53] (as is the standard expression under Dutch law of what should guide the board in all its decisions). The board has to justify its corporate strategy to the shareholders at the annual general meeting, and strategic matters may be discussed at the general meeting, including by allowing shareholders to pose questions to the board about strategy, but that does not entitle 3% (or more) shareholders to demand a vote at the general meeting on a strategic matter like dismantling anti-takeover defenses, not even a non-binding vote.

These three anecdotes and court cases illustrate at least three points: NGOs are litigating against companies and even their directors in order to influence corporate strategies, especially related to corporate climate policies. Such litigation is enabled by the French sustainability due diligence legislation. Some NGOs also buy a few shares in order to enable them to use shareholder rights to pursue their campaigns against companies, including shareholder activist tactics such as harassing the board with questions during the AGM or tabling shareholder proposals. In some jurisdictions like the Netherlands the latter tactic (shareholder proposals) is almost completely unavailable because courts have ruled it is

[53] In Dutch: "De vennootschap en de met haar verbonden onderneming"; standard formula, used among other instances in the leading "Cancun" ruling of the Hoge Raad (HR 4 april 2014, *NJ* 2014/286, ann. P. van Schilfgaarde, *Ondernemingsrecht* 2014/101, ann A.F.J.A. Leijten) on the meaning of the duty to act in the corporate interest. Dutch legal professionals see the reference to the "company" as a reference to (the interests of) the whole body of shareholders, whereas the reference to "the firm" is to be read as a reference to (the interests of) all stakeholders, including esp. employees; there can therefore be no doubt that under Dutch law, the interest of the company that the board should serve is broadly construed or, in American parlance, the Netherlands have a stakeholder conception of the board's fiduciary duties.

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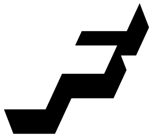

incompatible with the exclusive right of the executive board to determine a company's strategy. Oddly, this argument is not invoked against climate litigation that is as much about corporate strategy as shareholder proposals.

III. *From shareholders pursuing ESG goals to NGOs becoming shareholder activists*

1. Traditional and ESG shareholder activism

Shareholder activism and shareholder engagement come in many shapes and sizes. The chapter by Tom Vos in this book provides a taxonomy of the major types of activism, while Anna Christie's chapter analyzes the ESG shareholder activism landscape. While it is debatable whether index funds and other passive investors get involved in shareholder engagement to a sufficient level[54] in view of the interests of their own investors and their fiduciary duties towards them[55], it cannot be doubted that engagement by these investors has increased over the past few years, especially on E&S matters rather than on traditional governance matters. Pension funds seem to play a bigger role than other passive funds, and based on anecdotal press reports, one gets the impression that pension funds of religious orders play an outsize role.[56] The NGOs and halo activism campaigns discussed in this chapter are part of a diverse ESG stewardship ecosystem, as beautifully described by Bowley and Hill[57]. It is also important to realize that much of it is part of a collaborative effort that is not coordinated but is stimulated by various global or Europe-wide advocacy organisations that represent institutional investor networks. These networks and collaborative efforts have been most systematically described by Mülbert/Sajnovits[58]. Of course, traditional activists, such as

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[54] For the sceptical view, see L. Bebchuk and S. Hirst, "Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy", *Columbia Law Review* 2019, 2029-2146. The case for the defense is made in E. Rock & M. Kahan, 'Index Funds and Corporate Governance: Let Shareholders be Shareholders', *Boston University Law Review* Vol. 100, 2019, 1771. (arguing that index funds are active enough as engaged shareholders).

[55] On these fiduciary duties, see the references *infra* in footnote 83. Note that in the EU, art. 3h SRDII requires institutional investors to make sure that the asset manager they choose applies policies that are aligned with their own. This says nothing directly about a duty of the investment funds themselves to take the preferences of their own clients into account, but it does encourage the transmission of such preferences to the asset manager.

[56] For a more systematic confirmation of this impression at least for the US, see P. Tkac, "One proxy at a time : pursuing social change through shareholder proposals", *Federal Reserve Bank of Atlanta Economic Review*, third quarter 2006, 1-20available at https://www.atlantafed.org/ who at p. 6 discusses the role of the Interfaith Center on Corporate Responsibility (ICCR) which at the time brought together 275 "faith-based" institutional investors, often pension funds of Christian churches, and identified those as repeat players in tabling socially responsible shareholder proposals.

[57] T. Bowley and J. Hill, "The global stewardship ecosystem", 7 October 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4240129

[58] P. Mülbert and A. Sajnovits, "Emerging ESG-Driven Models of Shareholder Collaborative Engagement" (fn. 7).

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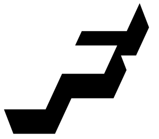

hedge funds, also often act in wolf packs[59] and rely on support by more passive investors, such as index funds[60]. But E&S activism often seems to be stimulated by all kinds of more or less permanent global or regional (e.g. EU) network organisations of institutional investors. Examples include Climate Action 100+[61], or the "Find it, Fix it, Prevent it" coalition of asset managers that have worked together to draw attention to "modern slavery" in certain branches of economic activity[62]. Non-profit advocacy groups such as British ShareAction[63] and Shareholder Commons draw attention to ESG issues at corporations, lobby regulators, try to interest investors in the topics they are concerned about and support certain forms of shareholder activism, for example by co-filing shareholder proposals. Ringe[64] points to the importance of what he labels international governance networks, including (and to name only a few of the most important ones) the Carbon Disclosure Project (CDP), the Interfaith Center for Corporate Responsibility (ICCR), and the Institutional Investors Group on Climate Change (IIGCC) [65].

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[59] E.g. J. Coffee and D. Palia, "The wolf at the door: the impact of hedge fund activism on corporate governance", *The Journal of Corporation Law,* Vol. 43, (547) at 561 and L. Strine "Who bleeds when the wolf bites ? A flesh-and-blood perspective on hedge fund activism and our strange corporate governance system", *Yale law Journal* (126), 2017, 1871.

[60] R.J. Gilson & J.N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights', *Columbia Law Review* (113) 2013, p. 863-928.

[61] www.climateaction100.org. An initiative of about 700 investors collectively managing about $ 68 trillion worth of assets and targeting the largest greenhouse gas emitters worldwide through engagement (about 166 companies that according to Climate Action 100+ are responsible for about 80% of worldwide greenhouse gas emissions.)

[62] See e.g. the 'Find It, Fix It, Prevent It' campaign (begun at the end of 2019) that brought together 56 large asset managers (with about 7 trillion assets under management) who wage campaigns against modern slavery and focused their attention in 2020 on the hospitality sector and in 2021 on the construction industry, see 'Investors urge UK building sector to check for modern slavery in supply chain', *FT* 12 April 2021. Another coalition of 22 investors led by Rathbones, a British asset manager, each year (at least in 2020, 2021 and 2022) sought out and contacted British companies who according to this coalition did not meet the requirements of the UK's (disclosure-focused and as such rather teethless) Modern Slavery Act (see *FT* Moral Money newsletter, 31 March 2021).

[63] ShareAction is a British organization registered as a UK charity and company limited by guarantee that began in 2005 as an effort to support the largest British pension scheme (the Universities Superannuation Scheme) to develop a "responsible investment policy", but then became permanent and expanded to encourage a broad range of investors to engage companies on ESG issues, and also lobbies policymakers on such issues. Its members are mainly NGOs like Oxfam, Amnesty International, the WWF, Greenpeace and some labour union organisations. On its shareholder activism support, see https://shareaction.org/unlocking-the-power/shareholder-resolutions. At https://shareaction.org/resolutions-to-watch2023 readers can find a list of ESG shareholder resolutions (not submitted by ShareAction) from the 2023 AGM season that ShareAction encourages asset managers to vote on, either for or, in case of climate and sustainability resolutions at UBS and Credit Suisse, against.

[64] W.-G. Ringe, "Investor-led Sustainability in Corporate Governance", *Annals of Corporate Governance* 2022, 93-151.

[65] See https://www.iigcc.org/our-work/. This important network in early 2023 had more than 400 institutional investors as members, managing more than $ 60 trillion of assets. The organization tries to influence policymakers, foremost at the level of the EU, on climate policy and sustainable finance, and tries to inspire members on how to be active owners, but also tries to act as an intermediary in organizing climate campaigns of groups of asset managers at portfolio companies

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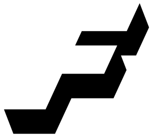

The activities of these networks are no doubt partly animated by the insight that ESG and especially climate risks are systemic and cannot be diversified away. One may therefore credibly surmise that when asset managers are invested in companies throughout the whole economy[66], they will not focus on individual companies in their shareholder engagement, but rather engage in portfolio-wide efforts.[67]

2. NGOs using shareholder activism tactics to press for ESG change at corporations

NGOs,which operate on a non-profit basis and are the proverbial civil society organisations, have become important voices in policy debates in Europe and the US since the 1980s, also through activist campaigns, including campaigns against corporations and their policies.[68]

[66] Much has, rightly, been made, of the impact of the Big Three, i.e. BlackRock, State Street and Vanguard, the largest US asset managers (see e.g. L. Bebchuk and S. Hirst, "Big Three Power, and Why it Matters" *Boston University Law Review*, Volume 102, 2022, pp. 1547-1600). While the concentration of the asset management industry is less pronounced in Europe and the US Big Three have smaller collective positions in European companies than they have in the US (see the figures in Mülbert/Sajnovits, fn.7 at p. 4, indicating that institutional ownership is significantly lower in Europe than in the US), the collective stakes of the Big Three in European companies are still very substantial: according to data in J. Fichtner & E.M. Heemskerk, 'The New Permanent Universal Owners: Index Funds, (Im)patient Capital, and the Claim of Long-termism', 2018, https://ssrn.com/abstract=2988937, at p. 18 the Big Three were the largest or 2nd shareholder in 70% of the European Stoxx50 , an index of 50 large listed European companies.

[67] See for this line of analysis, M. Condon, "Externalities and the Common Owner", 95 *Washington law Review* 2020, 1-80; J. Coffee, Jr., "The Future of Disclosure: ESG, Common Ownership, and Systematic Risk", *Columbia Business Law Review* 2021, 602; J. N. Gordon, "Systematic Stewardship", 47 *The Journal of Corporation Law*, 2022, 627-654 ; L. Enriques and A. Romano, "Rewiring Corporate Law in an Interconnected World", 64 *Arizona Law Review*, 2022, 51-87.

[68] See J.P. Doh and T.R. Guay, "Corporate social responsibility, public policy, and NGO activism in Europe and the United Sates: an institutional-stakeholder perspective", *Journal of Management Studies* 43:1, 2006, 47-73 (arguing that NGOs became influential in international affairs, including in campaigns about the corporate sector, from the 1980s onwards); the same argument (1980s as a turning point concerning NGO activism against corporations) was made in *The Economist,* "Non-governmental organizations and business: living with the enemy", 9 August 2003, 49-50. F. Briscoe, and A. Gupta, "Social activism in and around organizations", *Academy of Management Annals*, Vol. 10 No. 1,2016, pp. 671-727 is a detailed literature review of social NGO activism. The Doh and Guay article illustrates the trend with three case studies about NGO campaigns: disputes over trade in genetically modified organisms; relaxation of intellectual property protection for HIV/AIDS medications; and activism around the Kyoto Agreement on Climate Change. They cite the 1995 activist campaigns against Shell because of its sinking of the Brent Spar oil rig and because of Shell's "neutrality" when the Nigerian

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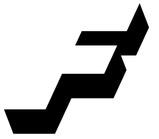

NGOs were important actors in the CSR movement, which has now morphed into the ESG movement. But these NGO campaigns did not initially take the form of shareholder activism. That has changed over the past few years, perhaps already earlier. Already in 2008, Sjöström's review article identified four scholarly articles, but none of them empirical, on NGOs turning themselves into shareholder activists.[69]

The NGOs that we have in mind in this article as actors that try to influence corporate policies and strategies, come in many varieties, but a primary distinction is between general purpose NGOs and shareholder advocacy NGOs. Oxfam or Amnesty international are examples of general purpose NGOs, but so are many organisations that focus on typical ESG topics such as climate change or workers' treatment. Shareholder advocacy NGOs by contrast have as a central goal to protect shareholder interests, usually by exercising shareholder rights, such as attending the general meeting. However, some of them, such as As You Sow, primarily use shareholder techniques, based on the ownership of a limited number of shares, to pursue goals like a reduction of CO2 emissions at corporations that have little to do with the defense of the immediate financial interests of the shareholders in a company. They pursue social goals and they acquired shares not to become a permanent stakeholder in companies, but for the purely instrumental reason that this allows them to use shareholder rights in their campaigns against companies. For that reason, it is potentially misleading to call organizations like As You Sow or Follow This "shareholder advocacy groups". Alternatively, in a way they can be seen as exponents of the shareholder welfare (as opposed to shareholder wealth)idea[70], i.e. the idea that some shareholders do not want companies to pursue the creation of shareholder value at the expense of negative externalities that damage the other interest that the person who is a shareholder has, outside the company, e.g. her interest in unpolluted air and water.

As documented below in section IV, in some countries, especially in the US and in Scandinavia, these NGOs do use shareholder proposals to pressure companies on E&S topics. As is apparent from Bakker's empirical research for Europe and Tallarita's for the US, the tactic is used by a limited number of repeat players. 70% of the NGO-sponsored E&S shareholder proposals in Bakker's study was sponsored by just three organisations, namely As You Sow, Follow This and Médac.[71]

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government executed or jailed social activists who had campaigned against Shell, as harbingers of what was then to come in the CSR area.

[69] E. Sjöström, "Shareholder activism for corporate social responsibility: what do we know?" *Sustainable Development*, 2008, vol. 16 (3), (141), 150. See also S. Waygood and W. Wehrmeyer "A critical assessment of how non-governmental organizations use the capital markets to achieve their aims: a UK study" *Business Strategy and the Environment*, 2003, Vol.12(6), 372–385.

[70] See O. Hart & L. Zingales, 'Companies should maximize shareholder welfare not market value', *Journal of Law, Finance, and Accounting* (2) 2017, p. 247-274.

[71] *As You Sow* (https://www.asyousow.org/) is a US-based shareholder advocacy group founded in 1992, whose "mission is to promote environmental and social corporate responsibility through

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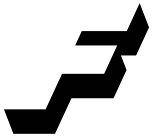

Although we have no empirical data on this, it appears a broader group of NGOs use other shareholder activism techniques than shareholder proposals, but we are still dealing with repeat players such as, prominently, the Dutch NGO Milieudefensie, which became famous for its litigation against Shell about climate issues[72]. The main tactic is asking questions to the board during the annual general meeting of shareholders (AGM),[73] which in many European countries attract a substantial number of in-person attendees. The right to ask questions in most jurisdictions also entails the right for shareholders to give speeches about the topic they want to ask a question about.[74] Indeed, it seems obvious that in Europe, including Belgium and the Netherlands, shareholder questions are far more often used as an activist technique than shareholder proposals. Indeed, one of the few (and earliest) examples of public shareholder activism in Belgium was the "Barco case".[75] This involved NGO-linked activists who had bought a few shares in this listed Belgian company and on that basis attended the AGM in order to question the board on the potential "dual use" of some Barco products. According to the activists, some Barco products could be used for military purposes and were sold to authoritarian regimes. The activists presented this as "arms production" and wanted the board to divulge more details about these "weapons exports". The chair of the general meeting after a while shut the activists down, and refused to give detailed answers. This led to litigation in which the activists claimed their right to ask questions of the board had been illegally curtailed and sued to have all the decisions of the general meeting annulled. The judgement clarified that shareholders can only ask questions related to items on the agenda of the general meeting, but that since at the AGM the mandatory management report to

shareholder advocacy, coalition building, and innovative legal strategies". *Follow This* is a Dutch NGO that focuses on the oil and gas industries and is a platform for "green shareholders" that mainly wants to submit shareholder proposals on climate and environmental matters at the oil majors. The organization wants members to buy one or a few shares in the companies it targets. See https://www.follow-this.org/. In the "about us" section, the organization says "We have the power to change oil companies from within -as shareholders". *Médac* (https://medac.qc.ca/) is a Canadian shareholder advocacy organization founded in 1995 to defend the interests of minority shareholders and make shareholder democracy work, but today engages in a broad array of ESG shareholder activism, as well as lobbying activities and awareness campaigns.

[72] https://milieudefensie.nl/aanmoediging/oproep, announced that for 2023, it would target the CEOs of 29 large polluters, including Dutch companies Ahold (supermarkets), ING (bank), Rabobank (cooperative bank, well-known as an important funder of Dutch farmers including agroindustry) and Schiphol airport, by attending the AGMs of these companies and ask the CEO about changes to the company's climate (e.g. emissions reduction) policies. The organization frequently engages in climate litigation.

[73] For the Netherlands, see A. Lafarre and C. Van der Elst, "Corporate Sustainability and Shareholder Activism in the Netherlands", in *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, B. Sjäfjell and C. Bruner (eds.), CUP, 2019, 260-275.

[74] For example for Germany, see § 131 Aktiengesetz.

[75] See P. Baert, "En hoe gaat het met uw wapenproductie? Bedenkingen bij het vraagrecht van de aandeelhouder, naar aanleiding van de Barco-zaak", *TRV* 2002, 397-403.

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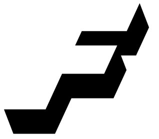

shareholders is discussed, there is room for questions about any general policy issue concerning the company; that while the chair of the meeting has the power to maintain orderly proceedings, that does not entail the power to decide that shareholders who have not yet asked a question, should not be allowed to pose it. The affair contributed to the government decision to amend the then Companies Act in order to clarify that boards may refuse to answer shareholder questions when answering them would be incompatible with the company's best interests in that it would potentially seriously harm the interests of shareholders or employees.

The use of such tactics is certainly stimulated by the lack of ownership thresholds for taking part in the AGM and asking questions. But another factor is that in some jurisdictions, shareholder proposals that touch upon a corporation's strategy are inadmissible (see section V), and it would be hard to deny that many and probably most shareholder proposals about corporate climate policies touch upon strategic matters (unless they are not about substance, but only about disclosure).

One of the best-known examples of ESG shareholder activism in Belgium concerns supermarket chain AholdDelhaize, and this was a typical example of NGOs exercising the shareholder right to question the board to pursue E&S goals at a company. Delhaize is a Belgian-American supermarket chain which was merged into the Dutch supermarket and retail group Ahold in 2015. The Delhaize campaign was waged by at least two NGOs using the right of every shareholder to ask questions during the AGM. In March 2022, Dutch environmental and climate NGO Milieudefensie published a list of 29 companies that it wanted to pressure that year to increase their climate efforts. This included AholdDelhaize[76][77]. By the 2022 general meeting, Milieudefensie had bought a few shares and used these to attend the meeting; it did not submit a shareholder proposal, but used the right that any shareholder holding a single share has to ask questions of the board, in this case whether the board wanted to commit to a 45% reduction of CO2 emissions compared to 2019 by 2030. At the April 12 2023 AGM unions protested outside the meeting room against what they perceived as "social dumping" (namely the decision by Delhaize Belgium to sell all shops and their staff to

[76] See W. Schramade, "Ahold Delhaize terecht onder druk wegens geringe milieutransparantie" *De Tijd* 17 May 2021. This opinion piece reported that Delhaize had contacted its 200 largest suppliers, asking them to detail, per product, the CO2 emissions caused by the production of each product they supplied to Delhaize, in order for Delhaize to assess its own CO2 impact.

[77] The same tactic was used at the 2023 general meeting of Dutch banking group ING. Dozens of representatives of NGO Milieudefensie repeatedly asked the same question as at AholdDelhaize (whether the company would reduce its CO2 emissions with 45% by 2030) and after the meeting's chair had put a stop to the same question being repeated, members of the Extinction Rebellion group took over and began to sing protest songs and shouted various climate slogans. One person who had announced he would sit on the ground and keep interrupting proceedings until ING stopped financing fossil fuel projects, was forcibly removed by police. See e.g. the report in *Algemeen Dagblad*, 24 April 2023, https://www.ad.nl/economie/extinction-rebellion-verstoort-vergadering-ing-met-protest-activist-gearresteerd~a5a9a4a9/. VEB, the most important association for the defense of shareholder interests in the Netherlands, complained that Milieudefensie's tactics of repeating the same question dozens of times at various AGMs gave shareholder activism a bad name and condemned this.

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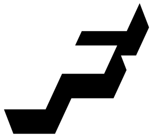

independent operators) whereas inside the room, climate activists FNV and Milieudefensie repeated the 2022 initiative. The environmental groups sent 30 members as shareholder to the AGM and these posed the same question 30 times to the CEO: would AholdDelhaize reduce the CO2 emissions of itself and its suppliers by 45% compared to 2019, whereas Ahold itself had promised a reduction of "only" 37%, and the CEO did not want to make another commitment during the AGM. In spite of a call by the chair of the meeting not to keep repeating the question, the question was (after that call) repeated more than 20 times, and the CEO kept answering it, each time with a slightly different wording. This ritual caused the meeting to last for 4.5 hours.[78]

It is likely that it was this kind of -annually recurring- ritual that the chairs of 35 British firms (including 26 from the FTSE 100) had in mind when they produced a document warning about their deteriorating relationship with institutional investors.[79] The document makes the point that too much "interference" by shareholder activists with board strategy can distract the board with issues that do not materially affect the companies' performance. No doubt this report was self-serving, but it does indicate that directors do indeed genuinely feel distracted by a large number of "engagements" with shareholders -who themselves are egged on by stewardship codes[80]- that they do not always find useful and which in the chairs' view lead to a blurring of responsibilities for corporate strategy between boards and institutional investors. At least one interviewed director pointed out that the UK Corporate Governance Code does after all assign responsibility for corporate strategy to the board, not investors, who in his view could always dismiss a board that failed in strategy development. [81]

3. *Halo activism*

By halo activism[82], we refer to (ESG) shareholder activism undertaken by investment funds/asset managers, not NGOs, but that cannot be explained by the pursuit of a financial return[83]. The institutional investors, whose primary purpose and fiduciary duty is to generate

[78] See J. Braaksma and J. Cornelissen, "Activisten en bonden kapen vergadering van Ahold Delhaize" ('activists and unions hijack the meeting of Ahold Delhaize'), *Financieel Dagblad* 13 April 2023 at 13.
[79] See D. Thomas, "FTSE chairs warn of declining relations with institutional investors", *FT* 7 November 2022.
[80] For the UK, see P. Davies "The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?" (March 12, 2020). European Corporate Governance Institute - Law Working Paper No. 506/2020, available at https://ssrn.com/abstract=3553493.

[81] See D.Thomas, fn. 78
[82] A term coined by J. Armour, L. Enriques and T. Wetzer in presentations about their "green pills"-paper, see Fn.21.
[83] In interesting research, S. Hirst, K. Kastiel, and T. Kricheli Katz, "How Much Do Investors Care About Social Responsibility?" (August 9, 2021), available at https://ssrn.com/abstract=4115854 or http://dx.doi.org/10.2139/ssrn.4115854 conducted an experiment involving real monetary rewards with 279 participants that found that many of them were prepared to forgo some investment returns in

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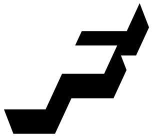

a return on investment for its clients[84], are often spending resources on perhaps relatively cheap but in absolute figures still costly activist campaigns, in pursuit of social and environmental goals. Especially in the case of pension funds, I believe sometimes a desire to do good is the simple explanation for this type of activism, also because the fund is a tool of its principals, whose preferences it expresses.[85] "Halo activism" will by definition never be the only or even main activity of investment funds and asset managers, since in the aggregate these always pursue financial returns. It will always be limited to either occasional campaigns or to more systematic, portfolio-wide efforts of shareholder engagement that are not detrimental to the financial bottom line.

A good example of the latter type of halo activism, that also nicely illustrates how these efforts are often collaborative, was the campaign against Amazon to force that company to disclose more of its tax data, so that the outside world could observe how much taxes the company paid in which jurisdiction, a sensitive topic in times of global tax reform and efforts to make sure companies pay a minimum tax in countries where they do a serious amount of business. The campaign was launched by a Catholic investment fund, Missionary Oblates of Mary Immaculate in cooperation with the Greater Manchester Pension Fund[86], who submitted a shareholder proposal to Amazon's AGM. But the campaign gradually gained supported from at least 24 institutional investors, mainly pension funds but also asset management groups. Their actions were coordinated by PIRC[87], a governance and shareholder services group, which had help organize campaigns on tax transparency at thirty companies, including Cisco and Microsoft.[88] It is noteworthy that Amazon had tried to prevent a vote on the shareholder proposal by invoking the ordinary business exception, but had been rebuked by the SEC, which addressed a letter to Amazon stating that in its view the proposal transcended matters of ordinary business.

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exchange for pursuing E&S-like goals (though 32% were not prepared to forgo financial returns). It is debatable how much one can deduce from such "laboratory" experiments about the potential behaviour of professional asset managers/institutional investors.

[84] On the fiduciary duties of fund managers as an impediment to ESG activism, see (with a focus on Europe) M. Lieberknecht, "Institutional Investors as Climate Activists - Curb Your Enthusiasm", 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4198042; for the US, M. Schanzenbach and R. Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee" 72 *Stanford Law Review*, 23020, 381 and also R Tallarita, "Fiduciary Deadlock" 171 *University of Pennsylvania Law Review* , forthcoming 2023, available at https://ssrn.com/abstract=4197225.

[85] And for millenial investors who put money into these funds, their preferences are increasingly sustainability-focused, see the literature referenced in e.g. G. Ringe, "Investor-led Sustainability in Corporate Governance", *Annals of Corporate Governance* 2022, his section 3.2.

[86] Also a repeat player in such campaigns.

[87] See https://www.pirc.co.uk/#. "PIRC" stands for Pensions & investment Research Consultants ltd. and presents itself as Europe's largest independent corporate governance and shareholder advisory consultancy, providing stewardship and proxy research services with a focus on ESG.

[88] M. McDougall, "Cisco urges shareholders to reject tax transparency proposal", *FT* 22 September 2022.

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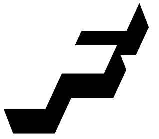

Tallarita has shown that such halo activism is not uncommon in the US[89], but it also occurs in Europe. Shareholder activism in Belgium is very limited, but one of the best-known campaigns was an example of halo activism, namely the campaign of Bluebell Capital partners against Solvay[90]. Bluebell Capital bought only one share in Solvay and started a campaign accusing Solvay of environmental pollution through limestone residue that was discharged into the sea at its soda plant on the Tuscan coast. Under Belgian law, any shareholder, even one holding only one share, can ask questions to the board at the general meeting, as long as they pertain to items on the agenda, but since the management report and annual accounts are discussed at the AGM, most company-related topics can be discussed through questions at the AGM[91]. At Solvay's 2021 AGM, Bluebell -which had only been set up three years earlier- asked 52 questions, during the May 2022 meeting 106, generating a lot of negative press for Solvay and putting pressure on its relatively new CEO to deal with the issue. In September 2022 Bluebell entered a settlement with Solvay, after the company had announced that a technological breakthrough it had made in soda ash production would allow it to end the controversial discharges into the sea (and reduce the CO2 emissions of soda production with 50%).[92]

Bluebell presents itself as an activist investor concentrating on European large caps and with an ESG focus.[93] While several of its campaigns do indeed have an ESG aspect to them[94], this is not always the case[95]. The firm almost always focuses on financial returns. This was for example the case in its first well-publicised campaign, when it was part of a coalition of investors who successfully tried to oust the CEO-chairman of Danone.[96] Here, Bluebell was clearly driven by the underperformance of Danone on financial metrics compared with its peers, which the activist coalition partly blamed on too much focus by its chairman on ESG matters -the CEO who was known in France as "Mr. ESG" and went on to become chair of the International Sustainability Standards Board. The Bluebell campaign against Danone highlights how shareholder activists with an ESG profile will often pursue financial returns through governance change that is intended to improve ESG features of the target company. This is the opposite of ESG goals getting in the way of financial returns. This was also the case for the spectacular and well- known campaign of Engine No1, which, as a small hedge fund owning 0.02 % of Exxon, succeeded in getting two of its candidates appointed to the board of Exxon, in a campaign intended, among other things, to force Exxon to accelerate its move into

[89] R. Tallarita, "stockholder politics" (fn.22), at 1729-32.
[90] See also the chapter by A. Christie in this book.
[91] Art. 7:139 Belgian Companies Code.
[92] See P. Hollinger, "European chemicals group Solvay declares truce with Activist Bluebell", *FT* 6 September 2022.
[93] https://www.bluebellcp.com/. For press reports on 10 activist campaigns of Bluebell, see the "press" section of its website.
[94] For instance, in its campaign against Glencore it tried to move Glencore to divest its coal-related assets.
[95] For instance, its 2020 campaign against Mediobanca had in any case nothing to do with environmental or social concerns.
[96] About this campaign, see L. Abboud, 'Danone Board ousts Emmanuel Faber as Chair and Chief executive', *FT* 15 March 2021.

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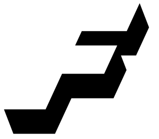

renewable energies. But it was clear the main driver behind the campaign was the conviction that Exxon was faltering or at least falling behind peers because of a lousy strategy.[97]

So while for most or probably all halo activists, pursuing a financial return is their usual modus operandi and main activity, also when engaging in activism, halo activism is a genuine phenomenon. Two other examples are the campaign coordinated by ShareAction against Unilever (Europe)[98], and the Green Century Capital Management campaign against Procter&Gamble (US), about deforestation[99]. This last campaign is a good illustration of how a "halo investor" can take the lead, but must be supported by other investors. The deforestation proposal was approved by a large majority of P&G shareholders.[100]

IV. Empirical research on NGO-sponsored ESG shareholder proposals in Europe, 2020-2022

Are the phenomena described in section III, shareholder activism by NGOs pursuing ESG goals, and halo activism, real? Until now we've only mentioned a few anecdotes, and this reflects the fact that while there is quite a bit of data on shareholder activism in Europe in general, and a burgeoning literature on ESG activism, there is very little systematic empirical research on ESG activism in Europe.[101] A recent exception is the work of Michael Bakker of the

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[97] See e.g. "ExxonMobil faces "winds of change" as climate battle reaches boardroom', *FT* 24 May 2021 and 'Defeats for big oil mark "sea change" in climate battle', *FT* 27 May 2021.

[98] ShareAction regulary submits shareholder proposals as the head of investor coalitions -those coalitions always seem to count pension funds as members, but in addition to other types of investment funds. It scored a success with its campaigns first at Unilever and then other food giants Nestlé, Kraft Foods, Danone and Kellogs to offer more healthy foods and increase disclosure on the health&nutrition aspects of their food products (see J. Evans, "Unilever to set new healthy food targets after investor pressure"*FT* 7 March 2022 and J. Evans, "Investors push Nestlé and KraftHeinz to set new health targets", *FT* April 26 2022). Arguably, the campaign it coordinated at Glencore about its coal activities is another example of activism that cannot really be explained by return on investment motives. It is true that in the near future, coal may become an uninteresting investment because using coal for energy generation might become unacceptable because of its impact on global warming. But at the time of this campaign, Glencore's profits from coal-related activities were booming. See about this campaign L. Hook, "Glencore shareholders demand more clarity about coal plans", *FT* 5 January 2023. The article reported that shareholders including the bank HSBC, asset managers LGIM, Vision Super, and the Ethos Foundation (representing two Swiss pension funds) backed the ShareAction proposal.

[99] See https://www.greencentury.com/green-century-presses-procter-gamble-to-end-deforestation-and-forest-degradation-in-its-supply-chain/. Green Century regularly files shareholder proposals with no or no obvious financial importance, but inspired by its desire to do good, see for instance S. Murray, " Investors push food companies to go greener", *FT* 20 October 2020 about its campaign at ConAgro, also about deforestation, or, P. McGee and P. Temple-West, "Apple fights shareholder call for more transparency on forced labour", *FT* October 27 2021, about its support for the campaign for a consumer "right to repair" at Apple.

[100] https://www.greencentury.com/pg-shareholders-resoundingly-support-deforestation-proposal/

[101] There is quite a bit more empirical research on environmental and climate *disclosures*, just one example being S.F.W. Van den Bosch, *Business at Risk: the Governance and Disclosure of Sustainablity Risks*, 2022 (Ph.D. thesis, Tilburg University law school).

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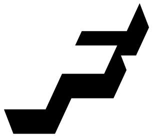

University of Amsterdam (UvA). Bakker published research on ESG activism that took the form of shareholder proposals in Europe and North-America in the 2021 AGM season. In 2023, his follow-up research covering the 2020-2022 will be published in *ECFR* (with the title "Shareholder Proposals and Sustainability: An Empirically-based Critical Reflection"). I asked Bakker to analyse his dataset to isolate the data concerning shareholder proposals at European companies (excluding the rest of the world), and he provided the three tables presented below. If one compares his findings with the important research by Roberto Tallarita about "political" ESG activism in the US, the conclusion is warranted that NGO and halo activism are indeed real phenomena in Europe, but that shareholder proposals are far more often used by this type of activist in the US than in Europe. This is because, as I will explain in section V, it is more difficult to submit shareholder proposals in some major European jurisdictions, such as the Netherlands, Germany and to a certain extent also France. Such shareholder proposals are deemed inadmissible if they impinge on corporate strategy, which is a broader concept than the "ordinary business" concept used in the US to ban proposals that would encroach too much on the board's prerogative to run the company.

1. *Tallarita's study on US E&S shareholder proposals*

For the US, Roberto Tallarita in a very interesting contribution, has produced a comprehensive overview of precisely the kind of social and environmental shareholder activism studied in this chapter, at least to the extent it is performed through shareholder proposals.[102] He analyzed 2933 shareholder proposals at US companies from the 2010-2021 period. He reported that 399 companies received S&E proposals, but predictably spread out unequally over industries and individual companies, with the 20 most targeted companies receiving 28.9% of all proposals and the 6 most frequently targeted industries being Retail, Oil & Gas, Utilities, Banks, Business Services, and Pharmaceuticals.[103] He identified only 4 proposals that were supported by management, and of the 1851 proposals in his sample on which shareholders voted, only 61 (3.3%) obtained a majority[104], but with (greatly) increased approval rates in 2020 (12.4%) and 2021 (19.2%)[105]. The vast majority of the votes were precatory (non-binding). This is standard in the US, as opposed to Europe, where non-binding votes were until recently virtually unknown, but are now clearly being proposed more often, precisely because of the rise of shareholder activism. Tallarita convincingly argues that when a proposal is not majority-approved, that does not necessarily indicate that most shareholders are opposed to them[106] (much less that shareholders do not care about the issue). 30.7% of the sample pertained to political activity proposals (such as lobbying efforts or political spending by

[102] In addition to the R. Tallarita research discussed in this section, other research with an empirical component on ESG shareholder proposals in the US includes S. Hirst, "Social Responsibility Resolutions", *Journal of Corporation Law* 2017, 218 and J. Fisch, "Purpose Proposals", *University of Chicago Business Law Review* 2022, 126.
[103] R. Tallarita (fn.22) at 1712-1713.
[104] R. Tallarita (fn.22) at 1719.
[105] R. Tallarita (fn.22) at 1727.
[106] R. Tallarita (fn.22) at 1726.

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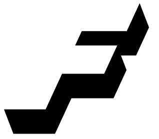

corporations), 28.1% was about environmental issues (including climate change – 11.4% of the proposals) and 40.3% about social issues[107,108]. One of the most interesting findings of Tallarita is that over half (53.4%) of the proposals in his sample were submitted by only 25 organizations. He labels these repeat players "stockholder politics specialists". They include investment advisers, public pension funds (some of them linked to unions), religious organisations and NGOs.

2. *Michael Bakker's research on E&S shareholder proposals in Europe between 2020 and 2022*

As mentioned, there is very little empirical research on shareholder proposals in Europe[109] - where far fewer proposals are launched than in the US - and this is even more true of research on ESG proposals. Even empirical research on ESG activism (irrespective of whether it takes the form of shareholder proposals or even shareholder activism) is usually either anecdotal or consist of case studies, not systematic descriptive statistics.

a. *Bakker's research on worldwide activity in the 2021 AGM season*

Michael Bakker has produced an excellent descriptive overview of shareholder resolutions concerning environmental (including climate) and social matters in the 2021 AGM season, mainly in North-America and Europe.[110] Looking at 3580 listed companies from 40 countries, Bakker identified 589 ESG-related shareholder resolutions at 333 companies. He only included resolutions on which an actual vote had been organized, thus for example excluding cases where a submitted resolution had resulted in a settlement between the activist and the target company. 425 of the proposals were submitted in the US, the vast majority of them non-binding. Japan (44), Sweden, Canada, Australia and Norway were the other countries where more than 10 ESG resolutions were tabled. The relatively high number of resolutions in Sweden and Norway is probably influenced by the extremely flexible rule in those countries that anyone holding at least one share can submit a shareholder proposal[111]. Conversely, not a single shareholder resolution was put to the vote in 2021 in the Netherlands, which is likely influenced by the Boskalis/Fugro judgement that we discussed above. Of those 589 proposals,

[107] Only 2.6 % pertained to employee rights whereas 12.5% of the total number of proposals in the sample were about sex, gender and race.
[108] See R. Tallarita, (fn.22) table 3 at p. 1714.
[109] But see V. Verheyden, "When shareholders use their right to convene meetings and submit proposals: a comparative and empirical analysis in four European Member States", *TRV*-RPS 2020, 975-995, which deals with shareholder proposals in France, Germany, the Netherlands and Belgium, but not with an ESG focus (and before the current wave of ESG proposals).
[110] M.H.C. Bakker, "Aandeelhoudersvoorstellen en duurzaamheid: een verkenning", *Ondernemingsrecht* 2022, 241-255.
[111] See *infra* footnote 122.

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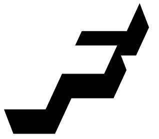

72 related to climate (64) and environmental (8) matters, 112 were classified as "social" by Bakker (relating to stakeholder relations, workplace conditions, diversity in the workforce, product safety and quality) and the rest was governance-related. He also identified 6 resolutions urging companies not to get distracted by climate concerns, all submitted in the US by Steven Milloy of the *Burn More Coal*[112] shareholder activist organization, garnering very low levels of support.

Interestingly, Bakker distinguished the proposals by type of shareholder that submitted them, and found 85 proposals by NGOs, 30 by religious organisations, 17 by unions, 2 by a thinktank and 6 by a shareholder association. The NGO category contained "traditional" NGOs like Oxfam as well as NGOs that have specifically been set up to influence corporate ESG policies, like "Follow This"[113] and "As You sow"[114]. Of the 132 proposals submitted by NGOs, religious organisations[115] and unions, 16% were majority-approved (18% of those of "dedicated" NGOs like Follow This).[116] Bakker found only two hedge funds – the traditional shareholder activists *par excellenc*e - that submitted ESG-related proposals, namely TCI (three say on climate proposals) and Bluebell Capital (4 proposals, at two Italian companies, all related to a possible suit against the former CEO of the bank Monte dei Paschi).

b. Bakker's research on E&S shareholder proposals in Europe in 2020-22

[112] On its website, the organisation says: "Burn More Coal (BMC) is a pro-coal electric utility shareholder activist group dedicated to promoting the increased use of coal as a fuel for electricity generation", see https://burnmorecoal.com/about/. The group does invest in shares of companies that generate electricity, the portfolio is described on the website.

[113] See https://www.follow-this.org/. In the "about us" section, the organization says "We have the power to change oil companies from within -as shareholders".

[114] https://www.asyousow.org/resolutions-tracker listed (as of April 6 2023) 677 shareholder resolutions submitted by As You Sow between 2010 and 2023, including exactly 100 from 2023, a dozen or so of those 2023 resolutions having already been withdrawn after an agreement with the target company had been reached.

[115] A recent example of ESG activism by a religious organization concerns Citigroup. In this case, an order of nuns that owns a small stake in Citi filed, in coalition with three other religious organisations, a shareholder resolution to Citi's 2023 AGM, calling on the board of Citi to report on the effects of its financing decisions on indigenous people and the environment. Specifically, the nuns reproached Citi to have provided important funding (about 5 billion US dollar) to a pipeline project that transports oil from the US to Canada, while the project is allegedly linked to oil spills and is opposed by indigenous people through whose living area the pipeline runs. See A. Mooney and A. Williams, "Nuns urge Citigroup to rethink financing of fossil fuel projects", *FT* April 10 2023.

[116] M.H.C. Bakker 2022 (fn. 109), 247 and his footnote 59.

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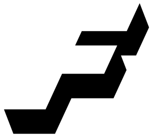

Michael Bakker has repeated his research for 2020 and 2022[117]. Based on the database on which his research is based[118] , at my request he prepared the following tables, specifically on E&S activism in Europe in the three years from 2020 through 2022.

Table 1 indicates that in Europe, too, governance issues get more attention from shareholder proposals than environmental and social issues: 158 proposals were about governance issues, whereas 61 proposals concerned climate and the environment and 55 dealt with social matters including 5 on affected communities. This is a total of 116 E&S proposals. Of those 116, only 7 resolutions, all on climate change, were passed, i.e. received majority support at the vote during the general meeting.

Table 1: Shareholder proposals voted upon between 2020 and 2022 in Europe, organized per topic

Pillar	Topic	Proposals voted on (passed)
Environmental	Climate change	54 (5)
	Pollution	1 (0)
	Water and marine resources	-
	Biodiversity and ecosystems	2 (0)
	Resource use and circular economy	2 (0)
Social	Own workforce	14 (0)
	Workers in the value chain	3 (0)
	Affected communities	5 (0)
	Consumers and end-users	33 (0)
Governance	Corporate governance	130 (31)
	Sustainable corporate governance	2 (0)
	Business conduct	10 (0)
	Leadership (ex board elections)	15 (2)
Other	Shareholder value	36 (12)
Total		307 (50)

[117] Part of it will be presented in an article that has been accepted by ECFR, M. H.C. Bakker "Shareholder Proposals and Sustainability: An Empirically-based Critical Reflection" (on file with the author).
[118] FactSet data for the US and Canada and hand-collected data on shareholder proposals in European companies, collected from corporate websites.

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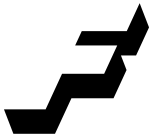

Note to Table 1: This table- prepared by Michael Bakker- reports the number shareholder proposals per category that have been put to a vote (in parentheses the number of proposals have received a passing vote) between 2020 and 2022 at publicly traded companies that are incorporated in France, the United Kingdom, Germany, Switzerland, the Netherlands, Sweden, Spain, Italy, Denmark, Belgium, Norway, Finland, Poland, Ireland, Austria, Portugal, Luxembourg, Greece, Hungary, and the Czech Republic. The sample consist of companies that are constituents of a stock market index that represents at least 50% of the respective capital markets of the selected jurisdictions; it includes 985 publicly traded companies. Proposals that concern director nominations or the removal of directors, proposals that have been withdrawn (e.g. after a settlement) and items submitted to the agenda for discussion only are not included. The topics have been based on the draft version of the European Sustainability Reporting Standards, available at <https://www.efrag.org/lab6> (last accessed 19 April 2023). The data was gathered through desk research, by examining the documentation pertaining to general meetings of the relevant companies.

Table 2 (below) indicates which type of organization submitted these European shareholder proposals. By far the largest individual group are individual investors, lending some support to what Americans sometimes call the "gadfly hypothesis"[119], namely that many shareholder proposals are submitted by individual shareholders who are pursuing their own hobby horses or very idiosyncratic issues they have with the company, without giving any thought to collective shareholder interests. But more research on the nature and content of these proposals would be needed, and that is not the topic of this article. Parent and holding companies are another important group- they mostly tabled proposals on changing the governance structure of the company. Strikingly, institutional investors such as hedge funds, mutual funds, pension funds and asset managers launch few proposals, namely only 26, i.e. 8.5% of the total number of ESG proposals in Europe. By contrast, as I expected, a relatively speaking substantial number of proposals is submitted by NGOs: Bakker found 24 proposals sponsored by what in his table he calls shareholder advocacy groups and NGOs, but these advocacy groups are NGOs that only become shareholders in order to be able to use shareholder activism tactics, like As You Sow and Follow This.

[119] See e.g. K Kastiel and Y. Nili, "The Giant Shadow of Corporate Gadflies", *Southern California Law Review* 2021, 569-636 who argue (and show), however, that the vast majority of proposals by individual investors in the US are not about trivial or cranky hobby horses, but relate to core governance matters. R. Tallarita, "Stockholder politics" (Fn.22) has, however, shown that in the US at least, individual shareholders play an unimportant role in E&S proposals.

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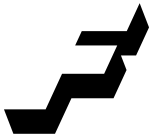

Table 2: Types of shareholder who have submitted shareholder proposals to European publicly traded companies between 2020 and 2022

Types of shareholders (lead filer)	Proposals voted on (passed)	Environmental proposals voted on (passed)	Social proposals voted on (passed)	Governance proposals voted on (passed)	Other proposals voted on (passed)
Asset managers & investment advisors (non-SRI)	2 (0)	1 (0)	-	-	1 (0)
Asset managers & investment advisors (SRI)	2 (0)	2 (0)	-	-	-
Employee stock ownership funds	12 (0)	-	5 (0)	1 (0)	6 (0)
Foundations & charities	7 (0)	3 (0)	2 (0)	2 (0)	-
Governments (state)	7 (7)	-	-	3 (3)	4 (4)
Hedge funds	10 (4)	3 (3)	-	7 (1)	-
Individual investors interest groups	6 (0)	-	-	3 (0)	3 (0)
Individuals	175 (2)	22 (0)	42 (0)	102 (2)	9 (0)
Mutual funds	4 (0)	-	-	1 (0)	3 (0)
Other non-profit organizations	4 (0)	-	3 (0)	1 (0)	-
Parent companies & other holding structures	27 (22)	-	-	20 (15)	7 (7)
Pension funds (private)	1 (1)	-	-	1 (1)	-
Pension funds (public)	7 (6)	2 (1)	-	4 (4)	1 (1)
Public development funds	2 (2)	-	-	2 (2)	-
Shareholder advocacy organizations	20 (1)	15 (1)	2 (0)	3 (0)	-
Identity of filer unknown	21 (5)	11 (0)	1 (0)	7 (5)	2 (0)
Total	307 (50)	59 (5)	55 (0)	157 (33)	36 (12)

Note to Table 2: This table presents an overview of the types of shareholders who have submitted shareholder proposals, that have been voted upon (in parentheses the number of passed proposals), to the European publicly traded companies that are included in the sample. The classification has been based on the lead filer of the shareholder proposals and the table, therefore, does not account for collaborations. Furthermore, in 21 cases the identity of the proponent was not disclosed and could not be traced through public records.

Table 3 documents that there are big differences between countries when it comes to the number of ESG shareholder proposals.

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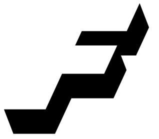

Strikingly, not a single proposal was submitted in the Netherlands. The Netherlands are no stranger to shareholder activism, but the Boskalis/Fugro court ruling has no doubt had a very chilling effect. In addition, it is not uncommon at Dutch listed companies to find a clause in the articles of association saying that only the board can take the initiative to add (certain) topics to the general meetings agenda.[120] I am convinced such clauses, when construed to mean not simply that organizationally only the board can put a shareholder proposal on the meeting's agenda (including at the request of shareholders), but also that the board may ignore requests of 5% shareholders to add topics to the agenda, are a gross violation of art. 6 SRD, which allows any shareholder holding 5%[121] to demand that the board puts its shareholder proposal on the agenda, irrespective of the topic. If Dutch legislation allows such oligarchic clauses, it should not be applied as it violates a higher-ranking EU norm, but my opinion is no doubt not shared by all legal advisors in the Netherlands [122].

Equally obvious from table 3 is that three Scandinavian countries, namely Sweden, Denmark and Norway, attract far more (ESG) shareholder proposals than other European jurisdictions. A likely explanation for this is that in those three countries, everyone holding just a single share can put a proposal on the AGM's agenda.[123]

Table 3: Shareholder proposals voted upon between 2020 and 2022 in Europe, by jurisdiction of incorporation of the companies

Jurisdiction (incorporation)	Proposals voted on (passed)	Environmental proposals voted on (passed)	Social proposals voted on (passed)	Governance proposals voted on (passed)	Other proposals voted on (passed)
Austria	8 (7)	-	-	6 (5)	2 (2)
Croatia	1 (1)	-	-	-	1 (1)
Czech Republic	4 (0)	1 (0)	-	1 (0)	2 (0)
Denmark	75 (5)	11 (1)	29 (0)	35 (4)	-

[120] See G. Van Solinge and M. Nieuwe Weme *NV en BV. Corporate governance*, Asser series, Vol. 2-IIb, 2019, at nr. 59 ("agenderingsrecht en oligargische besluitvormingsclausules"), with a fine-grained analysis of different varieties of such clauses.

[121] More precisely, the threshold is to be determined in national law, but may not be higher than 5%. In Belgium for instance, it is3 % (art. 7: 130 § 1 Belgian Companies Code). The Directive does not contain any distinctions depending on the nature of the shareholder proposal.

[122] See however the leading textbook G. Van Solinge and M. Nieuwe Weme *NV en BV. Corporate governance*, 2019 Asser series, Vol. 2-IIb (2019) at nr. 92 and especially nr. 59 where the same doubts as here are expressed, but with reference to five contributions in Dutch legal literature where the view is defended that such clauses are compatible with EU law.

[123] Chap. 7, § 16 of the Swedish Companies Act 2005 (*Aktiebolagslagen*); chap. 5, § 11 of the Norwegian Public Limited Liability Companies Act (*allmennaksjeloven*); § 11 of the Danish Companies Act 2009 (*selskabsloven*). These references were provided to me by Michael Bakker.

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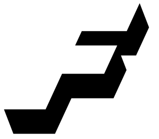

Finland	6 (3)	1 (0)	-	4 (3)	1 (0)
France	14 (0)	1 (0)	5 (0)	2 (0)	6 (0)
Germany	6 (0)	1 (0)	-	5 (0)	-
Greece	3 (3)	-	-	3 (3)	-
Hungary	4 (0)	-	-	1 (0)	3 (0)
Ireland	1 (1)	-	-	1 (1)	-
Italy	7 (2)	-	-	5 (1)	2 (1)
Norway	28 (2)	20 (0)	3 (0)	3 (2)	2 (0)
Poland	16 (12)	-	-	13 (9)	3 (3)
Portugal	1 (1)	-	-	1 (1)	-
Romania	4 (4)	-	-	-	4 (4)
Spain	6 (6)	3 (3)	-	3 (3)	-
Sweden	104 (1)	10 (0)	15 (0)	70 (1)	9 (0)
Switzerland	6 (1)	3 (1)	-	3 (0)	-
United Kingdom	13 (1)	8 (0)	3 (0)	1 (0)	1 (1)
Total	307 (50)	59 (5)	55 (0)	157 (33)	36 (12)

Note to Table 3: The table – provided by Michael Bakker-provides an overview of the number of shareholder proposals that have been put to a vote between 2020 and 2022 at publicly traded companies within the selected 20 European countries organized by jurisdiction of incorporation of the respective companies (in parentheses the number of proposals that have passed). A caveat is that it is not necessarily the case that the right to submit a shareholder proposals has been exercised on the basis of the laws of the country of incorporation of a company. In cases where the shares in a company are listed on an exchange in a foreign jurisdiction, it may be the case that shareholders have a right to submit shareholder proposals on the basis of the securities laws of that other jurisdiction. The data concerning the jurisdiction of incorporation of the companies was obtained from Compustat.

V. The Netherlands and Germany (and France?): no shareholder proposals concerning the board's strategy development

1. The Netherlands: a board-centric stakeholder system

One of the striking findings from table 3 in the previous section is that not a single shareholder proposal on ESG matters was tabled in the Netherlands during the three years of 2020-2022.[124]

[124] Though as pointed out by Bakker in his Ondernemingsrecht article (Fn.109) two times an item was added to the agenda at LyondellBasell based on as a shareholder proposal, but for discussion only, see also R. Abma, 'Kroniek van het seizoen van jaarlijkse algemene vergaderingen

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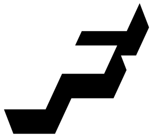

The Netherlands gets its fair share of shareholder activism[125], but not through shareholder proposals.[126] We explained earlier that in the Netherlands, shareholder proposals concerning strategic matters may not be put to the vote at the general meeting, not even when a non-binding vote is demanded, because courts regard this as incompatible with the executive board's exclusive competence to determine the company's strategy.[127] This hostility among the Dutch corporate law community towards shareholder involvement in corporate strategy is also reflected in several cases where the Enterprise Chamber, the main corporate law court in the Netherlands[128], ruled that it constituted an abuse of shareholder power[129] when shareholders dismissed directors with the clear goal of bringing about a change of strategy, so that the Enterprise Chamber could block such a director election[130]. As a non-Dutch outsider I

2021', *Ondernemingsrecht* 2021/95. I would call LyondellBasell a *de facto* US corporation that is however registered in the Netherlands.

[125] For a general discussion, A. Lafarre and C. Van der Elst, "Corporate Sustainability and Shareholder Activism in the Netherlands", in *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, B. Sjåfjell and C. Bruner (eds.), CUP, 2019, 260-275.

[126] On this topic, see also S. Cools, *supra* fn. 23.

[127] Before the 2018 Boskalis/Fugro ruling applied that principle in order to exclude shareholder proposals that touch upon strategy, the Hoge raad had already confirmed the executive board's primacy concerning strategy in HR 13 July 2007, ECLI:NL:HR:2007:BA7972, *NJ* 2007/434, ann. J.M.M. Maeijer (*ABN AMRO*) and HR 9 July 2010, ECLI:NL:HR:2010:BM0976, *NJ* 2010/544, ann. P. van Schilfgaarde (*ASMI*), r.o. 4.4.1. As of January 1 2022, art. 2:129 BW (Civil Code, Book 2 dealing with company law) explicitly determines that "policy and strategy" are determined by the board. As explained by C.J.C. De Brauw, "Strategiebepaling bij beursvennootschappen, activistische aandeelhouders en bescherming in het Nederlandse stakeholdermodel", *Ondernemingsrecht* 2022, 141, the Dutch governance model is resolutely different from Delaware's and is stakeholder-oriented and not necessarily shareholder-friendly.

[128] This "Ondernemingskamer" is a specialist division of the Amsterdam court of appeal.

[129] More precisely behaviour incompatible with "reasonableness and fairness" ("redelijkheid en billijkheid"), a fundamental overarching concept in Dutch corporate law as enshrined in art. 2:8 BW and in the light of which basically all corporate law must be construed. The principle is regularly invoked by courts to intervene in company affairs, a prime example being Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4888 ("Versatel") which ruled that fact-finding judges may invoke "reasonableness and fairness" to shove aside, in provisional measures taken in summary proceedings about a company's affairs, mandatory provisions from the Dutch companies act. One of several applications by fact-finding courts is Ondernemingskamer Hof Amsterdam, 22 December 2022, ECLI:NL:GHAMS:2022:3706 in which judges ruled that, in view of "reasonableness and fairness", a major shareholder could not invoke the protection offered to its position by both mandatory statutory rules on preemption rights and a shareholder agreement, and that statutory anti-money-laundering provisions did not have to be applied in this case.

[130] See C.J.C. De Brauw, "Strategiebepaling bij beursvennootschappen, activistische aandeelhouders en bescherming in het Nederlandse stakeholdermodel", *Ondernemingsrecht* 2022, 141 and C.J.C. de Brauw, 'De centrale rol van bestuur en RvC bij besluitvorming over strategie, openbare biedingen en bescherming tegen vijandige biedingen en aandeelhoudersactivisme' in: M. Lückerath-Rovers, B. Bier, H. van Ees en M. Kaptein (eds.), *Jaarboek Corporate Governance 2018-2019*, Kluwer, Deventer, 2020. The most notorious decision by the enterprise chamber was its Akzo/Nobel ruling, Court of Amsterdam (Enterprise Chamber), 29 May 2017, Elliott International, L.P. v. Akzo Nobel N.V., ECLI:NL:GHAMS:2017:1965. This was about a hostile bid by a US bidder for Dutch company Akzo/Nobel. An activist hedge fund that supported the bid wanted to oust the chair of the supervisory

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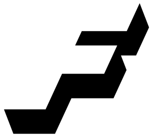

may be permitted to vent the opinion that this type of reasoning of the Enterprise Chamber is undesirable, because if one does not want to totally rob shareholders of meaningful influence on a company's governance, they should have the right to appoint and dismiss (supervisory, non-executive) board members, precisely also if they do not like the strategy of the current board. But the case law is clear and an illustration of how legal culture in the Netherlands is still somewhat hostile to too large a role for shareholders in running a company. The Netherlands has always had, at the level of large or listed firms, a stakeholder approach to corporate governance. During the 1990s, the system was exposed to pressure from investors to become somewhat more shareholder-centric, and at the end of the 1990s and early 2000s, this led to some shareholder-friendly-reforms[131]. In general, however, the Dutch corporate law system still allows for what Dutch lawyers love to call "oligarchic" governance arrangements.[132]

2. *Germany: doubts about shareholder proposals on climate strategy*

The situation concerning shareholder proposals on strategic matters like a company's climate policy in Germany is similar to the approach in the Netherlands. § 76 AktG states that the executive board ("Vorstand") "leads [i.e. manages] the company under its own responsibility", which has traditionally been construed as meaning that the board may not act under the instruction of anybody, and must independently determine what it thinks is in the

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board and wanted to add this as an item to the agenda of an extraordinary general meeting. This was blocked by the Enterprise Chamber because the court was convinced that the attempt to oust the chair was also an attempt to change the corporate strategy of Akzo, which ought to be determined by the board, and that board had refused any type of negotiation with the bidder. For a discussion in English of the case, see T. Vos, "The AkzoNobel Case: An Activist Shareholder's Battle Against the Backdrop of the Shareholder Rights Directive" *European Company Law*, Vol. 14, Issue 1, 2017, 238-243. From among the many discussion in Dutch literature, see F.G.K. Overkleeft, "AkzoNobel, PPG en de Ondernemingskamer", *Ondernemingsrecht* , 2017, 135.

[131] The story and intellectual history has been beautifully documented and analysed by F.G.K Overkleeft, *De positie van aandeelhouders in beursvennootschappen*, Kluwer, Deventer, 2017, 681 p.

[132] For instance, it is not uncommon to award preference shares and share subscription rights (allowing to subscribe to shares at a discount e.g. when the company becomes the target of a hostile bid)to foundations (the famous "stichtingen") -the mechanism is clearly functionally equivalent to a Delaware poison pill, though the technicalities differ- and "waiting period" or, in Orwellian newspeak, "time for reflection" granted to boards of Dutch companies that become the target of a hostile takeover bid or a shareholder proposal to dismiss directors. This means boards who think more reflection time is in the interest of the company, get 250 days "to consult stakeholders" and "reflect" if a shareholder wants to change the composition of the board. The rules became effective on May 1 2021. The Dutch Minister of Justice at the time declared upon approval in parliament of the new rules: "What makes the Netherlands so special is that we have a very competitive economy with a lot of competition (sic), but within this (system) we also have regard for other interests than merely those of shareholders.", see https://www.rijksoverheid.nl/actueel/nieuws/2021/03/23/eerste-kamer-stemt-in-met-bedenktijd-voor-beursvennootschappen-bij-vijandig-overnamebod-of-dreigend-ontslag. Elswehere (see text at footnote 122) I briefly mention the clauses in articles of association that only allow boards to put items on the agenda of the general meeting.

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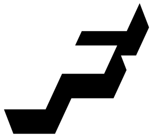

best interest of the company. At least one German author has written that changing the companies act to the effect that the general meeting could take binding votes on ESG issues, would be incompatible with the idea behind § 76 AktG, which means that in his opinion at least it would be even more incompatible with the law as it is today[133]. The drafters of the German *Aktiengesetz* (law on public companies) took the conscious decision to emasculate the general meeting when it comes to managing the company, so that shareholders or the general meeting are not allowed to have a direct influence on the management of the company ("Geschäfstführung").[134]

Consequently, in Germany, legal obstacles to submitting ESG-related shareholder proposals to the general meeting exist.[135] As in all EU jurisdictions, as a result of SRD II, a (group of) shareholder(s) holding 5% of all shares can force the board to add an item to the agenda of the general meeting of listed companies.[136] But though this has not, to the best of our knowledge, been tested in a leading court case in Germany - German corporate law specialists assume that this does not allow such 5% shareholders to submit proposals concerning ESG-related issues unless the general meeting is competent to decide, i.e. vote in a binding way, on such issues,[137] A case on the issue is now pending before the district court of Braunschweig.[138] As in other European jurisdictions, German general meetings are only competent to decide on those issues enumerated in the companies act, all other matters are the competence of the board. Corporate strategy as such, or ESG-related issues as such are not competences of the general meeting. German authors deduce from this that even a non-binding vote may not be organized about such matters, let alone that 5 % shareholders would have the right to *demand* such a vote[139]. Harnos/Holle convincingly add that there are fewer objections to shareholders demanding a mere debate on e.g. corporate climate policy at the general meeting, since it is undisputed that shareholders can use their right to address the general meeting and ask questions of the board to talk about e.g. the corporation's climate policy. However, German authors are even reluctant to accept the right to demand mere discussion ("beschlussloser Meinungsaustausch"), again based on the exclusive competence of the board to determine corporate strategy. Theoretically, the executive board is competent to, at its own initiative,

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[133] Ph. Jaspers "Sustainable Shareholder Activism", *Die Aktiengesellschaft* 2022, (145), 151, nr. 24.
[134] Jaspers (previous footnote), 156, nr. 52.
[135] For a thorough analysis, see R. Harnos and Ph. M. Holle, "Say on climate", *Die Aktiengesellschaft*, 2021, 853-866. See also the analyses of German law in M-Ph. Weller and V. Hoppmann "Environment Social Governance (ESG). Neue Kompetenzen der Hauptversammlung?", *Die Aktiengesellschaft* 2022, 640; M-Ph. Weller and N. Benz, "Klimaschutz und corporate Governance", *ZGR* 2022, 563-601. A nuanced approach is taken in H. Fleischer and Ph. Hülse, "Klimaschutz und aktienrechtliche Kompetenzverteilung: zum Für und Wider eines 'Say on Climate'", *Der Betrieb* 2023, 41 (evaluating pros and cons of a say on climate within the German governance framework).
[136] See § 122 AktG.
[137] See Ph. Jaspers "Sustainable Shareholder Activism", *Die Aktiengesellschaft* 2022, (145), 150-51 and R. Harnos and Ph. M. Holle, "Say on climate", *Die Aktiengesellschaft*, 2021, (853) 862-64.
[138] See *infra*, this section.
[139] See esp. R. Harnos and Ph. M. Holle, previous footnote, with references in their footnote 104 to the general opinion but also to the dissenting opinion of two law professors (M. Roth and J. Ekkenga) .

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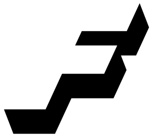

submit any issue for which itself is competent to a vote of the general meeting.[140] The literature assumes such a vote may be binding or non-binding. The board may do so to get its back covered by shareholder approval of a certain decision. Nevertheless, as Jaspers point out, this almost never happens[141] and it is unlikely that a board would voluntarily seek a debate at the general meeting of sensitive ESG issues.[142] The decisive point (from a technical-legal perspective) is that neither shareholders nor anyone else can *force* the board to go down this route. In addition, precisely in order to avoid abuse of the possibility by boards that want to escape liability, the general meeting cannot be forced to take the request of the board into consideration for discussion, let alone for a vote[143]. According to majority opinion, these rules apply not only to the possibility of the board to demand a binding decision of the general meeting, but also to the hypothesis where the board pursued a non-binding vote, the taking of a "position" by the general meeting without taking a formal decision or the organization by the board of a mere debate at the general meeting.[144]

At the time of writing, the issues are being tested before a court in Braunschweig, as a result of the refusal of Volkswagen to discuss at its 2022 AGM a shareholder proposal suggesting Volkswagen should change its articles of incorporation to force itself to extensively disclose its lobbying efforts concerning climate regulation.[145] It seems likely that the proposal's sponsors were well-informed about the German law on shareholder proposals and that this explains why they suggested an amendment to VW's articles: changing the articles is a competence of the general meeting, as opposed to determining a company's climate strategy. The proposal had been submitted by a group of Swedish and Danish Pension funds as well as the Church of England Pensions Board, but Volkswagen refused to accept it for the AGM because it allegedly infringed the competence of the executive board to determine VWs climate policies. This moved the investors to sue Volkswagen[146] (at the time of writing, the case is still pending). Also in 2022, the board of energy firm RWE did accept to organize a vote at its AGM on whether it should divest its lignite ("Braunkohl") activities branch. The item was based on a shareholder proposal submitted by the investment fund Enkraft Capital, owner of 0.03% of

[140] So-called "Vorstandsvorlage" on the basis of § 119 abs. 2 AktG.
[141] A recent example of a company whose board nevertheless voluntarily submitted the company's emissions reduction plan to a non-binding vote at its AGM is Alzchem Group AG, see R. Harnos, "Vorreiter bei Say on Climate: die Alzchem Group AG" *Gesellschafstrechtsblog 2023* (available at https://online.otto-schmidt.de/db/dokument?id=y-wpgesr.1428&q=say%20on%20climate).
[142] Jaspers, fn 136, p. 150 *in fine*.
[143] R. Harnos and Ph. M. Holle, "Say on climate", *Die Aktiengesellschaft*, 2021, (853), 857, nr. 19.
[144] For a detailed analysis of the different hypotheses, see Harnos/Holle, previous footnote, at 857-862.
[145] For a discussion of the case, see B. Fuhrmann and S. Röseler, "VW und die Leitungsautonomie – legitime Schranke für ESG-Aktivismus in Deutschland?", *Die Aktiengesellschaft* 2022, p. R 153.
[146] See https://www.clientearth.org/latest/press-office/press/investors-turn-to-courts-after-vw-withholds-climate-lobbying-details.

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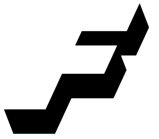

RWE and a repeat activist at energy companies, though usually it does not focus on environmental issues[147]. In the end, 97.5% of votes rejected the proposal.[148]

The conclusion must be that shareholders who want to influence a German company's executive board and pressure it to devote more attention to ESG themes, will have to rely on shareholder engagement in the sense of talking to directors, and the very indirect route of trying to influence the profile of those who get elected by shareholders[149] at the general meeting to the supervisory (i.e. non-executive) board that will in turn appoint the executive board that manages the company, including determining its climate and environmental policies The German corporate Governance Code now - and this is somewhat controversial within Germany - encourages chairs of the supervisory board to sound out investors on topics relevant for the supervisory boards activities.[150] The legal situation in Germany is very similar to that in the Netherlands, with the important difference that the BGH has not explicitly ruled on the matter whereas the Dutch have the Boskalis/Fugro ruling from their highest court.

3. *France: greater legal uncertainty, but a conservative approach dominates*

[147] About this campaign, see B. Fuhrmann and K. Döding, "Enkraft Capital vs RWE AG- misslungener Auftakt des ESG-Aktivismus in Deutschland?" *Die Aktiengesellschaft* 2022, p. R168. The authors mention some interesting details. Approximately 14% of RWE is owned by German cities and communities from the Ruhr region. In order to manage their shareholdings, these have contributed their shares to a GmbH (private company) called VkA (translatable as Union of Communal Shareholders). It was apparently well-known well before the AGM that these cities were opposed to Enkraft's "brownspinning" campaign because they feared for loss of employment in the region. As a reaction, Enkraft tried to neutralize KvA's voting power at the AGM, arguing that the KvA constituted a form of acting in concert and should therefore have been notified to RWE and market authorities (BaFin, which was seized about the matter by Enkraft; I have no knowledge of Bafin's reaction); since this had not happened, Enkraft argued that the voting rights of KvA were suspended, but apparently its complaint came too late to prevent KvA from voting at the AGM. What is striking is that an ESG shareholder activist here aggressively tried to exclude a "dissenting" important long-term shareholder from the vote, invoking legal rules (on the notification of stakes exceeding 3%) that are quite regularly invoked by corporate boards *against* shareholder activist (Enkraft also opposed the re-appointment of a local mayor, member of KvA, to RWE's supervisory board, but the mayor was reappointed with approximately 98% of votes in favour).

[148] H. Fleischer and Ph. Hülse, "Klimaschutz und aktienrechtliche Kompetenzverteilung: Zum Für und Wider eines „Say on Climate"", *Der Betrieb* 2023, p. 46, text accompanying their footnote 48.

[149] In companies employing more than 2000 people this is only 50% of supervisory board members, in companies with more than 500 but fewer than 2000 employees, it's 66% of board members who are elected by shareholders. The other board members are elected by employees.

[150] Recommendation A.6 of the Deutscher Corporate Governance Kodex 2022: "The Supervisory Board Chair should be available – within reasonable limits – to discuss Supervisory Board-related issues with investors".

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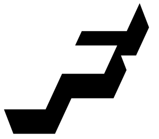

In France, the legal situation concerning shareholder proposals that touch upon corporate strategy was less clear[151], but companies also invoked the allocation of powers between boards and shareholder meetings to refuse to organize a vote on shareholder resolutions relating to corporate climate policies. Again it was TotalEnergies who did this in its 2020 shareholder meeting, but in 2021 it allowed a vote, not, however, without explaining in a written note to shareholders why it thought such a proposal was unlawful.[152] Total's stance was supported by a position paper issued by ANSA, an interest group of French public companies, which also warned that proposals that are too prescriptive about a company's sustainability strategy are incompatible with the division of powers between board and shareholders.[153] In the end the *Haut comité juridique de la place financière de Paris*[154] tried to arbitrate in the matter by issuing a report[155] that on the one hand opined that determining the company's climate strategy is indeed a board competence and responsibility, and that therefore prescriptive resolutions containing specific emission reduction targets or requiring the board to organize an annual vote on climate matters can be excluded from the general meeting's agenda because they relate to the boards competences[156], but on the other hand, in its conclusions[157], the report only states

[151] For legal analysis also based on the division of powers between general meeting and boards, see C. Baldon, "Les résolutions climatiques au prisme du principe de séparation des pouvoirs au sein de la société anonyme", *JCP E (= La Semaine Juridique- Entreprises et Affaires)*, 2021, issue 36, p. 24-30.

[152] See about the "resistance" by Total (and also by another French company, Vinci), https://reclaimfinance.org/site/2021/12/02/resolutions-climatiques-dinitiative-actionnariale-la-france-a-la-traine/.

[153] See https://www.ansa.fr/rappel-des-regles-applicables-pour-linscription-a-lordre-du-jour-de-points-ou-de-projets-de-resolution/ (3 March 2021). In the statement, ANSA refers to a leading French decision of the cour de cassation, "Motte" (Cass. civ. 4 June 1946, *Sirey* 1947, 1, 153 ann. Barbry ; *J.C.P.* 1947. II. 3518, ann. Bastian ; *Gaz. pal.* 1946, 2, 136 ; *J. sociétés* 1946, 374; *Grands arrêts de la jurisprudence commerciale*, p. 297, n° 69, ann. Jean Noirel) but while that ruling made clear that company bodies derive their competences from the law (statute), and that in a public company statute has organized their competences in a hierarchical way so that the general meeting may not encroach on competences of the board, and while it is reasonable to deduce from the ruling that the board cannot receive binding instructions from the general meeting, in my view it contains nothing that would lend authority to the opinion that shareholder proposals may not touch upon matters for which the board also has (final decision-making) competences, such as, typically strategy (The case was about a company where the general meeting had decided to transfer all powers of the board to the PDG, i.e. the equivalent of the combined CEO-chair; cassation ruled that such a decision was indeed unlawful). ANSA also referred to Tribunal de commerce Marseille, 7 November 2001, *CE Gemplus / SA Gemplus* , *Rev. soc.* 2002, 57, ann R. Vatinet, to underpin its opinion that shareholder resolutions may not touch upon the "gestion" of the company, but in my reading the only thing that court ruling said was that the general meeting may not give binding instructions to the board on the management of the company, nor may itself take management decisions ("actes de gestion").

[154] https://hcjp.fr/. This is a committee of lawyers set up at the initiative of the French financial markets supervisor and the French National Bank in order to promote the success of Paris as a financial center by contributing to legal certainty, among other things by issuing reports on disputed legal questions.

[155] *Rapport sur les resolutions climatiques*. *'Say on climate'*, 15 December 2022, 52 p. https://www.banque-france.fr/sites/default/files/rapport_54_f.pdf I have to thank Sofie Cools for drawing my attention to this report which I had not seen before, by sending me her paper "Climate Proposals: ESG Shareholder Activism Sidestepping Board Authority" (March 2, 2023), forthcoming in Th. Kuntz ed., *Research Handbook on Environmental, Social, and Corporate Governance*, Edward Elgar, 2023, available at https://ssrn.com/abstract=4377030.

[156] *Rapport sur les resolutions climatiques* (fn. 155) p. 24.

[157] *Rapport sur les resolutions climatiques* (fn. 155) p. 29.

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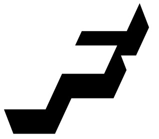

that there are no legal objections against non-binding ("consultative") votes on climate policy organized at the initiative either of the board or shareholders.

As I will argue in section VII.2, the Dutch and German approaches to shareholder proposals are too restrictive to the extent they are based on a blanket ban for the general meeting to discuss or at least vote on proposals that impinge on corporate strategy. Nor should French or Belgian law be construed as if it contains a ban on such proposals. I will argue that only overly prescriptive shareholder proposals, that would have the general meeting decide on the details of corporate strategy, should be banned. But first I discuss another development contributing to more stakeholderist, politicized corporations and boards, namely sustainability due diligence legislation and NGO sponsored climate litigation. The problems caused by these developments are the same as those caused by overly prescriptive shareholder proposals, namely that they are undue influences on the board's strategy-setting role, which is why I discuss these issues first.

VI. Enforced stakeholder dialogue and strategic stakeholder litigation[158]

1. Sustainability due diligence legislation creates leverage for stakeholders

a. European law: from internal to external stakeholders

For many decades, European corporate law has been stakeholder-oriented. Admittedly "shareholder value creation" was the dominant governance tune in listed companies between approximately 1992 and 2010, but that should not distract from the fact that companies acts throughout western Europe from at least the turn of the 20th century onwards contained a host of provisions aimed at protecting creditors (many of them built around the legal capital concept[159]). Especially after the second world war, protection of employee interests also became a goal not just, obviously, of the legal system, but of corporate governance legislation in several European countries, perhaps most prominently in Germany and the Netherlands[160].

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[158] M. Rajavuori, A. Savaresi and H. van Asselt "Mandatory due diligence laws and climate change litigation: Bridging the corporate climate accountability gap ?" https://doi.org/10.1111/rego.12518 May 2 2023, make a point similar to mine in this section, namely that the European due diligence legislation is creating an additional avenue for stakeholders to influence (climate) policies of firms, including by enabling litigation.

[159] The fact that these rules were largely ineffective in protecting creditors' interests, should not obscure the undeniable fact that legislators from an early date wanted to protect those interest not just through all kinds of legal rules (contract law by definition is , of course, to a large extent about protection of contractual creditors), but also specifically through mandatory rules in companies acts (and those rules were completely alien to contract law).

[160] Prime examples are of course the German employee co-determination system ("Mitbestimmung") but also the extensive co-decision rights granted to works councils in the Netherlands, a country where in addition in about 500 of the largest corporations, subject to the "structuurregime" ("structure

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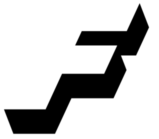

This stakeholderist approach was reflected in so-called broad definitions of "the corporate interest" – a concept which theoretically should have guided boards in all their decisions[161]. Prime examples are, again, the Dutch and German conceptions of "the corporate interest"[162].

However, until recently, corporate law in Europe (including Belgium) did not care about wider societal interests or mitigating negative externalities. To be sure, negative externalities had to be addressed by regulation, but according to the dominant conviction among policymakers,

regime"), 1/3 of supervisory board members needs to be elected at the proposal of employee representatives; in the 1970s through the mid 90s, such "structure companies" were regularly sued by unions or other employee representatives because their supervisory boards allegedly did not have a "balanced composition" as mandated by statute (read: contained too many shareholder-oriented directors). See about the role of the works council in Dutch corporate governance, chapter 9 of J. Winter, J. Wezeman, J. Schoonbrood, *P. van Schilfegaarde's Van de BV en de NV*, Deventer, Kluwer, 18th. Ed. 2022 - tellingly, this is a chapter in a corporate law handbook.

[161] Readers from outside continental Europe should be aware that in (western) continental jurisdictions, the rule that directors always have to be guided by "the company's interest", and the "broad" or narrow" interpretation of this "company's interest" (Gesellschaftsinteresse, vennootschapsbelang, intérêt social, …), serve a function similar to UK-US doctrines about to whom directors owe their fiduciary duties. In continental Europe, the concept of a duty of loyalty was developed very late (not before the 1990s). When writing in English, continental lawyers will also talk about fiduciary duties when they talk about directors' duties in their jurisdictions, but in fact fiduciary thinking was (and to a large extent still is) alien to continental European law -certainly in French-inspired civil law systems- until court cases in countries like France and Germany began to talk about a "devoir de loyauté"/"Treuepflicht" for directors (and sometimes controlling shareholders) in the 1990s. Even today, there is nothing like a statutory or court-developed general "no profit" or "no conflict" rule with the same sweeping ambit of the UK or even Delaware rules in continental European jurisdictions. Rather, companies operate(d) under a system where directors and boards had to always "respect the corporate interest" and in addition were subject to a set of specific rules on conflicts of interest applicable to board decisions (often not to decisions of individual directors outside board meetings). The latter often are statutory rules with a limited scope; in countries where courts had developed conflicts of interest rules, these were originally even (far) weaker than in countries that had statutory rules (e.g. The Dutch rules were until the 1990s virtually non-existent compared with the Belgian statutory rules which had been in place since 1870). Today, in many jurisdictions the courts have developed loyalty doctrines to fill the gaps left by specific conflicts of interest rules and the general instruction for boards always to serve the interest of the company, but it would really be seriously misleading to present these rules as having the same meaning in practice as the English duty of loyalty. On the limited role of the duty of loyalty in continental Europe, see H. De Wulf, "What is a duty of loyalty for directors or shareholders and does it exit under Belgian law," in *Liber amicorum Didier Willermain*, Brussels, Larcier, forthcoming June 2023.

[162] For Germany, see H. Fleischer, "Unternehmensinteresse und intérêt social: Schlüsselfiguren aktienrechtlichen Denkens in Deutschland und Frankreich" *ZGR* 2018, p. 703-734 (in a comparison with France where, outside academia and certainly from the 1980s onwards, a shareholder-focused, "narrow" conception of the corporate interest prevailed until the 2019 Loi Pacte defined "l'intêrêt social" in art. 1833 Code civil in a stakeholderist way, in the sense that it states that companies should take into account the social and environmental stakes of their activities). The Dutch leading case ("Cancun", Hoge Raad 4 April 2014, *NJ* 2014/286, ann. P. van Schilfgaarde, *Ondernemingsrecht* 2014/101, ann. A.F.J.A. Leijten) states that boards should act in accordance with "the interest of the company and the firm connected to it"; this wording assumes that the company should be seen as "the whole body of shareholders" (read: not just controlling shareholders) and the reference to the firm is meant as a reference to other stakeholder interests. Thus, Dutch law undoubtedly has a "broad", "stakeholderist" conception of "the corporate interest".

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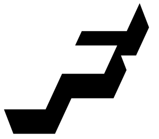

business leaders and corporate law academics alike, things like the impact of firms on the environment or climate, had to be tackled through all kinds of mandatory regulation[163]- perhaps aided by tort law as a private enforcement mechanism- *outside* of company law, not through company law or other legislation with an impact on corporate governance structures, board composition or board duties. From the late 1970s onwards, NGOs and some academics launched a discourse about Corporate Social Responsibility (CSR), but these debates had very little impact on the way large firms operated or on their governance structure; neither were they reflected in companies acts and related governance legislation, contrary to what was the case for creditor and employee protection.

This is now changing, as NGOs representing truly external stakeholders (i.e. others than equity or debt investors or even employees) gain influence over corporate boards and the company's polices and strategies determined by those boards. Human rights/sustainability due diligence legislation now recognizes NGOs as important corporate stakeholders, and creates leverage for them to influence corporate E&S policies. The "hard law" due diligence legislation in France, Germany and the EU will increase the leverage of NGOs to enforce such a stakeholder dialogue with firms. The French law on sustainability due diligence ("Vigilance Law") became effective in 2017 and Germany followed suit with its *Lieferkettengesetz* (effective on 1 January 2023)[164]. Large firms from France and Germany have lobbied their governments to create a level playing field, at least within the EU, through the adoption of a EU Sustainability Due Diligence Directive (CSDDD, colloquially known as "triple D", still being negotiated at the time of writing). Due diligence in this context means[165] integrating due diligence concerning ESG issues in corporations' policies and risk management systems; identifying potential "adverse impacts"[166] that a company, its subsidiaries and relevant business partners may create (especially at the level of outsiders' human (and social) rights, the environment or climate); preventing and mitigating such adverse impacts and, where they materialize after all, trying to end or minimize their impact and then compensate victims; establishing a complaints procedure; periodically monitoring the effectiveness of their DD policies and measures; and reporting on DD practices on the company website and through management reports.

The non-binding international (UN, OECD) due diligence guidelines that preceded the mandatory European legislation, already offered a platform for stakeholder NGOs to enter into a dialogue with firms. Spurred on by the UN's Ruggie Principles[167] and the OECD

[163] Environmental regulation, health&safety rules for the workplace, product safety regulation, …

[164] For company groups with more than 3000 employees; it will become applicable to groups with at least 1000 employees from January 1 2024 onwards.

[165] A brief summary is in fact given in article 4 (1) of the draft CSDDD (Fn.11)

[166] In effect, this concept is more or less synonymous with "negative externality" rather than with the traditional legal concept of (negligently caused) damage.

[167] UN Human Rights Office, *Guiding Principles on Business and Human Rights. Implementing the United Nations 'Protect, Respect and Remedy' Framework,* 2011, 42p., available at https://scholar.harvard.edu/files/john-ruggie/files/guidingprinciplesbusinesshr_en.pdf

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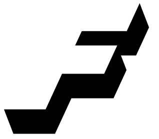

guidelines[168], many OECD member states established so-called National Contact Points (NCP), which are government-sponsored organisations that can help firms understand due diligence best practices but that can also act as mediators when someone has a complaint about the due diligence policies (or the lack thereof) of a company. An example of how this creates leverage for NGO's was the 2017 complaint by Oxfam Novib, Greenpeace Netherlands, Backtrack and Milieudefensie to the Dutch NCP, asking the NCP to investigate the climate policies of ING (an international bank with Dutch roots), in order to enjoin ING to change its due diligence policies so that they would conform to the OECD guidelines.[169] The Dutch NCP was of the opinion that the request did indeed warrant a dialogue, facilitated by the NCP between the four NGOs and ING. This resulted in a so-called "final statement" in April 2019[170] which inter alia contained a commitment of ING to try and develop an emissions policy in line with the Paris Climate Agreement while at the same time pointing out that several methodological issues first had to be clarified before ING could realistically develop such a policy. The Statement explicitly stated that it would not have been useful to issue a judgement on whether ING had complied with the OECD due diligence Guidelines, as this would have complicated further dialogue between ING and the NGOs. This all confirms that the procedure based on a complaint to an NCP will usually not result in hard, enforceable commitments by the "defendant" corporation. But it did lead to a type of mediated dialogue which the NGOs would not necessarily have had with ING if the procedure had not been available.

b. the draft CSDDD imposes stakeholder dialogue

In the draft CSDDD, "Stakeholders" are defined in a very broad way[171]. Not just the employees, trade unions and workers representatives of a company and its subsidiaries, but also consumers and "other individuals, groups communities or entities whose rights or interests are or could be affected by the products, services and operations" of the company, its subsidiaries and business partners. The definition concludes with an explicit reference to "civil society organisations, national human rights and environmental institutions and human rights and environmental defenders". This means, for instance, that a Belgian multinational with an important Indonesian supplier of palm oil, will have to count not only a Belgian NGO that

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[168] The latest version of the general *OECD Guidelines for Multinational Enterprises*, 2011 edition, 95p., available at http://mneguidelines.oecd.org/guidelines/ incorporates the Ruggie Principles. The OECD then developed more specific due diligence guidelines, the *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, 100 p., available at http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm, as well as sector-specific guidelines, all available at the "mneguidelines.oecd.org" website.

[169] See for a description of this "event", the website of the Dutch NCP at https://www.oesorichtlijnen.nl/actueel/nieuws/2017/11/14/publicatie-eerste-evaluatie-melding-oxfam-novib-greenpeace-banktrack-en-milieudefensie-vs.-ing.

[170] Available for download at https://www.oecdguidelines.nl/notifications/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing

[171] In art. 3 (n) of the November 30 2023 (Council's General Approach text) draft of the CSDDD (Fn.11).

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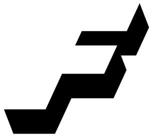

defends human rights world-wide as one of its stakeholders, but also an Indonesian NGO defending the interests of local farmers that have to make room for palm oil plantations.

Art. 6 (4) of the draft states that companies should, where relevant, consult with potentially affected groups including stakeholders to gather information on actual or potential adverse impacts. In case complex measures are required to prevent adverse impacts, companies should develop a "prevention action plan" and this has to be developed "in consultation with potentially affected stakeholders"[172]. If an adverse impact is unfortunately created and cannot be brought immediately to an end, a "corrective action plan" must be developed in consultation with stakeholders[173]. The complaints procedure that companies must organize must not only be open to persons who are affected by adverse impacts, but also to trade unions and employee representatives from throughout the value chain, and to civil society organisations active in the areas of human rights or environmental adverse impacts[174]. The draft Directive also refers to the possibility of organizing "collaborative complaints procedures" in which firms work together with "multi-stakeholder initiatives".[175] At least every 24 months, companies must assess the effectiveness of their due diligence policies and again the draft Directive explicitly mentions that as a result due diligence polices will be updated "with due consideration of relevant information from stakeholders".[176] Art. 19 provides that "natural and legal persons" must be allowed to share substantiated concerns about CSDD with the national supervisory authorities; although stakeholders are not explicitly mentioned, no doubt they are among the eligible "natural or legal persons".

c. Stakeholders in the French due diligence legislation

Under French due diligence legislation, the risk management plan that the company needs to draft, must be developed together with ("en association avec") the company's stakeholders[177]- a concept which is not defined in the French legislation. The stakeholders can issue a formal warning to a company that its due diligence plan does not meet the demands of the legislation. If the company does not remedy the situation within three months "any party who has an interest in the matter" can sue the company to ask for an injunction ordering the company to take measures necessary to respect its due diligence duties[178]. It has never been doubted that NGOs should be considered such "interested parties" and therefore have standing to sue,

[172] Art. 7 (2) draft CSDDD.
[173] Art. 8 (3) (b) draft CSDDD.
[174] Art. 9 (2) draft CSDDD.
[175] Art. 9 (5) draft CSDDD.
[176] Art. 10 (1) draft CSDDD.
[177] Art. L. 225-102-4.-I. (3rd indent) Code de Commerce.

[178] Art. L. 225-102-4.-II.

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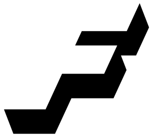

indeed every case so far has been brought by (a coalition of) NGOs and in the TotalEnergies case, their standing was never in doubt.

The TotalEnergies judgement of the Paris court of first instance (28 February 2023)[179] stresses that one of the few things that are clear about the Vigilance Act - which the judgement criticizes because of the vagueness of its central concepts and of the duties it introduces - is that companies should elaborate their "plan de vigilance" in consultation with NGOs[180]. According to the court, since the Act does not indicate which NGOs could be relevant, companies could usefully enlist the input of a wide array of NGOs to help them define the desirable perimeter of their due diligence action while simultaneously reducing the risk of litigation which questions the relevance of the due diligence plan. The court then adds that such an inclusive approach can help to achieve the "monumental goals"[181] of the due diligence legislation *which are essentially political* to the extent they pertain to the protection of the environment and human rights (emphasis added -hdw). The court continues by saying that the procedure of "mise en demeure" (put on notice) is essentially part of this dialogue between NGOs and companies. This is one reason why the court action against TotalEnergies was inadmissible: the NGOs had only dialogued with Total about its 2018 due diligence plan, not about the more recent 2021 plan, even though in the end they mainly had complaints about that 2021 plan.

d. The more reluctant German attitude

The German Supply Chain Due Diligence Act is far more detailed than its French equivalent (and from a technical-legal perspective the drafting is far superior). But it envisions a far more limited role than the French Act for stakeholders. § 4 (4) states that when companies design their supply chain risk management system, they should take the interests of the stakeholders who are directly affected by the activities of the company's supply chain into account, but that is obvious. There is no rule, as there is in the French act, that companies need to actively consult stakeholders in developing their risk management system. The only provision in the German Act that explicitly provides for a special role for external stakeholders and especially NGOs is § 11. This allows victims of serious violations of the Act to delegate the enforcement of their rights before German courts to a domestic union or non-governmental organization. The NGO

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[179] Tribunal judiciaire de Paris, 28 February 2023, no. 22/53942.

[180] p. 19, top, of the judgement.

[181] No doubt the court was here inspired by the work of M-A. Frison-Roche, a French compliance specialist who submitted an amicus curiae brief to the court and who is the editor of book called *Les buts monumentaux de la compliance,* Paris, Dalloz, 2022, 520 p. In an approach which is highly unusual for French courts at least until today, the Paris court encouraged several external experts to enlighten the court on how to deal with the Vigilance Act by submitting amicus briefs.

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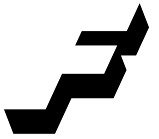

is only eligible if it can show it is a long-standing organization whose articles of association show it is not commercially active (is a non-profit, in other words) and has a more than ephemeral track record in the defense of human rights or related rights under the law of a specific national state[182].

e. External stakeholders are not investors

When policymakers evaluate the desirability of and limits to stakeholder activism using shareholder activism tools, I would argue they can legitimately take into account that other stakeholders than shareholders, large creditors (mainly banks and bondholders) and employees, such as typically environmental NGOs, have indeed invested less or nothing in the companies they are trying to influence. They have no financial incentives to care about the company. They are really representatives of society, or at least of E&S activists within society. Of course, such truly external stakeholders may be exposed to the negative externalities created by companies (called "adverse impacts" in the draft CSDDD), and the NGOs may represent the interest of such victims and may engage in all kinds of efforts to force companies to internalize the cost of hose externalities. If the negative externality takes the form of damage caused by negligence, the victim may of course sue the company, based on tort law. But, again, they should not try to internalize the externalities cost by directly prescribing corporate strategy in shareholder proposals or in claims for injunctions before courts. The NGOs or the external stakeholders they represent do not bear the consequences of decisions of the board or the general meeting to the same extent as long-term shareholders, employees or creditors. A classic well-founded claim of agency theory is that a divergence among shareholders between financial investment and governance power (e.g. voting power), makes agency problems worse.[183] For instance, investors who vote with borrowed shares do not bear the full (financial) consequences of their voting (governance) behavior or those enjoying multiple voting rights per share have a power disproportionate to their investment. It seems to me that the same problem arises about NGOs who have only a symbolic investment (of one share or a few 1000 euros worth of shares) but use certain shareholder rights, such as the right to ask questions to the board at the AGM, as a megaphone, sometimes (increasingly) backed up with the threat of stakeholder/general litigation.

2. NGO litigation in order to change corporate (climate) strategies

[182] The wording makes one wonder whether the German Act wants to allow representative litigation by globally active human rights organisations like Amnesty International, but I assume it would suffice for, say, Amnesty, to show it has been active in the specific country where the human rights violation arose that gives rise to a potential claim under the German Act.

[183] See e.g. many of the papers discussed in R. Adams and D. Ferreira, "One Share-One Vote: The Empirical Evidence", *Review of Finance* Vol. 12, 2008, 51-91 (discussing the governance problems caused or exacerbated by discrepancies between voting power and cash flow rights); or L. Bebchuk and K. Kastiel, "The Perils of Small-Minority Controllers", 107 *Georgetown Law Journal*, 2019, 1453.

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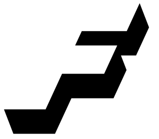

a. *Strategic litigation in general, or why climate litigation is different*

Activist in Europe regularly launch litigation that is intended to change both government and corporate policies. These days, this is often climate litigation intended to increase the efforts companies make to reduce their greenhouse gas emissions, or, relatedly, divest activities in the fossil fuel sector. Repeat players in climate litigation in Europe include the NGOs ClientEarth[184] and Milieudefensie. The case brought by Milieudefensie against Shell in The Hague, in order to force Shell to reduce its CO2 emissions quicker than Shell allegedly intended to do, goes to the core of Shell's corporate strategy. The court of first instance in The Hague ordered the Shell holding company to reduce the emissions of the Shell group and its clients at a specific rate[185], thus forcing Shell (which has appealed the decision) to move into renewable energy at a quicker rate than the board and shareholders had wanted to. The plaintiffs were NGOs, who successfully claimed standing on the basis of Dutch legislation that facilitates general interest litigation.[186] They sued for an injunction to reduce emissions on the basis of the Dutch statutory rules on tort law.[187] The court fleshed out the meaning of Shell's duty of care by invoking a societal consensus on the need for companies to contribute to a reduction in CO2 emissions and the human right to private life as protected articles 2 and 8 of the European convention on Human Rights, which according to the court also encompasses a right to an environment that does not become unsupportable as a result of global warming. The court explicitly pointed out that since the inhabitants of the Netherlands represented by the NGO plaintiffs can invoke such a *right*, it did not have to balance that right against other interests or considerations.

That this litigation is an attempt to have judges impose strategic policies on companies is made even clearer by the stress both the NGO plaintiffs and the court itself put on the responsibility of Shell to also make an effort to reduce the emissions of its customers (scope 3 emissions). The recently launched derivative claim against Shell directors, discussed above at II.1, is also clearly intended to force the directors' and through them the company's hand concerning climate policy. It would be extremely naïve to think that receiving damages from the defendant directors is a major aim of this litigation.

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[184] https://www.clientearth.org/ is an NGO, active world-wide, that calls itself "the world's most ambitious environmental organization" and that focuses on using the law to bring about change, also at companies, in environmental and climate policies. It frequently litigates about environmental matters. As of May 2 2023, its website said it had 168 court cases pending.

[185] See Rb. Den Haag 26 May 2021, ECLI:NL:RBDHA:2021:5337, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5337.

[186] Art. 3: 305a Dutch Civil Code. This essentially states that a non-profit organization can launch court proceedings in defense of similar interests of a group of persons other than itself. Such general interest litigation ("algemeenbelangactie") pursue general interests (plural) that cannot be individualized because they are linked to a very large group of persons that is diffuse and indeterminate.

[187] Art. 6:162 BW (Dutch Civil Code).

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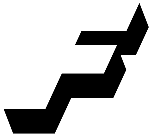

I argue that it is an inconsistency within a legal system like the Dutch: it bans shareholder proposals that touch upon a company's strategy (because determining that strategy is the board's exclusive prerogative), but at the same time admits climate litigation against companies at the initiative of NGOs representing external stakeholders when such litigation touches upon corporate strategies at least as much as the typical climate shareholder proposal.

This type of litigation is enabled by the trend in many European jurisdictions to facilitate general interest litigation. In another internal contradiction, class actions are still regarded unfavorably by European policymakers, at least outside the realm of consumer protection, even though they are not, contrary to climate litigation, geared towards the enforcement of the general interest, but aim to enforce individual interests that are common to a class of plaintiffs. All EU member states had to implement the Aarhus Convention, which entailed a duty for signatories to give standing to NGOs to enforce environmental regulation.[188] In Belgium, the Constitutional Court ruled that it was incompatible with the equal treatment clause in the constitution that the Aarhus rules only applied to environmental claims. Belgian Parliament reacted with the introduction of a rule essentially creating standing for NGOs to sue (before civil courts) when any human right protected by the Constitution or international treaties (when they have been ratified by Belgium) is violated.[189]

Climate litigation against corporations is different in nature than the general interest litigation that NGOs bring against companies based on more traditional human rights violations. This latter type of litigation is also, like climate litigation, often sponsored by NGOs, not primarily because they would want to obtain damages or even injunctive relief against a single company or corporate group. Rather, it often has in common with climate litigation that it is part of a wider campaign to attract attention to deplorable situations and to change policies. This type of litigation can be strategic in the double sense of being aimed at influencing corporate strategies and having aims that go beyond the individual case being litigated. An article on the German KiK case[190] rightly calls the KiK litigation an example of such "strategic

[188] See https://environment.ec.europa.eu/law-and-governance/aarhus_en. Art. 9(2) of the Aarhus Convention is the basis for (forcing signatories to recognize the right of) NGOs to engage in general interest litigation concerning the topics covered by the Convention.
[189] See the second paragraph of art. 17 Belgian Code of Civil Procedure, as introduced in 2018. For a description of the evolution of the rules in Belgium, see Kruithof, *supra* Fn. 27.
[190] "KiK" is a German retail clothing chain. In 2012, 259 workers died, and at least 32 were injured, in a fire in the Ali Enterprises (AE) factory in Karachi, Pakistan. Ali Enterprises was a supplier (but not a subsidiary) of KiK Textilien und Non-food GmbH, which bought 70% of the output of the Karachi factory. KiK Germany was sued in 2015 by some of the (surviving family members of) victims of the fire, who alleged that KiK had been fully aware of the dire and dangerous working conditions at the AE factory, and should have done more to improve the situation or else should have terminated its business relationship with AE. In the end, a German court ruled that under applicable Pakistani tort law, the claim was time-barred when it was brought before the German courts (District court Dortmund, 10

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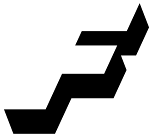

litigation"[191]. The authors, one of whom assisted some Pakistani families to build their legal case in Germany, state that "*Jabir and Others v Kik is not a regular court case*" but that it was part of a broader campaign "*to make visible the workers hidden in global chains of production by enabling their testimony in Germany. The lawsuit therefore also aims at facilitating a protest against the global economic system in a German court as a public forum in the country where KiK is headquartered and its products are bought and worn.*" In other words, strategic litigation is the continuation of war on the excesses of "the global economic system" by other means. However, contrary to climate litigation, at least one of the aims of most such tort-based human rights litigation is to actually receive damages for victims.[192] Also, the litigation may be intended to change company policies on say, health & safety and he amount of investment the company devotes to combating negative externalities –"adverse impacts" in the new legal parlance- but contrary to climate litigation, it does not go the core of determining a company's strategy. The alleged tort or human rights violation (usually one and the same thing) that is at the basis of such suits is usually quite specific (eg causing an oil spill). As a result, courts who have to deal with such cases are not being asked to determine or review a company's strategy (but simply to help enforce respect for quite clear rules of behaviour), contrary to what is the case in climate litigation cases.

By contrast, litigation is singularly unsuitable to help determine corporate strategies concerning climate policy. In adversarial systems, parties will only present the angles to an issue that are beneficial to themselves. Plaintiffs will be focused on a single issue - e.g. CO2 reduction - without due consideration for other interests or values that are affected. As in the Shell climate case decided in the Hague, the claim will often be presented as an attempt to enforce a *right* (of plaintiff) or a corresponding duty (of the corporation). The enforcement of existing rights -which, as Dworkin taught us, are trumps[193] - leaves no room for the balancing of interests against each other, but only for the enforced application of the right or the rejection of its application. The same goes for duties. Just like the corporate boards or strategy-setters whose policies gave rise to the litigation, the court will not only be presented by the parties with distorted information, it has no meaningful guidelines on how to balance the various

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January 2019, judgement Az: 7 O 95/15, available at https://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-Urteil-KIK.pdf.).

[191] M. Bader, M. Saage-Maass, C. Terwindt, "Strategic Litigation against the Misconduct of Multinational Enterprises: an Anatomy of Jabir and Others v KiK", *Verfassung und Recht in Übersee*, vol. 52, 2019, 156-171. On this "model" of strategic litigation, see already J. Lobel, "*Courts as Forums for Protest*", 52 *UCLA Law Review*, 2004, 477.

[192] See as illustrations the "modern classics" cases of *Chandler v. Cape plc* (2012) EWCA (civ) 525, p. 80; *Vedanta resources plc v. Lungowe* (2019) UKSC 20; *Okpabi & Others v. Royal Dutch Shell Plc & Another* (2021) UKSC 3; Begum v Maran (UK) Ltd (Rev1) [2021] EWCA Civ 326, 10 March 2021, and several similar cases.

[193] R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977.

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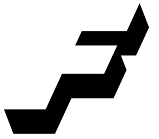

stakeholder interests and values at play.[194] Experts would be confronted with the same difficulty, meaning that invoking their help would be a waste of time.

b. French due diligence litigation

The French vigilance act empowers NGOs to enforce the Act, by suing companies that, according to the NGO, have not complied with their duties to draft and implement a suitable "plan de vigilance". As will become apparent from our discussion, this litigation sometimes opens the door to attempts to change a company's strategy rather than simply remedying the company's risk management concerning the adverse impacts it could create.

A French website keeps track of the court cases against companies based on the Vigilance Act, and as of April 2023, 6 years after the French Vigilance Act had been enacted, listed 10 cases where an NGO had subpoenaed a company for violation of its duties under the Act.[195] In an additional 5 cases, an NGO had sent out a "mise en demeure", that is an official notice of breach, but had not (yet) gone to court.[196] Only one case, namely that against Total Energies, had resulted in a final judgement, with (as discussed above) the claim being ruled inadmissible for procedural reasons. This means six years after the Act came into effect, not a single judgement on the merits of a claim has been reached. Matters were not helped by the initial uncertainty about which court (the regular court of first instance or the commercial court) was competent to deal with claims. It's also striking that the implementing regulations to be adopted by the French government, have not yet been issued.

According to a contribution on the website Novethic[197], the complaints based on the Vigilance Act so far concerned the French headquarters of 16 corporate groups but also three foreign companies with a French subsidiary subject to the Act; some of these companies faced more

[194] Lest a law and economics adept suggest that the guideline should be "efficiency", I have to point out that when incommensurable values clash, efficiency is a meaningless concept that cannot be operationalized (e.g. the "least cost avoider" principle is of no use when a judge has to decide whether to impose certain CO_2 reduction duties on a company).

[195] https://plan-vigilance.org/ The website (which calls itself a "radar for vigilance") also contains a list of companies that according to the website are subject to the Vigilance Act as well as a handy database with links to the actual "plans de vigilance" drafted by French companies and published in their management reports (accompanying the annual report). As far as we could ascertain, the website is maintained by two NGOs, Sherpa and CCFD-Terre Solidaire. According to the 2022 report on this website, in 2021 44 French companies subject to the Act would simply not (yet) have drafted a "due diligence plan" at all.

[196] See also M. Fabre Soundron, "Devoir de vigilance, six ans après: "une loi aussi ambitieuse qui tient sur une page A4 ne peut pas être révolutionnaire" at www.novethic.fr/actualite/social/droits-humains/isr-rse/devoir-de-vigilance-six-ans-apres-une-loi-qui-tient-sur-une-page-a4-ne-peut-pas-etre-revolutionnaire-151430.html. (last consulted April 9 2023).

[197] Which tracks news about sustainability in economics and finance.

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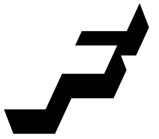

than one complaint. The alleged violations of substantive rules would have taken place in France in 5 cases and abroad in 15 cases. 8 cases concerned climate and the environment, 5 workers' rights and 4 the human rights of local people (eg illegal taking of farm land). 11 complaints had been directed against firms from the distribution sector (like supermarkets), 9 against energy companies and 2 against a bank (in addition to complaints against firms from various other sectors). Usually a coalition of several NGOs, in addition to directly affected people, filed the complaint. In addition to French or "local" NGOs (e.g. a Brazilian organization in cases about Amazon deforestation), US NGOs were coalition partners in several cases based on the French Act.

After the litigation against TotalEnergies, the second court case that was launched seems to be the suit commenced in 2019 by two NGOs, Sherpa and Uni Global Union, against a leading French call center organizer ("Teleperformance") that in 2019 employed about 300.000 people in call centers globally. Plaintiffs argued that Teleperformance had not enacted a due diligence plan concerning the people working for it outside France, whereas there were signs, according to plaintiffs, that working conditions in many foreign call centers of the group did not meet minimum standards.[198] Another case that drew some attention concerned French supermarket chain Casino. It was accused by several French and US NGOs as well as by a group of inhabitants of the Amazon forest that it had over long periods of time bought large amounts of beef from three suppliers who knew or should have known that their own suppliers, certain cattle ranches and beef producers in Brazil and Colombia, allegedly were responsible for illegal deforestation in the Amazon forest with negative impacts on local populations, allegedly constituting a violation of human rights of those local people.

The two campaigns just mentioned are examples of cases about environmental or human rights violations, not about corporate strategies. That is different for the recent high profile case launched against BNP Paribas, a major French bank[199], which stands accused of not doing enough to cut back funding to fossil fuel firms. The detailed 15 p. complaint[200], filed by a coalition of NGOs at the initiative of Oxfam France and Amis de la Terre France, starts with a reminder addressed to BNP Paribas that it is under a duty to align its business with the goal of the Paris Climate Agreement to keep global warming below the 1.5°C limit, and that for a bank this entails that it should not fund any new fossil fuel projects -whereas according to the complaint, BNP Paribas is not only one of the most important funders of the oil industry, both through its lending and bond underwriting activities and because it offers a whole range of investment funds that invest in fossil fuel industries, but is also (according to the complaint)

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[198] https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights.

[199] The Brazilian subsidiary of BNP Paribas has been sued separately, in another case, because it allegedly funded the activities of one of the Brazilian beef producers that also supplies beef to supermarket chain Casino and that allegedly would be responsible for illegal deforestation.

[200] On file with Ghent law school.

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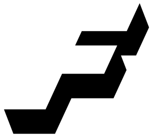

the most important financier world-wide of the "expansion of fossil energies"[201]. The "plan de vigilance" of the bank is far too vague, according to the complaint, and while the bank had announced in 2017 but mainly in 2022 a whole range of "exclusions", meaning certain types of activities or clients it would no longer fund, these were, according to the plaintiffs, wholly insufficient to prevent serious harms to the planet's climate. The banking group ought to completely stop funding new fossil fuel projects but had explicitly refused to do so. A diligent "plan de vigilance" would contain a list with the names of the companies the bank had decided to defund, and a list of the fossil fuel companies it was still funding.

A case like the one against BNP Paribas illustrates that while formally, judicial proceedings against companies based on the Vigilance Act should be about deficiencies in the sustainability due diligence performed, in the accompanying risk management plan or in its implementation, in fact the "put on notice-procedure" provides NGOs with a channel through which to put pressure on companies to change their business model and allows them to grab attention for their actions. This creates reputational pressure for the targeted companies (and even for their clients to the extent plaintiffs want BNP Paribas to publish the names of the "bad polluters" it had decided to stop funding). That such pressure can have at least an appearance of effect became clear at the 2023 AGM of BNP Paribas, where the group announced it would stop funding new gasfield projects.[202]

I would argue that European policymakers, when finalizing the CSDD Directive, should see the French example as a warning and should not copy the French enforcement approach, relying on private enforcement through litigation by NGOs. Since, as we argued, litigation is singularly unsuitable to determine a company's strategy, it should not be encouraged.

VII. *The politicized corporation - or why Europe is too restrictive for shareholder proposals and too accommodating for stakeholder litigation*

1. boards are under pressure to weigh incommensurable conflicting stakeholder interests and values

I contend that the new NGO ESG activism, in its triple form of shareholder activism, strategic litigation, and mandatory dialogue with a broad array of stakeholders as part of a company's

[201] The complaint here relies on a report by several NGOs, *Banking on Climate Chaos -Fossil Fuel Finance Report 2022*, see https://www.ran.org/wp-content/uploads/2022/03/BOCC_2022_vSPREAD-1.pdf.
[202] S. White and K. Bryan, "BNP Paribas to stop funding gas projects as litigation risks mount", *FT* 11 May 2023. The article reports that several NGOs said the move was a step in the right direction, but would only apply to direct loans and would leave room -to the dissatisfaction of the campaigners- for BNP to underwrite bonds used to finance gas projects.

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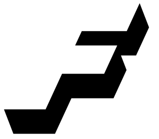

due diligence obligations, are making life more difficult for boards. It threatens to turn boards into unfocused decisionmakers that have to take the type of decisions that are normally the preserve of politicians, namely to decide what is in the general interest by balancing incommensurable values and interest of different stakeholder groups, including society at large without any guidance on how to rationally order these conflicting interests and values.[203] Roberto Tallarita has made a similar point for the US.[204] This threatens to undermine the effectiveness of the role of the board in determining corporate strategy and in the next section (VIII) I will argue this is probably made worse when companies install sustainability or ESG committees and/or lead directors in one tier boards.

I need to point out immediately that, by arguing that European boards are being politicized, I do not mean to say that the situation in Europe is (already) becoming similar to the one in the US, where in some states there is backlash against anything ESG, as part of the broader culture wars, and where boards have to make truly political decisions, like whether to protect their employees from the consequences of the Supreme Court's abortion ruling (see below, VII.3). I only mean that boards are increasingly being buffeted from all sides by stakeholder demands, because stakeholders are turning themselves into small shareholders in order to be able to use the shareholder activist toolkit, and because due diligence legislation is increasing their leverage and possibilities to litigate.

As mentioned before, company law in Europe has been stakeholder-oriented for a long time, in the sense that it has always contained more statutory rules than Delaware law to protect the interest of creditors, and in certain countries has also given a voice to employees at the level of governance bodies, including the codetermination rules which allow employees to appoint up to half of the non-executive board members. But since the rise of the ESG movement, boards have for the first time been forced to take the interest of society at large into account when helping to set the company's strategy. The interests in large corporations of other stakeholders than shareholders, creditors and employees are now being defended more vigorously than ever by NGOs/civil society organisations, including shareholder advocacy groups that do not necessarily focus on shareholder interest, but rather focus on climate lobbying against companies, thereby defending the interest society at large has in combatting climate change.

Arguably, when shareholder advocacy groups battle climate change, they can be regarded as implementing the insight formalized by Hart and Zingales that when a firm's activities are

[203] That that is the essence of political decision-making has been beautifully explained by Ch. Mouffe *On the Political*, London, Routledge, 2005, 144 p. She coins the term "agonism" to refer to a "we/they relation where the conflicting parties, *although acknowledging that there is no rational solution to their conflict*, nevertheless recognize the legitimacy of their opponents" as the essence of the political (Mouffe, p. 20).
[204] R. Tallarita, "Stockholder politics" (fn.22) at 1733.

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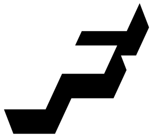

inextricably linked with the creation of negative externalities, the firm should not maximize shareholder *value* (market value and profitability) but should pursue shareholder *welfare*[205]: a retail shareholder who has some limited investments through several funds in such a corporate sector, does not want such firms to pursue shareholder value at the expense of a polluted environment in which her children will grow up , or an economy where workers like herself are systematically exploited. I feel the Hart/Zingales framework is probably less convincing in companies with "old-style" controlling shareholders[206], who probably see and treat the company purely as a wealth-maximisation machine and are opposed to any measures that would deflect management's focus from the creation of shareholder value. In other words, such controlling shareholders are probably not interested in shareholder welfare: insofar as their investments contribute to their welfare, they have decided it will be through generating financial returns (often including private benefits of control). But for non-controlling shareholders, or at least for retail investors and the index funds and pension funds that "represent" them, the Hart-Zingales way of thinking is indeed apposite.

My argument in the next section is that shareholder proposals that basically take away the interest-balancing act that boards have to perform and allow shareholders to instruct the board on how to balance conflicting stakeholder interests, are an unwarranted encroachment on the board's powers.

2. The distinction between desirable and undesirable shareholder proposals - and why Germany and the Netherlands should become more tolerant of proposals that touch upon corporate strategy

a. Shareholder proposals should be allowed to touch upon corporate strategy

As indicated in section V, in major continental European economies like Germany and the Netherlands, and perhaps also in France, corporate law specialists (and in the Netherlands: courts and even statute) assume that the board should set strategy without the intervention of the general meeting. Therefore, in those countries, shareholder proposals that impinge on strategy are considered undesirable and the board cannot be forced to put them on the agenda

[205] O. Hart & L. Zingales, 'Companies should maximize shareholder welfare not market value', *Journal of Law, Finance, and Accounting* (2) 2017, p. 247-274.

[206] By which I mean not companies with important and perhaps influential but still minority blockholders, nor companies where three or four asset managers exercise a majority of votes, but companies where one or a concerted coalition of shareholders hold a majority, or at least more than 30% of voting rights.

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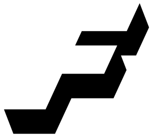

of the general meeting. I think this approach is too restrictive and is undesirable. It should be refined.[207]

First, most shareholder activism, whatever the tactics used and whether they involve shareholder proposals or not, concerns strategic matters. That in itself cannot be a valid objection against shareholder proposals being discussed or voted on at the general meeting. When activists try to bring about or block a merger or encourage divestments, these transactions can have long-term impacts and can certainly be considered strategic[208]. Proxy fights intended to have board members proposed by activists appointed to the board are strategic as well, even though only indirectly: they are intended to influence the composition of the corporate body that will determine strategy.

On the other hand, many shareholder proposals do not interfere with strategy development. An example are disclosure proposals. These demand, for example, that firms offer more transparency about their policies concerning such issues as workforce or top management diversity, or about a firm's lobbying efforts concerning climate change regulation. Many "social" proposals, e.g. about minimum pay or allowing unionization of the workforce, will be either about respecting workers' legal rights, or applying "best practices", and likewise cannot really be said to encroach on corporate strategy. Somewhat more intrusive are proposals that want the company to develop explicit policies concerning a certain area of concern, for instance policies about diversity, or emissions reduction policies. Asking the board to develop a policy and disclose it in the form of a written plan will almost always entail that the proposal's sponsor suggests the policy goes in a certain direction, e.g. increasing diversity at top management level, or reducing emissions faster than until now. But as long as the proposal does not contain prescriptive elements about how the policy should be developed, and simply boils down to an exhortation that the board should devote attention to a certain issue, I believe the proposal does not really limit the freedom of the board to develop corporate strategies. I believe legal systems like the Dutch and the German should be more accommodating to such proposals. If NGOs acting as shareholders are prevented from using the shareholder proposal tool to vent their opinion, they will more easily switch to litigation, which is always undesirable.

b. *But prescriptive divestment and climate proposals are unwarranted*

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[207] It seems Australian case law on shareholder proposals that touch on corporate strategy is also very restrictive about them, similar to the situation in the Netherlands, see S. Bottomley, "Rethinking the law on shareholder-initiated resolutions at company general meetings", *Melbourne University Law Review* Vol. 43 (1), 2019, 94-132 who analyzes this case law and then pleads for a legislative intervention to facilitate more shareholder proposals.

[208] This is not the case for activism that is only intended to influence the price offered to shareholders in M&A transactions.

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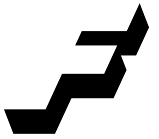

There is, however, a category of shareholder proposals that is undesirable. These are proposals that prescribe a certain strategy or already fill it out. A typical example are the proposals that want to instruct the board to divest a certain branch of activity -e. g. proposals to spin-off all fossil fuel activities and completely, within a certain time-path designed in the proposal, transform the company into a renewable energy company. The fact that there probably is no European or North-American legal system where the general meeting of a public company can issue a binding instruction to the board for such matters, does not diminish the fact that votes on them at the general meeting directly encroach on the board's strategy-setting powers. This is even more the case for the not uncommon proposals, or demands formulated as a shareholder question at the AGM, that companies reduce their CO2 emissions by a certain quantity towards a specific date (e.g. proposals saying that an oil major, or a supermarket chain, should by 2030 reduce its emissions by 45% compared to their 2019 levels).

Such specific climate action plan proposals ask of companies, that is their boards, to develop policies the way politicians have to do this. By this I mean that these forms of activism ask the board to weigh against each other various stakeholder interests that are incompatible, in that a corporate decision or policy cannot serve the interests of one stakeholder group without hurting the interests of another one. With these conflicting interests are associated incommensurable values, and neither economics, ethics, management science, political science nor any other set of rules or methodologies to guide decision-making can help to order these values, interests and preferences in a rational or even well-considered way. Decision-makers - in our context: boards - often have to cut a gordian knot and do what they think is best, provided they have no conflict of interest and provided they have decided on an informed basis, taking into account all relevant interests. Take a European oil major that in the spring of 2022, shortly after the outbreak of the Ukraine war and with Europe in the midst of an energy crisis, needs to consider its corporate strategy with attention for climate issues. In the interest of society at large and because it knows it will be expected to contribute to the pursuit of the goals of the Paris Climate Agreement and of the European Commission's Green Deal, the company wants to reduce its CO2 emissions. In its own interest and especially that of its shareholders, it wants to develop a long term strategy that will generate nice financial returns and it realizes that some day, it will need to transform itself into a renewable energy company. But at present and in the next few years, it is clear that investments in oil will generate nice returns that at least in 2022 will very much exceed the returns of investments in renewables. The country where the company is headquartered wants the company to contribute to energy security by providing sufficient amounts of oil in the near future, especially now that Russian gas is no longer available. The government of that country tries to keep energy affordable for middle class and low-income consumers during the Ukraine war, and expects or hopes companies will cooperate with that goal, in the case of oil majors by supplying sufficient oil to the country's economy. Such a European oil major in 2022 had to develop a policy concerning a gradual switch to renewable energy and reduction of climate impact by balancing conflicting

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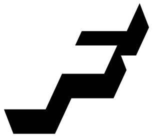

interests and values in exactly the same way as European governments had to develop a climate and energy security policy in that same year. Just like even constitutional and administrative courts are not allowed to second-guess government policy by themselves developing, through judicial review, their own version of a national climate policy, developing such a corporate climate policy is something that should be left to the board, free from specific instructions from shareholders, even through precatory shareholder proposals on which the general meeting votes.[209]

c. *The link with the debate on stakeholderist directors' duties*

The criticism of such prescriptive shareholder proposals that encroach too far on the board's strategy-setting competence, is very much related to one of the convincing criticisms against a stakeholderist approach to directors' duties. During the debates that raged among European corporate law scholars (and attorneys) especially during the 1980s and 1990s[210] about whether boards should be guided by a "broad" (stakeholderist) or narrow (shareholder-focused) interpretation of "the corporate interest", many scholars convincingly pointed out that imposing a broad conception of the corporate interest on boards made no sense because nobody could provide boards with criteria on how to weigh conflicting stakeholder interest against each other, or in other words how to rank those conflicting stakeholder preferences.[211] In other words, nobody could offer an algorithm, or even vague guidelines that could help board operationalize the (possible) instruction to pursue the interests of all stakeholders. In the recent debates about corporate purpose and stakeholderism[212], this convincing argument

[209] It is clear that such thinking rightfully also helped the judge in the ClientEarth v. Shell derivative action discussed in section II.1 *supra* Fn. 37 to refuse to grant permission for this derivative claim to proceed.

[210] In France, the debate started earlier under the influence of the "institutional theory" of the corporation as propagated by J. Pailluseau in his influential (among scholars) *La société anonyme. Technique d'organisation d'entreprise*, Paris, Sirey, 1967, 259 p.

[211] The European literature is enormous. One of the best analyses was J.E. Parkinson, *Corporate Power and Responsibility. Issues in the Theory of Company Law*, Oxford: Clarendon Press 1993, e.g. at p. 82 ff. See also H. De Wulf *Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*,(Ph.D. thesis) Antwerp, Intersentia, 2002, 521-529 (where I argued "the corporate interest" broadly construed was a concept that cannot be falsified or operationalized, that it is therefore useless in guiding directors in their decisions, let alone courts in their review of such decisions, and that generally, the concept however construed serves no useful purpose in judicial review of board decisions, e.g. with a view to their annulment by courts on the basis of art. 2:42 Belgian Companies Code). For a summary of the views on the meaning of "the corporate interest" in continental European legal scholarship (Belgium, France, Germany, the Netherlands) in the 1950-1999 period, see A. François, *Het vennootschapsbelang in het Belgisch vennootschapsrecht. Inhoud en grondslagen*, Antwerp, Intersentia, 1999, p. 401ff. and the cornucopia of references therein.

[212] A rich summary of the original phases (2018-2020) of the purpose debate, with references to all the major contributions (in English) at the time, is G. Ferrarini, "Redefining corporate purpose: sustainability as a game changer" in D. Busch, G. Ferrarini & S. Grünewald (eds.), *Sustainable Finance in Europe*, Palgrave Macmillan 2021, 85-150. A recent important contribution from a mainly American perspective on how corporate law is becoming "welfarist" and therefore to a certain extent

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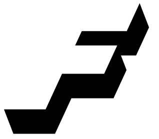

has resurfaced, most elaborately and cogently in the criticism levied by Lucian Bebchuk and Roberto Tallarita against stakeholderism[213]. Bebchuk and co-authors have added to the existing arguments by showing in empirical research that at least in the US, boards and executives do not act in accordance with stakeholderist rhetoric: they negotiate and take decisions in the interest of those who appoint and dismiss them (shareholders) and in the interest of management, but not in the interest of other stakeholders[214]. It would be interesting to do similar research in European jurisdictions where employees have serious governance powers. One thinks of the anecdote where the CEO of Volkswagen was forced out mainly under the influence of employee representatives in the non-executive supervisory board[215] - an example of non-executive directors clearly "bargaining" in favor of others than shareholders. But the point that nobody can guide directors in how to balance the conflicting interests of stakeholders, holds in a system where non-shareholders have serious governance powers. It is far *easier* – although not necessarily more desirable - for boards to serve the interest of only one stakeholder group, such as shareholders, whose interest are relatively uniform -the classic justification for only allowing shareholders to vote.[216]The irrationalities of decision-making known from social choice theory[217] are less likely in "coherent" groups with one overriding common interest - firm value - and hence more or less uniform values.[218].

The impossibility of finding objective criteria for deciding between incommensurable conflicting interests and values is an important justification for not allowing courts to second-guess a board's strategic decisions. Such business judgements are protected by the business judgement rule in Delaware, and in Europe by various doctrines that require judges to show restraint in reviewing the decisions of corporate bodies, such as in Belgium the doctrine of "marginale toetsing" (marginal review only) or in Germany doctrines about limits to "materielle Inhaltskontrolle" (material judicial review of the content of corporate decisions). If

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stakeholderist (though the authors suggest the "movement" may have a bigger impact on politics than on private enterprise) is M. Kahan and E. Rock, "Governance Welfarism" (December 22, 2022), European Corporate Governance Institute - Law Working Paper No. 683/2023, available at https://ssrn.com/abstract=4328626.

[213] L. Bebchuk & R. Tallarita, 'The Illusory Promise of Stakeholder Governance', 106 *Cornell Law Review*, 2020, p. 91-178.

[214] See L. Bebchuk, K. Kastiel, and A. Toniolo, "How Twitter Pushed Stakeholders Under The Bus" (January 19, 2023), forthcoming, 28 *Stanford Journal of Law, Business, and Finance*, 2023, available at https://ssrn.com/abstract=4330393 and references therein to earlier work of Bebchuk and co-authors proving the same point, such as L. Bebchuk, K. Kastiel, and R. Tallarita, "For Whom Corporate Leaders Bargain" 94 *Southern California Law Review,* 2021, pp. 1467-1560.

[215] See J. Miller, "Herbert Diess ousted as Volkswagen boss", *FT* July 22, 2022.

[216] H. Hansmann, *The Ownership of Enterprise*, Cambridge Mass., Harvard University Press, 1996.

[217] As expressed, for instance, in the Condorcet voting paradox or in Arrow's impossibility theorem; see for a formal and informal advanced introduction to social choice theory A. Sen *Collective Choice and Social Welfare* (expanded edition), Penguin, 2017, 640 p.

[218] Even though such matters as time horizons may differ and even though many investors do not care very much about the firm value of individual firms, as long as their whole portfolio generates a good return.

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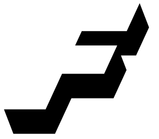

ex post review of such decisions is to be limited to egregious cases of mismanagement ("waste", "intent to defraud minority interests", …), the case for limiting *ex ante* instructions on strategy to the board issued either in the form of shareholder proposal instructions from the general meeting or injunctions ordered by a court, is all the more convincing.

Therefore, the same criteria that I proposed to judge the admissibility of shareholder proposals, can also be used to help courts determine whether they can accept stakeholder litigation aimed at influencing corporate strategy. If an NGO sues a company for damages because it has treated employees in a (foreign) mine almost like slaves, or has illegally expropriated local farmers in order to clear land for a palm oil plantation, then the NGO is simply trying to get the company civilly punished for violating clear mandatory rules. Such claims should be admissible and the judge can not only award damages but also issue cease and desist orders (which are a form of injunction). But if Milieudefensie sues Shell in order to obtain a court order that Shell reduce its CO2 emissions with 45% by 2030 compared to 2019 levels, then such claims should at least be found unfounded -if they are admissible- because they are asking the court both to replace politically elected or appointed state regulators and to determine the strategy of a corporation in a detailed, prescriptive way. This is not just undesirable, it is illegal[219]. I think a similar attitude is warranted towards the efforts by a coalition of NGOs who are threatening to sue BNP Paribas, a major French bank, in order to stop it from funding fossil fuel companies like the oil majors. Shareholder proposals to that effect should, in my view, not be taken into consideration by the general meeting for the same reason, whereas shareholder proposals that enjoin the board of a bank to take a stance and develop and announce a policy about funding of the fossil fuel industry, should be considered legitimate and can be put to a vote.

d. Illustrations of the right approach

The right attitude was recently taken by a court in Braunschweig in a suit against Volkswagen. NGOs including Milieudefensie sued the three major German carmakers (Volkswagen, BMW, Mercedes-Benz) to demand an injunction ordering them to stop the production of fossil fuel cars by 2030 (this was before the EU had decided to phase out most of that production in the non-truck sector by 2035). The district court in Braunschweig rightfully rejected such a claim against Volkswagen, not based on the argument that courts cannot be used to determine a company's strategy, but on the in this case even better (and related) ground that private companies like Volkswagen, that are not directly subject to treaties like the Paris Climate Agreement and that by definition are not legally bound by soft law, aspirational

[219] I tried to explain in e.g. H. De Wulf, "Some thoughts on the regulatory use of tort law in a corporate context" in F. Mourlon Beernaert, G. Collard, D. Szafran, & D. Willermain (Eds.), *Liber Amicorum Xavier Dieux : hommage d'exception à un esprit libre*, Brussels, Larcier, 2022, Vol. 1, pp. 731–770 why I think the the Hague ruling in the Shell climate case would at least in France and Belgium have to be regarded as incompatible with tort law, and as a violation of the constitutional principle of separation of powers.

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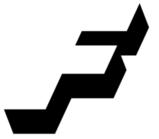

environmental and climate goals, cannot be held, on the basis of tort law, to a higher standard than governments and than the standard imposed by mandatory regulation in implementing a climate strategy.[220]

I think the attitude BlackRock took in 2022 towards climate shareholder proposals is also about the right one, and one that could inspire European rule-makers about shareholder proposals. 2022 saw shareholders in US companies offering less support for climate-related shareholder proposals. According to an analysis by The Conference Board, investors submitted more environmental and social proposals than ever before in 2022 -namely 389- but support dropped from 37 to 33 percent[221]. Investors cited as reasons that the board should direct corporate strategy[222] and that some proposals were too prescriptive, e.g. when they prescribed specific emissions reduction targets or when ten proposals to demand banks stop financing fossil fuel industries, only gained 10% of the vote support. BlackRock had indeed announced before the start of the proxy season that it would not support proposals that were too prescriptive[223]. It was perhaps telling that at ExxonMobil, where the previous year it had supported the nomination of two directors by Bluebell, it now voted against a proposal that asked ExxonMobil to set specific targets for greenhouse gas emissions, whereas it did approve of a proposal asking the company to engage in scenario planning for a range of energy transition pathways.[224] I think the attitude of BlackRock is commendable: it points towards the right approach for European regulators to take to shareholder proposals that allegedly encroach on the board's power to determine corporate strategy.

The approach I favour is probably similar to the SEC's former policy about the "ordinary business exception" to shareholder proposals[225] as explained in its now rescinded 2019 Staff legal Bulletin no 14 K (CF), and thus before the 2021 changes to that policy with its 14L Bulletin[226]. Rule 14a-8 of the Securities Exchange Act 1934 contains the US federal rules on

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[220] See Landgericht Braunschweig ruling 6 O 3931/21 of 24 February 2023, as discussed in "Zivilklage gegen Volkswagen AG wegen Verringerung der CO2-Emissionen erfolglos", https://www.die-aktiengesellschaft.de/82788.htm (last consulted on April 30 2023).
[221] B. Masters, "Shareholders back away from green petitions in US proxy voting season", *FT* July 1 2022. Analysis by Blackrock of data provided by ISS said there was a drop from 36% of the vote -support in 2021 to 27% in 2022, see B. Masters, "Blackrock pulls back support for climate and social resolutions", *FT* July 26 2022.The same article mentions that BlackRock supported 43% of environmental and social proposals in 2021 but that this dropped to 24% of the total number of proposals in 2022.
[222] See the quote in the FT "green petitions" article (previous footnote) from the head of stewardship of stewardship for State street Global Advisers.

[223] See the statement in BlackRock Investment Stewardship, *2022 climate-related shareholder proposals more prescriptive than 2021*, available at https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf.
[224] B. Masters, "Shareholders back away from green petitions in US proxy voting season", *FT* July 1 2022.
[225] See Rule 17 C.F.R. § 240.14a-8 on shareholder proposals.
[226] For the latter, see https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

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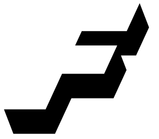

shareholder proposals and establishes that a company must as a rule include a shareholder proposal (submitted by an eligible shareholder) in its proxy materials, unless the company can invoke one of the 13 exclusion grounds listed in the Rule. Companies that want to exclude certain proposals will typically try to obtain a so-called "no-action letter" from the SEC.[227] Rule 14a-8(i)(7) is the exclusion ground for a shareholder proposal that "deals with a matter relating to the company's ordinary business operations." It has never been very clear what the contours are of the "ordinary business" concept[228], but it does seem clear that the fact that a shareholder proposal touches upon corporate policies or strategies is not in itself sufficient grounds for a shareholder proposal to be disqualified. However, when a proposal becomes too prescriptive, it could be blocked as being an attempt at forbidden micromanagement. According to the SEC's policy guidance -which is not binding legal guidance- in its now rescinded 2019 Bulletin 14K:

"In considering arguments for exclusion based on micromanagement, and consistent with the Commission's views, we look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board. Thus, a proposal framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue generally would not be viewed as micromanaging matters of a complex nature. However, a proposal, regardless of its precatory nature, that prescribes specific timeframes or methods for implementing complex policies, consistent with the

[227] J. Cox and R. Thomas, "The SEC's Shareholder Proposal Rule: Creating A Corporate Public Square", *Columbia Business Law Review* 2021, 3, 1147-1198 provide a history of the evolution of Rule 14a-8 and make the interesting suggestion that, since boards tend to be insulated and lack information, shareholder proposals can function like a "town square", allowing a broad range of shareholders to canvass opinions that, even if such proposals are not supported by a large number of shareholders, may provide the board with useful information. This raises the question whether shareholder proposals are not a very expensive and procedurally complicated way of allowing shareholders to voice their opinions. In Europe, the potentially disruptive but far cheaper method of allowing shareholders to ask questions and give speeches at the general meeting, seem more suitable to provide such a townhall square function. But this admittedly only works because -and as long- as meetings are held physically, in relatively small countries where shareholders travel to meetings, as they until today still often do in continental Europe. Experiences with online meetings during the COVID19 epidemic showed that online meetings do not lend themselves very well to critical questioning of the board by participating shareholders.

[228] It appears from SEC policy announcements made in various so-called "Staff Legal Bulletins" (it seems esp. SLB 14 E, K and L are relevant for this matter, though E and K have now been rescinded) that the ordinary business exception permits exclusion of proposals that are "*fundamental to management's ability to run the company on a day-to-day basis*". Proposals that focus on policy issues that are deemed to be so significant that they transcend ordinary business cannot be excluded. Shareholder proposals that engage in micromanagement, "*by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment*", can be excluded. In 2021, the SEC's Staff Legal Bulletin No. 14L announced changes in the no-action letter policy, including about the ordinary business exception, in general making it more difficult for companies to invoke the exception. The details do not need to detain us here.

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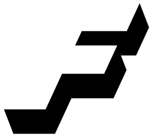

Commission's guidance, may run afoul of micromanagement. In our view, the precatory nature of a proposal does not bear on the degree to which a proposal micromanages." [229]

I think those views were commendable and could guide policy changes in European countries that are too restrictive for shareholder proposals. However, in 2021 (when the ownership thresholds for introducing shareholder proposals were also lowered) the SEC changed its guidance with its 14L Bulletin, making clear it wanted to facilitate shareholder proposals on ESG matters by reintroducing its 1976 exception to the ordinary business exclusion rule for proposals about significant social policy issues, and by "clarifying" that the "micromanagement" -possibility to bar proposals should not necessarily exclude proposals that contain specific timelines or methods to achieve a desired goal, such as emissions reductions. But it gives as an example illustrating its new guidance its refusal in 2021 to grant a no-action letter in a case where a shareholder proposal wanted to impose specific greenhouse gas emission reductions on a company and its products, but without imposing a specific method for doing so - which creates unclarity about whether suggesting specific methods is acceptable or not.

In any case, I think the newest SEC guidance would be hard to swallow for policymakers in European countries such as Germany and the Netherlands, and as explained above, I personally also think that shareholder proposals that impose specific quantified targets with a timeline, are too intrusive concerning strategy to be desirable.

To conclude, my recommendation to courts and policymakers in the Netherlands and Germany would therefore be to take a more nuanced approach to shareholder proposals that impinge on board competences. That a proposal touches upon matters on which only the board can take a binding decision, should not be sufficient ground for the board/the company to refuse to put such a proposal on the agenda of a general meeting. Only proposals that are

[229] Excerpt from SLB 14K (CF) (October 16 2019, now rescinded and replaced by SBL14L) (internal footnotes omitted) where it was added: " For example, this past season we agreed that a proposal seeking annual reporting on "short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement to keep the increase in global average temperature to well below 2 degrees Celsius and to pursue efforts to limit the increase to 1.5 degrees Celsius" was excludable on the basis of micromanagement. In our view, the proposal micromanaged the company by prescribing the method for addressing reduction of greenhouse gas emissions. We viewed the proposal as effectively requiring the adoption of time-bound targets (short, medium and long) that the company would measure itself against and changes in operations to meet those goals, thereby imposing a specific method for implementing a complex policy. In contrast, we did not concur with the excludability of a proposal seeking a report "describing if, and how, [a company] plans to reduce its total contribution to climate change and align its operations and investments with the Paris [Climate] Agreement's goal of maintaining global temperatures well below 2 degrees Celsius." The proposal was not excludable because the proposal transcended ordinary business matters and did not seek to micromanage the company to such a degree that exclusion would be appropriate. "

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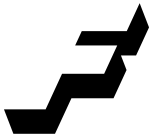

too prescriptive, in that they impose a specific strategy on the board, should be refused. Although it would be naïve to assume that shareholder proposals and litigation about corporate, e.g. climate strategy are communicating vessels, and that if shareholder proposals are admitted more easily, such litigation will diminish, I do think the pressure to litigate will at least be alleviated. Perhaps more importantly, the legitimacy of such litigation - which is always the worst solution to stakeholder conflict - will be diminished. Dutch policymakers and Dutch and German attorneys and scholars who defend the current very restrictive approach to shareholder proposals in those two countries, also seem to me to have an unrealistic image of the way corporate strategy is determined. It is fine to write into statute that the (executive) board has exclusive competence to determine the corporations strategy, but this will not prevent non-executive supervisory boards and controlling shareholders or blockholders to work with the board to help it develop strategy. Nor should it. A supervisory board that totally neglects to talk about strategy with the executive board, fails in part of its monitoring duty and does not play the corporate governance role that it should play. At the same time, in companies with a controlling shareholder, it is unrealistic to expect that that shareholder will not try to influence strategy setting. Indeed when SRD II, national corporate governance codes and stewardship codes encourage shareholder engagement, such engagement can only be meaningful if it also pertains to strategy, as long as nobody gets it into their heads that they can *dictate* a specific strategy to the board.

3. ESG is even more politicized in the US

While in Europe boards, under pressure from external stakeholders, increasingly have to take the *type* of decision that politicians have to take (namely cutting gordian knots in situations where incommensurable stakeholder values and interests clash), the situation is still largely different from that in the US, where boards take decisions that are viewed as political[230]. The debate about the involvement of corporations and their investors in ESG issues is very much alive in the US, and in certain states (where Republicans are in control of state political bodies) there is a clear backlash against ESG. Some states like Texas and West Virginia have prepared bills that would ban state agencies from doing business with asset managers and investment funds that are too ESG-focused. Texas seems to have instructed state pension funds to divest themselves from funds that exclude fossil fuel companies from their portfolio, whereas Florida has banned its state pension funds from considering ESG factors in their investments.

[230] Just one example are shareholder proposals (at least 22 were identified by the FT) that demand that companies produce more detailed disclosure of their "abortion policies", and about how their workforce is affected by the reversal of *Roe v Wade* by the US supreme Court in *Dobbs v. Jackson Women's Health Organization*, see P. Temple-West, "Shareholders bring US abortion battle to the boardroom", *FT* January 10 2023. See more generally L. Stewart (Morningstar Inc.), "Proxy-voting insights: voting on politics", April 2 2032 , https://corpgov.law.harvard.edu/2023/04/02/proxy-voting-insights-voting-on-politics/ (full Morningstar report available at https://www.morningstar.com/lp/esg-proxy-voting-on-politics), focusing on how many shareholder proposals concerning political lobbying disclosures and about climate change were launched in the US in 2020-2022 and how the 10 largest US asset managers voted on them.

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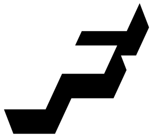

Blackrock has been a prominent target of such state divestment efforts, because of the relatively vocal stance of its CEO, Larry Fink, on ESG and corporate purpose[231], and no doubt also simply because it is the largest asset manager in the US, and thus potentially influential. But attorney-generals from 21 states also targeted leading proxy advisors ISS and Glass Lewis in a letter accusing them of failing their fiduciary duties because of their support for climate proposals[232]. In 2022, "conservative" shareholder activists, like the national legal and Policy Centre and the National Center for Public Policy Research's Free enterprise Project, allegedly submitted a record number of shareholder proposals, though this still only amounted to 5% of all shareholder proposals.[233] A recent iteration of the debate is the saga around Department of Labour rules. In November 2022, the DOL had revoked Trump-era rules that banned retirement fund managers to consider ESG factors in their investments. But in early 2023, US Congress overturned the more lenient new rules, which led president Biden to exercise the first veto of his presidency, in order to block the anti-ESG rules[234].

Strikingly, shareholder proposals on ESG topics are far more widespread in the US than in Europe, as is clear from the empirical research of Tallarita and Bakker in particular[235]. It is

[231] See B. Masters, "BlackRock denies Republican claims of climate 'actvism'", *FT* September 7 2022, mentioning 19 Republican attorneys-general writing a letter to BlackRock in August 2023 accusing the firm of prioritising activism over its fiduciary duty towards state pension funds. At the same time, BlackRock, which in 2022 shied away from supporting shareholder proposals on climate that it found "too prescriptive", e.g. because they wanted to set specific emission reduction targets for individual companies, found itself under attack from the (UK-based) Bluebell Capital Partners activist fund for "ESG hypocrisy", i.e. not doing enough on ESG issues, see B. Masters, "Blackrock chief Larry Fink pressured to resign over 'ESG hypocrisy'", *FT* 6 December 2022. Remarkably, Bluebell objected in particular to BlackRock's new (2022) "Voting Choice Program", which is a platform that allows some of BlackRocks largest institutional investor clients to vote directly at AGMs, without using the voting services of Blackrock, enabling these investors to directly express their own preferences through a vote (see https://www.blackrock.com/corporate/about-us/investment-stewardship/2021-blackrock-voting-choice). In other words, Bluebell did not want these pension funds and other investors to express their own preferences on ESG, but wanted BlackRock to use its substantial power at AGMs (based on its asset management services) to systematically support ESG proposals at AGMs. Bluebell lamented that its own ESG proposals at Glencore and Solvay had not been supported by BlackRock.

[232] P. Temple-West, "Republicans target proxy advisors ISS and Glass Lewis in ESG backlash", *FT* 17 January 2023.

[233] See A. Edgecliff-Johnson and B. Masters, "Political proxies: conservative activists file record shareholder proposals", *FT* March 28 2022. From the examples given, it seems many of the 'conservative' proposals are about the same topics as 'liberal' proposals (e.g. about board diversity, or a proposal criticizing Disney for using a subcontractor from China that was active in Xinjiang province, where according to US Congress China is committing genocide), but they regularly have a different intent: the article cites a 'conservative'-backed proposal demanding a racial equity audit at Johnson & Johnson, but because the sponsor (NCPPR) was concerned that anti-racist training at companies was itself "deeply racist" and that employees deemed "non-diverse" could be discriminated against.

[234] See for this story about the DOL's rules e.g. S. Rajgopal, A. Srivastava and R. Zhao, "Do political anti-ESG sanctions have any economic substance ?", available at clsbluesky.law.columbia.edu/2023/04/04/do-political-anti-esg-sanctions-have-any-economic-substance/ (April 4 2023).

[235] *Supra* section IV.

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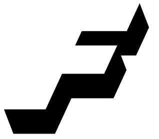

unlikely that this is because US investors are more ESG focused than investors (many of them US asset managers) in European companies or than European investors. A far likelier explanation is that it has become far easier in the US than in most continental European jurisdictions to submit shareholder proposals, not only because the ownership thresholds in the US[236] are lower than in many European countries, but also because the US federal "ordinary business"- exception – barring shareholders from submitting proposals that would interfere with the daily management of companies, thus attempting to micromanage them[237]- is far less restrictive than the prohibition for general meetings in Germany or the Netherlands and possibly France to interfere with corporate strategy.

VIII. *Board effectiveness and board structure: sustainability committees and ESG lead directors*

When companies, under pressure from ESG activists, adapt the structure of their boards by introducing a sustainability committee (or committee with a different name but similar functions) and/or nominate a "lead director" for ESG matters[238], this may be good for their "ESG performance" and oversight of such matters, but could be detrimental to the strategic role of the board. Perhaps a "solution" to this trade-off[239] could be found in switching to a dual, two tier board structure, with the supervisory board concentrating on oversight and the executive board on strategy. But while the ideas put forward in this section are based on research by economists, I want to stress that I'm fully aware that my conclusions here are far more tentative than in the rest of the article, and that far more research on these issues is needed. This section is therefore more about the development of a research hypothesis than about drawing firm conclusions or making sound policy recommendations.

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[236] The ownership threshold in Rule 14a-8 was amended in 2020, see e.g. https://www.sec.gov/news/press-release/2020-220.

[237] See discussion at section VII.2.d.

[238] See, for example, the 2021 campaign of IICCG (Institutional investors climate change group) to have companies not only organize an annual vote on the follow-up of their climate transition plans, but also appoint a lead director responsible for these climate plans, as reported in A. Mooney, 'Big investors demand vote on companies' net zero plans', *FT* 30 July 2021. See also the plea by a group of leading Dutch corporate law scholars for the installation by listed companies of a separate "societal advisory board", in addition to the supervisory and executive boards and with whom the official two boards would meet regularly: J.W. Winter, J.M. De Jongh, J.B.S. Hijink, L. Timmerman, and G. van Solinge, "Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer. Een antwoord op reacties". *Ondernemingsrecht,* 2021 (1), 31-39, section 5 of this article.

[239] Two articles studying trade-offs between different expected roles of boards are J. Winter and E. Van Looy, "Boards on task: developing a comprehensive understanding of the performance of boards", in M. Belcredi and G. Ferrarini (eds.,) *Boards and shareholders in listed European companies*, Cambridge, Cambridge university Press, 2013, 225- 250 and J. A. Mccahery, E. P.M. Vermeulen, M Histake, "Understanding the role of the board of directors: what is the right balance between managerial oversight and value creation" in H. Birkmose, M. Neville and K.E. Sörsensen, *Boards of directors in European companies*, Wolters Kluwer, 2013, 301- 325.

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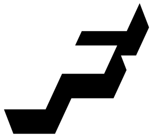

1. Sustainability committees and ESG lead directors

As part of societal and investor pressure on firms to devote more attention to stakeholder and ESG issues, it is sometimes suggested companies should install a sustainability committee, or appoint a "lead director" who's the target person within the board for ESG matters. Once CSDD legislation will apply throughout the EU instead of only in France and Germany, pressure to bolster the board's oversight function concerning ESG matters (which are at the heart of CSDD legislation) will likely increase.

Many companies already have a sustainability committee (which goes by various names; in the early days "environmental committee" was sometimes used and today they are also often called "ESG committees")[240] within the board[241], and this development predates the increased attention to ESG matters from about 2016 onwards. Usually such a committee is not exclusively composed of board members, but also contains several officers. It seems certain

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[240] On such committees, see International Finance Corporation (part of the World Bank Group), *Sustainability committees: structure and practices*, 2021, 80 p.; D. Salvioni, and F. Gennari, "Stakeholder Perspective of Corporate Governance and CSR Committees" (December 1, 2019) available at https://ssrn.com/abstract=3523684. For Japan, see S. Kozuka, "Introducing Sustainability into the Japanese Corporate Governance: The Shift to the "New Capitalism" or the Continued Gradual Transformation?", May 14, 2022, available at https://ssrn.com/abstract=4109982

[241] For instance, J. Burke, R. Hotaish and U Hotaish "The Heterogeneity of Board-Level Sustainability Committees and Corporate Social Performance", *Journal of Business Ethics* 154(4), 1-26 report that *in the US* in 2010, 65% of S&P 100 and 20% of Russell 1000 companies had such a committee, and that, predictably, their prevalence was greater in environmentally sensitive industries. In 2020, 73 of 151 *Italian companies* that produced a non-financial management statement on the basis of the European Non-Financial Reporting Directive had a sustainability committee, up from 54 in 2019: N. Linciano, A. Ciavarella, G. Di Stefano, L. Pierantoni, and L Piermattei, *Rapporto 2020 sulla rendicontazione non finanziaria delle società quotate italiane*, June 23, 2021, CONSOB Statistics and Analyses 2020, available at https://ssrn.com/abstract=3872828 . *For Germany*, Ph. Jaspers, "Nachhaltigkeit-und ESG-Ausschüsse des Aufsichtsrat" *Die Aktiengesellschaft* 2022, 310 lists 10 companies in the Dax40 that have such a committee, and cites a report based on a poll in which "many more" German listed firms indicated they intended to set up such a committee. *For France*, research by the AMF (financial markets supervisor that also plays a role in monitoring the implementation of the French corporate governance code) found that in 2021, almost two-thirds of SBF 120 companies had a committee in charge of CSR matters, compared with 25 % in 2015, see the report on French governance arrangements at https://thelawreviews.co.uk/title/the-corporate-governance-review/france. *For Australia*, L. Law Chapple, Z.Chen, Zixi and Y. Zhang, "Sustainability Committee Effectiveness and CSR Assurance" , March 10, 2017, available at https://ssrn.com/abstract=2967165 report that 26% of the ASX 200 companies (200 of the largest Australian companies) in their sample had a sustainability committee in the 2010-2014 period and that during that period, that percentage was stable.

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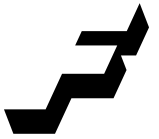

that the adoption of such committees is on the rise, but that far fewer companies have one than have an audit committee or a remuneration committee. Empirical data is patchy, but makes sufficiently clear that they are not adopted at the same rate in every west-European country. There is not enough empirical research yet to say anything reliable about their effectiveness, but there is no research showing an effect of sustainability committees on firm (financial) performance, whereas there is some research showing higher quality disclosure on some ESG topics in firms with a sustainability committee.[242]

In the US, Strine and coauthors[243] rightfully argue that companies should be wary of adding too many committees to the board, because this could prevent an integrated approach to ESG matters, which they see as part of or at least closely linked to the board's compliance oversight function under *Caremark*[244]. At the same time these authors contest the view that, because ESG oversight should be a matter for the whole board, no separate committee should therefore be set up. They assert that some level of specialization is required for effective oversight of these matters. We disagree with the latter contention. Of course explicitly making attention to ESG matters part of the remit of a board committee[245]or creating a specific sustainability committee will allow directors to devote more attention to the topics, but ESG topics are so core to a company's strategy and its culture, that in our view the whole board needs to deal with these issues; delegating important work to a separate committee tends to disenfranchise the directors who are not part of the committee, while at the same time some directors will feel they need not to be very involved concerning those topics, precisely because the specialist committee is dealing with ESG and can be relied upon. As we'll detail in the next section, a surfeit of oversight committees may be detrimental to the board's strategy-setting role.

[242] *See* J. Burke, R. Hotaish and U Hotaish, (Fn.242). Like earlier research, the article -which deals with US companies in the 2003-2013 period- found no link between sustainability committees and firm performance, but did find a positive influence of these committees on sustainability disclosure by companies. The same finding (but for a more recent period) was reported for a sample of US and non-US firms by H. Driss, W. Drobetz, S. El Ghoul and O. Guedhami, "The Sustainability Committee and Environmental Disclosure: International Evidence", November 6, 2022, available at: https://ssrn.com/abstract=4226967.

[243] L. Strine, Jr., K. Smith, and R. Steel, "Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and ESG Strategy ", *Iowa Law Review*, Vol. 106, 2021, pp. 1885-1922, esp. at 1919-20.

[244]*In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).This the fundamental case about the board's oversigjht duties under US law.

[245] Apparently, in the US such matters are often (30% of cases) assigned to nominating and remuneration committees, see L. Strine, Jr., K. Smith, and R. Steel, "Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and ESG Strategy ", *Iowa Law Review*, Vol. 106, 2021, at p. 2019.

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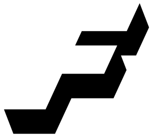

2. Balkanized one-tier boards struggle with strategy-making

a. Boards as oversight bureaucracies

In Europe, there have always been, at least since the early 20th century, two competing board models, one tier and two tier.[246] These models operate in a way that makes them more alike than could be thought by someone who is only familiar with the relevant statutory rules, for instance in that most large companies in one tier systems have always had an executive committee consisting of top executives some (but not all) of whom are also board members, whereas in both the German and the Dutch two tier system, it is standard for the supervisory board to hold joint sessions with the executive board, indeed at many companies the supervisory board only seems to meet separately when it discusses sensitive staff issues concerning the executive board, or to discuss its own functioning. Still, differences between the two system remain substantial, also at the level of board dynamics[247]. As is well-known, there are no indications that one system is superior as a governance system to the other.[248] Dual board systems seem better suited to deal with conflicts of interest of executives in a clear-cut way, but seem to suffer from less information flow from executives to non-executives than in a one tier system, and their decision-making seems to be slower.[249]

Beginning in the 1990s, the one tier board was transformed in Europe. In the wake of the 1992 Cadbury Code in the UK, all western European countries adopted corporate governance codes

[246] See e.g. K. Hopt and P. Leyens, "Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy, *European Company and Financial Law Review* 2004, pp. 135-168. On boards in Europe generally, 2013 saw the publication of three "legal aspects of corporate governance"-oriented collective volumes that are still worth consulting: P. Davies, K. Hopt, R. Nowak and G. van Solinge, *Corporate boards in practice- a comparative analysis in Europe*, Oxford University Press, 2013, 880 p.; M. Belcredi and G. Ferrarini *Boards and shareholders in listed European companies*, Cambridge, Cambridge university Press, 2013, 437 p. and H. Birkmose, M. Neville and K.E. Sörsensen, *Boards of directors in European companies*, Wolters Kluwer, 2013, 399 p. The overview article by Davies/Hopt, " Boards in Europe -accountability and governance" in the first volume presented the state of the art at the time.

[247] For a brief introduction to the scholarly discipline, see Ph. Stiles, *Board Dynamics*, Cambridge University Press, 2021; See also e.g. J.D. Westphal, and E.J.Zajac, "A behavioural theory of corporate governance: Explicating the mechanisms of socially situated and socially constituted agency", *Academy of Management Annals*, 2013, 607–661.

[248] See from among many authors e.g. C. Jungmann, "The effectiveness of corporate governance in one-tier and two-tier board systems", *ECFR* 2006, 426-474; K.J. Hopt, "The German two-tier board: experience, theories, reforms" in K. Hopt, E. Wymeersch et al. (eds.) *Comparative Corporate Governance. The State of the Art and Emerging Research*, Oxford, OUP, 1998, 227.

[249] This seems to have been if not the consensus then at least the dominant opinion among those with a knowledge of two tier systems for a long time, see already M. Lutter, "Defizite für eine effiziente Aufsichtsratstätigkeit und gesetzliche Möglichkeiten der Verbesserung", *ZHR* 1995, at 287.

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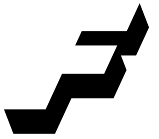

that stressed the monitoring and oversight function of the board[250]. In order to effectively fulfill that role, it was recommended to split the roles of chair and CEO (which until then had been combined in many, probably a majority of cases, even mandatorily so under the French companies act at that time); to appoint a sufficient number of non-executives to balance the role and influence of the executives in the board; and to appoint a sufficient number -read: more- independent directors. Also, it was recommended to install an audit committee and a remuneration committee, which often doubled as the third classic committee, the nomination committee. Today, audit committees are mandatory for listed companies in the EU[251] and few listed companies would dare to operate without a remuneration committee in view of corporate governance code recommendations and other pressures.

The increased importance attached to board composition and governance has today resulted in what I would call one tier boards as oversight bureaucracies. Within the suite of the board's monitoring tasks, its oversight function, in the sense that it has to oversee that the company installs state of the art internal controls, risk management and compliance systems, has vastly gained in importance. For companies that will become subject to the CSDDD (or are already subject to equivalent French or German legislation), the oversight function will now gain a new add-on, namely at least an increased focus on oversight of the supply chain due diligence system. This oversight function centers around risk management, regulatory compliance, and keeping top executives in check by making sure they do not shirk but above all, that they act in the best interest of the company rather than in their own interest, including trying to prevent self-dealing in such matters as the determination of executive remuneration. The oversight function should be distinguished from, and is of a different nature than the broader monitoring role of the board. As part of that monitoring role, the board will approve (and sometimes choose between) strategic options presented by the CEO and his top executive team. Adams and Ferreira reflect this in what is perhaps a terminologically clearer distinction, namely between the oversight and strategic advice functions of the board.[252]

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[250] For a comparative analysis of what that monitoring and oversight role entailed in some major European jurisdictions (Belgium, Netherlands, France, Germany) around the year 2000, after the heady developments of the 1990s, see H. De Wulf, *Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002, p. 235-297. For a more detailed and more recent comparative analysis, see S. De Geyter, *Organisatieaansprakelijkheid*, Antwerp, Intersentia, 2012. For an up-to date overview of the state of the art in the US, see J. Arlen, "Evolution of Director Oversight Duties and Liability under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest" (August 28, 2022), available at https://ssrn.com/abstract=4202830. See also the "macro view" expressed by a US law firm in https://corpgov.law.harvard.edu/2021/05/10/directors-oversight-role-today-increased-expectations-responsibility-and-accountability-a-macro-view/.

[251] See Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, *OJ* L 157, 9.6.2006, p. 87–107.

[252] R.B. Adams and F. Ferreira, "A Theory of Friendly Boards", *Journal of Finance*, Vol. 62, 2007, 217.

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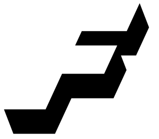

In the (in the low countries) famous words of 1960s Dutch corporate law professor Löwensteyn[253], boards have always been a "nexus of conflicting interests", irrespective of whether a legal system officially honors a shareholder value or a stakeholder orientation. But the post-Cadbury evolutions have led to an ever-increasing differentiation between directors: the separation between chairman and CEO stresses that one is the representative of non-executives and the other is management's top dog; the explicit distinction in corporate governance reports in the annual report between executive and non-executive directors has of course had the same effect. Legally, directors are supposed to represent the interests of "the whole company", meaning all shareholders or all stakeholders depending on the legal system, but the explicit designation of some directors as independent and others as "mere" non-executives, has driven home the point, and the feeling among directors, that some of them are *de facto* representatives of controlling shareholders, whereas the job description of the independent directors is explicitly to be a counterweight to both executives and controlling shareholders and their representatives in the board. The installation of board committees -in addition to the executive committee than many if not most large companies with a one tier board had voluntarily organized for decades- is now in the EU mandatorily supplemented by an audit committee and a remuneration committee (that usually doubles as the nomination committee, although some companies split the roles). This has led to a clearly more differentiated role for directors, leading also to *de facto* (but usually not legal) differences in the exposure to liability risk[254]. There are of course still plenary sessions of the board where real work is done, especially when the board wants to involve itself in discussions about strategy, and in meetings about budget allocation. But my contention is that the evolutions I just sketched have led to an increasing balkanization of one tier boards[255], where directors increasingly have different roles and probably also feel that they are not equal and not all representing the same "support base", and non-executives are busier exercising oversight functions than being able to deal with strategy. Non-executive directors -the recruitment of

[253] See F.J.W. Löwensteyn, "De naamloze vennootschap als raakpunt van contraire belangen" in *Honderd jaar rechtsleven*, Zwolle, Tjeenk Willink, 1970, 85 and *Wezen en bevoegdheid van het bestuur van de vereniging en de naamloze vennootschap*, Zwolle, Tjeenk Willink, 1959.

[254] For instance, cases from Australia to Belgium (AWA-case, AWA Ltd v Daniels (formerly practising as Deloitte Haskins & Sells), New South Wales Court of Appeal, 15 May 1995, see G.P. Stapledon, "The AWA-case: non-executive directors, auditors and corporate governance issues in court" in D. Prentice and PRJ Holland (eds.) *Contemporary issues in Corporate Governance*, Oxford, Clarendon Press, 1993, 187-219; Lernout&Hauspie (criminal case), Court of Appeal Ghent, 20 September 2010, not officially reported, on file with Ghent law School) indicate that audit committee members are expected to have their nose closer to possible accounting irregularities or other forms of fraud than other directors, i.e. they seem more likely to be sued for negligence when things go wrong. An early illustration from Germany was the wide-ranging ARAG-Garmenbeck case (OLG Düsseldorf, *ZIP* 1997, 27 and see J. Grooterhorst, "Die ARAG/Garmenbeck-prozesse -eine Gesamtschau im Rückblick", *ZIP* 1999, 1118).

[255] On this phenomenon see also, with a special focus on bank boards in Belgium as influenced by the 2014 Banking Act, J. Cerfontaine, *Corporate Governance in Banken*, VUB Press, 2015, p. 146 ff.

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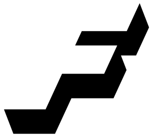

whom has also been made subject to diversity requirements[256] that were virtually non-existent twenty years ago- also serve as an important link to stakeholders, in that one of their roles is supposed to be to make sure that, through their intermediary role, the company internalizes important evolutions in societal convictions about how companies should behave responsibly.

b. The oversight-strategy trade-off

Theoretical models devised not by social psychologists or organization specialist but by economists, suggest the functioning of groups is affected by the existence of subgroups, and in particular, the model of Aghion/Tirole (1997) plausibly suggests that communication within the group -e.g. the board- can be negatively affected by the existence of subgroups such as board committees. [257] One of the contentions of that article was that members of committees that lack formal decision-making power, strategically withhold and manipulate information from group members (of the group where formal power resides) outside the committee in order to gain influence, and the reverse is also true (e.g. executive board members withholding information from a non-executive committee). Inspired by empirical research on the effects of board composition and monitoring on various governance outcomes, Adams and Ferreira (2007) developed their "friendly boards" theoretical model about the trade-off between the board's role as a monitor and its role as an advisor to top management.[258] They start from the finding that independent boards are tougher monitors of CEOs. This may lead the CEO to share less information with such an "unfriendly" board than he would with a manager-friendly board, which in turn would have a negative effect on the quality of the advice the independent board is able to provide, for instance on strategy. The authors stress, as we do, that information flows in a dual board system are often limited. This could be explained by the Adams/Ferreira theory, namely that since a separate supervisory board, containing only non-executives who are all independent from management, is considered an "unfriendly board" by top management. I hypothesize that this effect may be worse if the supervisory board contains representatives of various stakeholders and indeed others than shareholder representatives, because I assume the typical corporate executive feels aligned more closely with shareholders than with labour or other stakeholder groups, even in companies where the

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[256] At the level of the EU, the most important legislative initiative is probably Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies and related measures *OJ* L315, 44-29, 7 December 2022 which came quite late compared to the mandatory legislation on gender balance in national legislations, such as the 2011 Belgian law (Norway were the pioneers with a mandatory law from 2003, after a 1988 Equal Opportunities Act had already introduced gender quota, but that latter law was hard to enforce and therefore had limited effect, see e.g. M. Huse, "The Norwegian gender balance law- a benchmark?" in M. De Vos and Ph. Culliford (eds.), *Gender Quotas for Corporate Boards,* Antwerp, Intersentia, 2014, p. 173-187).

[257] See P. Aghion and J. Tirole "Formal and real authority in organizations", *Journal of Political Economy* vol. 107, 1997, 1- 29. For a somewhat comparable model, see H. Li and W. Suen, "Delegating decisions to experts", *Journal of Political Economy* 2004, vol. 112 (S1), S311–S335.

[258] R. B. Adams and F. Ferreira, "A Theory of Friendly Boards", *Journal of Finance*, Vol. 62, 2007, 217-250.

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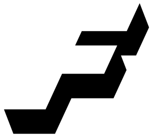

supervisory board, containing 50 or 33% employee representatives has appointed the executives, and not the general meeting of shareholders.

Adams, Ragunathan and Tumarkin (2021) report that in the US in 1996, 25% of all director meetings took place in board committees composed exclusively of non-executive directors, while that percentage of meetings had increased to 45% by 2010. Based on empirical research, namely looking at the correlation of such matters as the prevalence of committee meetings consisting of only "outside directors" and firm financial performance indicators such as cumulative abnormal returns of acquisitions, they found that formally delegating authority to board committees can have a negative effect on the board's efforts to maximize firm value. They also found that the existence of committees of non-executives ("outside directors") can indeed have a negative effect on the flow of information between directors -especially between non-executives on committees and executive directors who remain outside the committee- and on decision-making[259]. Research based on interviews with (the admittedly limited number of) 32 directors reported that in the US, directors themselves believed the Sarbanes-Oxley Act, by demanding an increased reliance on board committees composed of non-executive directors, had a very negative impact on both the amount and the quality of decision-making by the full board on corporate strategy[260] and J. Lorsch also argued that there is a trade-off between board oversight and attendant interventions on he board's composition and structure, and a board's effectiveness in strategy development.[261] There is more systematic empirical research that supports the existence of such a trade-off. O. Faleye, R. Hoitash, and U. Hoitash report "*greater sensitivity of CEO turn-over to firm performance, lower excess executive compensation, and reduced earnings management*" when board committees contain a majority of independent directors. But "*The improvement in monitoring quality comes at the significant cost of weaker strategic advising and greater managerial myopia. Firms with boards that monitor intensely exhibit worse acquisition performance and diminished corporate innovation.*"[262] Because of the methodological challenges of such correlational research, the evidence should be overwhelming before one draws any firm policy conclusions from it. As yet we do not have nearly enough robust empirical research on this topic. But what we have is consistent with the suggested strategy-oversight trade-off.

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[259] R. Adams, V. Ragunatham and R. Tumarkin, "Death by committee? An analysis of corporate board (sub)committees, *Journal of Financial Economics*, vol. 141, 2021, 119-146.

[260] J.R. Cohen, C. Hayes, G. Krishnamoorthy, G. S. Monroe, and A. M. Wright, "The Effectiveness of SOX Regulation: An Interview Study of Corporate Directors" *Behavioral Research in Accounting*, Vol. 25, 2013, 61–87.

[261] J. Lorsch, "Boardroom challenges, lessons from the financial crisis and beyond" in J. Lorsch (ed.) *The future of boards: meeting the governance challenges of the Twenty-First Century,* Harvard Business Review Press 2012, p. 13.

[262] O. Faleye, R. Hoitash, and U. Hoitash, "The costs of intense board monitoring" *Journal of Financial Economics*, Vol. 101 (1), 2011, 160–181.

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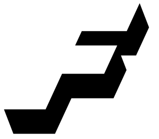

3. A switch to a dual board structure as part of the solution?

In many continental European jurisdictions where the one tier board is dominant, legislation provides the option for companies to switch, through a change to their articles of association, to a dual board model,[263] with a supervisory board chosen by the shareholders at general meeting, and an executive board appointed by the supervisory board. Members of one board cannot also be members of the other board at the same company.

My feeling is that a dual board system may be more effective in allowing boards to deal with their two roles of oversight and strategy-setting. In such a system, the supervisory board can concentrate on oversight, and the executive board on strategy. By separating the two functions and allocating to two bodies that would have no members in common, group coherence between the team members of each board could be cemented[264] while at the same time, each group could focus on its core task without being distracted by conflicting roles. Within each board, members would all have a very similar role. The small executive team could gain in decision-making efficiency when determining the corporate strategy. It would be relatively insulated from conflicting stakeholder demands about the company's strategy, since the stakeholders would not be directly represented in the executive board. The influence of stakeholders would be mediated by the supervisory board. The latter would in certain jurisdictions contain members directly chosen by certain non-shareholder stakeholders, such as under worker codetermination systems [265]. This type of direct representation is without a doubt a more effective way of giving a voice to non-shareholder stakeholders than instructing directors who are appointed, dismissed and remunerated by shareholders to take the interests of other stakeholders into account or to (only) rhetorically subjugate them to a broad corporate purpose declaration.[266] The supervisory board could then concentrate on oversight (meaning

[263] E.g. Belgium and France, art. 7: 104 Belgian Companies Code and art. L225-57 French Code Commerce, offering the possibility (in both countries) for every public company (*société anonyme*) to opt into the dual board system through an amendment to its articles of association.

[264] Some will object that this will contribute to undesirable groupthink, but I don't think this would outweigh the advantges of coherence. This is however one of the many questions of board dynamics in this section that would need further research by a wide body of scholars and scientists.

[265] On the German worker codetermination system, its pros and cons and empirical research on its effects, see now J. Daman and H. Eidenmüller, " Co-determination: a poor fit for US corporations"*Columbia Business Law Review* 2020, 870-941 with references to most of the relevant literature in English.

[266] L. Bebchuk & R. Tallarita, 'The Illusory Promise of Stakeholder Governance', *Cornell Law Review* (106) 2020, p. 91-178, see also the overview of arguments from European literature in H. De Wulf, *Taak en* loyateitsplicht, 2002, 525-531 with also my argument, at p. 542, about German *Mitbestimmung* as a system that, whatever one might think of it in general, and contrary to a stakeholderist interpretation of directors' duties, is effective in giving non-shareholder stakeholders, namely employees, a voice in corporate governance by giving employees the right to appoint, dismiss and remunerate a certain number of (non-executive) directors; see also the different but related (and convincing) views on how a purpose statement and purpose-orientation of directors duties will either be ineffective because unenforceable, or unnecessary, in P. Davies, "Shareholder Voice and Corporate Purpose: The

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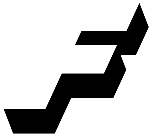

with a compliance and risk management mindset) and selecting executives with the desired profile to determine corporate strategy with, if the supervisory board such an executive profile is desirable, also the interests of various stakeholders in mind. The supervisory board would however not directly interfere with the determination of corporate strategy, limiting itself to replacing executives who have proven to be ineffective in their role as strategy-setters. Even under such a system it would be naïve to think that the supervisory board would not involve itself at all in corporate strategy. Indeed, in spite of the law assigning the power to set corporate strategy to the executive board in both Germany and the Netherlands, it is widely accepted that the supervisory board has to play an advisory/supervisory role in this respect and this is one explanation of why in those jurisdictions, supervisory boards rarely meet without the executive board joining the meeting. Still, my feeling is that board members would have a less muddled, conflicted view of their respective roles under a dual board system with a clear separation of powers and membership than in one tier systems with a board and an executive committee. Perhaps I'm too optimistic about the possibility to make a clear-cut distinction between the oversight responsibilities of a supervisory board and the strategy decision-making role of the executive board. Perhaps this impossibility is the reason for the (probably purposeful) ambiguity in European banking regulation[267] about where strategy determination should be located[268]

Also, it could be objected that in dual board systems, information flows from executives to non-executives in the supervisory board are even more restricted than in a one tier board. But as we argued above, the situation may be equally bad in one tier boards with several strong committees. Also, precisely because the supervisory board would have only very limited involvement in strategy, the kind of information it needs would be different. It would need sufficient and timely information to exercise its oversight function, but that type of information is more easily provided in the form of formal reports and through the internal control systems of the company. Finally- and to repeat- the information flow disadvantage of a dual board system would likely be off-set by an increased group coherence within each board[269], with an

Purposeless of Mandatory Corporate Purpose Statements" (November 1, 2022), available at https://ssrn.com/abstract=4285770.

[267] Which is "board model neutral".
[268] I thank Jan Cerfontaine (UGent and director in financial sector companies) for pointing this out to me. Documenting this ambibuity would require another page of text at least, please read paragraphs 22 and 28 through 34 of EBA *Guidelines on Internal governance under Directive 2013, 16/EU,* 2021 edition, available at https://www.eba.europa.eu/eba-publishes-its-final-guidelines-internal-governance.
[269] That is not to deny that even within relatively small executive boards, one may be confronted with a CEO acting as an *Einzelgänger* rather than with the backing of a tight team. One thinks here, e.g., of the role Paul Polman played as CEO of Unilever. Polman wanted Unilever to focus on sustainability, but the strategy he developed in that regard seemed not to be backed by the whole executive board, nor by the supervisory board and, importantly, shareholders also had their doubts. Some quipped (grossly exaggerating, but still driving home a point about how he was perceived) that the first time Polman cared about shareholders was when HeinzKraft launched a hostile bid for Unilever. For a very

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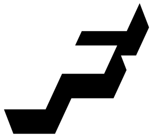

exclusive focus on their respective core tasks, and without executives being buffeted by conflicting stakeholder demands and conflicting strategy and oversight roles.

IX. *Conclusion*

The life of boards at listed companies is not getting any easier. Evolutions in society and in financial markets mean that, at the same time when their compliance and risk management oversight function is stressed more and more, at least in Europe boards can no longer focus exclusively on the creation of shareholder value. This is even true in systems where, contrary to what is the case in systems like Germany with its worker codetermination regime, directors are exclusively appointed, remunerated and dismissed by shareholders. Boards are increasingly exposed to ESG shareholder activism that forces them to take more account of stakeholder interests and, especially as a result of recent due diligence legislation, the negative externalities ("adverse impacts") companies create. This article focused on NGOs using shareholder activism tactics to exert pressure on boards to take negative externalities and the interest of other stakeholders than shareholders seriously. These NGOs often want to influence a company's strategy, especially when they "lobby" companies about their climate strategy. Certain economically important jurisdictions like Germany and the Netherlands take a radical view on the exclusive competence of the executive board to determine a company's strategy. The shareholder activism by NGOs (and their climate litigation) is hard to reconcile with the board's exclusive competence. That is also why in those jurisdictions, the activism does not take the form of shareholder proposals, as opposed to what we see in the US. The influence of these non-governmental non-profits organisations will, and already is, leveraged by recent due diligence legislation that forces companies into a dialogue with these civil society organisations. That dialogue is sometimes and with increasing frequency continued in the form of litigation launched by those same NGOs. The climate litigation against companies brought by these NGOs goes to the heart of corporate strategies. I argued that it would be deplorable if the EU were to copy the French litigation-focused enforcement model in its soon-to be adopted CSDD Directive. Litigation is singularly unsuitable as a mechanism to help form a company's strategy. In any case, the result of these developments is that the strategy setting role of boards is being made more difficult, buffeted as boards are by conflicting stakeholder demands while at the same time group coherence and therefore decisiveness within the board is being undermined by the increased use of specialist board committees and distinctions between directors with different roles. In this climate, I argued, tentatively, that boards may perhaps fulfill their conflicting oversight and strategy roles more effectively in a dual board system, where the supervisory board can concentrate on oversight, and the executive board on strategy. But more research on this last issue is surely needed.

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instructive interview with Paul Polman while he was CEO of Unilever, see "Captain Planet", *Harvard Business Review*, June 2012 issue.

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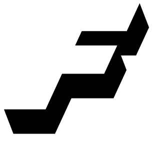

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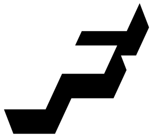

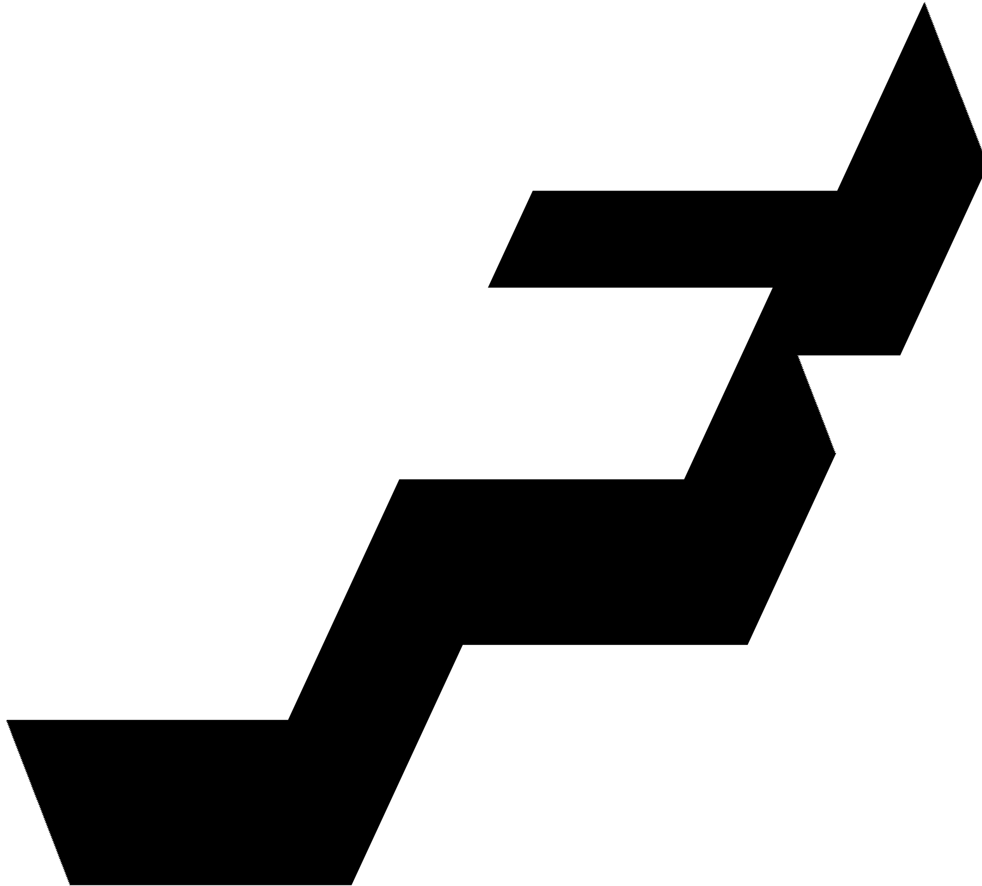

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