SOVEREIGN WEALTH FUND TRANSPARENCY AND THE EUROPEAN RULES ON INSTITUTIONAL INVESTOR DISCLOSURE

Enrico Ginevra & Chiara Presciani[*]

INTRODUCTION

Sovereign wealth funds ("SWFs") are among the most important players in modern capital markets. In recent years, they have drawn attention from the public because they have invested billions of dollars (and Euros) in equity, taking stakes in listed companies all over the world.[1] The significant amount of money under their management[2] and their public nature have caused a rise in concerns

---

* Although this Article is the result of teamwork, Subparts I.B. and III.B. are attributable to Enrico Ginevra, while Part II and Subparts I.A., III.A., and III.C. are attributable to Chiara Presciani; the introduction and conclusion are equally attributable to both authors.

1. The attention paid by SWFs to equity investment is a recent phenomenon. In the past, they were interested only in low-risk, low-return securities, such as government bonds. Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345, 1347 (2008); *see, e.g.*, Fabio Bassan, *Una regolazione per i fondi sovrani*, 2009 MERCATO CONCORRENZA E REGOLE 95, 97 (2009); Simone Mezzacapo, *The So-called "Sovereign Wealth Funds": Regulatory Issues, Financial Stability and Prudential Supervision*, *in* EUROPEAN ECONOMY 21 (European Comm'n, Directorate Gen. for Econ. & Fin. Affairs, Economic Papers No. 378, 2009), http://ec.europa.eu/economy_finance/publications/pages/publication15064_en.pdf; Simone Alvaro & Paola Ciccaglioni, *I Fondi Sovrani e la Regolamentazione Degli Investimenti nei Settori Strategici* 8 (CONSOB Discussion Paper No. 3, 2012).

2. In the last decade, the number of SWFs as well as the assets under their management has significantly increased. Since 2005 more than forty new SWFs were established, and the assets under their management have outstripped the value of hedge funds and private equity funds (but not the assets of mutual funds and pension funds). ELIOT KALTER, SOVEREIGN WEALTH FUND INVESTMENT TRENDS 4 (2016), https://sites.tufts.edu/sovereignet/files/2017/07/Kalter_SWF-Investment-Trends_1-16.pdf; *What is a SWF?*, SWFI, https://www.swfinstitute.org/sovereign-wealth-fund/ (last visited Nov. 4, 2017); *see, e.g.*, ETTORE CROCI, SHAREHOLDER ACTIVISM. AZIONISTI, INVESTITORI ISTITUZIONALI E HEDGE FUND 99 (2011); Bassan, *supra* note 1, at 97; Gilson & Milhaupt, *supra* note 1, at 1356; Ashley Thomas Lenihan, *Sovereign Wealth Funds and the Acquisition of Power*, 19 NEW POL. ECON. 227, 231 (2014); William L. Megginson & Veljko Fotak, *Rise of The Fiduciary State: A Survey of Sovereign Wealth Fund Research*, 29 J. ECON. SURV. 733, 734 (2015); Mezzacapo, *supra* note 1; Paul Rose, *Sovereign Investing and Corporate Governance: Evidence and Policy*, 18 FORDHAM J. CORP. & FIN. L. 914, 919 (2013); Robert M. Kimmitt, *Public*

about their regulation.[3] In this regard, one of the most discussed issues raised by the SWF phenomenon is the need for more information about them and, in particular, the possibility to oblige them to be more transparent.[4]

Indeed, the problem of SWFs' transparency could be faced from different points of view. First, disclosure requests often aim to determine if a SWF is a mere instrument in the hands of a state to pursue *political interests*. For example, the importance of information regarding the internal structure and organization of SWFs is often highlighted in order to identify their system of corporate governance and the level of independence from the government.[5] Moreover, there is a need to know what interests SWFs follow when they decide where to invest their money and how to manage their investment in order to understand if they have financial or political intentions. In this regard, transparency is seen as an alternative to stricter protectionist rules, such as those already in force in strategic sectors.[6] In other words, the problem underpinned by these disclosure requests is to recognize and discourage SWF investments driven by political intent and prevent countries from benefitting domestic companies by harming foreign competitors or importing industrial knowledge.[7] From this point of view, a system of mandatory disclosure *specifically imposed on SWFs* is difficult to imagine: it would mean that a sovereign state obliges another to act in a specific way. This is the

Footprints in Private Markets: Sovereign Wealth Funds and the World Economy, FOREIGN AFF. (Jan./Feb. 2008), https://www.foreignaffairs.com/articles/2008-01-01/public-footprints-private-markets; Alvaro & Ciccaglioni, *supra* note 1.

3. Maurizia De Bellis, *Global Standards for Sovereign Wealth Funds: The Quest for Transparency*, 1 ASIAN J. INT'L L. 349, 349–50 (2011) (discussing the growing concerns regarding SWFs).

4. On the issue of transparency, see generally Edwin M. Truman, *Are Asian Sovereign Wealth Funds Different?*, 6 ASIAN ECON. POL'Y REV. 249 (2011) (offering an index by which to measure the level of SWFs' transparency); Edwin M. Truman, *A Blueprint for Sovereign Wealth Fund Best Practices* (Peterson Inst. for Int'l Econ, Policy Brief No. PB08-3, 2008); Edwin M. Truman, *Sovereign Wealth Funds: The Need for Greater Transparency and Accountability* (Peterson Inst. for Int'l Econ, Policy Brief No. PB07-6, 2007); *The Linaburg-Maduell Index*, SWFI, http://www.swfinstitute.org/statistics-research/linaburg-maduell-transparency-index/ (last visited Nov. 3, 2017).

5. Megginson & Fotak, *supra* note 2, at 744 (stressing the importance of understanding the internal structure of funds for transparency's sake).

6. For an overview of the European approach to the issue of the protection of strategic sectors, see generally Anna De Luca, *The EU and Member States: FDI, Portfolio Investments, Golden Powers and SWFs*, *in* RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 178 (Fabio Bassan ed., 2015).

7. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Approach to Sovereign Wealth Funds*, at 5, COM (2008) 115 (Feb. 27, 2008); *see also* Bassan, *supra* note 1, at 110; Gilson & Milhaupt, *supra* note 1, at 1351; Kimmitt, *supra* note 2; Alvaro & Ciccaglioni, *supra* note 1.

reason why the Santiago Principles—the well-known international set of voluntary principles and practices developed in 2008 by the International Working Group of Sovereign Wealth Funds—whose purpose is to "reduce protectionist pressures and help maintain an open and stable investment climate,"[8] are the only way to discipline SWF behavior.

Apart from these political concerns, another point of view deserves to be explored. This point of view is one that considers SWFs not as agents of other countries but simply as special actors in financial markets, a particular class of *institutional shareholders* that stand alongside other (more common) institutional investors, such as mutual funds and hedge funds.[9] In this light, the problem of SWF transparency becomes a matter of financial market regulation and involves the private interests of target companies and/or their shareholders and the general interest in market efficiency.[10] This is the specific perspective that we adopt in this Article to analyze the problem of SWF transparency and determine if the current European (and Italian) financial market rules on institutional investor transparency, directly imposed on mutual funds and hedge funds, can also apply to these special institutional investors despite their peculiarities. In other words, we will try to understand whether institutional shareholders' duties of transparency should be applied to SWFs, taking into account the interest in financial market efficiency and whether such duties already apply to SWFs under existing legal provisions.

To do so, in Part I we first sketch the specific characteristics of SWFs in comparison with those of other institutional investors, particularly mutual funds and hedge funds. Then, in Part II, we describe the current European (and Italian) disclosure rules applicable to institutional investors and, in particular, to hedge funds and mutual funds. In doing so, we will distinguish between two different sets of norms: (1) the regulation of investment companies and asset managers and (2) the regulation of securities and listed corporations. The reasons underpinning these rules (the European system they depict or presuppose) will be discussed in Part III, where we will finally assess their adequacy as applied to the issue of SWF transparency.

8. Paul Rose, *A Disclosure Framework for Public Fund Investment Policies*, 29 PROCEDIA ECON. & FIN. 5, 6 (2015).

9. Rose, *supra* note 2, at 920.

10. Actually, this perspective is nothing new if we consider the literature that focuses on the role played by SWFs in the corporate governance of target companies. *See, e.g.*, Gilson & Milhaupt, *supra* note 1, at 1361; Megginson & Fotak, *supra* note 2, at 744; Rose, *supra* note 2, at 934–50.

I. SOVEREIGN WEALTH FUNDS AS SPECIAL INSTITUTIONAL INVESTORS

SWFs are commonly defined as investment vehicles established by sovereign countries with the specific purpose of investing public resources under their management in foreign capital markets.[11] Leaving aside the political problems that they carry,[12] SWFs are a new kind of institutional investor with specific features that distinguish them from their colleagues, mutual funds and hedge funds.

As we have already noted, assuming this point of view, the issue of SWFs' transparency becomes a part of the more general problem of institutional shareholder transparency.[13] But, before analyzing the disclosure system currently imposed on hedge funds and mutual funds in Europe and Italy, we need to briefly identify those elements that characterize SWFs.

A. The Economic Logic Behind SWF Behavior

SWFs are often established by countries in order to accumulate savings for future generations or to protect the value of money in excess of what may be needed at a given time.[14] It follows that one of the most important elements that characterizes the operability of SWFs on the equity market is their long-term investment horizon.[15]

11. It is well-settled that there is not a generally accepted definition of SWFs. The one we assume in this Article follows the one adopted by the European Commission, which considers SWFs "state-owned investment vehicles, which manage a diversified portfolio of domestic and international financial assets." *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Approach to Sovereign Wealth Funds*, *supra* note 7, at 3; *see also* Ronald Beck & Michael Fidora, *The Impact of Sovereign Wealth Funds on Global Financial Markets*, *in* OCCASIONAL PAPER SERIES 6 (Eur. Cent. Bank, Occasional Paper No. 91, 2008) (defining SWFs as "public investment agencies which manage part of the (foreign) assets of national states"). These "minimal" descriptions of the phenomenon can be considered the common denominator among the wide range of definitions given because they take into account only the features reported in every description of SWFs: funds that are (1) public in nature (2) with a specific purpose of investing in the equity market and (3) the ability to invest outside the domestic market. For other, more specific, definitions, see Andrew Rozanov, *Who Holds the Wealth of Nations*, 15 CENT. BANKING J. 1, 4 (2005); Kimmitt, *supra* note 2; *What is a SWF?*, SWFI, http://www.swfinstitute.org/sovereign-wealth-fund/ (last visited Oct. 31, 2017). For more on the problem of defining SWFs, see Bassan, *supra* note 1, at 103; Megginson & Fotak, *supra* note 2, at 737; Mezzacapo, *supra* note 1, at 4. *See generally* Fabio Bassan, *Sovereign Wealth Funds: A Definition and Classification*, *in* RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW, *supra* note 6, at 41.

12. *See* Lenihan, *supra* note 2, at 227 (discussing the political nature of SWFs).

13. *Id.* at 233–34.

14. Mezzacapo, *supra* note 1, at 5–7.

15. The long-term investment prospective is often included in the definition of SWFs. *See, e.g.*, Rozanov, *supra* note 11. But even those who adopt a definition

Researchers, in fact, agree on defining SWFs as stable shareholders that buy and hold large stakes of shares[16] and care more about (long-term) profits than the speedy maximization of and exit from an investment.[17] This is also consistent with the fact that they rarely follow the "Wall Street Rule."[18] In these respects, they are similar to industrial shareholders, but SWFs differ because they have shown little interest in controlling corporations: even when they hold large stakes, they are often passive investors.[19] This, however, does not mean that they are completely apathetic. They monitor the board and intervene in corporate governance (voting in general meetings and electing directors) in cases of mismanagement.[20]

The above considerations lead to the first important difference between SWFs and activist hedge funds. Activist hedge funds are often accused of being interested in increasing shareholder value in the short term by implementing an aggressive form of activism that can undermine the sustainability of the target firms.[21] Indeed, this

---

of SWFs that does not account for their investment horizon agree that SWFs are long-term investors. *See* Beck & Fidora, *supra* note 11; Megginson & Fotak, *supra* note 2, at 745; Kimmitt, *supra* note 2.

16. *See* Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 93 (2008).

17. *See* Naveen Thomas, *Regulating Sovereign Wealth Funds*, 24 DUKE J. COMP. & INT'L L. 459, 461 (2013).

18. *See* Paul Rose, *Sovereign Shareholder Activism: How SWFs Can Engage in Corporate Governance* (Ohio State Pub. Law, Working Paper No. 264, 2014), https://ssrn.com/abstract=2461227.

19. Paul Rose, *Sovereign Wealth Funds: Active or Passive Investors?*, 118 YALE L.J. 104, 108 (2008).

20. Gilson & Milhaupt, *supra* note 1, at 1351; Rose, *supra* note 2, at 935; Kimmitt, *supra* note 2; Bernardo Bortolotti, et al., *Quiet Leviathans: Sovereign Wealth Fund Investment, Passivity, and the Value of the Firm* 6 (Oct. 25, 2010) (unpublished manuscript), http://www.baffi.unibocconi.it/wps/allegatiCTP/SWF-paper-RFS-Final-oct25_2010.pdf; *see* Massimo Belcredi & Luca Enriques, *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: The Case of Italy* (Eur. Corp. Governance Inst., Law Working Paper No. 225/2013, 2013), https://ssrn.com/abstract=2325421. For a synthesis of the literature about SWFs' corporate governance behavior, see Megginson & Fotak, *supra* note 2, at 767.

21. *See* Vincenzo Calandra Buonaura, *Intermediari finanziari e corporate governance*, 2009 GIUR. COMM. 867, 879 (2009); Jack B. Jacobs, *"Patient Capital": Can Delaware Corporate Law Help Revive It?*, 68 WASH. & LEE L. REV. 1645, 1650 (2011); Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. L. 1, 8 (2010) ("[T]here is a danger that activist shareholders will make proposals motivated by interests other than maximizing the long-term, sustainable profitability of the corporation."). For evidence that short-termism is currently the biggest concern expressed about hedge funds' activism, see Matteo Erede & Giulio Sandrelli, *Attivismo dei soci e investimento short term: note critiche sul ruolo degli investitori professionali a margine del dibattito europeo sulla corporate governance*, 2013 RIV. SOC. 931, 931 (2013); Mario Stella Richter, Jr., *Considerazioni Preliminari in tema di corporate governance e risparmio gestito*, 2006 GIUR. COMM. 196, 206 (2006).

description is not completely true. The timeframe needed to implement the strategic plans that activist hedge funds propose cannot be considered "short."[22] In fact, aggressive hedge funds often maintain their investments for years before exiting them.[23] Nevertheless, we agree with the fact that they are not "stable shareholders" but are instead "temporary shareholders": they aim to increase the value of the firm for the forthcoming disinvestment in order to obtain a capital gain.[24] A limited horizon could not take due account of the long term perspective of the firm.[25]

Moreover, SWFs' investment attitudes have important differences from those of mutual funds. First, even mutual funds can be considered "temporary shareholders," and they can have time horizons even shorter than those of activist hedge funds.[26] Second, mutual funds are known to be passive investors that often (but not always) prefer to follow the "Wall Street Rule" rather than engage in corporate governance when faced with a board making unsatisfactory investments.[27]

---

22. Belcredi & Enriques, *supra* note 20.

23. Some researchers have shown that hedge funds hold their investment for two to five years on average. *See* William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1380 (2007); Eddy Wymeersch, *Shareholders in Action: Towards a New Company Paradigm?*, 4 EUR. COMP. L. 50, 53 (2007) ("It is often mentioned that these funds are short-term investors that are not interested in the company's welfare but only look at the evolution of the market prices. This is true for some funds, while others propose a longer-term (two to five years) growth objective, during which their restructuring plan is supposed to come to fruition."). *See generally* Marco Becht et al., *Hedge Fund Activism in Europe* (Eur. Corp. Governance Inst., Fin. Working Paper No. 283/2010, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616340.

24. *See* Martijn Cremers et al., *Activist Hedge Funds and the Corporation*, 94 WASH. U. L. REV. 261, 264 (2016).

25. However, some authors have emphasized the absence of evidence about this concern. *See* Lucian Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1096–97 (2015); Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1730 (2006) [hereinafter Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*]; Alon Brav et al., *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 REV. FIN. ST. 2723, 2728 (2015).

26. Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, *supra* note 25.

27. Luca Enriques, *Nuova disciplina delle società quotate e attivismo degli investitori istituzionali: fatti prospettive alla luce dell'esperienza anglosassone*, 1998 GIUR. COMM. 680, 681 (1998); Jill E. Fisch, *Relationship Investing: Will It Happen? Will It Work?*, 55 OHIO ST. L.J. 1009, 1020 (1994). Indeed, short-termism and passivism of mutual funds are linked: the first, in fact, is often considered an obstacle to the second. *See* Hanne Birkmose, *European Challenges for Institutional Investor Engagement—Is Mandatory Disclosure the Way Forward*, 11 EUR. COMPANY FIN. L. REV. 214, 235 (2014). For a more general analysis of the causes of institutional investors lack of activism, see CROCI, *supra* note 2, at 28; Bernard Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 827–29 (1992) [hereinafter Black, *Agents Watching*

B. Underlying Agency Relations

Another important difference between SWFs and other institutional shareholders is the particular character of the agency relationship with final investors. Mutual funds and hedge funds are intermediaries that invest other people's money in accordance with fixed objectives that have to be achieved.[28] In particular, they raise money to invest in equity markets from a multitude of private investors for whom they hold and manage a portfolio as strict (trust-like) fiduciaries.[29] As a consequence, they have great discretion in determining where and how to invest, which creates a trust-like agency relationship between the institutional investor (as trust-like agent) and the beneficiaries (as principals).[30] The main problem this relationship creates is that beneficiaries must be protected from the risk that their fiduciaries will not respect their fiduciary duties but will instead manage the investments to pursue interests that may conflict with those of their clients. Moreover, this agency relationship (between fund managers and their beneficiaries) is in addition to the one between corporate directors and shareholders, creating double-level agency problems.[31]

The situation with SWFs is quite different. First, it is clear that the problem of protecting beneficiaries does not exist for SWFs,[32] which have no fiduciary duties to private investors because they do not have any private clients.[33] They manage money coming from their home country, with which they have a very particular agency

Agents]; Bernard Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 580 (1990); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1338 (1991); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO L.J. 445, 452 (1991). *See generally* Frank Partnoy & Randall Thomas, *Gap Filling, Hedge Funds, and Financial Innovation* (Vanderbilt Univ. Law Sch., Law & Econs. Working Paper No. 06-21, 2006), https://ssrn.com/abstract=931254.

28. Thierry Olivier Desmet, *Understanding Hedge Fund Adviser Regulation*, 4 HASTINGS BUS. L.J. 1, 2 (2008); Donald W. Glazer, *A Study of Mutual Fund Complexities*, 119 U. PA. L. REV. 205, 206 (1970).

29. *Fast Answers: Hedge Funds*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answershedgehtm.html (last modified Dec. 4, 2012).

30. *Id.*

31. Black, *Agents Watching Agents*, *supra* note 27, at 850; Francesco Bordiga, *Partecipazione degli investitori istituzionali alla s.p.a. e doveri fiduciari*, 2013 RIV. SOC. 202, 214 (2013); Coffee, Jr., *supra* note 27, at 1283; Paul Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1386 (2014); Erede & Sandrelli, *supra* note 21, at 931; Fisch, *supra* note 27, at 1029; Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 878 (2010); Ronald J. Gilson & Jeffery N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 864 (2013); Rock, *supra* note 27, at 452, 469; Richter, Jr., *supra* note 21, at 197.

32. *See* Rose, *supra* note 16, at 136.

33. *Id.* at 145.

relationship because the principal (i.e., the government) often has an incisive power to influence the investment decisions of its agent (i.e., the SWF manager).[34] In this sense, there is also a more direct agent-principal relationship between corporate directors and the large final investor so that double-level agency problems do not occur. Moreover, the logic behind SWFs' investment choices could be oriented not by share value maximization (that is typical of private investors) but instead by political or general public interests.[35]

II. EUROPEAN RULES ON TRANSPARENCY OF INSTITUTIONAL INVESTORS

In 2008, Professors Gilson and Milhaupt, in an important article published in the Stanford Law Review,[36] wrote, "[T]he equity holdings of most hedge funds . . . are no more transparent than those of SWFs. Disclosure regulations in the European Union and major Asian countries are roughly similar. To explain the controversy, SWFs must pose different problems than other nontransparent shareholders."[37] However, as we will later explain, today in the European Union things have changed even for hedge funds.[38] In this new scenario, where institutional shareholders in general are required to be highly transparent,[39] the central question is how to isolate the particular problems that can be solved by the institutional shareholder disclosure system from those problems that do not occur at all in the case of SWFs, taking into account their specific features identified in the previous Part.[40]

To this aim, we will briefly analyze the EU norms that oblige mutual funds and hedge funds to disclose certain information. These rules belong to two different groups of norms: (1) the regulation of investment companies and assets managers and (2) the regulation of securities and listed corporations. The following Subparts describe the main features of the disclosure duties included in these two sets of norms.

A. European Rules on Investment Companies and Assets Managers

The European legislation on investment companies and asset managers comprises two different disclosure duties that oblige institutional investors to be (more or less) transparent regarding:

34. *Id.* at 123.

35. *See* Megginson & Fotak, *supra* note 2, at 745. Concern about the risk that political interests could clash with share value maximization has led some authors to propose sterilizing the voting power attached to SWFs' shares. *See* Gilson & Milhaupt, *supra* note 1.

36. Gilson & Milhaupt, *supra* note 1.

37. *Id.* at 1361.

38. *Id.* at 1350.

39. Megginson & Fotak, *supra* note 2, at 742.

40. Gilson & Milhaupt, *supra* note 1, at 1360–61.

(1) the composition of each portfolio managed and (2) the voting strategies followed.

1. Mandatory Portfolio Disclosure

Under Directive 2009/65/EC, European mutual funds (*rectius*: harmonized funds) are required to disclose their portfolios in half-yearly financial reports,[41] which are published with four and two-month delays.[42] In other words, with regard to this kind of institutional investor, the market has the right to know, twice a year, a mutual fund's existing investments as of a specific date. In applying this rule, Italy requires mutual funds to disclose every six months their top fifty investments and, in any case, each security that represents more than 0.50% of the fund's total assets.[43]

It is clear that this system is similar to that designed by regulations promulgated under the Investment Company Act of 1940, which require mutual funds (and other investment companies) to publish quarterly their entire portfolio with a sixty-day delay.[44] The main differences between European and U.S. rules are the frequency and the delay period of the disclosure, which reduce the level of European transparency as compared to the U.S. system.[45]

The rules about the portfolio transparency of hedge funds are rather different. In fact, the European rule, discussed above, does not apply to hedge funds, which are allowed (in Europe and in the United States) to be less transparent. Today, even if, after the global financial crisis, the European Union decided to regulate their asset managers (with Directive 2011/61/EU and supplementing Commission Delegated Regulation (EU) No 231/2013[46]), hedge funds are not yet required to publicly disclose their analytic portfolio. Hedge funds (deemed to be "alternative investment funds" ("AIFs")), have a

41. *See* Directive 2009/65/EC, of the European Parliament and of the Council of 13 July 2009 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), art. 69(3)–(4), annex I, 2009 O.J. (L 302) 32, 69–70, 83–87.

42. *See* Directive 2009/65/EC, art. 68(2), 2009 O.J. (L 302) 32, 69.

43. *See* Decreto Ministeriale 19 gennaio 2015, n.30, art. 2, in G.U. Mar. 5, 2015, n.65 (It.); Banca d'Italia Reg., all. IV.6.1 (Jan 19, 2015), http://www.consob.it/documents/46180/46181/bi_2015_01_19.pdf/106767de-3122-41c0-8727-1d07e2bf300e.

44. 17 CFR § 270.30b1-5 (2017).

45. Erin E. Martin, *The Intersection Between Finance and Intellectual Property: Trade Secrets, Hedge Funds, and Section 13(f) of the Exchange Act*, 53 N.Y. L. SCH. L. REV. 575, 586 (2008).

46. Directive 2011/61/EU, of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and Amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, 2011 O.J. (L 174) 1; Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 Supplementing Directive 2011/61/EU of the European Parliament and of the Council with Regard to Exemptions, General Operating Conditions, Depositaries, Leverage, Transparency and Supervision, 2013 O.J. (L83) 1.

duty of transparency *only with respect to their individual investors*, who have the power to obtain "an *overview* of the AIF's portfolio at year-end or period end."[47] Thus, an overview of the list of investments is all that is required. In this respect, the biggest difference between the European and U.S. systems is that in Europe there exists no requirement like § 13(f) of the Securities Exchange Act of 1934, which requires all major investors in the equity market (including hedge funds) to publicly disclose their holdings.[48]

It is important to emphasize the peculiarity of Italian rules. Despite the European system allowing a lack of transparency, in Italy even hedge funds must supply their clients with an analytic list of their holdings.[49] However, this information is not public,[50] and it would be very difficult (but not impossible) for the market to obtain.

2. Voting Strategies Disclosure

European mutual funds and hedge funds are both required to create a voting policy for determining when and how voting rights attached to instruments held in managed portfolios are to be exercised.[51]

However, these policies are not fully disclosed. Mutual funds, in fact, must put at the disposal of their investors only a "summary description" of their policies, and the details must be given to investors *on request*.[52] Hedge funds, once again, are allowed to be even less transparent because they are not obliged to communicate even a summary of their voting strategies *until their clients explicitly request it* or its details.[53] However, as far as we know, no similar rule exists for U.S. hedge funds, and, in this regard, the European system could be considered a little more transparent. On the contrary, the

47. *See* Directive 2011/61/EU, art. 22, 2011 O.J. (L 174) 1, 32–33; Commission Delegated Regulation (EU) No 231/2013, art. 105(1)(a), 2013 O.J. (L83) 1, 60 (emphasis added).

48. 15 U.S.C. § 78m(f) (2012). For an overview on § 13(f), see Ryan M. Carpenter, *Providing Equal Investment Opportunity via Securities Exchange Act Section 13(f)*, 46 CONN. L. REV. 763, 771 (2013); Thomas Lemke & Gerald Lins, *Disclosure of Equity Holdings by Institutional Investment Managers: An Analysis of Section 13(f) of the Securities Exchange Act of 1934*, 43 BUS. LAW. 93, 93 (1987); Martin, *supra* note 45.

49. *See* Banca d'Italia Reg., *supra* note 43, at all. IV.6.2.

50. *See* Decreto Ministeriale 5 marzo 2015, n.30, art. 3, in G.U. Mar. 19, 2015, n.65 (It.).

51. *See* Commission Delegated Regulation (EU) No 231/2013, art. 37(1), 2013 O.J. (L83) 1, 31; Commission Directive 2010/43/EU of 1 July 2010, Implementing Directive 2009/65/EC of the European Parliament and of the Council as Regards Organisational Requirements, Conflicts of Interest, Conduct of Business, Risk Management and Content of the Agreement Between a Depositary and a Management Company, art. 21(1), 2010 O.J. (L 176) 42, 53–54.

52. *See* Commission Directive 2010/43/EU, art. 21(3), 2010 O.J. (L 176) 42, 54.

53. *See* Commission Delegated Regulation (EU) No 231/2013, art. 37(3), 2013 O.J. (L83) 1, 31.

level of mutual funds' voting policy transparency required in Europe is significantly lower than that mandated by regulations promulgated under the Investment Company Act of 1940, which require disclosure of not only a fund's entire voting policy but also of its voting records.[54] Indeed, this difference has been erased by a new EU directive.[55]

B. European Union Rules on Listed Corporations

Besides complying with European rules on investment companies and asset managers, institutional shareholders must also comply with the general rules on listed corporations.[56] In this group of norms there are two important transparency rules that deserve to be analyzed: (1) ownership disclosure and (2) engagement policies and time-horizon disclosure of institutional shareholders.[57]

1. Ownership Disclosure

Under article 9 of Directive 2004/109/EC (Transparency Directive), every shareholder whose "proportion of voting rights . . . reaches, exceeds, or falls below" five percent of the voting shares of a listed company must disclose his, her, or its identity and the number (and the type) of shares held.[58] In Italy, the threshold is

54. *See* 17 C.F.R. §§ 270.30b1-4, 275.206(4)-6 (2017); *see also Final Rule: Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/rules/final/33-8188.htm#P78_23117 (last modified Sept. 23, 2003). The introduction of the mutual fund voting disclosure requirement was strongly supported by some but opposed by others. *See generally* Kathleen Clarke & Paul Miller, *Complying with the SEC's New Proxy Voting Rules*, 4 J. INV. COMPLIANCE 22 (2003); Victoria P. Hulick, *Proxy Voting: The Rules and Industry Reactions*, 3 J. INV. COMPLIANCE 31 (2003); H. Anne Nicholson, *Securities Law: Proxies Pull Mutual Funds into the Sunlight: Mandatory Disclosure of Proxy Voting Records*, 57 OKLA. L. REV. 687 (2004); Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?*, 23 CARDOZO L. REV. 1429 (2002); Brian D. Stewart, *Disclosure of the Irrelevant? Impact of the SEC's Final Proxy Voting Disclosure Rules*, 9 FORDHAM J. CORP. & FIN. L. 233 (2003); Kathryn Watt, *Proxy Voting Trends: Funds Managers in the United States of America and Australia*, 15 BOND L. REV. 12 (2003).

55. *See* discussion *infra* Subpart II.B.2.

56. Michael C. Schouten, *The Case for Mandatory Ownership Disclosure*, 15 STAN. L.J. BUS. FIN. 127, 132 (2009).

57. Actually, there is also a third disclosure rule specifically imposed on hedge funds that acquire control of a nonlisted company. In this specific case, the institutional shareholder is required to disclose (to the company, the shareholders, the employees, and the authorities) some important information, such as (1) the identity of the hedge fund that has acquired control; (2) policies implemented to prevent and manage conflicts of interest; and (3) policies implemented to address external and internal communication relating to the company. *See* Directive 2011/61/EU, art. 28, 2011 O.J. (L 174) 1, 37. Indeed, this specific form of transparency is strictly linked with the features of hedge funds. *See infra* note 75.

58. Directive 2004/109/EC, of the European Parliament and of the Council of 15 December 2004 on the Harmonization of Transparency Requirements in

fixed at three percent,[59] except for asset managers of mutual funds or hedge funds, which are allowed to become transparent at five percent.[60] It is important to note that these rules are also binding on SWFs that invest in European-listed companies.

It is well known that the same occurs in the United States, where major holdings (even of SWFs) must be disclosed under § 13(d) of the Security Exchange Act of 1934.[61] However, there is a very important difference between U.S. and European systems: unlike U.S. ownership disclosure rules, Europe (including Italy) imposes no duty to communicate the intention to acquire control and/or the plans connected with a forthcoming takeover.[62] This kind of information is required only in the prospectus that must be filed when the investor makes, or has to make, a takeover bid.[63] And if there is no mandatory takeover bid, which is triggered by an investor acquiring a controlling percentage (fixed at twenty-five percent in Italy) of the voting capital, then the shareholder can keep his intention undisclosed.

2. *Engagement Policies and Time-Horizons Disclosure*

On May 17, 2017, European Union institutions finally adopted a new directive (Directive (EU) 2017/828) that amended the Shareholder Rights Directive (Directive 2007/36/EC) by adding Chapter Ib, entitled "Transparency of institutional investors, asset managers and proxy advisors."[64]

Relation to Information About Issuers Whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC, art. 9, 2004 O.J. (L 390) 38, 47; *see also* NIAMH MOLONEY, EU SECURITIES AND FINANCIAL MARKETS REGULATION 141 (2014); Schouten, *supra* note 56, at 138. *See generally* Michael Schouten & Mathias Siems, *The Evolution of Ownership Disclosure Rules Across Countries*, (Ctr. for Bus. Research of the Univ. of Cambridge, Working Paper No. 393, 2010), http://ssrn.com/abstract=1434144.

59. *See* Decreto Legislativo 24 febbraio 1998, n.58, art. 120, in G.U. Mar. 26, 1998, n.71 (It.).

60. *See* CONSOB Reg. n. 11971, art. 119-*bis* (May 14, 1999), http://www.consob.it/documents/46180/46181/reg_consob_1999_11971.pdf /bd8d1812-6866-473e-8234-c54c75c0363a.

61. 15 U.S.C. § 78 (2012).

62. Only a few member states impose a duty to disclose the purpose of an acquisition of a large number of shares. *See, e.g.*, CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L233-7(7) (Fr.); Gesetz über den Wertpapierhandel [WpHG] [Securities Trading Act], § 27(a), Sept. 9, 1998, BUNDESANZEIGER [BANZ] (Gr.).

63. Schouten, *supra* note 56, at 136.

64. *See* Directive (EU) 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 O.J. (L 132) 1, 16. This new directive is the result of a long debate about mandatory voting disclosure of institutional shareholders, which started at the beginning of the century with the 2003 Action Plan. *See generally Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward*, COM (2003) 284 final (May 21, 2003). In this document,

In particular, this new regulation will require institutional investors and asset managers to comply with two new duties of transparency regarding their (1) the engagement policy and (2) investment strategies.[65]

The engagement policy must provide a broad description of how institutional shareholders integrate shareholder engagement in their investment strategies.[66] In particular, the policy will have to include information about institutional shareholders, such as

> how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage

European authorities planned, for the first time, to oblige institutional investors "a) to disclose their investment policy and their policy with respect to the exercise of voting rights in companies in which they invest; b) to disclose to their beneficial holders at their request how these rights have been used in a particular case." *Id. at* 13; *see* Klaus U. Schmolke, *Institutional Investors' Mandatory Voting Disclosure—European Plans and U.S. Experience*, 7 EUR. BUS. ORG. L. REV. 767, 774 n.21 (2006). Nevertheless, nothing was done, and the target was reintroduced in 2012. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European Company Law and Corporate Governance—A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies*, COM (2012) 740 final (Dec. 12, 2012). Directive (EU) 2017/828 is the implementation of the 2012 Action Plan. However, between the 2003 Action Plan and the 2012 Action Plan there were many other occasions in which the matter of institutional voting transparency was addressed. *See, e.g.*, European Commission, *Corporate Governance in Financial Institutions and Remuneration Policies*, COM (2010) 284 final (June 2, 2010); *Report of the Reflection Group on the Future of EU Company Law*, at 49 (Apr. 5, 2011), http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf.

65. For comments on previous drafts of Directive (EU) 2017/828, see generally Birkmose, *supra* note 27; Iris Chiu, *Learning from the UK in the Proposed Shareholders' Rights Directive 2014? European Corporate Governance Regulation from a UK Perspective*, 114 ZVGLRWISS 121 (2015); Tom Dijkhuizen, *Report from Europe: The Proposal for a Directive Amending the Shareholders Rights Directive*, 12 EUR. COMPANY L. 47 (2015); Andrew Johnston & Paige Morrow, *Towards Long-Termism in Corporate Governance: The Shareholder Rights Directive and Beyond*, in 3 LONG-TERM INVESTMENT AND THE SUSTAINABLE COMPANY: A STAKEHOLDER PERSPECTIVE (Sigurt Vitols ed., 2015); Iris Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?* (King's College London Law Sch., Research Paper No. 2016-21, 2016); Peter Bokli, et al., Shareholder Engagement and Identification (Feb. 2015) (unpublished manuscript), http://ssrn.com/abstract=2568741.

66. Birkmose, *supra* note 27.

> actual and potential conflicts of interests in relation to their engagement.[67]

Moreover, institutional investors and asset managers will also be required to publicly disclose once a year "how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors [and] how they have cast votes in the general meetings of companies in which they hold shares," excluding those votes that can be considered insignificant due to the subject matter or the size of the holding in the company.[68] However, these new disclosure rules will not be binding.[69] In fact, institutional investors and asset managers will be able to depart from them if they explain their reasons for doing so.[70] In other words, institutional shareholders will be subject only to a comply-or-explain obligation.

As to the investment strategy disclosure, the focus is on the time horizons adopted by institutional investors, who will be required to publicly disclose "how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium-to-long-term performance of their assets."[71] In addition, when institutional investors entrust their money to an asset manager, they must also publicly disclose those arrangements that might have an impact on the time horizon adopted by the latter in making investment decisions.[72] It is clear that this new duty of transparency stems from concerns over the negative impact of short-termism on the sustainability of firms.

In conclusion, the new directive requires institutional shareholders to comply with a stricter form of transparency than the current voting strategies[73] imposed by European regulations on investment companies and asset managers. In other words, it seems we are witnessing a shift in the transparency issue from the law of investment (and its management) to the law of listed corporations.

III. ADEQUACY OF EUROPEAN TRANSPARENCY RULES

Having in mind the legal framework surrounding institutional investors' transparency, we can now identify its purpose and assess its adequacy for our issue. We start with European rules concerning investment companies and asset managers in Subpart III.A. and follow with the regulation of listed companies in Subparts III.B. and III.C.

67. *See* Directive (EU) 2017/828, art. 1, 2017 O.J. (L 132) 1, 16.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 16–17.
73. *See* discussion *supra* Subpart II.A.2.

A. Assessing the Adequacy of European Union Rules about Investment Companies and Asset Managers

There is no doubt that the transparency of portfolio and voting strategies was intended to develop an efficient EU market of managed investments. More specifically, the information disclosed should be an instrument in the hands of the beneficiaries to counterbalance the wide discretion of their fiduciaries. In this way, clients should be enabled to monitor their fiduciaries and, in case of bad management, withdraw their money and allocate it to another fiduciary. Consequently, the transparency (and the monitoring activity that comes with it) should improve the level of accountability of both fund directors and asset managers and induce them to exercise their power in a manner consistent with the interests of their clients.

In this respect, we have serious doubts about the effectiveness of these European norms in improving the efficiency of the market of managed investments. In our opinion, the low level of transparency highlighted above[74] does not allow beneficiaries to adequately monitor their fiduciaries.

However, it is clear that this consideration does not apply to SWFs. As noted above, SWFs do not pose a problem of investor protection given the absence of a trust-like agency relationship with private investors. In addition, SWFs' management behavior is monitored by the political owner, who often has the power to influence investment and voting choices. In any case, it would be quite odd to have a regulation whose task was to protect another sovereign country.[75]

B. Assessing the Adequacy of European Union Rules about Major-Shareholder Transparency

As we have shown, in European markets (unlike the U.S. market), major shareholders do not have any duty to publicly disclose their intention to seek control. However, in our opinion, this lower level of transparency cannot be considered a *lacuna* because it is consistent with the specific structure of European financial markets, on the one hand, and the European corporate law system, on the other.

---

74. *See* discussion *supra* Subparts II.A.1. and II.A.2.

75. The reasons underpinning the duties of disclosure that are triggered when a hedge fund acquires control are quite different. In these cases, the main fear is that the companies could be run without taking due account of the long-term perspective. In other words, transparency is a measure to contain those aggressive forms of shareholder activism typical of some hedge funds. *See* Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, *supra* note 25, at 1730. In this respect, we are of the opinion that the extension of this duty to SWFs is not necessary. As noted, SWFs have not shown any interest in controlling listed companies and, even if they did, they are "stable shareholders" that pursue long-term profits. *See* Megginson & Fotak, *supra* note 2.

First, in the United States, requirements imposed pursuant to § 13(d) of the Securities Exchange Act of 1934 are always justified by the need to enable investors to assess the probability of a change of control and determine the value of the company.[76] This makes sense in those markets characterized by the presence of a large number of public corporations, where the market of corporate control is highly dynamic and the accumulation of a large block of shares can actually lead to a takeover. This is not the case in the European continental market, where the majority of the voting capital of listed companies is often concentrated in the hands of a stable shareholder.[77] In this scenario, it is difficult to argue that an acquisition of five percent (or three percent) is the first step toward a change of control.[78] This is even more true if we consider that in the European Union there is still in force the system of mandatory legal capital that gives to shareholders the power to decide whether to raise new capital from the market by issuing new shares and whether to distribute dividends.[79] It follows that majority shareholders can lock their control position without any possibility for the minority shareholders (or for the market in general) to eliminate or reduce it in the future.

In addition, the absence of a duty to disclose any intention to seek control seems to be consistent with European takeover rules, which oblige the member state to allow a "passivity rule" in the presence of

76. *See* Mark Berman, *SEC Takeover Regulation under the Williams Act*, 62 N.Y.U. L. REV. 580, 585 (1987); Daniel Bertaccini, *To Disclose or Not to Disclose?* CSX Corp., *Total Return Swaps, and Their Implication for Schedule 13D Filing Purposes*, 31 CARDOZO L. REV. 267, 268 (2009); Adam Emmerich et al., *Fair Markets and Fair Disclosure*, 3 HARV. BUS. L. REV. 135, 136 (2013); Henry Hu & Bernard Black, *The New Vote Buying*, 79 S. CAL. L. REV. 811, 877 (2006); Robert Law, *The Derailment of Section 13(D) Liability after* CSX v. Children's Investment Fund*: An Argument for Maintaining the Beneficial Ownership Requirement for Section 13(D) Disclosure*, 59 CATH. U. L. REV. 259, 288 (2009); Jonathan Macey & Jeffry Netter, *Regulation 13D and the Regulatory Process*, 65 WASH. U. L. Q. 131, 133 (1987); Joshua Mitts, *A Private Ordering Solution to Blockholder Disclosure*, 35 N.C. CENT. L. REV. 203, 204 (2012); Edward Small, *Group Formation Under Section 13(d) of the Securities Exchange Act of 1934*, 33 CASE W. RES. L. REV. 72, 74 (1982); Kristin Giglia, Note, *A Little Letter, A Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings*, 116 COLUM. L. REV. 105, 110 (2016); Jhon Coffee, *Regulators Need to Shed Light on Derivatives*, FIN. TIMES (June 29, 2008), https://www.ft.com/content/1ec6fce6-45e5-11dd-9009-0000779fd2ac. *See generally* Hemispherx Biopharma, Inc. v. Johannesburg Consolidated Investments, 553 F.3d 1351 (11th Cir. 2008); Wellman v. Dickinson, 682 F.2d 355 (2d Cir. 1982); GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971); Bath Industries v. Blot, 427 F.2d 97 (7th Cir. 1970); CSX Corp. v. The Children's Inv. Fund Mgmt., 562 F. Supp. 2d 511 (S.D.N.Y. 2008).

77. Schouten, *supra* note 56, at 153.

78. FEDERICO M. MUCCIARELLI, LE OFFERTE PUBBLICHE DI ACQUISTO E DI SCAMBIO 60 (2014). *But see* MOLONEY, *supra* note 58, at 140.

79. *See generally* Enrico Ginevra, *Il capitale sociale nel XXI secolo. Crisi e critica di un istituto*, *in* IL NUOVO CAPITALE SOCIALE 15 (Ilaria Capelli & Sergio Patriarca eds., 2016).

a takeover bid.[80] In fact, it is clear that an obligation to disclose the intention to assume control before the launch of the takeover would render the passivity rule useless, considering that managers could trigger poison pills or other defensive measures in advance.[81]

In conclusion, information on whether five percent (or three percent) blockholders intend to seek control is surely less relevant in European markets than in the United States. Moreover, it could also be considered misleading because in many cases the interest in control is simply unfulfillable.

What, then, is the reason underlying the major-shareholder disclosure regime in Europe? In our opinion, this information allows the identification of activist shareholders or, at least, of those who can overcome rational apathy and bear the costs of monitoring the board and majority shareholder (so-called blockholders). This information is fundamental in enabling blockholders to get in touch with each other and to eventually join forces. From this point of view, ownership disclosure becomes an important corporate governance tool that facilitates the dialogue between relevant investors of the company and also enhances shareholder monitoring by reducing collective action problems. Additionally, since even SWFs are obliged to comply with this duty of transparency, their intervention in the corporate governance of a company may be expected.

If the importance of this rule is not in question, there is certainly room for improvement. Depending on the level of shareholder activism, some blockholders are interested only in monitoring the loyalty and efficiency of the board in order to discipline directors and reduce the risk of moral hazard.[82] Other activist shareholders are more aggressive and try to change business policies by proposing new strategic plans to the board and/or the majority shareholder (e.g., hedge funds).[83] Some others are "rationally reticent" in the sense that they do not develop new business or governance plans but are willing to take into consideration the proposals introduced by others, either directors or other shareholders.[84] This is the case not only with some

80. *See* Directive 2004/25/EC, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, arts. 9, 12, 2004 O.J. (L 142) 12, 19, 21.

81. The same risks exist in the United States. *See* Macey & Netter, *supra* note 76, at 133.

82. Fenghua Song, *Blockholder Short-Term Incentives, Structures, and Governance* 1 (Smill Coll. Bus, Pa. State Univ., Working Paper No. 513/2017, 2017).

83. Martin Lipton, *Dealing with Activist Hedge Funds*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 26, 2017), https://corpgov.law.harvard.edu/2017/01/26/dealing-with-activist-hedge-funds-and-other-activist-investors/.

84. Marcello Bianchi, *L'attivismo degli investitori istituzionali nel governo delle società quotate: una analisi empirica, in* GOVERNO DELLE SOCIETÀ QUOTATE E ATTIVISMO DEGLI INVESTITORI ISTITUZIONALI 5, 13 (Marco Maugeri ed., 2015); Gilson & Gordon, *supra* note 31, at 867 (coining the phrase "rationally reticent"); *see* Edelman et al., *supra* note 31, at 1407-08; Chiu & Katelouzou, *supra* note 65, at 6.

mutual funds[85] but also with some SWFs, since they are not completely apathetic.[86] As noted, SWFs have not shown a particular proclivity toward aggressive activism, but in some cases they have required and obtained the nomination of a director. In addition to different attitudes toward activism, shareholders may have different interests in equity investments.[87] One important difference is surely the time horizon for maximizing the value of the shares. But besides share value maximization, it is known, for example, that even more shareholders are paying particular attention to corporate social responsibility issues, even when these do not represent the most profitable approach for the company.[88] It cannot be ignored that other kinds of interests (even those in conflict with share-value maximization) could underlie shareholders' investment. In this regard, the case of SWFs is particularly significant. Their public nature and home-government influence can induce them to pursue ends other than share-value maximization. Given the above, it is clear that the general ownership disclosure rule does not bring to light any of these differences and attitudes.

C. Assessing the Adequacy of New European Union Rules about Engagement Policies and Time-Horizons Disclosure

As discussed at the end of the previous Subpart, current European ownership disclosure rules lack useful information about corporate governance preferences of major shareholders, which could curb the dialogue among shareholders and between shareholders and the board. This justifies the new disclosure rules about engagement policies and time horizons described in Subpart II.B.2.[89] In other words, this new form of transparency will integrate ownership

85. *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PENN. L. REV. 1021, 1043 (2007); Serdar Çelik & Mats Isaksson, *Institutional Investors as Owners: Who Are They and What Do They Do?* 26 (OECD Corp. Governance Working Papers, Working Paper No. 11, 2013); Edward B. Rock, *Institutional Investors in Corporate Governance* (Univ. of Penn., Inst. Law & Econ. Research Paper No. 14-37, 2015), http://ssrn.com/abstract=2512303.

86. Rose, *supra* note 2.

87. George W. Dent, *The Essential Unity of Shareholders*, 35 DEL. J. CORP. L. 98, 149 (2010).

88. Katherina Glac, *The Influence of Shareholders on Corporate Social Responsibility* 3 (Ctr. for Ethical Bus. Cultures at Univ. of St. Thomas, Working Paper No. 2, 2010).

89. *See* Directive (EU) 2017/828, 2017 O.J. (L 132) 1, 3 ("Whereas . . . "[i]nstitutional investors and asset managers are often not transparent about their investment strategies, their engagement policy and the implementation thereof. Public disclosure of such information could have a positive impact on investor awareness, enable ultimate beneficiaries such as future pensioners optimise investment decisions, *facilitate the dialogue between companies and their shareholders*, encourage shareholder engagement and strengthen their accountability to stakeholders and civil society." (emphasis added)).

disclosure and will help shareholders to get to know each other better. In this way, corporate bodies will be able to better assess the future path that corporate governance will probably follow. This new rule is surely an important step toward a better corporate governance system, but we believe there are two significant shortcomings that could undermine the chances of achieving such a goal.

First, the new disclosure rules will be applied not to every institutional investor or asset manager that invests in European listed companies but only to those included in the strict definition offered by the new Article 2 of the Shareholder Rights Directive. In particular, the definition refers to some institutional investors and asset managers (e.g., pension funds, insurance companies, mutual funds, and hedge funds) subjected to or established under other cited European Union directives.[90] Therefore, it seems that non-EU mutual funds and hedge funds are *excluded* from the application of the new rules and will be able to remain nontransparent. *A fortiori*, the same is true for SWFs (even European ones) that are subjected to none of the European regulations mentioned in the definition. In our opinion, this is an unjustified and unequal treatment that should be remedied. We do not understand why foreign institutional shareholders or SWFs do not have to comply with a rule that is supposed to improve the corporate governance of domestic listed companies. In other words, why should the attitudes and the interests of these institutional shareholders not be of interest to the company and the market?

---

90. In this context, "institutional investor" means

> (i) an undertaking carrying out activities of life assurance within the meaning of points (a), (b) and (c) of Article 2(3) of Directive 2009/138/EC of the European Parliament and of the Council, and of reinsurance as defined in point (7) of Article 13 of that Directive provided that those activities cover life-insurance obligations, and which is not excluded pursuant to that Directive; (ii) an institution for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council in accordance with Article 2 thereof, unless a Member State has chosen not to apply that Directive in whole or in parts to that institution in accordance with Article 5 of that Directive.

Id. at 12. And "asset manager" means

> an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU that provides portfolio management services to investors, an AIFM (alternative investment fund manager) as defined in point (b) of Article 4(1) of Directive 2011/61/EU that does not fulfill the conditions for an exemption in accordance with Article 3 of that Directive or a management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC, or an investment company that is authorised in accordance with Directive 2009/65/EC provided that it has not designated a management company authorised under that Directive for its management.

Id.

Some may think that this regulation would not be necessary for SWFs since they could already decide to comply with GAPP 21 of the Santiago Principles, which prescribes that "[t]he SWF should publicly disclose its general approach to voting securities of listed entities, including the key factors guiding its exercise of ownership rights."[91]

This leads to the second problem of the new directive: the comply-or-explain mechanism included in the required disclosure of engagement policies. Actually, this mechanism is not new in European corporate law. For example, article 20 of Directive 2013/34/EU requires European companies that do not respect one or more of the best practices of corporate governance stated in soft law codes of conduct to explain why they chose to depart from them.[92] The reason underpinning this rule is quite simple: The best practices are not binding because in some circumstances they could also be inefficient from a corporate governance prospective. Companies are allowed to depart from them but must explain the reasons for their inefficiency. The decision will then be judged and priced by the market. But if the comply-or-explain principle is able to trigger those market mechanisms that induce companies to structure their corporate governance systems in the best way, in our view this mechanism does not fit with institutional investor transparency. First, it is hard to imagine cases in which transparency about engagement policies may harm the efficiency of the corporate governance of a corporation. Second, the negative consequences of the lack of disclosure will be borne not by the institutional shareholder who has made the decision but by the company itself, which will have to pay for the noncompliance of its institutional shareholders.

The above considerations lead us to the conclusion that even the Santiago Principles (e.g., GAPP 21) are insufficient from a corporate governance perspective. Moreover, due to SWFs' public nature and their heterogeneity, it is very difficult to foresee their corporate governance behavior, and thus a system of mandatory disclosure on their governance attitude is needed.

CONCLUSION

This Article deals with the issues of SWF transparency, considering them special institutional shareholders with long-term

91. INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" 9 (2008), http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf; *see* Rose, *supra* note 8.

92. *See* Directive 2013/34/EU, of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC, art. 20, 2013 O.J. (L 182) 19, 38–39.

investment horizons and no particular interest in control. SWFs differ from other institutional investors (like mutual funds and hedge funds) because of the public nature of their principal and the absence of a trust-like relationship with private investors.[93] From this perspective, we believe that it does not make sense to argue about the application of European norms about portfolio disclosure and voting policies disclosure to SWFs if these norms are aimed at protecting fund investors.

On the other hand, there are other forms of transparency, imposed by European rules on listed companies, whose function is to improve corporate governance dynamics. First, there are the ownership transparency provisions which are already binding on SWFs. Second, new EU rules require some institutional investors to publicly disclose their engagement policies and the time horizon followed in their investment strategies. It is important to highlight the European trend to shift disclosure regulations from managed investments to listed companies. However, these new norms do not take into account some investors—like SWFs—that can remain nontransparent. In our view, this is unjustified and unequal treatment that must be remedied in order to level the position of every institutional shareholder. We are also of the opinion that the Santiago Principles are not adequate to satisfy the corporate governance needs of transparency because they are merely a voluntary set of principles. In conclusion, to improve the corporate governance of listed companies, a system of mandatory disclosure that would shed light on the interests and attitudes of every institutional shareholder (including SWFs) is still needed.

We think the above considerations are also consistent with modern EU law, taking into account Article 3 of the Consolidated Version of the Treaty on European Union, according to which

> [t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.[94]

From this perspective, transparency can be seen as the premise on which SWFs and, through them, various countries may participate in a competitive socioeconomic process.

93. *See* Rose, *supra* note 16, at 136.

94. Consolidated Version of the Treaty on European Union art. 3, Oct. 26, 2012, 2012 O.J. (C 326) 17.

***