Appraisal Activism in M&A Deals: Recent Developments in the United States and the EU

Raluca Papadima

Available at: https://works.bepress.com/raluca_papadima/1/
European Company Law

European Company Law (ECL) is published under the aegis of the Centre for European Company Law (CECL), an academic partnership of the Universities of Leiden, Utrecht, Maastricht, the Netherlands, Uppsala (Sweden) and Rome, LUISS Guido Carli (Italy) (www.cecl.nl). The purpose of CECL is to further the study of company law by focusing on supra-national issues. These include both developments in the EU and on other international levels, as well as comparative law. Leiden University acts as the leading partner in CECL, with Professor Steef M. Bartman, as coordinating director. ECL aims to be interesting for both academics and practitioners, as well as columns that offer summaries of recent EU legislation, ECL case law and of selected articles from various national legal periodicals.

European Company Law (ECL) is published six times a year. Subscriptions for 2015: $755/€598/£520.

E-mail: customer.service@aspenpublishers.com

Published by: Aspen Publishers, Inc.

www.aspenlaw.com

The Netherlands

ISSN: 1572-4999

European Company Law is published online in 2010. Select subscription prices for 2015 include online access.

Print subscription prices: £63 (UK), €71 (Europe), US$96 (Rest of World)

Online subscription prices: £56 (UK), €55 (Europe), US$75 (Rest of World)

Print and online prices do not include international delivery charges.

SUBJECTS COVERED: European Union Law, Industrial Relations, Securities, Insolvency, Codetermination, Cross-Border Mergers, Shareholders and Shareholders’ Rights, Capital Market Law, Accounting, Consumer Law, Corporate Governance, EU Competition Law, EU Taxation, EU Directives

European Company Law (ECL) deals with European company law in a broad sense, including such topics as codetermination law, insolvency law and securities law. All contributions should follow ECL’s ‘SCP-principle’, which welcomes articles that are scientific, concise, informative and practical.

Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision.

To promote an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

The editors reserve the right to make alterations as to style, punctuation, grammar etc.

Before submitting their article, authors should ensure that the manuscript is written with the following style. Omit or replace all numbers marked by [x].

[9] Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision. The Journal’s policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

European Company Law is published online in 2010. Select subscription prices for 2015 include online access.

Print subscription prices: £63 (UK), €71 (Europe), US$96 (Rest of World)

Online subscription prices: £56 (UK), €55 (Europe), US$75 (Rest of World)

Print and online prices do not include international delivery charges.


European Company Law (ECL) deals with European company law in a broad sense, including such topics as codetermination law, insolvency law and securities law. All contributions should follow ECL’s ‘SCP-principle’, which welcomes articles that are scientific, concise, informative and practical.

Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision. The Journal’s policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

The editors reserve the right to make alterations as to style, punctuation, grammar etc.

Before submitting their article, authors should ensure that the manuscript is written with the following style. Omit or replace all numbers marked by [x].

European Company Law (ECL) deals with European company law in a broad sense, including such topics as codetermination law, insolvency law and securities law. All contributions should follow ECL’s ‘SCP-principle’, which welcomes articles that are scientific, concise, informative and practical.

Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision. The Journal’s policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

The editors reserve the right to make alterations as to style, punctuation, grammar etc.

Before submitting their article, authors should ensure that the manuscript is written with the following style. Omit or replace all numbers marked by [x].

European Company Law (ECL) deals with European company law in a broad sense, including such topics as codetermination law, insolvency law and securities law. All contributions should follow ECL’s ‘SCP-principle’, which welcomes articles that are scientific, concise, informative and practical.

Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision. The Journal’s policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

The editors reserve the right to make alterations as to style, punctuation, grammar etc.

Before submitting their article, authors should ensure that the manuscript is written with the following style. Omit or replace all numbers marked by [x].

European Company Law (ECL) deals with European company law in a broad sense, including such topics as codetermination law, insolvency law and securities law. All contributions should follow ECL’s ‘SCP-principle’, which welcomes articles that are scientific, concise, informative and practical.

Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision. The Journal’s policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

The editors reserve the right to make alterations as to style, punctuation, grammar etc.

Before submitting their article, authors should ensure that the manuscript is written with the following style. Omit or replace all numbers marked by [x].

European Company Law (ECL) deals with European company law in a broad sense, including such topics as codetermination law, insolvency law and securities law. All contributions should follow ECL’s ‘SCP-principle’, which welcomes articles that are scientific, concise, informative and practical.

Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision. The Journal’s policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally reviewed for reference, this period may be extended.

The editors reserve the right to make alterations as to style, punctuation, grammar etc.

Before submitting their article, authors should ensure that the manuscript is written with the following style. Omit or replace all numbers marked by [x].
## Table of Contents

<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
</tr>
</thead>
</table>
| 186  | Editorial  
Reforming EU Takeover Law Remains on Hold  
Jonathan Mukwiri |
| 188  | Appraisal Activism in M&A Deals: Recent Developments in the United States and the EU  
This article discusses the recent rise in M&A appraisal activism in the United States and, to a lower extent, in the European Union (using France, Germany and Romania as examples). It explains the mechanisms and rationale that lead to appraisal proceedings, their outcome and their effects for the parties involved (buyers, targets, financial advisors) and for M&A practitioners. It concludes that while appraisal activism is expected to continue, and amplify, in the United States, there is not a similarly high or immediate cause for concern in the European Union.  
Raluca Papadima |
| 199  | Country Statutes Reports  
Lazaros G. Grigoriadis |
| 204  | Report from Turkey: Rules on the Meeting and Decision Taking Procedure of the Board of Directors in Turkey  
Soner Altas |
1. INTRODUCTION

Appraisal activism is a recent phenomenon, already noticeable both in the United States (US) and in the European Union (EU). It typically consists of purchasing a relatively large equity stake (typically, 5%-10%) in a target company in anticipation or after the announcement of its proposed acquisition by another company, for the sole purpose of making, or threatening to make, an appraisal claim. The exercise of appraisal rights is often accompanied by shareholder activism in its classical sense. This article discusses the causes and assesses future trends with respect to this phenomenon.

The term ‘appraisal’ is specific to the US. It is used in this article to increase readability and comparability. In the EU, the term ‘withdrawal right’ is most often used (or variations thereof). Appraisal refers to various mechanisms which allow a shareholder to receive a ‘fair value’ for its shares in case of certain change of control transactions (mergers, divisions or sales of assets), other fundamental corporate changes (e.g., amendments to the certificate of incorporation, including transfer of the company seat abroad, modification of the legal form of the company, change of the main activity of the company or delisting of the shares) as well as in other instances (e.g., the exercise of certain squeeze-out or a sell-out rights in connection with or following mergers or public offers).

It follows from the preceding definition of appraisal that the remedy in appraisal claims is the receipt by the shareholder of ‘fair value’ for its shares, determined pursuant to a certain mechanism (most often involving a judicial proceeding), (i) instead of the transaction consideration, when appraisal rights are exercised in connection with a change of control transaction or (ii) as a ‘legal price’, when appraisal rights are exercised in other instances. The appraisal remedy is narrow and specific, as compared to remedies available in standard M&A shareholder litigation (such as injunction or rescission of the transaction). A key point for the development of appraisal activism is that interest, at a statutory rate, is added to the ‘fair value’ of the shares determined pursuant to the appraisal mechanism.

Appraisal rights exist in various situations under both US and EU law, for private and public companies. They were created to protect minority shareholders from (i) being forced to accept a consideration that does not reflect the fair value of their shares in cases of significant corporate transactions, usually involving a change of control or (ii) seeing the value of their shares reduced in the case of a fundamental corporate change which the minority shareholder cannot otherwise oppose. In this sense, appraisal rights protect shareholders as a class ‘by making unpopular decisions more expensive for management to pursue’. Appraisal rights have existed in American and European legislations for a long time. However, the full flavour of their virtues and (unintended) lucrative effects have only recently started to be discovered in the US and in the EU, especially in the context of public company M&A deals.

* Attorney at Greenberg Traurig LLP, New York and Ph.D. researcher at the University of Bucharest and the University of Paris 2 Panthéon-Assas. Email: raluca.papadima@drpt.uibuc.ro.

1 The author wishes to thank David Schwartzbaum, Michael Maimone and Serban Danescu for helpful discussions and comments on earlier drafts of this article. The work on this article was partially funded by the strategic grant POSDRU/159/1.5/S/133255, Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007–2013.

2 In the US, the term ‘stockholder’ is used in certain States (notably, in Delaware) and the term ‘shareholder’ is used in other States. Because EU regulations use the term ‘shareholder’, this article does too.

3 In the US, the term ‘tender offer’ is used. EU regulations refer to ‘takeover bids’. Because most national laws of EU Member States use the term ‘public offer’, this article does too.

4 As used in this article, the term ‘public company’ refers to a company listed on a stock exchange.

2. APPRAISAL PRACTICE IN THE UNITED STATES

An appraisal mechanism is contained in the laws of most US States. Although many States employ similar requirements for shareholders to avail themselves of appraisal rights, each State’s statutory mechanism has its own unique characteristics. Unless otherwise indicated, all references below are to appraisal practice in Delaware. Delaware is the second smallest American state but it is the winner of the ‘race’ for company incorporations.6 More than 1 million companies are incorporated in Delaware, including more than 50% of all US public companies and more than 60% of Fortune 500 companies.7 For this reason, Delaware is a privileged venue for M&A shareholder litigation. Until a few years ago, the appraisal procedure was very rarely used, the conventional wisdom being that it presented several major disadvantages. During the last few years, however, appraisal activity increased significantly.

2.1. The Appraisal Procedure in M&A Deals: Conventional Wisdom

The appraisal procedure is set forth in section 262 of the Delaware General Corporation Law (DGCL), pursuant to which any shareholder ‘who holds shares of stock on the date of the making of a demand, who continuously holds such shares through the effective date of the merger and who has neither voted in favour of the merger or consolidation nor consented thereto in writing’ may exercise appraisal rights. Such shareholders must first deliver to the corporation, before the vote on the merger, a written demand for appraisal. After the effective date of the merger, they must commence or join a formal appraisal proceeding by filing a petition in the Delaware Court of Chancery. The court determines ‘the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger …’, together with interest. In determining the ‘fair value’, the court must ‘take into account all relevant factors’. From the effective date of the merger, shareholders who demanded appraisal are no longer entitled to vote their shares or to receive payment of dividends or other distributions on the shares.

The scope of the appraisal procedure is narrow. First, it covers only mergers and consolidations. In contrast with Delaware, in States that follow the Model Business Corporations Act (MBCA), appraisal rights are available in a wide variety of transactions including mergers, sales of assets or amendments to the certificate of incorporation.8 In particular, most States, MBCA and non-MBCA (e.g., New York9), provide for appraisal rights in connection with sales of assets involving all or substantially all of the assets, with the notable exception of Delaware.10 Second, the availability of appraisal rights depends on the form of consideration offered. In general, appraisal rights are available only when the consideration is all cash, a combination of cash and stock (and the shareholders cannot make an election) or stock in a private company or in a company with less than 2,000 shareholders. The rationale is that, if the consideration is stock in a public company or in a company with a significant number of shareholders, the shareholders do not need appraisal rights as they can sell the stock received on the public (or at least liquid) market for that stock. However, appraisal rights are available, irrespective of the form of consideration offered, in second-step mergers (following a public offer) effected pursuant to the recently adopted section 251(b) of the DGCL.11 Appraisal rights are also available in squeeze-out mergers (commonly referred to as ‘short-form’ mergers) effected pursuant to section 253 of the DGCL,12 whether or not the 90% applicability threshold is reached as a result of a change of control transaction, such as a public offer, or independently thereof.

The appraisal procedure was traditionally described as a useless remedy ‘of virtually no economic advantage’.13 Until recently, it received very little attention due to several major disadvantages perceived:

(a) Procedural burdens of preserving and asserting the remedy. First, the shareholder must not vote in favour of the merger (vote against the merger or abstain from voting). Second, it must file a demand on the corporation prior to the general meeting.

8 Section 13.12(a)(3) of the MBCA.
10 In three US States, appraisal rights (referred to as ‘control share cash-out’ provisions) also exist if an offeror reaches a certain percentage of voting power in the company (20% in Pennsylvania, 25% in Maine, 50% in South Dakota). In such cases, the other shareholders can demand that the offeror purchase their shares at a fair price. The mechanism is similar to that of ‘mandatory offers’ in the EU (requiring an offer to be made to all shareholders of a public company by a shareholder who acquires 50% of the voting rights in the company). Because, with the exception of these three US States, the ‘mandatory offers’ mechanism does not apply in the US, it is not discussed in this article.
11 Section 251(b) of the DGCL dispenses of the requirement of a shareholder vote for acquisitions structured as a public offer for all the shares of the company followed by a second-step merger for all the remaining shares if certain requirements are met (target company is a public company or a company with more than 2,000 shareholders, the number of shares tendered in the offer plus owned by the buyer is at least equal to that which would have been required for shareholder merger approval, same consideration in the offer and the second-step merger, etc.).
12 Section 253 of the DGCL allows a shareholder who owns 90% or more of the stock of a corporation to squeeze-out the remaining minority shareholders by means of a merger. Contrary to squeeze-out mergers by a controlling shareholder who owns less than 90% (to which, in addition to general appraisal rights, an ‘entire fairness’ standard applies in terms of both process and price, under case law and Rule 13e-3 of the Securities Exchange Act of 1934), squeeze-out mergers by a controlling shareholder who owns more than 90% are only subject to appraisal rights, not also to a fairness review by the courts or by the Securities Exchange Commission. See B. Kraakeman et al., The Anatomy of Corporate Law, cited supra note 3, at 202–204, 263–265.
Consequently, they are also in re Appraisal of Transkaryotic Therapies, Inc., 18 Jun. 2014, where the remedy is 'fair value' of the shares plus interest. 'Fair value' is the going concern value of the company assuming the transaction giving rise to appraisal rights had not occurred (therefore, excluding the value of synergies and a control premium). The methodology most often used to determine the going concern value is a discounted cash flow (DCF) analysis based, in part, on the company's internally-generated projections and other data and assumptions about how the company would have performed had the merger not occurred.

Given these disadvantages, appraisal rights litigation has not been historically significant. In the last twenty years, only approximately fifty appraisal cases have carried through a post-trial decision.

2.2. The Appraisal Procedure in M&A Deals: Brave New World

(a) Recent rise in appraisal activism. Appraisal activity in connection with mergers of public companies increased significantly, and continuously, starting in 2011. This trend is expected to continue, and even amplify, in 2015 and future years. The percentage of appraisal-eligible transactions that attracted at least one appraisal petition evolved as follows: 5% (from 2004 to 2010), 12% (in 2011 and 2012) and 17% (in 2013, although there was not a similarly substantial increase in appraisal activity). In 2013, the value of the dissenting shares was almost USD 1.5 billion, nearly three times the amount involved in any prior year from 2004 to 2013 and the percentage of the equity value of the shares that sought appraisal out of the equity value of all appraisal-eligible transactions was almost 1%.16

The surge in appraisal litigation is often attributed to a decision issued by the Court of Chancery in 2007,17 where the court held that investors that buy target company shares after the record date for the vote on a merger (which is typically sixty days before the general meeting) can assert appraisal rights. This decision basically allowed potential petitioners to delay a decision on whether to buy target company stock for the purpose of pursuing an appraisal action until the date of the general meeting.

Although the percentage of transactions attracting appraisal litigation (17% in 2013) might not seem high in absolute terms or when compared with merger litigation (93% in 201318), it is high enough to cause concern. The most vulnerable transactions are all cash mergers where the price appears to significantly undervalue the company (by 20%–30%), in particular ‘take private’ transactions and other interested transactions (e.g., where there is no market check or majority of minority approval). Recent transactions that have attracted significant appraisal petitions are, for example, the Dell and Dole Food take private transactions in 2013, the Ancestry.com take private transaction in 2012 or the sale of 3M to Cogenet in 2010.

(b) Strategic rationale for current appraisal activism. A few factors explain the recent rise:

(i) Appraisal is a low cost weapon to exerting pressure. The procedure allows shareholders to threaten exercising appraisal rights without later following through, proving them with deal blocking potential and negotiation leverage. For example, they can threaten to make a demand but not ultimately make it. They can also make a demand but then not bring a formal appraisal petition (e.g., this was the strategy used by Carl Icahn in the Dell transaction, which resulted in a price increase by the buy-out group). Most importantly, they can do so publicly in an effort to attract other shareholders to embrace the same strategy (the Dell transaction also exemplifies this strategy). Finally, even when a formal appraisal petition is filed, it can be abandoned (e.g.,

---

18 M. D. Cain, S. D. Solomon, Takeover Litigation in 2014, 20 Feb. 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567902 (accessed 19 Apr. 2015). The authors observed that for mergers, the percentage of transactions attracting litigation evolved as follows: 39% in 2003, 87% in 2010, 91% in 2011, 92% in 2012, 93% in 2013 and 94% in 2014. The study considered all completed mergers where: (a) the target was a US company publicly traded on the NYSE, AMEX, or NASDAQ stock exchanges, (b) the transaction size was at least USD 100 million, (c) the offer price was at least USD 3 per share and (d) a merger agreement was signed and publicly disclosed through a filing with the Securities Exchange Commission.
over the sixty days following the effective date of the merger, by electing to take the merger price instead of pursuing the appraisal claim) or the matter can be resolved by a settlement.

(ii) Statutory interest rate well above market. Interest is added to the ‘fair value’ determined in the appraisal litigation. Pursuant to the DGCL, the interest rate is 5% over the Federal Reserve discount rate, compounded quarterly, from the effective date of the merger to the date the appraisal award is actually paid. As such, the interest rate is well above market and accrues for a long period of time. This advantage comes with the risk of a possible legislative change in the future. Even though the Delaware legislature is currently contemplating changes to the appraisal statute (including allowing a corporation to cut off accrual of the statutory interest), the modification of the rate is not one of them. However, one of the contemplated changes is to allow a corporation facing an appraisal claim to cut off the accrual of statutory interest. More specifically, at any time before the court enters judgment in an appraisal action, the corporation could pay to each shareholder seeking appraisal rights an amount of cash, with interest continuing to accrue only on the amount that is the difference between that cash payment and the court’s ultimate award.19

(iii) Informational advantage. This advantage comes from the fact that shares acquired after the announcement of a transaction are eligible for appraisal. Shareholders can accumulate stock in the target after the announcement of the merger (including after the record date)20 and still pursue appraisal rights, with sufficient time to examine public information regarding the sale process and the valuation metrics. It is not always possible, from a practical point of view, for the shareholders who seek appraisal to demonstrate that none of the shares for which appraisal is sought were voted in favour of the merger (although this requirement is specifically set forth in the DGCL). Nevertheless, the Court of Chancery has allowed appraisal claims to proceed despite this. Two recent decisions reconfirmed this approach, thereby further encouraging appraisal arbitrage:21

(iv) No wrongdoing needs to be alleged or proven. In contrast with M&A shareholder litigation (involving breach of fiduciary duties by the board), in appraisal claims no wrongdoing in connection with the transaction or flaws in the sale process need to be alleged or proved by plaintiffs. Consequently, it is easier to pursue an appraisal claim than a fiduciary duty claim and often both are pursued.

(v) Appraisal awards are generally higher than the merger price. The Court of Chancery has considerable leeway to consider a wide variety of arguments as to the fair value of the shares. This has often lead to appraisal awards higher than the merger price. A recent survey of post-trial appraisal decisions shows that the court’s determination of fair value was higher than the merger price in 77% of the cases and that the average premium was 61% for all transactions in which there was a premium, and approximately 81% of all interested transactions, without taking into account the additional premium represented by the statutory interest rate.22 Whether, and to what extent, the merger price is, can, or will be taken into account by the Court of Chancery in determining fair value is still uncertain. The Delaware Supreme Court ruled in 2010 that the Court of Chancery may not defer, even presumptively, to the merger price in determining fair value.23 However, in two recent decisions (one of which was affirmed by the Delaware Supreme Court), the Court of Chancery found that the merger price was the most reliable and probative indicator of fair value, and rejected each party’s expert valuations.24

(c) Emergence of institutional appraisal activists. Given these newly-discovered advantages of the appraisal procedure, petitioners became increasingly sophisticated and institutional activists emerged. Since 2011, more than 80% of appraisal proceedings have involved a petitioner who had previously filed an appraisal petition. The most important repeat petitioners are funds specialized in appraisal arbitrage:

---


Initially, appraisal was largely a one-off.\textsuperscript{25} Initially, appraisal was largely a one-off exercise for a particular aggrieved shareholder or a repeat player acting as a lone wolf. Since 2011, there is a wolf-packing tendency as specialized funds and other institutional shareholders tend to regroup and target the same deals.

\textit{(d) Implications of appraisal activism for targets and buyers.} The threat of appraisal claims has started to affect the dynamics surrounding the negotiation of merger transactions, as this threat can have a significant effect on the price ultimately paid in the transaction as well as on closing certainty:

(i) Effect on price. It is likely that buyers will respond to the recent rise in appraisal activism by lowering the price payable to all shareholders and holding back some incremental value for the appraisal activists (in contrast with M&A shareholder litigation where all shareholders share in any incremental value paid by the buyer). At first glance, buyers should build into their financial models the possibility of an appraisal award as a post-closing cost. However, such an approach presents several disadvantages. First, it can significantly decrease bid competitiveness, which may prevent a deal from being reached. Second, it is difficult to model for the outcome with respect to appraisal claims because it is nearly impossible to predict whether or for what price a settlement could be reached (petitioners focus on accruing interest) and the amount of an appraisal award will remain uncertain for a long time after closing.

(ii) Effect on closing certainty. Appraisal activism results in increased closing uncertainty because the dissenting shares cannot vote in favour of the merger. However, appraisal activists must ensure that the deal closes. Consequently, a strategy often used by activists is to vote some shares in favour of the merger, and, for the remaining shares, vote against or abstain. Given these mechanics, it is currently being debated whether an appraisal closing condition (5%–10% of the outstanding shares) would be useful. They were common in public company deals ten to fifteen years ago. Both targets and buyers must request to be directed by the board. Financial advisors and the management of the company to develop sellside projections that present a credible and realistic view of the target company value but that do not invite appraisal activists. The public filings must carefully explain the projections, including what the board understands about execution risks.

At the stage of the appraisal proceedings, projections play a key part again, as part of the DCF analysis. Financial advisors should not pick which projections to use for their valuation analyses or unilaterally prepare their own sensitivity analyses. Instead, they must request to be directed by the board. Financial advisors and management of the buyer may need to ask the target whether and what other projections are being considered by the board in evaluating the proposed transaction, and ask to receive those projections, as opposed to applying a ‘haircut’ to the target projections.

3. APPRAISAL PRACTICE IN THE EUROPEAN UNION

EU regulations do not provide for appraisal rights as an element of the M&A process. As such, we do not typically find in EU Member States general appraisal statutes for M&A transactions similar to section 262 of the DGCL. Instead, in addition to the shareholder approval and management report requirements which also exist under US law, the EU directive 2011/35/EU on mergers requires public companies who merge to commission and provide to the shareholders, prior to the general meeting called to approve the merger, an independent expert report on whether ‘the share exchange ratio is fair and reasonable’, which must (i) indicate the methods used to arrive at the share exchange ratio proposed, including their adequacy, and the values arrived at using each such method and (ii) give an opinion on the relative importance attributed to such methods in arriving at the value decided (Article 10). Experts may be natural or legal persons, depending on the

\textsuperscript{25} D. Katz, L. McIntosh, Corporate Governance Update, cited supra note 15, at 6.

\textsuperscript{26} C. Korsmo, M. Myers, Appraisal Arbitrage, cited supra note 16, at 18–21; D. Katz, L. McIntosh, Corporate Governance Update, cited supra note 15, at 6.
laws of each EU Member State, but they must be in any case appointed or approved by a judicial or administrative authority, whereas, in the US, the solicitation of a fairness opinion, from an investment banker and not a judicially-appointed or approved expert, for mergers of public companies represents only a (widespread) practice. In case of private companies, EU Member States are allowed to adopt a more relaxed regime and some EU Member States only require an expert assessment for mergers of private companies if the shareholders request such an assessment.27

EU regulations provide however for limited appraisal rights in certain cases. One example may be found in the EU directive 2011/35/EU on mergers. For mergers carried out by a company which holds 90% or more of the shares of the company being acquired, the minority shareholders of the company being acquired are entitled ‘to have their shares acquired by the acquiring company’ and, if they exercise their right, ‘to receive consideration corresponding to the value of their shares’. In case of disagreement regarding the consideration, it must be possible for it to be determined by a national court or administrative authority (Article 28). No presumption of fairness with respect to the consideration applies. Another example can be found in the EU directive 2004/25/EC on takeover bids. Following an offer to all the holders of securities of the target for all their securities, an offeror who reaches a 90% (or 95%) threshold, may require all the remaining holders to sell their securities (right of squeeze-out) and, conversely, a holder of remaining securities may require the offeror to buy its securities (right of sell-out), in both cases, ‘at a fair price’; the offer consideration being presumed fair, for both voluntary and mandatory offers (Articles 15 and 16).

Because no general appraisal statute in connection with M&A transactions typically exists in EU Member States, possibilities of appraisal activism typically stem from certain minority shareholder rights. We analyse such appraisal rights in France, Germany and Romania. France and Germany, on the one hand, and Romania, on the other hand, are representative of States with strong and respectively weak capital markets and with a high level and respectively a low level of M&A activity and litigation.

3.1. French Provisions regarding Appraisal in M&A Deals

French law provides for an impressive array of shareholder sell-out rights (‘droit de rachat’ or ‘droit de retrait’) and squeeze-out rights (‘offre publique de retrait’ or ‘procédure de retrait obligatoire’). Under an ‘apples to apples’ approach, we will only focus in this article on comparable rights to those existing in the US and in other EU Member States:

(a) Appraisal rights for shareholders of private companies. Article L. 236-11-1 of the French Commercial Code transposed Article 28 of the EU directive on mergers. As such, French law provides for a sell-out right in connection with squeeze-out mergers but there is no general sell-out right in connection with mergers, at least not for shareholders of private companies. The result is counterintuitive: a better legal protection for shareholders of public companies than for shareholders of private companies.28

Specifically, if from the publication of the draft terms of the merger and until the merger is effected, the absorbing company continuously holds at least 90% of the voting rights of the absorbed company, the management and independent expert (‘commissaires à la fusion’) reports are not necessary if the absorbing company has offered to the minority shareholders of the absorbed company, prior to the merger, to buy their shares for a consideration equal to the value of the shares, such consideration to be determined, for private companies, pursuant to Article 1843-4 of the French Civil Code.

Article 1843-4 of the French Civil Code is the pivotal provision for all appraisal rights in France. In July 2014, it was profoundly revamped, in order to put an end to conflicting case law from French jurisdictions. Article 1843-4 of the French Civil Code applies as an imperative provision whenever it is cross-referenced by other legal provisions which establish an appraisal right and, as a subsidiary default provision, when an appraisal right results from other circumstances. When another legal provision cross-references this article for the purpose of establishing the price for an acquisition of shares (such as the cross-reference in Article L. 236-11-1 of the French Commercial Code regarding appraisal in squeeze-out mergers), the price is determined, in case of a dispute, by an expert, designated by the parties or, if the parties fail to reach an agreement, by ordinance of the president of the tribunal pursuant to an emergency procedure (‘référé’), without any appeal being possible. As we can see, the principle is that the parties are free to agree among themselves with respect to the expert and it is only when they fail to reach an agreement that the courts intervene and appoint one (who cannot afterwards be contested by the parties). The law is also deferential to contractual freedom with respect to the valuation methods. It

provides that the expert ‘must apply, whenever they exist, the rules and methods for determining the value of the shares provided in the bylaws of the company or any convention between the parties.\textsuperscript{29}

Because of the high threshold required for the exercise of appraisal rights in squeeze-out mergers (90\%) as well as the specifics of the appraisal procedure, it has not been conducive of appraisal activism. (b) Appraisal rights for shareholders of public companies. The general regulation (RGAMF) of the Autorité des Marchés Financiers (AMF), the capital markets authority in France, applies to public companies and contains two procedures providing for sell-out and/or squeeze-out rights: the forced buy-out offers and the forced buy-out procedure.\textsuperscript{30} In addition, other specific mechanisms have created premises for appraisal activism by shareholders of public companies:

(i) Public buy-out offers. Shareholders of a public company can request that the majority shareholder(s) initiate a public buy-out offer (sell-out right, Article 236-1 and 236-2 of the RGAMF). Conversely, the majority shareholder(s) can choose in this situation to initiate a public buy-out offer (squeeze-out right, Article 236-3 and 236-4 of the RGAMF). Both these rights apply in situations where a shareholder or group of shareholders comes to own more than 95\% of the voting rights in the company, whether as a result of a merger, a public offer or other corporate transaction.

Moreover, in case of a modification of the legal form of a public company (from a ‘société anonyme’ to a ‘société en commandite per actions’; these being the only two legal forms available for listed companies in France), the persons who control the company prior to the modification of legal form must initiate a public buy-out offer (Article 236-5 of the RGAMF).

Finally, the AMF may impose, ‘in light of the consequences of the operation on the rights and interests of the [shareholders]’ the initiation of a public buy-out offer in case certain fundamental operations are being proposed. These operations include (i) ‘significant modifications to the by-laws, especially those related to the legal form of the company and conditions for the sale and transfer of [capital or voting rights]’ and (ii) mergers with a controlled company (or with a company under common control), the sale or contribution to another company of all or the main portion of a company’s assets, the reorientation of the main activity of the company or the prolonged suppression of monetary rights (such as dividends) for the shares of the company (Article 236-6 of the RGAMF).

(ii) Forced buy-out procedure. This procedure can be used in connection with, and following, any public offer or a public buy-out offer. It allows an offeror who, after the offer, holds securities representing not less than 95\% of the capital or voting rights of the target to squeeze-out the remaining shareholders by compensating them for their shares (Article 237-1 and 237-14 of the RGAMF). This procedure represents the transposition in France of the provisions of Article 15 of the EU directive on takeover bids, France having opted for a higher threshold than the 90\% default threshold set forth in the directive. Unless the presumption regarding the fairness of the offer price applies, the AMF assesses the conformity of the proposed buy-out procedure, in particular in light of ‘an evaluation of the shares of the company [prepared by the offeror], made pursuant to objective [valuation] methods employed for sales of shares which take into consideration, in accordance with the appropriate weight to be given to each element, the value of the shares, the corresponding benefits, the stock price, the existence of subsidiaries and the business prospects of the company’ (Article 237-16 paragraph (II) of the RGAMF).

(iii) AMF authorization of public offers. Public offers to shareholders of public companies are subject to prior authorization by the AMF.\textsuperscript{31} Shareholders have more and more frequently introduced litigation challenging this authorization on various grounds, including inadequacy of the price or lack of independence of the expert appointed to assess the offer. Such claims, which are heard exclusively by the Paris Court of Appeal,\textsuperscript{32} have been rejected in most instances, for two reasons. First, AMF’s control on price is limited to ascertaining if it was calculated in compliance with the formal legal provisions. Second, the Paris Court of Appeal can only approve or


\textsuperscript{30} RGAMF Book II, Title III, Chapter VI (Offres publiques de retrait) (Public Buy-Out Offers) and Chapter VII (Retrait obligatoire) (Forced Buy-Out). On what follows, see A. Pietrancosta, ‘Géométrie privée ou transaction en France’, 4 Revue trimestrielle de droit financier 65–87 (2013); S. Schiller et al., La procédure de retrait obligatoire, 130 Actes Pratiques et Ingénierie Sociétaire 6–14 (2013).

\textsuperscript{31} Article L. 621-8 of the French Monetary and Financial Code.

\textsuperscript{32} Article R. 621-45 et seq. of the French Monetary and Financial Code.
cancel AMF’s authorization, without the possibility of authorizing itself the offer or making changes to its terms (including with respect to the price).33

(c) Status of appraisal activism in M&A deals. The sell-out rights which could lead to appraisal claims in connection with mergers and public offers are very limited and infrequently used. We have seen that they apply only where a shareholder comes to own a very high stake (90% or 95%) of the company and could apply, only with respect to public companies, in case of certain other fundamental corporate changes. The rules regarding the establishment of the price, including the fairness presumption of the offer price, further limit the interest of these rights for potential activists. Moreover, litigation in connection with public offers has had only limited success. Consequently, the premises for appraisal activism similar to the US do not seem to exist in France, despite a marked increase in minority shareholder activism in general over the last few years. Shareholder activism that is typically seen in France consists primarily of proxy battles, media campaigns, lobbying or contesting management proposals and is focused less on litigation. French shareholders rather focus on trying to obtain a higher bid from the offeror (e.g., the saga involving the merger of Suez and Gaz de France between 2006–2008, which involved frequent shareholder activists: ADAM, Albert Frère, Knight Vinke and CalPERS) and/or to derail the transaction (e.g., in the case of the public offer launched by Macquarie Bank on Theolia in 2013).

3.2. German Provisions regarding Appraisal in M&A Deals

(a) Provisions incentivizing appraisal activism. In accordance with the EU regulations discussed above, German law also has a sell-out right in connection with squeeze-out mergers (at 90%)34 and both sell-out and squeeze-out rights in connection with public offers (at 95%).35 Because these provisions merely transpose EU regulations they will not be discussed. In addition, German law provides for a general squeeze-out right (at 95%) for stock corporations and partnerships limited by shares, not specifically linked to a merger or a public offer, pursuant to which the controlling shareholder may request to acquire the remaining shares in the company against payment of 'adequate cash compensation'.36 Similar to US law, the compensation is established by the controlling shareholder but the minority shareholders may commence litigation to challenge it, in which case the court determines the adequate compensation. This type of litigation typically only last between three and six months in Germany. Interest accrues on the cash compensation at the rate of 5% over the applicable base rate set forth in the German Civil Code.

Other German provisions also provide incentives for appraisal activism. One in particular has already led to significant appraisal activism in Germany. Under German law, a parent company (the buyer) is permitted to enter into an enterprise agreement with its subsidiary (the target), pursuant to which the parent company (i) issues certain instructions to the subsidiary’s management, including instructions detrimental to the subsidiary and/or (ii) receives all or a portion of the subsidiary’s profits. These enterprise agreements basically allow the parent to control the target’s strategy and business decisions and to access its cash flow. German law provides for a detailed procedure for entering into such agreements, which requires an approval by the target’s shareholders with a majority of 75% of the share capital.37

An enterprise agreement must include the obligation on the part of the parent to acquire the shares of the minority shareholders of the target in return for appropriate consideration, typically in cash. The minority shareholders have the right, during a period of at least two months after the conclusion of the agreement, to offer their shares to the parent company, at a price offered by the parent and audited by an expert. They also have the right to commence litigation challenging the appropriateness of the consideration offered by the parent.38 According to German case law, the consideration to be paid is calculated taking into account the average weighted stock price for a period of time preceding the announcement of the conclusion of the enterprise agreement, as well as other valuation methods (a form of DCF analysis and the liquidation value of the target). Therefore, the timing of a corporate structural measure such as the conclusion of an enterprise agreement and its announcement, respectively, are issues to be considered when structuring the timetable of a public offer and subsequent corporate integration steps. Interest also accrues on the cash compensation at the rate of 5% over the applicable base rate set forth in the German Civil Code.

Several funds have been reported to adopt the following strategy: buy a significant block of shares (around 10%) in a

34 Article 62(1) and 62(3) of the German Transformation Act (UmwG), adopted in 2011.
35 Article 39 of the German Securities Acquisition and Takeover Act (WpÜG).
36 Article 327(a)-(f) of the German Stock Corporation Act (AktG).
37 Article 327(a)-(f) of the German Stock Corporation Act (AktG).
target company, tender the necessary number of shares into an offer made for the target in order to help it succeed (especially if, as it is customary, the offer is conditional upon approval by a 75% qualified majority), wait for an enterprise agreement to be concluded and then commence litigation challenging the appropriateness of the consideration in an effort to achieve a higher price. Funds have been notably successful in such proceedings, not infrequently obtaining a considerable premium. In particular, specialized appraisal activists have emerged (such as the hedge fund Elliott Management). Examples where appraisal activists have intervened are the lawsuits in connection with UniCredit’s acquisition of HypoVereinsbank in 2005 and the subsequent squeeze-out of HypoVereinsbank’s remaining minority shareholders in 2007 or in connection with the public offer by Terex for Demag Cranes (2011), by Vodafone for Kabel Deutschland (2013) and by McKesson for Celesio (2013).39

(b) Status of appraisal activism in M&A deals. The specific sell-out rights in connection with mergers and public offers are very limited because, as in France, they require a high threshold (90% or 95%). However, given the broad scope of the general squeeze-out right for stock corporations and its mechanism (including interest above market), it creates premises for appraisal activism (except that a converse sell-out right does not exist). Moreover, the specific German provisions creating a sell-out right in relation with the entry into an enterprise agreement have led to appraisal activism and to the emergence of specialized plaintiffs. However, appraisal activism in Germany has not yet reached US levels.

3.3. Romanian provisions regarding Appraisal in M&A Deals

Romanian law also provides for a variety of sell-out rights that could result in appraisal activism, in particular pursuant to the EU regulations discussed above. Romanian law provides for both sell-out and squeeze-out rights at a ‘fair price’ in connection with public offers (at 90% or 95%).40 Because these provisions merely transpose EU regulations, albeit imperfectly (which is unsurprising given that public offers are infrequent in Romania and these provisions did not get tested in practice many times), they will not be discussed. However, under Romanian law there is no sell-out right for squeeze-out mergers specifically. Instead, there is a very broad sell-out right for stock companies:

(a) Provisions incentivizing appraisal activism. The sell-out right for stock companies is very similar to that existing in the US and could potentially lead to appraisal activism. Article 134 of the Romanian Company Law41 provides that shareholders of a private or public stock company ‘who did not vote in favour of a decision of the general meeting may withdraw from the company and request the purchase of their shares by the company.’ The sell-out right covers (i) mergers and divisions, (ii) the change of the main activity of the company, (iii) the transfer of the company seat abroad and (iv) the modification of the legal form of the company. With respect to mergers, it is not limited to squeeze-out mergers but applies, as in the US, to mergers in general. Contrary to the US however, it applies irrespective of the consideration being offered in the merger. The procedure and conditions for the exercise of this sell-out right are relatively similar to those existing in the US.

For mergers, the sell-out right must be exercised within thirty days from the date of the general meeting or, for squeeze-out mergers (at 90% or 100%), from the date of publication of the draft terms of the merger. It is exercised by submitting, at the registered seat of the company, a written declaration of withdrawal, accompanied by the physical shares or by the certificates representing the shares, depending on the form in which the shares were issued. As there are (at least) two companies involved in the merger, the deadline is, in theory, different for the shareholders of each company. However, in negotiated mergers it is customary for both general meetings to take place on the same date, which reduces the problem.

The price to be paid by the company is determined by a registered independent expert as the ‘average value resulting from the application of at least two valuation methods recognized by the legislation in force as of the evaluation date.’ The initial version of this provision referenced only an evaluation performed in accordance with the European Valuation Standards (EVS). The EU directive on mergers did not provide for such a limitation. It was, fortunately, removed subsequently, in order to enable the expert to use any valuation methods deemed best suited, provided they are recognized by the legislation. The expert is designated by the competent tribunal, upon request of the board. The company pays the evaluation costs. Because the shareholders obtain a monetary right by complying with the formal requirements of the sell-out procedure, they can enforce that right (including in case the board does not act to request the designation of an expert) by petitioning the competent tribunal.42

40 Articles 206-207 of Law no. 297/2004 regarding the capital market, as subsequently modified. A search in iDrept returned 11 references to these provisions in litigation before the Supreme Court and appellate courts. Of these references, only one was to Art. 207 (sell-out right) while the remaining ten were to Art. 206 (squeeze-out right).
41 Law no. 31/1990 regarding companies, republished in 2004, as subsequently modified.
Romanian Company Law is silent on the issue of the interest rate applicable to such awards and the generally applicable legal interest rate is at the level of the reference interest rate of the National Bank of Romania.35

It is debated if shareholders can dispute the appointment of the expert (in other situations than where the legal requirement of independence is not met) or the results of the evaluation (in other situations than where the formal legal requirements are not met).44 A negative response, which would prevent appraisal activism from developing in Romania, does not appear to be beneficial to anyone. More specifically, shareholders would be powerless if appropriate valuation methods (as opposed to just two valuation methods) are not employed by the expert. By using the singular (‘expert’) the law could not have meant to exclude the possibility of receiving multiple valuations, leading to a more robust determination.

There is a similar debate regarding the possibility of handling withdrawal demands by means of a negotiation between the shareholder(s) and the company, as opposed to the price being established solely by an expert. This question is also fundamental on the issue of the development of appraisal activism in Romania. Several good arguments are advanced by both sides.45 Allowing the price to be established by negotiations would be beneficial, including to unload the dockets of the courts. As long as there is judicial control over the establishment of the price and such price applies to all shareholders exercising the sell-out right, the rationale of the legal provision would remain intact. The EU directive on mergers seems to indicate the same by stating that ‘in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a [national] court or by an administrative authority’. The use of the word ‘disagreement’ seems to indicate that ‘agreement’ is possible.

(b) Status of appraisal activism in M&A deals. A review of references, returned by iDrept, to Article 134 of the Romanian Company Law in M&A litigation before the Supreme Court and appellate courts indicated that this provision is frequently mobilized. The high number of reported cases is in line with the generally illiquid market for shares in Romania, and, as such, reflects a shareholder demand for appraisal mechanisms allowing them to liquidate their participations.

4. COMPARATIVE OBSERVATIONS

With respect to appraisal, devil is in the details. In other words, whether or not appraisal activism develops is dependent on the existence or not of certain specific features in the applicable provisions which, as we have seen, exist both in the US and in the three EU Member States analysed. In particular, the development of appraisal activism in M&A deals requires that (i) the appraisal provisions apply to mergers in general, not just in squeeze-out scenarios, (ii) there are financial incentives for potential appraisal activists consisting of an above market interest rate and/or judicial proceedings resulting frequently in the ‘fair price’ being established above the merger price and (iii) the mechanism has predictable outcomes.

The first condition is clearly met in the US and Romania. Given the specific procedure regarding the entry into enterprise agreements, we may consider the condition also met in Germany. In France, given that the AMF may impose the initiation of a public buy-out offer in case of certain fundamental corporate changes at public companies, including mergers with a controlled company or sales of all of the main portion of the company’s assets, we may also consider the condition met to a certain extent. There is, however, a notable difference between the EU Member States, on one hand, and the US, on the other hand. In the EU Member States, appraisal exists as a sell-out right of the shareholders. In the US, the appraisal procedure is applicable only if a merger is initiated by the company (or a majority shareholder). In this sense, US shareholders do not have a sell-out right, not even in case of a squeeze-out scenario. Another notable difference is that appraisal rights in the US typically exist only with respect to all cash mergers (or a combination of cash and stock). In the EU, most mergers are stock for stock mergers, but the type of consideration does not determine the applicability of appraisal rights.46

The second condition is met in the US and Germany and not met in France and Romania. We have seen that the DGCL provides for an above market interest rate (5% over the Federal Reserve discount rate, compounded quarterly, from the effective date of the merger to the date the appraisal award is actually paid). Similarly, in Germany, the interest rate applicable in cases of exercise of sell-out rights is above market (5% over the applicable base rate set forth in the German Civil Code, from the publication of the transfer resolution’s registration in the commercial register to the date the payment is made). In contrast, interest accrues in

35 Article 3 para. (1) of Government Ordinance no. 15/2011 regarding the compensatory and punitive legal interest for monetary obligations, and for the regulation of certain financial and fiscal measures in the banking sector (approved without amendments by Law no. 43/2012).
37 S. David, Commentary under article 134, cited supra note 42, at 514, 516, 518 (the price is a ‘legal price’ and cannot be established by means of negotiation); T. Prescure, Commentary under article 134, cited supra note 44, at 7 and note 169 (the price can be established by means of negotiation because the sell-out right has a monetary value and, like any other monetary right, is transferable).
38 4. COMPARATIVE OBSERVATIONS

With respect to appraisal, devil is in the details. In other words, whether or not appraisal activism develops is dependent on the existence or not of certain specific features in the applicable provisions which, as we have seen, exist both in the US and in the three EU Member States analysed. In particular, the development of appraisal activism in M&A deals requires that (i) the appraisal provisions apply to mergers in general, not just in squeeze-out scenarios, (ii) there are financial incentives for potential appraisal activists consisting of an above market interest rate and/or judicial proceedings resulting frequently in the ‘fair price’ being established above the merger price and (iii) the mechanism has predictable outcomes.

The first condition is clearly met in the US and Romania. Given the specific procedure regarding the entry into enterprise agreements, we may consider the condition also met in Germany. In France, given that the AMF may impose the initiation of a public buy-out offer in case of certain fundamental corporate changes at public companies, including mergers with a controlled company or sales of all of the main portion of the company’s assets, we may also consider the condition met to a certain extent. There is, however, a notable difference between the EU Member States, on one hand, and the US, on the other hand. In the EU Member States, appraisal exists as a sell-out right of the shareholders. In the US, the appraisal procedure is applicable only if a merger is initiated by the company (or a majority shareholder). In this sense, US shareholders do not have a sell-out right, not even in case of a squeeze-out scenario. Another notable difference is that appraisal rights in the US typically exist only with respect to all cash mergers (or a combination of cash and stock). In the EU, most mergers are stock for stock mergers, but the type of consideration does not determine the applicability of appraisal rights.46

The second condition is met in the US and Germany and not met in France and Romania. We have seen that the DGCL provides for an above market interest rate (5% over the Federal Reserve discount rate, compounded quarterly, from the effective date of the merger to the date the appraisal award is actually paid). Similarly, in Germany, the interest rate applicable in cases of exercise of sell-out rights is above market (5% over the applicable base rate set forth in the German Civil Code, from the publication of the transfer resolution’s registration in the commercial register to the date the payment is made). In contrast, interest accrues in
Romania at the reference interest rate of the National Bank of Romania.

We have also seen that the Delaware Court of Chancery’s determination of fair value, typically based on a DCF analysis, is higher than the merger price in 77% of the cases, with an average premium of 61% over the merger price (and an even higher average premium in interested transactions). In Germany, we have also seen that shareholders engaged in appraisal litigation in connection with enterprise agreements have often obtained a considerable premium over the offer price, the courts calculating the fair value by taking into account the average weighted stock price for a period of time preceding the announcement, as well as other valuation methods such as a form of DCF analysis and the liquidation value of the target. We could not find similar evidence of consistent findings of higher than the deal price judicial determinations of fair value in France and Romania. In France, in particular, litigation in connection with public offers has been generally unsuccessful, one of the reasons being precisely the fact that the Paris Court of Appeal cannot change the price offered. In Romania, it is still uncertain if, and to what extent, shareholders can challenge the results of the evaluation performed by the expert under the general merger sell-out right statute and what type of analysis courts would use or impose for purposes of valuation.

The third condition is met in the US and not met in any of the three EU Member States analysed. None of the EU Member States have a judicial body similar to the Delaware Court of Chancery and the relevant provisions have not been tested in litigation as frequently as in the US. For that reason, the outcomes of legal proceedings are uncertain. In particular, in countries with weak capital markets and a low level of M&A activity and litigation, such as Romania, there is inherent uncertainty with respect to how courts would interpret and apply the relevant provisions (which often incorrectly transpose EU regulations). In France, the legislation has an additional element of unpredictability consisting in a case-by-case determination of the AMF regarding whether or not to impose the initiation of a public buy-out offer in connection with certain fundamental corporate changes.

In sum, the appraisal procedure has received increased attention in the US in the past few years, 17% of eligible transactions attracting at least one appraisal petition in 2013. In the EU, appraisal procedures appear to be more and more frequently mobilized as well, and there is a general demand for appraisal rights, especially because EU stock markets are less liquid than their US counterparts. What is missing in the EU are a procedural setting and financial incentives closer to those existing in the US. Moreover, with certain exceptions, continuing uncertainties with respect to the consistent application of the relevant legal provisions prevent potential activists from being able to establish and use a predictable appraisal strategy in the EU.

5. CONCLUSION

Shareholder litigation in connection with M&A transactions has been historically high in the US and recently, shareholder activism in general, and appraisal activism in particular, increased. In the EU, shareholder litigation in connection with M&A transactions has generally been lower than in the US but, over the past few years, the EU also experienced a significant increase in shareholder activism in general, coupled with a noticeable increase in appraisal activism.

Appraisal activism is a current reality, both in the US and in the EU. Whether or not appraisal activism develops is dependent on specific national provisions and on the structure of the capital markets. Of the three EU Member States analysed in this article, the highest level of appraisal activism in M&A transactions was noticed in Germany, although the levels are much lower than in the US. In France, given the narrow scope of the sell-out rights provided by the national legislation and the case-by-case application of the national provisions in certain instances, premises for appraisal activism in M&A transactions similar to the US do not seem to exist and litigation in connection with public offers has had only limited success. In Romania, there is a clear demand for appraisal in M&A transactions because the market for the sale of shares is particularly illiquid, for both private and public companies, and, given the broad nature of the remedy and the similarities of the mechanism with that employed in the US, appraisal activism could develop in the future. In conclusion, while appraisal activism is expected to continue, and amplify, in the US, there is not a similarly high or immediate cause for concern in the EU.
European Company Law

European Company Law (ECL) is published under the aegis of the Centre for European Company Law (CECL), an academic partnership of the Universities of Leiden, Utrecht, Maastricht, the Netherlands Uppsala (Sweden) and Rome, LUISS Guido Carli (Italy) (www.cecl.nl). The purpose of CECL is to further the study of company law by focusing on supranational issues. These include both developments in the EU and on other international levels, as well as comparative law. Leiden University acts as the leading partner in CECL, with Professor Steef M. Louwers as Professor of International Company Law.

There are six issues of ECL per year. Two of these (April and October) concentrate on specific topics. The other issues contain articles on various other international levels, as well as comparative law. Leiden University acts as the leading partner in CECL, with Professor Steef M. Louwers as Professor of International Company Law.

European Company Law is published six times a year. Subscriptions prices for 2015 include postage and handling.

Website: www.kluwerlaw.com

European Company Law Journal is published in six issues per year. Subscriptions prices for 2015 include postage and handling.

Published by Kluwer Law International 750 Madison Circle Federal Rd 21708 United States of America E-mail: customercare@kluwerpublishers.com

Cover image: Central Station, Amsterdam, The Netherlands

Dies and distributed in all countries by: Torpin Distribution Services Ltd. Beaver Street Ealing Po Box 316 76 Ninth Avenue, 7th floor, New York, NY 10011, USA

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, without written permission from the publisher.