SHAREHOLDER EXIT SIGNS ON AMERICAN AND EUROPEAN HIGHWAYS: UNDER CONSTRUCTION

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This article discusses legal exit rights (referred to in the United States as appraisal rights and in civil law Europe as withdrawal rights), in the United States, France, and Romania. We selected these three countries because they are representative of strong, average, and weak capital markets, respectively, with varying levels of shareholder activism and litigation (high, normal, and low, respectively). In addition, the selection of these countries enabled us to compare the structure of legal exit rights in the United States and in Europe and, within Europe, between two politically, economically, and culturally sister countries (France and Romania) that nevertheless (and for no good reason) fundamentally diverge with respect to legal exit rights.

Until recently, this topic had not received much attention in literature or in practice. Now, in all three countries, it is raising passionate debates, albeit for different reasons, and we observed a recent and significant increase in the exercise of legal exit rights. In the United States, a phenomenon of "appraisal activism" has emerged, led by specialized and aggressive hedge funds. In France, shareholder activism, in general, is on the rise, and new regulations or proposals pertaining to legal exit rights have recently been adopted or are currently being debated. In Romania, the second most important market was recently dissolved, a situation that has triggered legal exit rights at hundreds of public companies.

The scope and procedures applicable to the exercise of legal exit rights differ greatly in the three countries analyzed. That was easy to conclude.

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While comparative law scholarship often has a tendency to emphasize differences between jurisdictions, we join an emerging trend in comparative law scholarship by choosing to focus on similarities. Consequently, the more difficult part of our analysis was to bring together, under an umbrella of common terminology and concepts, very different institutions, having separate sources and historical backgrounds. We offer a common language and a general analytical framework for legal exit rights, from the pragmatic perspective of current practitioners in each of the countries surveyed. In doing so, a certain extent of deliberate imprecision and generalization was unavoidable. At the end of this process, and within the analytical framework created, we found that numerous similarities in the regulation of legal exit rights exist in these three countries. We explored the identified similarities, which should allow each country to benefit from the experience of the others.

In particular, our analysis indicates that the scope of legal exit rights for public companies is not correlated to the strength of the capital markets, and that shareholders are granted a broader scope of legal exit rights in private companies than in public companies (with the exception of France). It also indicates that there is extreme variation regarding exit rights for limited liability companies (almost exclusively contractual in the United States and France, while broad legal exit rights exist in Romania), and that there is generally less state intervention and more contractual freedom regarding the determination of the fair price with respect to companies other than joint stock companies. Moreover, it indicates that the frequency of use of legal exit rights is not proportional to the level of shareholder litigation.

INTRODUCTION

Two of the core structural characteristics of a company[1] are legal personality and limited liability, also described as "entity shielding" and "owner shielding". Entity shielding protects the assets of the company from the creditors of the company's owners, while owner shielding protects the assets of the company's owners from the creditors of the company. A component of entity shielding, which serves to protect the going concern value of the company against destruction by either individual owners or their creditors, is that the individual owners of the company (the shareholders[2]) cannot withdraw their share of the company's assets at will, thereby forcing partial or complete liquidation of the company, nor can the personal creditors of an individual owner foreclose on the owner's share of the company's assets.[3] It follows that, unless a legal or contractual exception applies, shareholders may not abandon the company at will.

At the origins of corporate law, shareholders had an absolute veto over extraordinary corporate events, which required unanimous approval. However, as this burdensome protection gave way to majority voting requirements, exit rights were granted as a compensation for the loss of the veto right.[4] Consequently, legal exit rights are instances when the

1. To increase readability, we use the term "company" to refer to a variety of business organizational forms in the three countries analyzed, which share all or most of the following main characteristics: (i) legal personality; (ii) limited liability; (iii) transferable shares; (iv) delegated management; and (v) shareholder ownership. For the US, we use this term to refer to corporations and limited liability companies (to the exclusion of partnerships). For France, we use this term to refer to (i) all forms of commercial companies, regulated by French corporate law (*société anonyme, société par actions simplifiée, société à responsabilité limitée, société en nom collectif, société en commandite simple and société en commandite par actions*) and (ii) civil companies (*société civile*), regulated by French civil law. For Romania, we use this term to refer to (i) all forms of commercial companies, regulated by Romanian corporate law (*societate pe acțiuni, societate cu răspundere limitată, societate în nume colectiv, societate în comandită simplă and societate în comandită pe acțiuni*) and (ii) civil companies (*societate simplă*), regulated by Romanian civil law. We refer to the Romanian *societate pe acțiuni* and to the French *société par actions* as "joint stock companies." We refer to limited liability companies in all three countries analyzed as "LLCs."

2. To increase readability, we use the term "shareholder" to refer generally to persons owning an interest in a company even if a different term is typically used in the relevant national provisions (for example, "stockholder" for Delaware corporations or "member" for LLCs).

3. Henry Hansmann, Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387, 411-13 (2000); *see also* Henry Hansmann, Reinier Kraakman, Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006) (explaining the notions of "entity shielding" and "owner shielding").

4. *See* Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO L. J. 1, 11-14 (1995) (providing an overview of the historical

applicable law provides that a shareholder has the right to exit the company and receive a fair price for its shares (also referred to as a sell-out right). A sell-out right of a minority shareholder is sometimes paired with a correlative buy-out right of the majority shareholder. In addition to, or instead of, legal exit rights, shareholders benefit sometimes from contractual exit rights.[5] In contrast with legal exit rights, contractual exit rights are set forth in the bylaws or in shareholder agreements.

This article discusses only legal exit rights, referred to in the U.S. as appraisal rights and in civil law Europe as withdrawal rights. We analyze the structure of legal exit rights, as a minority shareholder protection, in the U.S., France, and Romania.

We selected these three countries because they are representative of strong, average, and weak capital markets, respectively, with varying levels of shareholder activism and litigation (high, normal, and low, respectively). Additionally, the selection of these countries enabled us to broadly compare the structure of legal exit rights in the U.S. and the European Union (EU), France, and Romania (as the latter two are both EU member states). Furthermore, by selecting France and Romania, we were able to explore the reason why two countries that are part of the same legal family (civil law) and have a very similar structure of their corporate law (due to strong political, economic, cultural and legislative influences) have nevertheless reached very different results regarding legal exit rights, including with respect to the implementation of relevant EU legislation, in particular, the Merger Directive[6] and the Takeover Directive.[7]

The U.S. has very strong and active capital markets, with almost 2,000

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rationale for granting legal exit rights to shareholders); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L. J. 613, 618-19 (1998) (providing an overview of the courts' process in determining fair value); *see also* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n. 6 (1941) (explaining the fairness of exit rights for both majority and minority shareholders); Willcox v. Stern, 18 N.Y.2d 195, 201-202 (N.Y. App. Div. 1966) (discussing the exit right as a fair means of compensating dissenting shareholders for majority, as opposed to unanimity, voting rule).

5. Such contractual exit rights of a shareholder may include (i) the right to exit the company by selling its interest to the company or to the other shareholders (in proportion to their ownership interest) at either a pre-agreed price, as determined by a formula set out in the agreement, or at a price to be determined by an independent third party (a "put" right or a sell-out right, where the company or a majority shareholder generally has a correlative "call" right or buy-out right) or (ii) the right to sell a pro rata portion of its ownership interest to any third party acquiring the majority interest in the company (right of co-sale or tag-along right, where the majority shareholder generally has a correlative drag-along right).

6. Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, 2011 O.J. (L 110) 1, as subsequently amended.

7. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, 2004 O.J. (L 142) 12, as subsequently amended.

national companies listed on the New York Stock Exchange and another 2,500 national companies listed on the Nasdaq Stock Exchange. The level of shareholder litigation has always been very high. More recently, shareholder activism in general has significantly increased, including by means of exercising legal exit rights, which have started being invoked frequently since 2011 despite not being particularly broad (a phenomenon referred to as "appraisal activism").

France has the second largest market capitalization in the EU, with over 600 companies listed on Euronext Paris, the main national stock exchange. The level of shareholder litigation is higher than that in Romania, but lower than that in the U.S. Over the past few years, France experienced a significant increase in shareholder activism. Despite this general increase, shareholder legal exit rights remain narrow in scope and infrequently used or litigated.

Romania has one of the lowest market capitalizations in the EU. With less than 100 companies listed on the regulated market of the Bucharest Stock Exchange (BVB), the main national stock exchange, there is little capital market activity. Shareholder litigation and activism are at low levels. However, legal exit rights are broad and not infrequently used by shareholders.

The scope and procedures applicable to the exercise of legal exit rights differ greatly in the three countries analyzed. That was easy to conclude. While comparative law scholarship often has a tendency to emphasize differences between jurisdictions, we join an emerging trend in comparative law scholarship by choosing to focus on similarities. Consequently, the more difficult part of our analysis was to bring together, under an umbrella of common terminology and concepts, very different institutions, each having separate sources and historical backgrounds. We offer a common language and a general analytical framework for legal exit rights, from the pragmatic perspective of current practitioners in each of the countries surveyed. In doing so, a certain extent of deliberate imprecision and generalization were unavoidable. At the end of this process, and within the analytical framework created, we found that numerous similarities in the regulation of legal exit rights exist in these three countries.

Until recently, the topic of legal exit rights had not received much attention in literature or in practice. Now, in all three countries, it is raising passionate debates, albeit for different reasons, and we observed a recent and significant increase in the exercise of legal exit rights. In the U.S., while being criticized by many authors and practitioners, appraisal activism, led by specialized and aggressive hedge funds, is gaining increasing momentum (more than 17% of eligible transactions now attract appraisal petitions, in addition to standard M&A shareholder litigation) and new categories of petitioners utilize it. In France, shareholder activism in general is on the rise and new regulations or proposals pertaining to legal exit rights have recently been adopted or are currently being debated. In Romania, the second most important stock market (the Rasdaq market of the BVB) has recently been dissolved after prolonged controversy regarding its legal status, which triggered potential legal exit rights at more than 800 companies and, in connection therewith, the adoption of new legislation, significant commentary and litigation.

Our analysis indicates that the scope of legal exit rights for public companies[8] is not correlated with the strength of the capital markets and that shareholders are granted a broader scope of legal exit rights in private companies than in public companies (with the exception of French companies). It also indicates an extreme variation in exit rights for LLCs and the fact that the frequency of use of legal exit rights is not proportional to the level of shareholder litigation.

This article proceeds as follows. We first analyze the structure of legal exit rights in each of the three countries selected: the U.S. (Part I), France (Part II), and Romania (Part III). We then present comparative remarks regarding the correlation between legal exit rights and the strength of capital markets and shareholder litigation, respectively. We also provide observations regarding certain particularly important points on which the three countries we surveyed are widely divergent, namely the sphere of extraordinary corporate events that trigger legal exit rights (and how it correlates with types of companies) and the determination of the fair price (Part IV).

I. LEGAL EXIT RIGHTS UNDER U.S. LAW

There are two main types of companies in the U.S.: corporations and LLCs. Absent federal intervention, corporate law is left to the national legislators. The national laws adopted by Delaware are particularly important because Delaware is the privileged venue for company incorporations, and, consequently, for shareholder litigation. More than one million companies are incorporated in Delaware, including more than 50% of all public companies and more than 60% of the Fortune 500 companies.[9]

8. We use the term "public companies" to refer to companies with securities listed on a stock exchange.

9. *See* About Agency, State of Delaware, Division of Corporations, http://corp.delaware.gov/aboutagency.shtml [https://perma.cc/J6P4-9BHZ] (noting the current number of Delaware corporations) (all links in this article were visited on July 14,

With respect to corporations, approximately half of the U.S. states follow the Model Business Corporation Act (MBCA), with certain national variations. Notably, California, Delaware, New Jersey, New York and Texas do not follow the MBCA. In Delaware, the Delaware General Corporation Law (DGCL) applies to both private and public corporations.

With respect to LLCs, there is a more pronounced variation at the national level. There is also a model law for LLCs, the Uniform Limited Liability Company Act, but only a minority of U.S. states have adopted it. In Delaware, LLCs are governed by the Delaware Limited Liability Company Act (DLLCA).

There are generally no legal exit rights for LLCs in the U.S. because this form of company is regarded inherently as a "creature of contract" and regulated accordingly. Only a small minority of U.S. states (for example, California, Florida, Minnesota and New York) grant legal exit rights for LLCs.[10] but in U.S. states where there are no legal exit rights for LLCs, courts might accept a determination of fair value of the shares by applying the implied contractual covenant of good faith and fair dealing. As such, exit rights for shareholders of LLCs generally exist only if, and to the extent, provided in the LLC agreement or in an agreement governing a specific corporate transaction. For example, the DLLCA allows for broad contractual exit rights in case of LLCs:

> A limited liability company agreement or an agreement of merger or consolidation or a plan of merger may provide that contractual appraisal rights with respect to a limited liability company interest or another interest in a limited liability company shall be available for any class or group or series of members or limited liability company interests in connection with any amendment of a limited liability company agreement, any merger or consolidation in which the limited liability company is a constituent party to the merger or consolidation, any conversion of the limited liability company to another business form, any transfer to or domestication or continuance in any jurisdiction by the limited liability company, or the sale of all or substantially all

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2016.); for a historical perspective on the evolution of the number of Delaware corporations, see generally Roberta Romano, THE GENIUS OF AMERICAN CORPORATE LAW 14 (1993); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571 (2002); Lucian A. Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 389-91 (2003).

10. *See, e.g.*, N.Y. LIMITED LIABILITY COMPANY LAW §1002 (Procedures for merger or consolidation) and §509 (Distribution upon withdrawal) (noting the right to receive "fair value of [the] membership interest in the limited liability company" in case of a merger or consolidation or in case of withdrawal). For a rare example of exercise of this legal exit right in an LLC, see Stulman v. John Dory LLC, 2010 N.Y. Misc. LEXIS 6938 (Sup. Ct. New York County Sept. 10, 2010).

> of the limited liability company's assets. The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such appraisal rights.[11]

Below, we discuss only legal exit rights ("appraisal rights")[12] applicable to corporations. Even for corporations, shareholder protection is typically ensured by contractual, rather than legal, exit rights. Legal exit rights typically apply only to certain extraordinary corporate events (discussed here in Section A) and U.S. law provides for only a few other legal exit rights (discussed here in Section B).

A. *Extraordinary Corporate Events*

There are notable differences between MBCA states (Section 1) and non-MBCA states, in particular, Delaware (Section 2), regarding exit rights applicable in case of extraordinary corporate events, especially with respect to the scope of the right and the procedure.

1. Exit Rights in MBCA States for Corporations

(a) Scope. Pursuant to Section 13.02(a) of the MBCA,[13] a shareholder is entitled to obtain payment of the "fair value" of that shareholder's shares,

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11. DEL. CODE ANN. tit. 6, §18-210 (2016).

12. For an overview of the appraisal remedy under U.S. law and its evolution see generally Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L. J. 223, 255 (1962); Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 304 (1974); Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective,* 56 N.Y.U. L. REV. 624 (1981); Elliott J. Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of Weinberger v. UOP, Inc.*, 8 DEL. J. CORP. L. 1 (1983); Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875; Joel Seligman, *Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829 (1984); Alexander Khutorsky, Note, *Coming in From the Cold: Reforming Shareholders' Appraisal Rights in Freeze-out Transactions*, 1997 COLUM. BUS. L. REV. 133, 133-37 (1997); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425 (1990); Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO L. J. 1 (1995); Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. ON LEGIS. 79 (1995); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L. J. 613, 618-19 (1998); J. Travis Laster, *The Appraisal Remedy in Third Party Deals*, 18 M&A INSIGHTS 4 (Apr. 2004); Lawrence Hammermesch & Michael L. Wachter*, The Fair Value of Cornfields in Delaware Appraisal Law*, 31 DEL. JOURNAL OF CORP. LAW 101 (2005); James C. Morphy, *Doing Away With Appraisal in Public Deals*, 26 DEL. LAW. 30 (2008).

13. *See* Mary Siegel, *An Appraisal of the Model Business Corporation Act's Appraisal Rights Provisions*, 74 L. CONTEMP. PROB. 231 (2011) (providing an overview of relevant MBCA provisions).

in the event of any of the following extraordinary corporate events: (i) merger to which the company is a party, if shareholder approval is required for the merger; (ii) share exchange to which the company is a party as the company whose shares will be acquired, or disposition of assets, if the shareholder is entitled to vote on the share exchange or disposition; (iii) any amendment to the articles of incorporation, including an amendment that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the company has the obligation or right to repurchase the fractional share so created,;(iv) domestication, if the shareholder does not receive shares in the foreign company resulting from the domestication that have terms as favorable to the shareholder in all material respects and represent at least the same percentage interest of the total voting rights as the shares held by the shareholder before the domestication; or (v) conversion to a nonprofit or unincorporated entity.

Therefore, under the MBCA, the shareholders whose votes are required to implement the extraordinary corporate event can dissent and exercise their appraisal rights. This means that the shareholders of the target company (rather than of the buyer) are those who can usually exercise the appraisal right. Direct mergers are among the limited cases where the buyer's shareholders have an appraisal right because they have a vote to approve the transaction. In those U.S. states where the buyer must obtain shareholder approval if it is issuing a significant amount of its stock to acquire the target company (in an all-stock or cash and stock transaction), the buyer's shareholders might also have appraisal rights.

(b) Market-out exception. Section 13.02(b)(1) of the MBCA provides that appraisal rights are not available for holders of shares of (i) a public company or (ii) a company that has at least 2,000 shareholders and a market value of at least $20 million. This exception presumes that shareholders do not need an appraisal right if there is a public and liquid market for their shares. If they disagree with the change envisioned, shareholders can sell their shares in the open market for the market value rather than involve the courts. Indeed, dissenting shareholders of a public company who disapprove of a proposed change will generally have little difficulty selling their shares on the market. That is because, in the case of a merger, the market often responds favorably (with a rise of the stock price), and because buyers generally price their offers above the market price in order to attract shareholders to approve the merger. Therefore, dissenting shareholders to the merger of a public company not only have a liquid market on which to sell their shares, they have a stimulated market.[14]

14. *See* Thompson, *supra* note 4 at 10, 29-30 (observing that approximately half of U.S. states do not grant appraisal rights if there is a liquid market on which the shareholders may sell their shares).

When the market-out exception is triggered, appraisal rights are restored in certain circumstances (the exception to the exception). Sections 13.02(b)(3) and 13.02(b)(4) of the MBCA provide that holders of shares in a public or widely held company regain appraisal rights (i) if such holders must accept for their shares anything *other than* cash or shares in a public or widely-held company or (ii) in case of interested transactions.

(c) Procedure. The procedural conditions for exercising appraisal rights are very similar in both MBCA states and non-MBCA states, but there are certain subtle differences. In general, most U.S. states require that the dissenting shareholder (i) give notice that it is exercising its right before the transaction is submitted to the shareholders for approval; (ii) not vote in favor of the transactions (some states requiring the shareholder to cast a "no" vote and others allowing also an abstention from voting); (iii) submit all the shareholder's shares of the company for appraisal (not retain any shares); and (iv) be a record holder of shares of the company. Some non-MBCA states also allow beneficial owners to exercise appraisal rights under certain circumstances (for example, Delaware, New Jersey and New York).

A significant point where the U.S. states differ is whether or not the company is required to make an offer to the dissenting shareholder before the court proceedings resulting in a judicial determination of "fair value" of the shares may start. For example, in New York, the company must make a written offer to the dissenting shareholders for an amount, in cash, that the company believes is the fair value of the shares and accompany its offer by (i) an advance payment (equal to 80% of the offer amount) and (ii) the company's balance sheet or profit and loss statement. The offer must be the same for all dissenting shareholders and the company may not negotiate different prices with different shareholders. The court proceedings are then triggered only with respect to the dissenting shareholders who did not accept the offer.[15]

2. Exit Rights in Delaware for Corporations

(a) Scope. Section 262(a) of the DGCL[16] provides that:

> [a]ny stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor

15. N.Y. BUSINESS CORPORATION LAW § 623(g) (2016).
16. DEL. CODE ANN. tit. 8, § 262 (2016).

> of the merger or consolidation nor consented thereto in writing . . . shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock.

It is readily apparent that the scope of the Delaware appraisal right is much narrower than that existing in MBCA states. It covers only mergers and consolidations. However, Section 262(c) of the DGCL allows Delaware corporations to provide in their certificate of incorporation that appraisal rights will exist for any amendments of the certificate of incorporation (whether or not in connection with a merger or consolidation); any merger or consolidation (irrespective of the form of consideration); or a sale of all or substantially all of the assets of the company.

The Delaware appraisal right does not cover a sale of assets, a frequently used deal structure as an alternative to a merger or a sale of shares. We have seen that a sale of assets results in appraisal rights in MBCA states. It also results in appraisal rights in a majority of non-MBCA states. For example, in New York, a non-MBCA state, appraisal rights also exist for any "sale, lease exchange or other disposition of all or substantially all of the assets" which requires shareholder approval, with certain exceptions.[17] In Delaware, an appraisal right exists for sales of assets only as a contractual protection.

With respect to the scope of the appraisal right in case of mergers, its availability typically depends on the existence, under the relevant provisions, of a shareholder vote. Therefore, appraisal rights do not exist for statutory mergers under Sections 251(f) and 251(g) of the DGCL. Two exceptions are however provided by the DGCL.

(i) Second-step mergers. Section 251(h) of the DGCL dispenses of the requirement of a shareholder vote for acquisitions structured as a public offer for all the shares of the target company followed by a second-step merger for all remaining shares, if certain requirements are met. The target must be a public or widely held company, the number of shares tendered in the offer plus the shares owned by the buyer must be at least equal to that which would have been required for shareholder approval of the merger, and, most importantly, the same nature and amount of consideration must apply to both the offer and the second-step merger. Despite the lack of a shareholder vote, appraisal rights exist for such second-step mergers.

(ii) Squeeze-out mergers. Section 253 of the DGCL allows a shareholder who owns at least 90% of a company to squeeze-out the remaining minority shareholders by means of a merger (commonly referred to as a "short-form" merger), without a vote. Appraisal rights are available

17. N.Y. BUSINESS CORPORATION LAW § 910(a)(1)(B) (2016).

in such short-form mergers, whether the 90% threshold is reached as a result of a change of control transaction, such as a public offer, or independently thereof.[18]

(b) Market-out exception. Section 262(b)(1) of the DGCL contains a market-out exception similar to that found in the MBCA. Holders of shares of a company listed on a national securities exchange or widely held (by more than 2,000 holders of record) do not have an appraisal right. The DGCL also contains the related exception to the exception, in the sense that, pursuant to Section 262(b)(2) of the DGCL, the appraisal right becomes applicable again to such holders if they have to accept anything *other than* stock of the surviving company or of any other public or widely held company. Therefore, holders of shares of a company listed on a national securities exchange or widely-held will have appraisal rights if they receive in the transaction either all cash or a combination of cash and stock and, in this second case, only if they cannot make an election between cash and stock.[19] The restoration of appraisal rights in case cash is received in the transaction (which does not occur in MBCA states) does not make much sense because cash is by definition more liquid than any stock.[20]

(c) Procedure. In Delaware, shareholders who own shares as of the

18. REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW. A COMPARATIVE AND FUNCTIONAL APPROACH, 202-04, 263-65 (Oxford University Press, 2nd ed. 2009).

19. Krieger v. Wesco Financial Corp., 30 A.3d 54 (Del. Ch. 2011) (stating that shareholders did not have appraisal rights because the consideration was either cash or stock of the surviving company, or a mix of cash and stock, at the election of the shareholder, with cash being paid to the shareholders who failed to make an election); Louisiana Municipal Police Employees' Retirement System v. Crawford, 918 A.2d 1172 (Del. Ch. 2007) (stating that shareholders did have appraisal rights because the consideration included a mix of cash and stock, the cash portion consisting of a dividend, and the shareholders could not make an election).

20. For discussions regarding the rationale, scope and utility of the market-out exception, see Wertheimer, *supra* note 4 at 633; David J. Ratway, *Delaware's Stock Market Exception to Appraisal Rights: Dissenting Minority Stockholders of Warner Communications, Inc. are "Market-Out" of Luck*, 28 U. TOL. L. REV. 179, 205 (1994) (stating that "proponents of the 'market-out' exception claim that with a publicly-traded stock, the stock market price is an accurate and fair valuation of the stock. Therefore, expensive judicial determination of the fair value would be redundant."); Michael R. Schwenk, *Valuation Problems in the Appraisal Remedy*, 16 CARDOZO L. REV. 649, 681-82 (1994) (stating that "if the shareholder can receive the fair value of his or her stock by selling it in the market, then there is no need for a judicial proceeding to determine this value. It has already been set with the best source of information regarding values: a competitive market."); Jeff Goetz, Note, *A Dissent Dampened by Timing: How the Stock Market Exception Systematically Deprives Public Shareholders of Fair Value*, 15 FORDHAM J. CORP. & FIN. L. 771, 787-88 (2010) (arguing that "valuation through appraisal is unnecessary because dissenting shareholders can sell their shares on the market for the appropriate price").

record date for the vote on a merger (which is typically 60 days before the general meeting), as well as those who buy shares after the record date but prior to the general meeting, may request appraisal. Indeed, in a 2007 decision of the Court of Chancery,[21] the court held, against expectations, that investors that buy target company shares after the record date for the vote on a merger can assert appraisal rights, allowing 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.

The requirements for the exercise of the appraisal right are relatively convoluted and the procedural burdens of preserving and asserting the appraisal remedy are significant.

First, the shareholder who wishes to exercise its appraisal right must deliver to the company, before the vote, a written demand. The demand must reasonably inform the company of the identity of the shareholder and that it intends to demand the appraisal of its shares.

Second, the shareholder must not vote in favor of the merger. It must vote against the merger or abstain from voting (or, as it sometimes happens, vote in favor just enough shares to get the merger approved and abstain with respect to the rest of the shares[22]). It is not always possible for the shareholder who seeks appraisal to demonstrate that none of the shares for which appraisal is sought were voted in favor of the merger. Nonetheless, the Court of Chancery permitted appraisal to be pursued even where the petitioner was unable to show that the shares for which it sought appraisal had not been voted in favor of the merger by the previous owner. Two decisions of the Court of Chancery have recently reconfirmed this approach.[23]

Third, within 120 days of the effective date of the merger, the shareholder must file a petition for appraisal or join an appraisal proceeding commenced by another petitioner. Such petitions are heard in Delaware exclusively by the Court of Chancery. Alternatively, at any time within 60 days of the effective date of the merger, the shareholder may withdraw its demand and accept the merger price, if the shareholder had not commenced or joined an appraisal proceeding.

Fourth, the shareholder must continuously hold the shares for which

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21. *In re* Appraisal of Transkaryotic Therapies, Inc., 954 A.2d 346 (Del. Ch. 2007).

22. It appears that at the general meeting called to vote on the merger Broadridge (frequently hired to assist companies with their shareholder communications and distribution of proxy materials, as well as with the organization of their general meetings and vote tabulation) provides less information in case of contested transactions than in case of uncontested transactions.

23. *In re* Appraisal of Ancestry.com, Inc., No. 8173-VCG, 2015 WL 66825 (Del. Ch. Jan. 5, 2015); Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 67586 (Del. Ch. Jan. 5, 2015).

appraisal is sought through the effective date of the merger and cannot, for the duration of the appraisal proceedings, vote such shares or receive dividends.

Appraisal proceedings are lengthy. They usually last 2-4 years and include extensive testimony from financial experts. Consequently, they are also expensive. Contrary to standard M&A shareholder litigation, appraisal petitioners may not proceed as a class and, therefore, may not shift their attorney's fees to all shareholders or to the defendants. Section 262(j) of the DGCL provides that the costs of the proceeding will be taxed upon the parties as the court deems equitable and that the court *may* order that the (reasonable) expenses incurred by any shareholder be charged pro rata against the value of all the shares entitled to appraisal.

The remedy in appraisal proceedings is "fair value" of the shares plus interest. Pursuant to Section 262(h) of the DGCL, the Court of Chancery determines "the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest." Therefore, fair value is the going concern value of the company assuming the transaction had not occurred (excluding the value of synergies and a control premium). The methodology most often used to determine the going concern value is a DCF analysis. In determining the fair value, Section 262(h) of the DGCL requires the court to "take into account all relevant factors." The Court of Chancery has leeway and a demonstrated willingness to consider a wide variety of arguments as to fair value.

A survey of certain post-trial appraisal decisions shows that the court's determination of fair value was higher than the merger price in 77% of the cases, with premiums ranging from approximately 9% to 150% and averaging 61% (81% for interested transactions) in transactions where there was a premium.[24] The numerical results of this survey are to be taken with a grain of salt because the study only covered 4.5 years of post-trial appraisal decisions (2010 to June 2014) and the sample was small (only

24. Fried, Frank, Harris, Shiver & Jacobson LLP, *New Activist Weapon—The Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications* (June 18, 2014), Columbia Law School Blog on Corporations and the Capital Markets, http://clsbluesky.law.columbia.edu/2014/07/09/fried-frank-discusses-delaware-appraisal-arbitrage-as-a-new-activist-weapon/ [https://perma.cc/NQ8L-9G74]. *See also* Fried, Frank, Harris, Shiver & Jacobson LLP, *Why Delaware Appraisal Awards Exceed the Merger Price—The Gap Between What the Delaware Chancery Court Says and Does* (Sept. 23, 2014), Harvard Law School Forum on Corporate Governance and Financial Regulation, http://blogs.law.harvard.edu/corpgov/2014/09/23/why-delaware-appraisal-awards-exceed-the-merger-price/ [https://perma.cc/ZN2W-72EX] (observing that the premium for the five interested transactions was 75.5%, 127.8%, 19.8%, 19.5% and 148.8% and that the premium for the four interested transactions was 0%, 8.5%, 15.6% and (14.4%)).

nine decisions). Additionally, the idea that the exercise of appraisal rights by shareholders of public companies results in a value consistently and significantly higher than the merger price is troubling in light of the theory of efficient markets. Moreover, in 2015, despite an older ruling of the Delaware Supreme Court that in determining fair value in appraisal proceedings the Court of Chancery may not defer, even presumptively, to the merger price,[25] the Court of Chancery issued a series of decisions (one of which was affirmed by the Delaware Supreme Court) where it found that the merger price was the most reliable and probative indicator of fair value.[26] Importantly, the merger price in all these cases was established following an arm's length, thorough and informed sales process, which allowed the Court of Chancery to rely on the merger price and to reject both parties' expert valuations.

The idea that the exercise of appraisal rights by shareholders of public companies results in a value consistently and significantly higher than the merger price is troubling in light of the theory of efficient markets. This theory stipulates that shares always trade at their fair value on capital markets because, in efficient capital markets, the trading prices always incorporate and reflect all relevant information. The merger price is typically already at a premium to the trading price, in order to be attractive. It is, therefore, counterintuitive that the "fair price" determined in appraisal proceedings would be higher than the merger price.[27] An explanation for this abnormality is that appraisal rights are often exercised in connection with interested transactions or transactions with flawed sales processes, to which the theory of efficient markets does not, by definition, apply.

Whether, and to what extent, the merger price is, can, or will be taken into account in determining fair value in appraisal litigation is still uncertain. The Delaware Supreme Court held that in determining fair value the Court of Chancery may not defer, even presumptively, to the merger price.[28] However, in two recent decisions (one of which was affirmed by

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25. Golden Telecom, Inc. v. Global GT LP, 11 A.3d 214 (Del. 2010).

26. Huff Fund Investment Partnership v. CKx, Inc., No. 6844-VCG, 2013 WL 5878807 (Del. Ch. Nov. 1, 2013) (*aff'd* Huff Fund Investment Partnership v. CKx, Inc., 2015 WL 631586 (Del. 2015)); *In re* Appraisal of Ancestry.com Inc., No. 8173-VCG, 2015 WL 399726 (Del. Ch. Jan. 30, 2015); Merlin Partners LP v. AutoInfo, Inc., No. 8509-VCN, 2015 WL 2069417 (Del. Ch. Apr. 30, 2015); LongPath Capital, LLC v. Ramtron Int'l Corp., No. 8094-VCP, 2015 Del. Ch. LEXIS 177 (Del. Ch. June 30, 2015); Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015). *See also* Van de Walle v. Unimation, Inc., Civ. A. No. 7046, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) (stating that "[t]he fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair").

27. Hammermesch & Wachter, *supra* note 12, at 119.

28. Golden Telecom, Inc. v. Global GT LP, 11 A.3d 214 (Del. 2010).

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. The court noted that the sales process had been robust and included "a full market canvas and auction."

In principle, interest is added to the fair value determined, for the period between the effective date of the merger and the date of payment. The applicable interest rate is established in Section 262(h) of the DGCL as "5% over the Federal Reserve discount rate", resulting in an interest rate well-above market. The current Federal Reserve discount rate, as of December 17, 2015, is 1% for primary credit,[29] which puts the "appraisal interest rate" at 6%. Section 262(h) of the DGCL authorizes the Court of Chancery to determine "in its discretion [. . .] for good cause shown" that interest will not be added to the fair value. So far, the Court of Chancery has refused to exercise its discretion to establish a different interest rate than the statutory rate.[30]

(d) Recent trends. The rational assumption would be that appraisal rights are most useful to, and, consequently, used by, private company shareholders, because they do not have a liquid market for their shares and because the market-out exception removes appraisal rights for shareholders of public companies in certain cases. However, the opposite is true in practice: the appraisal procedure is mostly used by shareholders of public companies. That is because specialized hedge funds and other institutional shareholders recently discovered the monetary and procedural advantages of the appraisal procedure as applied to public companies.

The main monetary advantage is that, as discussed above, the fair value determined in the appraisal proceedings is often much higher than the merger price and interest at a rate well above market is automatically added to this fair value for the (long) duration of the proceedings.

The main procedural advantage is that shares acquired after the public announcement of a transaction are eligible for appraisal and those who want to exercise appraisal rights can buy shares on the market after the announcement, with the benefit of, and sufficient time to examine, public filings which contain information regarding the sale process and valuation metrics, including those employed by experts who are invariably hired to render fairness opinions (although they are not mandatory under either

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29. *See* https://www.frbdiscountwindow.org/Pages/Discount-Rates/Current-Discount-Rates.aspx [https://perma.cc/EW78-85XK] (listing current discount rates).

30. *In re* Appraisal of Metromedia Int'l Group, Inc., 971 A.2d 893, 907 (Del. Ch. 2009) (noting that "a different rate may be justified where it is necessary to avoid an inequitable result, such as where there has been improper delay or a bad faith assertion of valuation claims").

federal or state law[31]). In addition, appraisal is a low cost weapon to exerting pressure. The procedure allows shareholders to threaten exercising appraisal rights without later following through, providing them with deal blocking potential and negotiation leverage (they can threaten to make a demand but not ultimately make it, make a demand but then not bring a formal appraisal, or abandon a petition after it is filed, choosing to take the merger price instead of pursuing the appraisal claim).

Another procedural advantage is that, in contrast with M&A shareholder litigation for breach of fiduciary duties by the board, plaintiffs in appraisal claims need not allege or prove any wrongdoing in connection with the transaction or flaws in the sale process. Consequently, it is easier to pursue an appraisal claim than a fiduciary duty claim. Often, both are pursued jointly.

These advantages were discovered recently. Until a few years ago, appraisal was perceived as a useless and inefficient remedy "of virtually no economic advantage,"[32] and was rarely used. The percentage of appraisal-eligible transactions that attracted at least one appraisal petition evolved in Delaware 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 M&A activity). In 2013, the value of the dissenting shares was almost $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%.[33] The increase came almost exclusively from appraisal petitions involving public companies and is expected to continue and amplify in the future. The most vulnerable transactions are all cash mergers where the price appears to significantly undervalue the company

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31. If a fairness opinion was obtained, the evaluation methods and the results thereof must be summarized in great detail in the proxy statement. The summary must include the procedures followed, the findings and recommendations, the bases for and methods of arriving at such findings and recommendations, and other elements. *See* Item 14(b)(6) of SEC Schedule 14A (cross-referencing Item 1015(b) of SEC Regulation M-A).

32. Manning, *supra* note 12, at 260. *See also* Lucian Arye Bebchuck, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1852-56 (1989); JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, CORPORATIONS 595-96 (1997) (asserting that "[appraisal] is rarely the remedy of other than the 'wine and cheese' crowd, for seldom is appraisal sought by investors whose holdings are less than $100,000").

33. Minor Myers & Charles R. Korsmo, *Appraisal Arbitrage and the Future of Public Company M&A*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424935 [https://perma.cc/GS4N-TUJE] (April 14, 2014), at 14-18. *But see* Paul G. Mahoney & Mark Weinstein, *The Appraisal Remedy and Merger Premiums*, 1 AM. L. & ECON. REV. 239, 242 (1999) (finding no evidence that the availability of appraisal is associated with higher merger premiums for target shareholders).

(by 20-30%), in particular take private and other interested transactions (for example, where there is no market check or majority of minority approval). Recent public company transactions that attracted significant appraisal litigation are, for example, the Dell and Dole Food take private transactions in 2013, the Ancestry.com take private transaction in 2012, and the sale of 3M to Cogent in 2010.[34]

This recent rise in appraisal litigation involving public companies is referred to as "appraisal activism."[35] Although the percentage of transactions attracting appraisal litigation (17% in 2013) might not seem high in absolute terms, or relative to the percentage of transactions attracting M&A shareholder litigation (93% in 2013[36]), it is nevertheless problematic. Appraisal litigation is undoubtedly a lucrative enterprise for petitioners (who have become increasingly sophisticated), but it has nefarious consequences for (public) companies and overloads the dockets of the Delaware judges, who have to spend a significant portion of their

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34. *See, e.g.*, *In re* Appraisal of Ancestry.com, Inc., No. 8173-VCG, 2015 WL 66825 (Del. Ch. Jan. 5, 2015); Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 67586 (Del. Ch. Jan. 5, 2015); *In re* Appraisal of Dole Food Co., 114 A.3d 541 (Del. Ch. 2014).

35. For more details regarding the rise of appraisal activism in the U.S. and its consequences, see generally Raluca Papadima, *Appraisal Activism in M&A Deals: Recent Developments in the United States and the EU*, 4 EUR. COMPANY L. 188, 190-192 (2015); Steven Davidoff Solomon, *A New Form of Shareholder Activism Gains Momentum*, N.Y. TIMES, Mar. 4, 2014; Miles Weiss, *Dell Value Dispute Spotlights Rise in Appraisal Arbitrage*, BLOOMBERG NEWS, Oct. 3, 2013; George S. Geis, *An Appraisal Puzzle*, 105 NW. U. L. REV. 1635 (2011).

36. Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015*, *available at* http://ssrn.com/abstract=2715890 [https://perma.cc/7A3R-RECH] (Jan. 14, 2016). The study considered all completed transactions of at least $100 million where the target was a publicly traded Delaware and non-Delaware company. The authors observed that the percentage of transactions attracting M&A shareholder litigation evolved as follows: 39.3% in 2005, 87.3% in 2010, 91.4% in 2011, 91.8% in 2012, 93.2% in 2013, 94.9% in 2014, and 87.7% in 2015. Although the 2015 numbers are preliminary, the significant decrease in 2015 can be explained by Delaware's sharp turn against disclosure-only settlements starting in the second half of 2015 and culminating with the Trulia decision in January 2016. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016) (explaining that "practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently"). This turn may create seismic shifts in M&A shareholder litigation in Delaware. For the reasons leading to this development, see Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015) (finding weak support that amendment settlements increase shareholder voting in favor of a transaction and no support that disclosure-only settlements do not affect shareholder voting).

time playing investment banker without commensurate compensation.

(i) Emergence of institutional appraisal activists. Since 2011, more than 80% of appraisal proceedings involved a petitioner who had previously filed an appraisal petition.[37] The most important repeat petitioners are the following "magnificent seven" funds, all of which specialize in appraisal arbitrage: Magnetar, Merlin (which has the most petitions filed), Merion (which has reportedly raised a billion dollars to invest in appraisal claims), Patchin, Predica, Quadre, and Verition.

Recently, other types of institutional investors have started taking part in appraisal litigation: other hedge funds (Fortress, Hudson Bay, TIG Advisors); mutual funds (which had previously only rarely been involved in standard M&A shareholder litigation; for example, T. Rowe Price and John Hancock in connection with the Dell appraisal litigation); and insurance companies (also rarely involved in standard M&A shareholder litigation in the past; for example, Prudential and Northwestern Mutual also in connection with the Dell appraisal litigation).

Initially, appraisal was largely a one-off exercise for a particular aggrieved shareholder or a repeat player acting as a lone wolf. More recently, specialized funds and other institutional shareholders with important financial resources tend to regroup and target the same deals. This wolf-packing tendency can be observed in particular among specialized plaintiffs, with the pair Merion/Magnetar (for example, the appraisal litigation involving Cogent and Dole Food) and the pair Merlin/Quadre (for example, the appraisal litigation involving Orchard Enterprises, Bronco Drilling, Official Payments, and Cornerstone Therapeutics) often seen targeting the same deals.

(ii) Implications of appraisal activism for targets, buyers and their financial advisors. The threat of appraisal litigation has started to affect the dynamics surrounding the negotiation of merger transactions, as it can have a significant effect on the price ultimately paid in the transaction, as well as deal-threatening potential by reducing closing certainty.

(α) 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 to M&A shareholder litigation where all shareholders share in any incremental value paid by the buyer). At first glance, it seems that 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

37. *See supra* note 33, at 18.

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 (because petitioners focus on accruing interest) and the amount of an appraisal award will remain uncertain for a long time after closing.

(β) Effect on closing certainty. Appraisal activism results in increased closing uncertainty because the dissenting shareholders cannot vote in favor of the merger. However, appraisal activists must ensure that the deal closes. Consequently, it is currently being debated whether an appraisal closing condition (5-10% of the outstanding shares) would be useful.[38] Such conditions were common in public company deals 10-15 years ago.[39] Both targets and buyers should carefully consider the utility of such conditions because they may actually increase the risk that the deal does not ultimately close and provide unwanted leverage to the appraisal activists. More useful contractual protections might be a representation as to process or a price reduction mechanism linked to appraisal claims. In addition, appraisal litigation leaves buyers with an unquantifiable post-closing risk that they have to take into account (which poses a major problem in leveraged transactions where it is critical for buyers to know in advance how much an acquisition is going to cost them) and makes it extremely difficult for companies with upside contingencies to sell themselves (for example, a biotech company waiting for regulatory approval of a new drug).

Appraisal litigation also impacts the process that surrounds the preparation and disclosure of financial projections. At the initial stage, (overly) optimistic sell-side projections, as disclosed in mandatory public filings, may invite appraisal activists. Hockey stick projections are not only an issue of fairness of the transaction from a financial point of view. They are also a deal issue because the likelihood of the deal receiving attention from appraisal activists can have a significant impact on the bidding and negotiation strategy of the buyer. Financial advisors to the target company must therefore work with the management of the company to develop sell-side projections that present a credible and realistic view of the target company's value but that do not invite appraisal activists, including what the board understands about execution risks. At the stage of appraisal litigation, projections play a key role again, as part of the DCF analysis. Given the scrutiny that the projections receive in appraisal proceedings, financial advisors should not pick which projections to use for their valuation analyses, but should instead request to be directed by the

38. *See Fried, Frank, Harris, Shiver & Jacobson LLP, New Activist Weapon—The Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications (June 18, 2014), supra* note 24, at 5.

39. *Id.*

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 should ask to receive those projections, as opposed to applying a "haircut" to the target projections.

B. *Other Legal Exit Rights*

There are very few other legal exit rights under U.S. law. In particular, there are no specific legal exit rights in freeze-out scenarios, whereby all shareholders are eliminated and the company, if public, is delisted (Section 1), and there are no mandatory offers under U.S. law (Section 2).

1. Absence of Specific Legal Exit Rights in Freeze-Out Transactions

The existence of legal exit rights with respect to freeze-out transactions depends on the technique used to cash out the shareholders and take the company private. In the vast majority of cases, one of the following two techniques is used: (a) a long-form merger with an all cash price or (b) a public offer followed by a second-step merger (in the states that allow it) or by a short-form merger (allowed in a majority of states).[40] It goes without saying that a short-form merger can also be effected without a public offer, if the controlling shareholder owns more than 90%.[41]

If the freeze-out uses a long-form merger, shareholders have a legal exit right pursuant to the provisions discussed above, which are applicable to any merger (including those involving public companies because the price is, by definition, in cash). In addition, given the consequences of the merger, it is submitted to an entire fairness review by the courts, both as to

40. For more details regarding the freeze-out mechanisms, see Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003); Bradley R. Aronstam et al., *Revisiting Delaware's Going-Private Dilemma Post-Pure Resources*, 59 BUS. LAW. 1459 (2004); A.C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 BERKELEY BUS. L.J. 83 (2004); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 30 (2005); Peter V. Letsou & Steven M. Haas, *The Dilemma that Should Never Have Been: Minority Freeze Outs in Delaware*, 61 BUS. LAW. 25 (2005); Michael J. McGuinness & Timo Rehbock, *Going-Private Transactions: A Practitioner's Guide*, 30 DEL. J. CORP. L. 437 (2005); Clark W. Furlow, *Back to Basics: Harmonizing Delaware's Law Governing Going Private Transactions*, 40 AKRON L. REV. 85 (2007); Mary Siegel, *Going Private: Three Doctrines Gone Astray*, 4 N.Y.U. J.L. & BUS. 399 (2008); Marco Ventoruzzo, *Freeze-Outs: Transcontinental Analysis and Reform Proposals*, 50 VA. J. INT'L L. 841 (2010).

41. DEL. CODE ANN. tit. 8, § 253 (2016).

process and price, with the burden of proving entire fairness on the defendant, unless the merger is approved by a special committee or by a majority of the minority shareholders, in which case the burden of proving unfairness is on the plaintiff. In these cases, appraisal litigation and standard M&A shareholder litigation often co-exist.

If the freeze-out uses a public offer followed by a second-step or short-form merger, there are no legal exit rights in connection with the first step (the public offer, because the shareholders are free to decide whether or not to tender their shares into the offer) but, as we have seen above, there are legal exit rights in the second step (the merger). However, the overall transaction is not subject to entire fairness review by the courts if the offer is conditioned on approval of a majority of the minority shareholders, the merger is effected promptly after the offer on the same terms (including regarding the price) and the acquirer made no retributive threats. Authors often criticize the disparate treatment of these two techniques, given that they are both used to achieve the same result, namely to eliminate all of the shareholders.[42]

2. Control Share Cash-Out Rights

In three U.S. states, none of which have a significant number of incorporated companies, there is a "control share cash-out right," pursuant to which, if a shareholder reaches a certain percentage of the voting rights in the company (20% in Pennsylvania, 25% in Maine, 50% in South Dakota), the other shareholders may demand that such shareholder purchase their shares at a "fair price."[43] These provisions were adopted as antitakeover measures. The main difference with an appraisal mechanism (other than the trigger) is that the price is paid by the controller rather than the company.

For example, in Pennsylvania,[44] the controller must give notice to each shareholder of record, and to the court, promptly following the occurrence of a control transaction.[45] The notice must state that all shareholders are

42. *See* Ventoruzzo, *supra* note 40, at 872 (noting that "this doctrinal outcome has been widely criticized by legal scholars and commentators" and classifying the different positions expressed on this subject into three major groups: "(1) authors who object to what they consider to be different standards of review for transactions leading to the same result, and who therefore argue for convergence toward either entire fairness review or the business judgment rule (. . .); (2) authors who approve the current status of Delaware case law; and (3) authors who suggest "mixed" approaches").

43. Practical Law Institute, Public mergers and acquisitions in United States: overview (Jul. 1, 2015), http://us.practicallaw.com/2-501-9729 [https://perma.cc/HT5T-X5TV].

44. 15 PA. C.S.A. §§ 2541-2548 (2016).

45. *Id.* at § 2545(a).

entitled to demand that they be paid the fair value of their shares and that the minimum value the shareholder can receive is the highest price paid by the controller within a 90-day period ending on the date of the control transaction. The notice must state the amount represented by such minimum value.[46]

Within a reasonable time after the notice is given (which may be specified in the notice), but also prior to receiving the notice, any shareholder may make a written demand on the controller to receive "fair value" for its shares "as of the date on which the control transaction occurs, taking into account all relevant factors, including an increment representing a proportion of any value payable for acquisition of control of the corporation."[47] The controller is not, however, precluded from offering, in the notice or otherwise, to purchase shares of the corporation at any price and, conversely, shareholders are not precluded from agreeing to sell their shares at any price to any person, including to the controller.[48]

If the controller and a shareholder are unable to agree on the fair value of the shares or on a binding procedure to determine such value within 45 days after the date of the notice, such shareholder must, no later than 30 days after the expiration of the 45-day period, (i) surrender or transfer its shares to the court, as escrow agent, and (ii) file or join a petition for determination of the fair value of the shares.[49] Within 30 days from receipt of any shares surrendered or transferred, the court appoints an appraiser to determine the fair value,[50] as well as the "appropriate market rate of interest."[51] This is significantly different from the Delaware appraisal mechanism, which does not impose the appointment of an appraiser and provides for a fixed, statutory, above-market interest rate. While the appraiser conducts its valuation, the controller must make a partial payment for the shares surrendered or transferred to the court, equal to the minimum value,[52] with interest then accruing only for the difference between such minimum price and the price determined by the appraiser. This difference, plus interest, must be paid by the controller within ten business days after the appraiser's final determination of the fair value.[53]

The appraiser's determination is final and binding on both the controller and all shareholders who surrendered or transferred their shares

46. *Id.* at § 2545(c).
47. *Id.* at § 2546(a)-(c).
48. *Id.* at § 2546(d).
49. *Id.* at § 2547(a).
50. *Id.* at § 2547(c).
51. *Id.* at § 2547(f).
52. *Id.* at § 2547(d).
53. *Id.* at § 2547(g).

to the court, but is subject to judicial review.[54] Shareholders retain the right to vote and receive dividends until the controller makes the partial payment. Thereafter, the controller has these rights. However, the fair value of any dividends (determined by the appraiser) received by the shareholders during this period will be subtracted from the final amount to be paid to them by the controller.[55] The costs and expenses of the appraiser are borne by the controller.[56]

II. LEGAL EXIT RIGHTS UNDER FRENCH LAW

There are two main types of companies in France: commercial companies (which include all public companies) governed by the French Commercial Code (FCOC), and civil companies governed by the French Civil Code (FCIC). Both types are frequently used.

French law focuses on shareholders' exclusion rather than their right to exit. Consequently, most exit rights are organized contractually and, therefore, outside the scope of our analysis.[57] French law provides for a very limited number of legal exit rights[58] and shareholders of public companies benefit from more legal exit rights than shareholders of private companies, which is a counterintuitive result.

We analyze first the limited exit rights in connection with certain extraordinary corporate events, which are applicable, with few exceptions, only to controlled public companies (A). We then analyze other exit rights provided by French law, which are the broad exit rights for shareholders of civil companies and variable capital companies (B).

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54. *Id.* at § 2547(f).

55. *Id.* at § 2547(h).

56. *Id.* at § 2547(j).

57. The FCOC grants certain forms of companies the right to contractually stipulate exit rights. That is particularly true for a form of commercial company that is specific to France, the simplified joint stock company (*société par actions simplifiée*), where the contractual nature is extremely pronounced.

58. For an overview of shareholder exit mechanisms in France, see generally Hélène Guebidiang A Tchoyi-Doumbe, La Cession de Droits Sociaux de l'Associé Minoritaire (Dec. 16, 2010) (unpublished SJD dissertation, Université D'Auvergne Clermont-Ferrand I) (on file with authors); Xavier Fromentin, *Les vertus du droit de retrait*, LA SEMAINE JURIDIQUE NOTARIALE ET IMMOBILIERE, Jul. 24, 2009, at 30-34; EMMANUEL GEORGES, ESSAI DE GENERALISATION D'UN DROIT DE RETRAIT DANS LA SOCIETE ANONYME (LGDL ed. 2006); Xavier Grosclaude, Les Droits des Actionnaires Dans les Opérations de Fusion (1995) (unpublished SJD dissertation, University of Strasbourg III) (on file with authors); Isabelle Sauget, Le Droit de Retrait de l'Associé (1991) (unpublished SJD dissertation, University of Paris X) (on file with authors).

A. *Extraordinary Corporate Events*

There are two categories of extraordinary corporate events that trigger legal exit rights in France. The first category encompasses certain specific transactions or corporate events, such as mergers, sales of assets, and significant modifications to the bylaws (Section 1). The second category encompasses events related to an ownership threshold being reached by a controlling or significant shareholder, in which cases the law permits or requires the elimination of the minority shareholders and accordingly provides legal exit rights (Section 2).

1. Exit Rights in Connection with Specific Transactions or Corporate Events

(a) Scope. The French Monetary and Financial Code (FMFC) and the regulations adopted by the supervising authority for capital markets, the *Autorité des Marchés Financiers* (AMF), the AMF General Regulation (RGAMF),[59] created an implied and conditional exit right, as an obligation to initiate a buy-out offer (*offre publique de retrait*) in the following three cases:[60] (i) mergers with an affiliated company and other extraordinary corporate events (art. 236-6(2) of the RGAMF); (ii) significant modifications to the bylaws (art. 236-6(1) of the RGAMF); and (iii) modification of the legal form from joint stock company (*société anonyme*) to SCA (*société en commandite par actions*) (art. 236-5 of the RGAMF).

In the first two cases, the obligation to initiate a buy-out offer exists only if the company has a controlling shareholder or group of shareholders and belongs to such controlling shareholder(s). In the third case, the obligation to initiate a buy-out offer belongs to the controlling shareholder(s) of the company prior to the modification of the legal form or to the (future) general partners in the SCA. The notion of control is defined in art. L 233-3 of the FCOC. In general, a company is controlled where a shareholder or a group of shareholders owns the majority of voting rights in the general meetings or otherwise has the power to appoint or dismiss a majority of the members of the board. In addition, there is a presumption that a company is controlled where a shareholder or a group of shareholders owns over 40% of the voting rights and no other shareholder or group of shareholders owns a higher percentage.

(i) Mergers with an affiliated company and other extraordinary

59. AMF General Regulation, approved on November 12, 2004, as subsequently amended.

60. The AMF was authorized to adopt these provisions by art. L 433-4(I)(2) and 433-4(I)(3) of the FMFC.

corporate events. The following situations might trigger a buy-out offer: (α) mergers with an affiliated company; (β) sale or contribution to another company of all or the main portion of a company's assets; (γ) reorientation of the main activity of the company; or (δ) prolonged suppression of monetary rights for the shares of the company (art. 236-6(2) of the RGAMF).

We discuss below the scope of each of these four situations. The first situation was included because mergers with an affiliated company are inherently subject to conflicts of interest and a special protection of the minority shareholders is therefore necessary. The last three situations were included because there is no shareholder vote in these cases, with decisions being made by the board of directors. For this reason, the French legislature debated whether to revise the law to impose a mandatory offer (instead of a buy-out offer) in these situations, in particular for sales of assets.[61]

(α) With respect to mergers, the provision covers only mergers of a company "with the company controlling it or with another company controlled by the company controlling it."[62] As such, the scope of the provision is limited to mergers between companies controlled by the same group (parent-subsidiary mergers or mergers between sister companies).[63]

61. The events that led to the debate were the acquisition of SFR by Altice-Numéricable and the acquisition of Alstom's energy division by General Electric. *See* Christian Schricke et al., *Consultation publique portant sur le rapport du groupe de réflexion sur les cessions d'actifs significatifs* [Report on Sales of Significant Assets by Public Companies] (Feb. 19, 2015), *available at* http://www.amf-france.org/technique/multimedia?docId=workspace:/SpacesStore/0deef39c-7f8c-4913-a889-6817f3180b41_fr_1.2_rendition [https://perma.cc/EA5Y-BDXE], 11, 17 (noting that absent a contrary contractual provision, a sale of the main portion of a company's assets is not a modification of the bylaws and does not therefore require a shareholder vote). The French Code of Corporate Governance provides for a shareholder vote in such a case as a recommendation, applicable only to public companies. The AMF has recently adopted a recommendation to the same effect (pursuant to a "comply or explain" approach), including enhanced disclosure obligations as to process and price. *See generally* Position-recommandation AMF: Les cessions et les acquisitions d'actifs significatifs-DOC n° 2015-05 [AMF Recommendation 2015-05 regarding sales and acquisitions of significant assets by public companies] (June 15, 2015), *available at* http://www.amf-france.org/Reglementation/Doctrine/Doctrine-list.html?category=I+-+Emetteurs+et+information+financi%C3%A8re [https://perma.cc/NL5N-38D8].

62. Art. 236-6(2) of the RGAMF.

63. Art. 433-4(I)(3) of FMFC referred to any situations when the controlling shareholder(s) decided the merger of the controlled company. Consequently, the obligation to initiate a buy-out offer was triggered every time a controlled company merged with another company, as there was no requirement that the other company be affiliated with the controller(s) in order to trigger a buy-out offer. In 2010, art. 433-4(I)(3) of the FMFC was amended and conformed with the more restrictive scope set forth in the AMF regulations that had been adopted to implement art. 433-4(I)(3) of the FMFC.

(β) With respect to sales of assets, the provision covers sales of "all or the main portion"[64] of the company's assets, and such sales do not need to be to an affiliate. What represents the "main portion" of a company's assets may be difficult to determine, especially if the company operates across multiple industries. Several criteria have been used by the AMF in its decisions regarding whether particular sales represented the "main portion" of a company's assets. A 50% threshold is generally employed.[65] The AMF looks not only at the net asset value of the assets sold as compared to the total net assets of the company, but also at the financial results of the assets (in terms of turnover, revenue, and profit) as compared to the aggregate financial results of the company.

(γ) With respect to the reorientation of the main activity of the company, a simple change in company ownership or management does not trigger a buy-out offer. To trigger a buy-out offer, the change would have to be significant.[66] If the reorientation of the main activity is so significant as to result in the modification of the main activity listed in the bylaws of the company, a buy-out offer would potentially be triggered under the separate hypothesis discussed below, regarding any significant changes to the bylaws.

(δ) With respect to the suppression of monetary rights, such suppression of the monetary rights (dividends) must be prolonged, "covering several fiscal years."[67]

(ii) Significant modifications to the bylaws. A buy-out offer might also be triggered by "significant" modifications to the bylaws (art. 236-6(1) of the RGAMF). The word "significant" is, perhaps deliberately, vague. Three types of modifications are specifically enumerated and therefore deemed to be significant: (α) the legal form of the company; (β) the conditions for the sale and transfer of shares; and (γ) the rights attached to

64. Art. 236-6(2) of the RGAMF.

65. The recent recommendation adopted by the AMF regarding certain sales of assets lists five criteria for defining what represents the "main portion" of a company's assets, of which two must be met for the two prior fiscal years. They all employ a 50% threshold and refer to the turnover realized by the asset(s) sold of the company's total turnover, the sale price of the asset(s) of the company's market capitalization, the net asset value of the asset(s) sold of the company's consolidated balance sheet, the pre-tax profit of the asset(s) sold of the company's pre-tax profit, and the number of employees of the business segment sold of the worldwide number of employees of the group. AMF Recommendation 2015-05, *supra* note 61, at 3. This recommendation was adopted in a different context than that of buy-out offers, but is nevertheless instructive.

66. For a few examples, see ALAIN VIANDIER, OPA, OPE ET AUTRES OFFRES PUBLIQUES 460 (para. 2397), 463 (para. 2404) (Francis Lefebvre ed., 5th ed. 2014) (noting that the modification of the management policy of a portfolio management company or refocusing the company's business towards a different type of assets would be significant changes).

67. Art. 236-6(2) of the RGAMF.

shares.

(α) With respect to the modification of the legal form of the company, any such modification would trigger a buy-out offer. This provision applies only to public companies. The joint stock company and the SCA are the only two legal forms available for public companies in France. The transformation of a joint stock company into an SCA is treated as a separate case, by art. 236-5 of the RGAMF, discussed below. The transformation of an SCA into a joint stock company is a very rare event. Consequently, all other modifications of the legal form will likely mean that the company will delist (or adopt a foreign legal form).

(β) With respect to the modification of the conditions for the sale and transfer of shares, this situation will rarely apply because shares of public companies must be freely transferable (except for contractual exit rights such as a right of first offer).

(γ) With respect to modifications to the rights attached to shares, the insertion of a voting cap or the removal of the double voting rights (for example, those instituted by the Florange Law[68] in 2014), might in theory trigger a buy-out offer under this provision, if they are "significant."

The three types of modifications specifically enumerated are not exclusive. Furthermore, due to the overlap between the various cases set forth in art. 236-6 of the RGAMF, the AMF and its precursors have analyzed certain events or changes in light of art. 236-6 of the RGAMF as a whole.[69] Consequently, other events or changes could trigger a buy-out offer, such as divisions; mergers other than with an affiliated company (for example, a merger with a private company as the surviving entity); the cessation of the company's status as a regulated entity (for example, financial establishment, real estate leasing company, or investment company); or the dissolution of the company.[70] Similarly, depending on the specific circumstances, the transfer of the registered office (for example, abroad), or the creation or withdrawal of preferred shares, could conceivably also trigger a buy-out offer.

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68. Loi 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014-384 of Mar. 29, 2014 to Regain the Real Economy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [JORF] [FRENCH OFFICIAL GAZETTE], Apr. 1, 2014, at 6227. In order to discourage takeovers of French public companies, the Florange Law provided, with immediate effect, that owners of registered shares having owned such shares for at least two years will have double voting rights in all general meetings. However, it allowed derogations in the bylaws. As a result, many companies have included as a point on the agenda of their annual general meetings the modification of the bylaws in order to remove these double voting rights.

69. GUY CANIVET, DIDIER MARTIN & NICOLAS MOLFESSIS, LES OFFRES PUBLIQUES D'ACHAT 306 (Lexis Nexis, 2009).

70. *See* Viandier, *supra* note 66, at 460 (para. 2397) (providing examples of events or changes that could trigger a buy-out offer).

(iii) Modification of the legal form from joint stock company to SCA. The SCA is rarely used in France, but a number of public companies (for example, Castorama, Hermès, and Euro Disney) use it as a takeover defense due to the dissociation between the management of the company (reserved to the general partners, who, in exchange, have unlimited joint and several liability for the obligations of the company) and the ownership of the share capital of the company (which rests generally with the limited partners, who have limited liability for the obligations of the company).[71] Because the management of the company belongs exclusively to the general partners, buying the shares of the limited partners in a hostile takeover does not confer control over the company, as the buyer will not be able to manage it. However, the mere fact that the company is less likely to be the subject of a takeover (despite remaining public) reduces the value of the shares and consequently the limited partners' ability to exit the company, which explains why a special trigger was provided.[72]

(b) Procedure. The procedural requirements and AMF's involvement are slightly different, depending on whether the buy-out offer is triggered by art. 236-6 of the RGAMF or by art. 236-5 of the RGAMF. Certain common and general requirements also apply.

(i) Extraordinary corporate events and significant changes to the bylaws. In the cases set forth in art. 236-6 of the RGAMF, the controlling shareholder(s) must inform the AMF of the envisioned operation, prior to the vote in the general meeting. The AMF then decides whether the initiation of a buy-out offer by the controlling shareholder(s) is necessary.[73] In practice, however, either the AMF issues a decision that the initiation of a buy-out offer is not required under art. 236-6 of the RGAMF (*décision de dérogation*) or the controlling shareholder(s) voluntarily initiates a buy-out offer.

The AMF makes its determination by analyzing "the consequences of the envisioned event on the rights and interests of the holders of capital or

71. Art. L. 226-1 and L. 226-4 of the FCOC.

72. Dominique Carreau & Hervé Letréguilly, *Offres publiques (OPA, OPE, OPR),* REPERTOIRE DE DROIT DES SOCIETES DALLOZ para. 352, 356-57, 454-59 (2012). Of the 21 SCAs listed on Euronext Paris, 16 are family-owned, with a focus on permanent transmission of the company within the controlling family (the general partners). Consequently, there is generally little to no breathing space for the limited partners.

73. Prior to 2008, the AMF did not have discretionary power to impose the initiation of a buy-out offer. Dominique Bompoint, *Toutes les Offres de Retrait Ont Désormais Base Légale – Commentaire de l'article 153 de la LME*, 5 BULL. JOLY BOURSE 357, 360 (2008). It could only provide an opinion concerning the opportunity of a buy-out offer and the minority shareholders had to request the initiation of a buy-out offer before the competent courts (not the AMF). *See, e.g.*, Cour d'appel [CA] [Regional Court of Appeal] Paris, *Buckel v. Société du Casino municipal de Cannes*, June 25, 1998, note A. Couret, 6 BULL. JOLY BOURSE 834 (1998).

voting rights of the company."[74] The criteria used by the AMF depend on the specific case presented to it, but it generally assesses the incidence of the event on the activity of the company; the internal organization and governance of the company; the liquidity of the shares; the ability of the company to pay dividends; and the future of the company.[75]

For mergers, the AMF also considers the exchange ratio (most mergers in the EU are stock for stock mergers)[76] and the findings of the independent expert.

For sales of assets,[77] if the AMF finds that the assets sold are "all or the main portion" of the company's assets, it then considers the consequences of the sale on the shareholders, by analyzing the purpose of the sale and the destination of the assets, the sustainability of the company's activity after the sale, or the relationship between the parties to the sale.[78]

(ii) Modification of the legal form from joint stock company to SCA. In the case set forth in art. 236-5 of the RGAMF, the AMF has only a subsidiary role. A buy-out offer "must" be initiated *after* the vote in the general meeting (contrary to other modifications of the legal form to which

74. Art. 236-6 of the RGAMF.

75. Viandier, *supra* note 66, at 464-65 (para. 2406-2408).

76. Pursuant to art. 3 and 4 of the Merger Directive, the cash portion of the consideration may not exceed 10% of the nominal value of the shares being issued.

77. For three examples where the controlling shareholders sold all the assets of the company and initiated a buy-out offer voluntarily (with decisions of conformity rendered by the AMF), see AMF dec. 209C1198, *Jet Multimedia*, Sept. 23, 2009 (the company sold one of its subsidiaries controlling the entirety of its "editing and international" division); AMF dec. 214C1484, *Carrefour Property Development*, July 22, 2014 (the company sold two assets representing the main portion of its assets to another company of the Carrefour group); AMF dec. 214C2672, *Compagnie Foncière Internationale*, Dec. 18, 2014 (the company sold all of its operating assets by liquidating its ownership interest in two subsidiaries).

78. *See*, *e.g.*, CA Paris, dec. *La Rochette*, Apr. 3, 2001, *cited in* 38 REVUE MENSUELLE DU CONSEIL MONETAIRE ET FINANCIER 24, 25 (2001) (approving the decision of the CMF not to impose a buy-out offer because, although the assets sold represented more than two-thirds of the company's immobilized net assets, they generated irregular revenue and were subject to rapid depreciation); AMF dec. 208C2236, *César*, Dec. 12, 2008, *cited in* Viandier, *supra* note 66, at 462-63 (para. 2403) (although the assets sold represented approximately two thirds of the company's net assets and turnover, the sale did not trigger a buy-out because there were no negative consequences for the shareholders where the sale was court-ordered to avoid bankruptcy); AMF dec. 204C1223, *Euro Disney*, Oct. 13, 2004, *cited in* Viandier, *supra* note 66, at 461-62 (para. 2401) (the sale of a company's main assets did not trigger a buy-out offer because the assets sold remained in the company's sphere of control); CMF dec. 200C0181, *Aérospatiale Matra*, Feb. 3, 2000, *cited in* Viandier, *supra* note 66, at 460 (para. 2397-2398) (the operation did not trigger a buy-out offer where the controlling shareholders decided to dissolve the existing company and transfer all the assets to a newly-formed company in exchange for shares of the new company proportional to each shareholder's contribution in the existing company).

art. 236-6(1) of the RGAMF applies and which requires the controlling shareholder(s) to inform the AMF *prior* to the vote in the general meeting and then gives the AMF discretion to decide whether the initiation of a buy-out offer by the controlling shareholder(s) is necessary).

Another particularity is that the obligation to initiate a buy-out offer belongs to the controlling shareholder(s) of the company prior to the modification of the legal form *or* to the (future) general partners in the SCA (which will typically be the previous controlling shareholder(s), but could also be different persons). As such, this trigger would be applicable even to companies that are not controlled.

(iii) General requirements. In all cases, the buy-out offer cannot contain any minimal tender condition (a departure from the general rules applicable to public offers) and "must be worded such that it may be declared conforming by the AMF" (art. 236-6 of the RGAMF) (in order to avoid that the controlling shareholder(s) present a buy-out offer that would be rejected by the AMF and therefore circumvent their obligation). As for any public offer, the price can consist of either cash or stock (art. 236-7 of the RGAMF). In the latter case, the shares offered in exchange must be sufficiently liquid.[79] The buy-out offer is carried out by purchases on the stock market for a period of at least 10 market days (art. 236-7 of the RGAMF).

The procedure for buy-out offers otherwise follows the general procedure applicable to any public offers. This means that the AMF assesses the proposed buy-out offer and renders a declaration of conformity. The AMF does not assess the adequacy of the price (art. 231-21-5 of the RGAMF). The price is established by the controlling shareholder(s), but, as is the case in any public offer, the buy-out offer must set forth the price "based on objective evaluation criteria usually employed, the characteristics of the company and the market for its shares" (art. 231-18(2) of the RGAMF). The AMF and French courts have imposed the use of a multi-criteria approach[80] to support the price proposed.[81] Although the

79. Carreau & Letréguilly. *supra* note 72, at para. 443.

80. *See* Marie-Anne Frison-Roche & Maurice Nussenbaum, *Les Méthodes d'Évaluation Financière Dans les Offres Publiques de Retrait et les Retraits Obligatoires d'Avenir-Havas-Media à Sogénal*, 48 REVUE DE DROIT BANCAIRE ET DE LA BOURSE 56 (1995) (providing an overview of evaluation methods in buy-out offers and forced squeeze-outs).

81. For all public company mergers and sales of assets, the AMF imposes a multi-criteria analysis, taking into account the market value of the company, profitability (capitalization of normalized expected earnings, discounted cash flows, etc.), asset value and value comparisons (with similar companies or similar transactions). Position-recommandation AMF n° 2011-11: Opérations d'apports ou de fusion [AMF Recommendation 2011-11 regarding Transfers of Assets and Mergers], July 21, 2011, *available at* http://www.amf-france.org/Reglementation/Doctrine/Doctrine-

existence of a fairness opinion from an independent expert is only required in certain limited cases (for example, if there are conflicts of interest in the board), in practice such fairness opinions are frequently included on a voluntary basis.

(c) Frequency of use. Buy-out offers pursuant to art. 236-5 and 236-6 of the RGAMF are very rare. In 2005-2014, the AMF issued derogations under art. 236-6 of the RGAMF in approximately 30 cases. More than half of these cases involved mergers, approximately one third involved sales of assets and the rest involved the other situations under art. 236-6 of the RGAMF. During the same 10-year period, only 17 buy-out offers were initiated pursuant to art. 236-5 and 236-6 of the RGAMF, which amounts to less than two per year.[82]

2. Exit Rights in Connection with Reaching Certain Ownership Thresholds

French law provides for limited exit rights in cases where a shareholder reaches certain ownership thresholds. One relevant threshold is 90% or 95% (to which we refer as a squeeze-out context), when several mechanisms become applicable, each accompanied by specific legal exit rights. The RGAMF provides for two mechanisms that are applicable where a shareholder owns 95% of a company, reserved only to public companies. The FCOM has two mechanisms that involve legal exit rights, one for squeeze-out mergers (between a parent company and its 90%-owned subsidiary), applicable to both public and private companies, and another one for bankruptcy proceedings involving certain public and private companies. Finally, another relevant threshold, applicable only to public companies, is that triggering the mechanism of mandatory offers, which constitutes an indirect legal exit right.

(a) Squeeze-out exit rights pursuant to the RGAMF. If a shareholder or group of shareholders owns 95% of a public company, two mechanisms may be used to eliminate the minority shareholders and delist the company: (i) buy-out offers and (ii) forced squeeze-out offers (*retrait obligatoire*).[83]

(i) Buy-out offers in a squeeze-out context. If 95% of the voting rights

list.html?category=I+-+Emetteurs+et+information+financi%C3%A8re [https://perma.cc/DN5W-CDQX].

82. These assessments are based on the authors' extensive review of AMF annual reports from 2005 to 2014 (*available at* http://www.amf-france.org/Publications/Rapports-annuels/Rapports-annuels-de-l-AMF/Dernier-publie.html [https://perma.cc/5R43-X7QA]), other public and non-public sources, and interviews conducted with AMF personnel and French lawyers.

83. The AMF was authorized to adopt these mechanisms by art. L 433-4(I)(1), 433-4(II), and 433-4(III) of the FMFC.

of a public company are controlled by a shareholder or group of shareholders, the minority shareholders can request that the controlling shareholder(s) initiate a buy-out offer (sell-out right, art. 236-1 and 236-2 of the RGAMF). Conversely, the controlling shareholder(s) can also choose in this situation to initiate a buy-out offer (buy-out right, art. 236-3 and 236-4 of the RGAMF). These rights apply irrespective of the event that led to reaching the 95% threshold (a merger, a public offer, or another corporate transaction).

The sell-out right of the minority shareholders in a squeeze-out context is very limited. The AMF has discretion to grant the request of the minority shareholders, or not, "in view notably of the conditions prevailing on the market in the securities concerned" (art. 236-1(2) of the RGAMF). The main criterion used by the AMF in its analysis is share liquidity.[84] If it grants the request, the AMF then notifies the controlling shareholder(s) of the obligation to initiate a buy-out offer, within a deadline that it prescribes (art. 236-1(3) of the RGAMF). Buy-out offers in a squeeze-out context (whether as a result of the exercise of a sell-out right or a buy-out right) are governed by the same requirements as any buy-out offers, as described above,[85] with respect to buy-out offers in the context of extraordinary corporate events. Buy-out offers in a squeeze-out context are almost invariably followed by forced squeeze-out offers.

(ii) Forced squeeze-out offers. This procedure can be used only in connection with, and following, a buy-out offer or any other public offer. It allows an offeror who, after the offer, owns securities representing 95% of the capital or voting rights of the target to squeeze-out the remaining shareholders by compensating them for the value of their shares (art. 237-1 and 237-14 of the RGAMF).

In the case of a forced squeeze-out following a buy-out offer, the controlling shareholder must provide an evaluation of the shares of the company:

> pursuant to objective methods used for sales of assets, taking into consideration the value of the assets, the benefits achieved, the market value, the existence of subsidiaries and the business prospects of the company, in each case, pursuant to the appropriate weight to be given to each of these elements.

(art. 237-2(2) of the RGAMF and art. L. 433-4-II of the FMFC). To comply with this requirement, a fairness opinion from an independent expert is mandatory (art. 261-1-II of the RGAMF). Case law has

84. MARIE-CHRYSTEL DANG TRAN & THOMAS FORSCHBACH, CODE PRATIQUE DES SOCIETES COTEES 615 (Joly ed., 2nd ed. 2011).

85. *See supra* Section II.A.1.b.iii.

established that the list of criteria is only illustrative in the sense that additional criteria may be used (for example, comparisons with other companies from the same sector, comparisons with the price offered in a prior offer, discounted cash flows, or research analyst estimates consensus) and some criteria may not be used (or may be given zero or close to zero weight) if they are not relevant or appropriate.[86] The price in the forced squeeze-out offer must be at least equal to the price in the preceding buy-out offer, but the AMF may impose a higher price if such increase is justified in light of events having influenced the value of the shares since the buy-out offer (art. 237-8 of the RGAMF). Except as noted above, the procedure is that applicable to any public offers, which means that the AMF assesses the proposed forced squeeze-out offer (including as to the minimum price requirement) and renders a declaration of conformity.

In case of a forced squeeze-out following any public offer that is not a buy-out offer, the mechanism is similar. However, there is no minimum price, (art. 237-14(3) of the RGAMF does not cross-reference art. 237-8 of the RGAMF) and, in practice, there is no declaration of conformity by the AMF, in almost all cases, because an exemption thereof applies. Exemptions exist if the price is in cash and equal to the price in the offer preceding the forced squeeze-out and if (i) either the forced squeeze-out follows an offer that was subject to the normal (as opposed to the simplified) procedure or (ii) the forced squeeze-out follows an offer that resulted in the AMF receiving an evaluation of the shares of the company (the requirements regarding this evaluation are identical to those set forth in art. 237-2(2) of the RGAMF and art. L. 433-4-II of the FMFC discussed above) and a fairness opinion from an independent expert (art. 237-16-I of the RGAMF).[87] However, if an exemption from the declaration of conformity is not applicable, an evaluation of the shares of the company must be provided to the AMF in order to obtain the declaration of conformity, and the same requirements apply regarding this evaluation (art. 237-16-II of the RGAMF).

The forced squeeze-out procedure is frequently used. In 2005-2014, there were approximately 200 offers followed by a forced squeeze-out. This averages out to 20 per year, representing approximately 40% of all offers for which the AMF issued declarations of conformity. Of these, a

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86. Carreau & Letréguilly, *supra* note 72, at para. 507.

87. By a corroborated interpretation of art. 237-2, 237-16-I(2), 237-16-II, and 261-1-II of the RGAMF, a fairness opinion from an independent expert is always provided in connection with any forced squeeze-out offer, unless one was provided in the offer preceding the squeeze-out offer. Contrary to its prior practice, the AMF cannot presently dismiss the results of the independent expert for reasons other than non-respect of the applicable legal provisions.

little over half were buy-out offers followed by a forced squeeze-out, and a little under half were other public offers followed by a forced squeeze-out. However, if we look only at more recent years (2010-2014), buy-out offers followed by a forced squeeze-out represented only approximately a third, and the rest were other public offers followed by a forced squeeze-out.[88]

(iii) Correlation with the Takeover Directive. Both mechanisms (buy-out offers and forced squeeze-out offers) predate the Takeover Directive but have been amended to take into account art. 15 and 16 of the Takeover Directive. Pursuant to these provisions of the Takeover Directive, following an offer made to all the holders of securities of the target for all their securities, if the offeror reaches a certain threshold (90% or 95%), it may require all the remaining holders to sell their securities to it (buy-out right) and, conversely, a holder of remaining securities may require the offeror to buy its securities (sell-out right), in both cases, "at an equitable price."[89]

More specifically, the Takeover Directive provides two alternative triggers: (i) where the offeror owns securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in the target (but member states may set a higher threshold, not to exceed 95%) or (ii) where, following acceptance of the offer, the offeror has acquired, or has firmly contracted to acquire, securities representing not less than 90% of the target's capital carrying voting rights and 90% of the voting rights comprised in the offer. The price in the offer preceding the squeeze-out is presumed to be an equitable price in the squeeze-out. The price in the squeeze-out is paid by the offeror (the majority shareholder), not by the company. With respect to the first EU trigger, France opted for a 95% threshold, higher than the 90% default threshold, for both mechanisms (buy-out offers and forced squeeze-out offers).

These provisions of the Takeover Directive were imperfectly transposed in French law. Art. 236-3 and 236-4 of the RGAMF, together

88. These assessments are based on the authors' extensive review of AMF annual reports from 2005 to 2014 (*available at* http://www.amf-france.org/Publications/Rapports-annuels/Rapports-annuels-de-l-AMF/Dernier-publie.html [https://perma.cc/5R43-X7QA]), other public and non-public sources, and interviews conducted with AMF personnel and French lawyers.

89. For a discussion of the buy-out and sell-out rights under the Takeover Directive, see generally Hubert Segain, *Les opérations de Public to Private en France: bilan et perspectives*, 5 BULL. JOLY BOURSE 536 (2005); Olivier Douvreleur, *Un nouveau cas de retrait obligatoire: Le Retrait Obligatoire dans la Foulée d'une Offre*, 3 REVUE TRIMESTRIELLE DE DROIT FINANCIER 58 (2006); Timo Kaisanlahti, *When Is a Tender Price Fair in a Squeeze-Out?*, 8 EUR. BUS. ORG. L. REV. 497 (2007); Christoph van der Elst & Lientje Van den Steen, *Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-out and Sell-out Rights*, 6 EUR. COMPANY & FIN. L. REV. 391 (2009).

with art. 237-1 to 237-19 of the RGAMF, effectively transpose art. 15 of the Takeover Directive by granting the controlling shareholder(s) the right to offer and then demand the acquisition of remaining shares from minority shareholders. There are no mirror provisions for the minority shareholders. They only have a right to request the AMF to order the controlling shareholder to commence a buy-out offer, pursuant to art. 236-1 and 236-2 of the RGAMF, and we have seen that the AMF has discretion whether or not to impose the initiation of a buy-out offer. As such, minority shareholders do not have the means to force the exit (as contemplated by art. 16 of the Takeover Directive) and are bound to either the will of the controlling shareholder(s) or the discretion of the AMF.

(iv) Correlation with the delisting mechanism. The mechanisms of buy-out offers and forced squeeze-out offers effectively allow a shareholder who owns 95% of a company to achieve its delisting. Effective July 2015, French law has introduced a supplemental mechanism, that allows a shareholder who owns only 90% of a company to proceed to its delisting while granting an indirect exit right to the minority shareholders.

Art. 1.4.2 of the special Euronext Rules for regulated French markets conditions the delisting on the controlling shareholder having committed to buy the shares of the minority shareholders who did not tender their shares into the delisting offer, at a price equal to the price in the delisting offer, for a period of three months from the closing of the delisting offer.

(b) Exit right for squeeze-out mergers pursuant to the FCOC. The Merger Directive organizes a protection for minority shareholders in case of mergers, in the form of a report from the board, a report from an independent expert on whether "the share exchange ratio is fair and reasonable," the right to inspect certain documents, and the right to vote on the merger. The Merger Directive provides that EU member states will not impose the first three protections (reports and right to inspect) to squeeze-out mergers (mergers between a parent company and its 90%-owned subsidiary), if three conditions are met:

> (a) the minority shareholders of the company being acquired must be entitled to have their shares acquired by the acquiring company;
> (b) if they exercise that right, they must be entitled to receive consideration corresponding to the value of their shares;
> (c) in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court or by an administrative authority . . . .

(art. 28(1) of the Merger Directive). From the perspective of the minority shareholders being squeezed-out, the right set forth in the Merger

Directive is only a *quasi* exit right, because it is subsidiary and unenforceable. It is subsidiary because its activation is exclusively dependent on the will of the absorbing company that does not want to establish the reports. It is unenforceable because the sanction in case of non-respect is the reactivation of the absorbing company's obligation to establish the reports.

Art. L. 236-11-1 of the FCOC, which implemented these provisions of the Merger Directive, states that if the absorbing company continuously owns 90% of the voting rights of the absorbed company (from the publication of the draft terms of the merger and until the merger is effected), the board and expert 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 price equal to the value of the shares. Such a price is to be determined: (i) for private companies, pursuant to art. 1843-4 of the FCIC (discussed below),[90] and (ii) for public companies, in a public offer pursuant to AMF regulations. In addition, no reunion or vote of the general meeting of the absorbing company is generally necessary. The reunion and vote of the general meeting of the absorbed company remain necessary, even if the vote leaves little room for surprises.[91]

For private companies, the draft terms of the merger often contain a provision documenting that the absorbing company has offered to the minority shareholders to buy their shares for a certain price (or will offer prior to the effective date of the merger), thereby excluding the obligation to establish the reports. Because of the cross-reference to art. 1843-4 of the FCIC, the absorbing company and the minority shareholders may freely negotiate the price (including based on an expert report voluntarily obtained by the absorbing company, outside of the application of art. 1843-4 of the FCIC). In case of disagreement (and only in such case) between the absorbing company and one or several minority shareholders, an expert would be appointed pursuant to art. 1843-4 of the FCIC. In other words, a systematic and prior intervention of an expert is not necessary.[92]

For public companies, the public offer contemplated by art. 236-11-1 of the FCIC can take several forms, depending on the specific circumstances. If the controlling shareholder owns 95% of the voting

90. *See infra* Section II.B.1.

91. Benoît Lecourt, *Fusions et Scissions de Sociétés: Transposition en Droit Français de la Directive de « Simplification »*, REVUE DES SOCIETES 654, 658 (2011).

92. Association Nationale des Sociétés par Actions (ANSA), *Nouveau régime des fusions après la loi de simplification du 17 mai 2011 : questions diverses*, 11-057, Oct. 12, 2011, 7-8 (para. 6). ANSA also noted that if only certain minority shareholders are in disagreement, the appointment of an expert pursuant to art. 1843-4 of the FCIC would not invalidate the acceptances previously made by other minority shareholders.

rights of the company, it may use the buy-out offers and forced squeeze-out offers, discussed above.[93] If the controlling shareholder owns more than 90%, but less than 95%, of the voting rights, it may use a simplified public offer, governed by art. 233-1 et seq. of the RGAMF, potentially in conjunction with the delisting mechanism, discussed above.[94] Simplified public offers may be used by controlling shareholders (one of the cases expressly enumerated by art. 233-1 of the RGAMF). They are more time efficient than regular public offers[95] but have stricter requirements regarding minimum price.[96]

To escape these constraints stemming from the regulations applicable to public offers, a shareholder who owns 90% of a company may decide to perform the squeeze-out by a merger, in which case it would have to provide the reports. The choice of the best structure might also depend on other considerations, such as the fact that the price may only be established in stock for mergers, whereas, for public offers, the price can be established in stock or in cash (if the price is established in cash, no dilution results).

(c) Exit right in bankruptcy proceedings pursuant to the FCOC. In August 2015, the French legislature amended the FCOC to add a mechanism triggering a legal exit right, which is applicable to certain private and public companies that are undergoing bankruptcy proceedings. This new legal exit right is not directly related to a shareholder reaching a certain ownership threshold, but we discuss it in this section because it is triggered by the existence of a controlling shareholder or of a significant minority shareholder(s), it is applicable to both public and private companies, and it shares certain characteristics with the mechanisms applicable in a squeeze-out context.

Specifically, if a company has more than 150 employees, if the discontinuation of the business would cause an impact on employment at the national or regional level, and if a modification of the share capital is the only "serious solution" allowing the company to continue to operate, the court may, among other options, order the holders of a majority of the voting rights or of a blocking minority (who refuse such modification) to sell their shares. In this case, all other shareholders have a legal exit right, in the sense that they can demand to also sell their shares, simultaneously with the forced sale of shares by the majority or blocking minority holders.

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93. *See supra* Section II.A.2.a.

94. *See supra* Section II.A.2.a.iv.

95. Art. 233-2 of the RGAMF. A simplified public offer can be limited to 10 days, if the price is established in cash, and 15 days, if the price is established in shares.

96. Art. 233-3(1) of the RGAMF. Absent consent of the AMF, the price offered by the controlling shareholder may not be less than the volume weighted average trading price for the 60 trading days prior to the publication of the offer.

The shares are purchased from the refusing shareholders and from the other shareholders that exercise legal exit rights by the person(s) having agreed to execute the restructuring plan adopted by the court in the bankruptcy proceedings (art. L. 631-19-2 of the FCOC).[97] The price is identical for all selling shareholders (forced sellers and voluntary sellers). As such, this legal exit right is similar to a contractual right of co-sale or tag-along.

Contrary to art. L. 236-11-1 of the FCOC, which provides that the price is determined pursuant to art. 1843-4 of the FCIC (for private companies) or in a public offer pursuant to AMF regulations (for public companies), art. L. 631-19-2 of the FCOC provides generally that, absent an agreement between the interested parties, the price is established by an expert appointed by the court. It then separately provides that if a public company is concerned, the court must consult the AMF prior to ordering the sale, and art. L. 433-1 et seq. of the FMFC must be applied (they govern public offers in general, including buy-out offers, forced squeeze-out offers, and mandatory offers). These provisions raise many questions regarding mechanics, especially in the case of public companies where the interplay between the mandatory court-ordered sale and the various mechanisms provided by the capital markets regulations is particularly unclear.

What seems clear, however, is that the lack of a cross-reference (for private companies) to art. 1843-4 of the FCIC was deliberate, because art. L. 631-19-2 of the FCOC derogates from it by providing that the reference date for the evaluation must be the date closest to the sale. In doing so, it addresses ongoing controversy on this point under art. 1843-4 of the FCIC, as we discuss in more detail below.[98] Moreover, art. L. 631-19-2 of the FCOC does not seem to contemplate the possibility (which exists under art. 1843-4 of the FCIC) for the parties to agree on the expert, because it provides in all cases that the expert is appointed by the court. Furthermore, art. L. 631-19-2 of the FCOC contains certain additional precisions that do not exist in art. 1843-4 of the FCIC. For example, it provides that the expert must respect the adversarial principle, meaning that both sides must be heard, and the same principle applies to the procedure before the court. It also provides that the price must be established by the court in the same decision whereby the court orders the sale, after receiving the expert's report, and detailed provisions set forth guarantees that the price will be paid by the buyer and determine the consequences in case of default.

(d) Mandatory offers. The Takeover Directive does not impose an

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97. Created by art. 238 of the Loi 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques [Law 2015-990 of Aug. 6, 2015 for the Economic Growth, Activity and Equal Chances], JORF, Aug. 7, 2015, p. 13537.

98. *See infra* Section II.B.1.

obligation that any public offer (voluntary or mandatory; hostile or not) be for 100% of the shares of the target company, but imposes the initiation of an offer by significant shareholders who cross a certain ownership threshold giving them control over the company (individually or through concerted action), for 100% of the shares not already owned by the significant shareholder(s), at an "equitable price." The relevant threshold is established by each member state (art. 5(1) and 5(3) of the Takeover Directive). However, if a shareholder reaches the relevant percentage, following a voluntary public offer for 100% of the shares of the target, it is exempt from initiating a mandatory offer (art. 5(2) of the Takeover Directive). The effect is to create an incentive to make offers for 100% of the shares of the target. These legal provisions represent a protection mechanism for all shareholders of public companies characterized by dispersed control.

The Takeover Directive provides that the equitable price is the highest price paid for shares of the target company by the offeror during a certain period of time prior to the mandatory offer. The relevant period (of not less than six months and not more than twelve months) is to be determined by each member state. Member states may authorize their supervising authorities to adjust, upwards or downwards, the equitable price in certain exceptional cases, and may also determine the criteria to be applied in such cases. The Takeover Directive enumerates illustratively "the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis" (art. 5(4) of the Takeover Directive).

Art. L 433-3 of the FMFC and art. 234-1 et seq. of the RGAMF transposed art. 5 of the Takeover Directive in France. The threshold for the initiation of a mandatory offer is 30% in France. More specifically, a shareholder must immediately inform the AMF and initiate a mandatory offer if, directly or indirectly, individually, or by means of a concerted action,[99] (i) the shareholder comes to own more than 30% of a company's capital or voting rights or (ii) where it previously owned between 30% and 50% of the company's capital or voting rights, the shareholder increases its participation by more than 1% of the company's total capital or voting rights during a period of twelve months. This second trigger, which does not exist in the Takeover Directive, was introduced in response to certain practices that consisted of launching a mandatory offer at an unattractive price, with the sole purpose of surpassing the 30% threshold, and then being able to freely accumulate additional shares on the market.[100]

99. *See* art. L. 233-10 of the FCOC (defining concerted action).

100. Michel Storck & Nicolas Rontchevsky, *L'impact de la loi Florange sur le droit des offres publiques d'acquisition et les sociétés cotées françaises*, REVUE TRIMESTRIELLE DE

Pursuant to the Takeover Directive, the "equitable price" in the mandatory offer is the highest price paid by the offeror for the securities of the company, during a certain period. France opted for a period of twelve months prior to the event triggering the mandatory offer for determining the equitable price. The AMF may request or authorize the modification of the price proposed by the offeror if such a measure is justified by a manifest change in the characteristics of the company or of the market for its securities (for example, in case of a leak of material non-public information or grave financial difficulties). In such cases, as well as when there are no purchase transactions of securities of the target company by the offeror during the twelve-month period, the equitable price is determined based on objective valuation criteria usually employed, the characteristics of the company, and of the market for its securities (art. 234-6 of the RGAMF). The mandatory offer procedure was sometimes used abusively by activist shareholders, leading to certain changes to its triggers.[101]

B. *Other Legal Exit Rights*

The only express provision under French law with respect to legal exit rights for companies is contained in the FCIC, and is applicable only to civil companies, the shareholders of which benefit accordingly from a broad legal exit right (Section 1). French law also contains a broad exit right for shareholders of variable capital companies, by virtue of the very nature of such companies (Section 2).

1. Exit Rights for Civil Companies

(a) Scope. Art. 1869 of the FCIC institutes a general and broad exit right for shareholders of civil companies by providing that a shareholder may withdraw from a civil company (i) under the conditions set forth in the bylaws; (ii) with the consent of all other shareholders; or (iii) for "justified reasons," following a judicial proceeding.

The first two withdrawal cases reflect contractual exit rights and, as such, fall outside the scope of this article. With respect to the last

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DROIT COMMERCIAL 363, 366 (2014).

101. For example, in the past, a mandatory offer had to be initiated whenever there was a change in the control of the significant shareholders of the company. Because such changes were frequent and activist shareholders required the initiation of mandatory offers, this provision was repealed in 2011. *See* CA Paris, *Association de Défense des Actionnaires Minoritaires v. Pinault-Printemps*, Feb. 26, 2002, note M. d'Orazio, 48 REVUE CMF 13 (2002) (providing an example of a failed attempt to trigger such a mandatory offer).

withdrawal case, courts decide on a case-by-case basis and operate a distinction between reasons related to disagreements with respect to the management of the company and purely personal reasons. On the one hand, courts have held that withdrawal is not "justified" by a disagreement concerning the management of the company, if the board acts in the exclusive interest of the company (but the non-distribution of dividends for several years was deemed a reason justifying withdrawal). On the other hand, courts are more lenient to purely personal reasons, and have authorized the withdrawal of a shareholder in case of serious personal debt or existence of an excessive non-compete clause.[102]

(b) Determination of the price. Art. 1869 of the FCIC provides that the shareholder is entitled to receive the value of its shares and, absent an agreement of the parties, such value is determined pursuant to art. 1843-4 of the FCIC. Art. 1843-4 of the FCIC is the pivotal provision in France for the determination of the price to be paid to exiting shareholders in various cases.[103] It applies as an imperative provision whenever it is cross-referenced by other legal provisions (for example, art. 1869 of the FCIC or art. 236-11-1 of the FCOC) but also, as a subsidiary default provision, in other cases. In 2014,[104] this article was profoundly revamped, in order to put an end to conflicting case law from French courts.[105]

The first paragraph of art. 1843-4 of the FCIC provides that when another legal provision cross-references it for determining the price of an acquisition of shares, the price "is determined, in case of a dispute, by an expert appointed, either by the parties, or, if the parties fail to reach an agreement, by ordinance of the president of the court, who shall decide by way of interim relief proceedings and whose judgment shall be final" (art. 1843-4(I), first sentence of the FCIC). Therefore, the parties are free to agree among themselves with respect to the price and, in case of disagreement regarding the price, with respect to the expert. The courts intervene and appoint an expert only if the parties fail to reach an agreement regarding who should be appointed. Art. 1843-4 of the FCIC is

102. For an overview of French case law, see generally Commentary of Article 1869 of the French civil code, CODE DES SOCIÉTÉS DALLOZ 192 (2015).

103. For an overview, see generally Alain Couret & Jacques Moury, *Le Nouvel Article 1843-4 du Code Civil: Tombeau ou Cénotaphe?*, D. 2015, 1328; Renaud Mortier, *Le nouvel article 1843-4 du Code civil issu de l'ordonnance no 2014-863 du 31 juillet 2014*, 10 DROIT DES SOCIETES 13 (2014).

104. Ordonnance 2014-863 du 31 juillet 2014 relative au droit des sociétés, prise en application de l'article 3 de la loi 2014-1 du 2 janvier 2014 habilitant le Gouvernement à simplifier et sécuriser la vie des entreprises [Government Ordinance 2014-863 of July 31, 2014 regarding Company Law, adopted pursuant to Art. 3 of Law 2014-1 of January 2, 2014 Authorizing the Government to Simplify and Protect the Corporate Environment], JORF, Aug. 2, 2014, p. 12820.

105. Mortier, *supra* note 103, at 13-18.

also deferential to contractual freedom with respect to 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" (art. 1843-4(I), second sentence of the FCIC).

The second paragraph of art. 1843-4 of the FCIC provides that if exit rights (or obligations) result from certain dispositions contained in the bylaws, and if the price to be paid is neither determined nor determinable, such price will also be determined, in case of disagreement, by an expert appointed by the parties or by the court, who "must apply, whenever they exist, the rules and methods for determining the value of the shares provided in any convention between the parties" (art. 1843-4(II) of the FCIC). Because this paragraph applies to contractual exit rights, we do not discuss it below.

The 2014 revisions to art. 1843-4 of the FCIC resolved a number of issues raised by the previous drafting of this provision. For example, courts had held that the imperative nature of this provision prohibited any contractual clause that limited the expert's freedom in choosing the valuation methods, even if inserted in the company's bylaws.[106] This interpretation was severely criticized.[107] In its revised version, art. 1843-4 of the FCIC adequately responded to the critiques by allowing complete contractual freedom with respect to valuation methods. Consequently, the expert will be bound by any contractual valuation methods set forth in the bylaws or a shareholder agreement.

The expert must establish a reference date for the evaluation. The expert could arrive at significantly different results if it values the shares at the moment of the exercise of the exit right or at the payment date. On the one hand, the exercise of an exit right could imply that the shareholder should not continue to bear the risk of future company value variations, because the shareholder has manifested its intent to leave the company.[108] On the other hand, the party exercising the exit right remains a shareholder until the price is paid[109] (having all financial and voting rights associated with being a shareholder), and should therefore be subject to any decrease in company value during the evaluation. Before 2010, the first and the

106. *See* Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., May 5, 2009, No. 08-17465, Bull. civ. IV, No. 61 (Fr.), note B. Dondero, D. 2009, 2195 (noting that "only the expert will determine the criteria it deems most appropriate to establish the value of the shares").

107. François-Xavier Lucas, *Date d'évaluation des parts de l'associé retrayant*, 7 BULL. JOLY SOCIETES 660, 661 (2010).

108. Jacques Moury, *Des ventes et des cessions de droits sociaux à dire de tiers*, REVUE DES SOCIETES 455 (1997).

109. Lucas, *supra* note 107, at 661.

third civil divisions of the French Supreme Court opted for the date closest to the exercise of the exit right.[110] However, in 2010, the commercial division of the French Supreme Court opted for the date closest to the payment date[111] and reiterated its position in 2013 and again in 2014.[112]

The parties cannot dispute the appointment of the expert by the court and the results of the evaluation are definitive, irrevocable and binding to the parties, as well as on the court.[113] Limited exceptions have been allowed by French courts in case of "manifest errors," such as evident calculus errors or a manifest bias towards an interested party.[114] Case law has indicated that choosing an incorrect reference date constitutes a "manifest error."[115]

In connection with a shareholder withdrawal, either as a result of art. 1869 of the FCIC or otherwise, legal interest might be due. The rate is established each semester by decision of the Ministry of Economy.[116] For the first semester of 2016, the rate is 1.01% if the creditor is a legal person or a professional, and 4.54% if the creditor is a natural person.[117]

(c) Frequency of use. Art. 1869 of the FCIC is invoked in a non-negligible number of cases before French courts. A search on Legifrance (one of the most extensive French case law databases) returned thirty-three decisions of the French Supreme Court citing this provision between 2010 and 2015, of which thirteen were rendered with a visa specifically referencing art. 1869 of the FCIC.

2. Exit Rights for Variable Capital Companies

Any form of commercial or civil company, except for joint stock

110. Cass. 1e civ., Oct. 30, 2008, No. 07-19459 (Fr.); Cass. 3e civ., June 12, 2002, No. 00-22505 (unreported) (Fr.).

111. Cass. com., May 4, 2010, No. 08-20693, Bull. civ. IV, No. 85 (Fr.).

112. *See* Cass. com., Jan. 15, 2013, No. 12-11666, Bull. civ. IV, No. 9 (Fr.) (establishing that "the decision of May 4, 2010 is neither a shift, nor an evolution of an unpredictable case law" and that, therefore, the relevant date is that closest to the payment of the exiting shareholder); Cass. com., Sept. 16, 2014, No. 13-17807, Bull. civ. IV, No. 130 (Fr.).

113. Cass. com., Nov. 4, 1987, No. 86-10.027, Bull. civ. IV, No. 226 (Fr.).

114. Alexis Constantin, *Réforme de l'article 1843-4 du code civil par l'ordonnance n° 2014-863 du 31 juillet 2014: faut-il s'en réjouir ou s'en inquiéter?*, 4 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ÉCONOMIQUE 633, 633-639 (2014)(Fr.).

115. Jean-Marc Desaché & Bruno Dondero, *L'Article 1843-4 du Code Civil et la Date d'Evaluation des Droits Sociaux*, D. 2014, 2446 (para. 13). *See also* Cass. com., May 3, 2012, No. 11-12717 (unreported) (Fr.), note J. Moury, REVUE DES SOCIETES 18 (2013) (noting that choosing an incorrect reference date constitutes a manifest error).

116. Art. 313-2 and 313-3 of the FMFC.

117. Different interest rates based on the type of creditors were introduced starting in 2015.

companies, may be organized as a variable capital company (*société à capital variable*).

The main advantage of a variable capital company is that the share capital may be adjusted through simple capital contributions or withdrawal of those contributions by the participating shareholders. Therefore, new shareholders can enter the company with no additional formal requirements and current shareholders can exit the company in a simplified manner. Pursuant to art. L. 231-6 of the FCOC, shareholders of variable capital companies can exit "whenever convenient." The exit corresponds to a reduction of the share capital operated on the balance sheet, with no other impact to the company or to its other shareholders.

III. LEGAL EXIT RIGHTS UNDER ROMANIAN LAW

There are two main types of companies in Romania: commercial companies, a type of company which has a distinct legal personality from that of its shareholders and is governed by the Romanian Company Law (RCL),[118] and civil companies, a type of company which does not have a distinct legal personality and is governed by the Romanian Civil Code (RCC). Civil companies are rarely used in Romania. Although no official statistics are publicly available, we believe they represent less than 5% of all business organizational forms.

Romanian law provides for exit rights in connection with certain extraordinary corporate events involving private and public commercial companies (Section A) and several other general legal exit rights for both commercial and civil companies (Section B).

A. *Extraordinary Corporate Events*

Art. 134 of the RCL provides that shareholders of a joint stock company "who did not vote in favor of a decision of the general meeting may withdraw from the company and request the purchase of their shares by the company." This exit right is also applicable to all other forms of commercial companies, including LLCs, but not to civil companies.[119] It has a very broad scope and 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 (art. 134(1) of the RCL).

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118. Legea societăților nr. 31/1990 [RCL] [Companies Law no. 31/1990], republished, MONITORUL OFICIAL AL ROMANIEI [M.O.] [OFFICIAL GAZETTE OF ROMANIA] 1066, Nov. 17, 2004, as subsequently amended.

119. Art. 187 and art. 226(1)(a^1) of the RCL.

The RCL applies to both private and public joint stock companies, but only to the extent the Romanian Capital Market Law (RCML)[120] and the regulations adopted by the Romanian capital markets supervising authority, *Comisia Națională a Valorilor Mobiliare* (CNVM) (currently *Autoritatea de Supraveghere Financiară* (ASF)), do not contain contrary provisions.[121] As discussed in more detail below,[122] the RCML and the CNVM/ASF regulations contain such contrary provisions, which are the exclusive provisions applicable to public companies. Therefore, in our opinion, art. 134 of the RCL is not applicable to public joint stock companies, the scope of legal exit rights for extraordinary corporate events involving public companies is narrower, and the procedure for the exercise of such legal exit rights is governed exclusively by the RCML and the CNVM/ASF regulations.

Therefore, we analyze separately legal exit rights in connection with extraordinary corporate events involving private (Section 1) and public (Section 2) joint stock commercial companies.

1. Exit Rights for Private Joint Stock Companies

(a) Procedural requirements. Because of its scarcity, art. 134 of the RCL raises more questions than it solves.[123] For example, it does not specify if the bylaws can modify (by expanding or narrowing) the legal exit right and Romanian courts have yet to decide the issue.

(i) Timing. The exit right must be exercised within thirty days from the date of either the adoption or the publication of the decision of the general meeting approving the extraordinary corporate event, depending on the trigger (art. 134(2) and 134(2^1) of the RCL). It is exercised by submitting, at the registered seat of the company, a written declaration of withdrawal (art. 134(3) of the RCL). From the moment of submitting the declaration of withdrawal, the petitioner loses its shareholder rights (the right to vote and the right to receive dividends), and becomes a creditor of the company for an amount equal to the value of the shares.[124] Art. 134 of

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120. Legea nr. 297/2004 privind piața de capital [RCML] [Capital Market Law no. 297/2004], M.O. 571, June 29, 2004, as subsequently amended (Rom.).

121. Art. 290(4) of the RCML.

122. *See infra* Section III.A.2.a.

123. Ioan Schiau & Monica Ionaș-Sălăgean, *Retragerea Asociaților. Certitudini, Dileme, Soluții*, 6 REVISTA ROMANA DE DREPT AL AFACERILOR 24, 26 (2014) (Rom.); Arcadia Hinescu, Regimul Juridic al Fuziunii Societăților 189-198 (2014) (unpublished SJD dissertation, University of Bucharest) (on file with authors) (Rom.).

124. Lavinia Maria Tec, *Retragerea Acționarului din Societatea pe Acțiuni de Tip Închis Reglementată de Legea nr. 31/1990,* 2 PANDECTELE ROMÂNE 29, 32 (2009) (Rom.); Schiau & Ionaș-Sălăgean, *supra* note 123, at 29 (note 3).

the RCL is silent on the date by which the company must pay the price.

(ii) Determination of the price. The price to be paid by the company is determined by a registered independent expert, designated by the director of the Trade Registry (ORC) upon request of the board of directors (art. 134(4) of the RCL). Given that the exit right belongs to the minority shareholders, having the expert designated upon request of the board is not the best option. However, shareholders obtain a monetary right by submitting their withdrawal demand, and they can enforce that right by petitioning the competent court (including if the board does not request the designation of an expert).[125]

The expert must be a member of the National Association of Certified Appraisers in Romania, *Asociația Națională a Evaluatorilor Autorizați din România* (ANEVAR). ANEVAR's members are both natural and legal persons, including major audit firms. In theory, the ORC should maintain a list of ANEVAR members willing to perform evaluations under art. 134 of the RCL and make appointments randomly from that list. In practice, however, ORC usually appoints the specific expert requested by the company. Some authors believe shareholders cannot dispute the appointment of the expert, except when the requirements of registration and independence are not met.[126] We agree with this view.

The expert must establish the price 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" (art. 134(4) of the RCL). The valuation methods currently recognized by the Romanian legislation are those adopted by ANEVAR,[127] and ANEVAR has adopted, in their entirety, the International Valuation Standards (IVS) as Romania's standards. According to IVS 250 (Financial Instruments), there are three main valuation approaches: (i) the market approach (which uses the trading or

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125. CRISTIAN DUȚESCU, DREPTURILE ACȚIONARILOR (C.H. Beck ed., 2nd ed. 2007) (Rom.) at 621; Sorin David, *Commentary under art. 134*, *in* STANCIU D. CĂRPENARU, SORIN DAVID & GHEORGHE PIPEREA, LEGEA COMENTATĂ A SOCIETĂȚILOR COMERCIALE (C.H. Beck ed., 2014) (Rom.) at 450 (para. 6) and 452 (para. 9); Tec, *supra* note 124, at 33; Schiau & Ionaș-Sălăgean, *supra* note 123, at 28. *But see*, Curtea de Apel [CA] [Regional Court of Appeal] București, dec. 967, June 18, 2009 (Rom.) (annulling the appointment of an expert by the lower court at the request of one of seventeen withdrawing shareholders, despite the board having failed to act, due to lack of procedural standing of the shareholder to request such appointment). We disagree with the solution, which might have depended on certain particular facts not described in the court's decision, such as the timing of the shareholder's request, preferences of the other sixteen shareholders, the company having later requested the appointment of an expert, etc.

126. David, *supra* note 125, at 450 (para. 6).

127. Art. 5(1)(c) of Ordonanța nr. 24/2011 privind unele măsuri în domeniul evaluării bunurilor [Ordinance no. 24/2011 on Certain Measures with Respect to Valuations of Assets] M.O. 622, Sept. 23, 2011, as subsequently amended (Rom.).

other reported prices of the shares of the company or of similar companies); (ii) the income approach (which consists of a DCF analysis); and (iii) the cost approach (which typically calculates the liquidation value of the company by determining the fair market value of its assets and liabilities, and generally results in the lowest value[128]).

Romanian law is unnecessarily rigid in requesting that the value be determined as the mean (average) of at least two valuation methods, instead of allowing flexibility to give more weight to the most relevant method(s) or use only one method where only one is appropriate. In contrast, the IVS allows experts to use certain variations of the three main approaches (which are neither the exclusive ones nor required to be employed in all cases), as well as to make adjustments to reflect particular situations. For example, certain valuation approaches are not appropriate in some cases (such as the market approach for insolvent companies or the cost approach for well-established companies). ANEVAR similarly noted that "all differences between two approaches will be justified" and "[e]ach approach will be selected taking into account the specific circumstances of the company being evaluated, valuation approaches will not just be applied formally and, conversely, will not be omitted if they are applicable."[129]

There is no express legal provision allowing shareholders (or the company) to dispute the results of the evaluation in court. Interested parties can, however, request a re-verification of the expert's report by another expert, pursuant to ANEVAR's procedures. They can also petition the courts if the formal legal requirements are not met, for example, if the expert does not use "valuation methods recognized by the legislation in force."[130] This requirement can and should be interpreted broadly by the courts. Courts should review expert reports for "manifest errors" in applying the IVS as a whole (not just IVS 250) and verify that the *appropriate* valuation methods were applied, in a reasonable and particularized manner. They may also appoint judicial experts to perform another evaluation.[131]

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128. Accordingly, ANEVAR noted that, "in our opinion, the minimum price cannot be under the value resulting from the Net Liquidation Value [under the cost approach].").
Asociația Națională a Evaluatorilor Autorizați din România (ANEVAR), Poziția oficială a ANEVAR cu privire la evaluările efectuate conform Legii 151/2014 (pentru delistarea de la sistemul de tranzacționare Rasdaq), Apr. 15, 2015, *available at* http://nou.anevar.ro/pagini/pozitia-oficiala-asociatiei [https://perma.cc/AP6F-RWEF].

129. *Id.*

130. David, *supra* note 125, at 450 (para. 6); Titus Prescure, *Commentary under Art. 134*, *in* IOAN SCHIAU & TITUS PRESCURE, LEGEA SOCIETATILOR COMERCIALE NR. 31/1990. ANALIZE ȘI COMENTARII PE ARTICOLE, para. 6 (Hamangiu ed., 2009) (Rom.).

131. *See, e.g.*, Înalta Curte de Casație și Justiție [ÎCCJ] [Supreme Court of Romania], civ. div. (2nd), dec. 1847, Apr. 25, 2013, *discussed in* Georgeta Maxim, *Procedura de Retragere a Acționarilor Dintr-o Societate pe Acțiuni și Cumpărarea Acțiunilor de către*

There is debate among authors 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, and several arguments are advanced by both sides.[132] Those against determination of the price by negotiation note that the RCL provides for a "legal price" which prevents the negotiation of a "contractual price" and that the interests of the shareholders who remain in the company could be adversely affected. Those in favor of determination by negotiation note that, because the shareholder becomes a creditor once the exit right is perfected, it may agree, like any other creditor, to receive a different amount than what would be received pursuant to the legal provisions.

We believe that the price may be established by negotiation, without recourse to an expert. Our view has beneficial practical implications. Normally, the evaluation costs are paid by the company (art. 134(5) of the RCL). If no expert is involved, the company, and therefore the shareholders collectively, would avoid the burden of the expert's fee. Moreover, if the price is amicably established, the litigation risk decreases, resulting in additional savings of attorneys' fees and judicial costs. Finally, because the RCL does not impose any deadline for the expert to complete its evaluation, not having to resort to one would speed up the process, in addition to providing certainty to the company as to the amounts that it would have to pay.[133]

Several compelling arguments support our view. First, determination by agreement of the shareholders is possible for LLCs and other forms of companies.[134] Second, we have seen that under the Merger Directive, which provides for a *quasi* exit right for squeeze-out mergers, agreement is possible and recourse to courts or an administrative authority for the

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Societate. Aplicabilitatea Dispozițiilor Art. 134 din Legea Societăților nr. 31/1990 în cazul Societăților Comerciale Admise la Tranzacționare pe o Piață Reglementată, 7 REVISTA ROMANA DE DREPT AL AFACERILOR 117 (2014) (Rom.) (noting that the court appointed an expert to perform another evaluation of the shares because the first evaluator had only applied two variations of a single valuation method).

132. *See, e.g.*, Prescure, *supra* note 130, at para. 7 and note 169 (stating that the price can be established by means of negotiation); Dragoș Călin, *Retragerea Acționarilor din Societățile Comerciale pe Acțiuni*, 3 REVISTA ROMANA DE DREPT AL AFACERILOR 73, 98-99 (2011) (Rom.) (also stating that the price can be established by means of negotiation); David, *supra* note 125, at 449 (para. 3), 450 (para. 6) (stating that the price cannot be established by means of negotiation); Tec, *supra* note 124, at 33 (also stating that the price cannot be established by means of negotiation).

133. Because the exit right is a form of stock repurchase under the RCL, the company may only use its net income or available reserves to pay the withdrawing shareholders. *See* art. 103(1)(d) and art. 104(2) of the RCL.

134. *See infra* Section III.B.1.

determination of the price applies only in case of disagreement.[135] Third, the right to receive the "legal price" pursuant to art. 134 of the RCL is an individual right of each shareholder (not a collective right) and any shareholder may therefore waive it, provided that such waiver is express.[136] Fourth, under Romanian civil procedure law, partial settlements (with only some of the parties) are generally allowed in order to prevent or end litigation.[137] It is true that the interests of the other shareholders could be adversely affected in such cases, but such shareholders have several mechanisms and claims available for the protection of the rights.[138]

Finally, practice also confirms our view. At several companies, the decision of the general meeting that approved the extraordinary corporate event resulting in legal exit rights also approved the price to be paid to one of the shareholders (usually a significant shareholder), pursuant to negotiations that had taken place, and established that if other shareholders decided to exercise their exit rights, the price to be paid to such additional withdrawing shareholders could not be lower than the price paid to the shareholder that had negotiated its exit.[139] We see no reason why such a decision would be invalid. In particular, this mechanism ensures the protection of minority or less significant shareholders adequately.

Art. 134 of the RCL does not establish as of which date the evaluation

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135. *See supra* Section II.A.2.b and *infra* Section III.A.1.b.i. *See also* art. 28(1)(c) of the Merger Directive (providing that "in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court or by an administrative authority").

136. Art. 13 of the RCC provides that "[t]he waiver of a right is not presumed." One of the authors who opposes determination of the price by negotiation admits, however, that waiver of the exit right (characterized as a "privilege" granted by the law) or forfeiture of the right to receive payment are possible. *See* David, *supra* note 125, at 451 (para. 7) (noting that shareholders can waive the legal exit right after submitting a declaration of withdrawal and/or can revoke their declaration of withdrawal), 452 (para. 10) (noting that shareholders can forfeit receiving payment for the value of their shares).

137. Art. 2267 of the RCC. *See also* 2268-2278 of the RCC and art. 438-440 of the Romanian Civil Procedure Code (governing judicial and extra-judicial settlements).

138. *See* Prescure, *supra* note 130, at para. 7 (noting the possibility of bringing a legal claim to have the convention annulled if the agreed price is disproportionately high). Such claims could be based, for example, on art. 136^1 of the RCL (good faith requirement for shareholders) or other anti-fraud provisions. Moreover, settlements acknowledged by a court decision are voidable for the same reasons that all contracts are voidable, following a separate legal proceeding (art. 2278 of the RCC).

139. *See Autoritatea de Supraveghere Financiară (ASF)*, dec. A/735, Dec. 23, 2013 (regarding Cocor Turism SA), *available at* http://www.asfromania.ro/files/capital/sanctiuni/2013/Decizia-ASF-735-2013.pdf [https://perma.cc/9YMU-BRRW] (ASF took no issue with respect to the determination of the price for the exit of SIF Transilvania, a significant shareholder, by the general meeting, and only imposed fines on other grounds). *See also* Călin*, supra* note 132, at 95 (para. 53), 98-99 (para. 59-61) (referencing this ASF decision).

must be made, or when payment is due. Together with other authors,[140] we believe that the evaluation must be made as of the date of the event that generates the exit right (the date of either the adoption or the publication of the decision of the general meeting approving the extraordinary corporate event). However, payment only becomes due when the expert finalizes its report.[141] Accordingly, (i) for the period between the withdrawal demand and the date the expert submits its report, the company will pay, in addition to the price established by the expert, "compensatory legal interest" and (ii) for the period between the date when the expert submits its report and the payment date, "punitive legal interest."[142] Under Romanian law, compensatory legal interest is 1.75% ("the reference interest rate of the National Bank of Romania") and punitive legal interest is 5.75% ("the reference interest rate plus 4 percentage points").[143] As such, the legal interest rate is at approximately market rate for compensatory legal interest and significantly higher than market rate for punitive legal interest.

(iii) Frequency of use. A sample review of decisions from appellate courts and the Supreme Court referencing art. 134 of the RCL indicated that the exit right is not infrequently used by shareholders. For example, in 2009, there were approximately ten decisions involving shareholders of joint stock companies,[144] which might seem low in absolute terms but is not insignificant given the general low level of shareholder litigation in Romania. As such, it reflects a shareholder demand for mechanisms allowing them to liquidate their participation.

(b) Scope and particularities. Art. 134 of the RCL covers four categories of extraordinary corporate events, each of which presents certain particularities.

(i) Mergers and divisions. The exit right must be exercised within thirty days from the date of the general meeting approving the merger or division (at this general meeting, the shareholders approve the draft terms of the merger or division, which had been previously published). The fact

140. Schiau & Ionaș-Sălăgean, *supra* note 123, at 30.

141. *Id.* at 31.

142. *See* Călin*, supra* note 132, at 96 (para. 55) (citing Tribunal [Lower Regional Court] Braşov, dec. 140/c, Jan. 20, 2010, applying legal interest), 97 (para. 57).

143. Ordonanța nr. 13 privind dobânda legală remuneratorie şi penalizatoare pentru obligații băneşti, precum şi pentru reglementarea unor măsuri financiar-fiscale în domeniul bancar [Ordinance no. 13/2011 regarding the Compensatory and Punitive Legal Interest for Monetary Obligations and for the Regulation of Certain Financial and Fiscal Measures in the Banking Sector], M.O. 607, Aug. 29, 2011, as subsequently amended, art. 1(2) and 3(1) for compensatory legal interest and art. 1(3) and 3(2)-(2^1) for punitive legal interest. Between professionals, the punitive interest rate is even higher, "the reference interest rate plus eight percentage points", which amounts to 9.75%.

144. There were no decisions under art. 134 of the RCL involving shareholders of LLCs and other forms of companies.

that the exit right may only be exercised after the final approval meeting (as opposed to prior to such meeting but after the publication of the draft terms of the merger or division) creates a number of technical problems,[145] because the exercise of legal exit rights impacts the financial condition of the company and, consequently, the share exchange ratio.

Regarding mergers, shareholders of both companies participating in the merger have voting and exit rights, irrespective of which company survives in the merger.[146] As such, the deadline to exercise exit rights is, in theory, different for the shareholders of each company. In practice, however, it is customary for both general meetings to take place on the same date, which reduces the problem. The exit right is very broad and covers all types of mergers, regular and squeeze-out mergers (between a parent company and a 90%-owned subsidiary).[147] It is therefore much broader than the *quasi* exit right set forth in the Merger Directive,[148] applicable only to squeeze-out mergers. As applicable to any mergers, the Romanian exit right is nevertheless compatible with the Merger Directive, except for the fact that, as discussed above,[149] art. 134 of the RCL provides, for all types of mergers, that the price is established by an expert appointed by the ORC as the first, not the last, resort, and does not expressly allow determination of the price by agreement.

Regarding divisions, the general principles applicable to mergers also apply.[150] In turn, the general principles applicable to divisions apply to spin-offs (referred to in Romanian legislation as partial divisions or partial asset contributions or transfers), including the legal exit right. Practice has confirmed that the legal exit right also applies to spin-offs, although, in the only reported case regarding the exercise of the legal exit right in connection with a spin-off, shareholders ultimately revoked their withdrawal demands or liquidated their participations, because the price established by the expert was below the trading price.[151]

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145. For more details, see David, *supra* note 125, at 451-52 (para. 8).

146. Cristian Duțescu, *Răscumpărarea Propriilor Acțiuni de către o Societate Comercială Admisă la Tranzacționare pe o Piață Reglementată*, 9 DREPTUL 68, 86, 90 (2010).

147. The RCL also provides that the exit right applies to mergers between a company and its 100% subsidiary, but that provision is illogical (art. $134(2^1)$ of the RCL, cross-referencing art. $246^1(1)$ of the RCL).

148. *See supra* Section II.A.2.b.

149. *See supra* Section III.A.1.a.ii.

150. Stanciu D. Cărpenaru, Commentary under art. 246^2, *in* Cărpenaru et al., *supra* note 125, at 833 (para. 4).

151. *See* Călin, *supra* note 132, at 76-77 (paras. 10-11) (citing the spin-off of the marketing and distribution business segment of OMV Petrom SA and its transfer to OMV Petrom Marketing SRL). The evaluation report of the expert (PricewaterhouseCoopers) was not made public. The price established by the expert was approximately 10% below the

(ii) Change of the main activity. An exit right was provided in this case, as well as in the two cases discussed below, because these events are likely to result in a loss of the shareholders' desire to continue in the company.[152] All these events represent a modification of the bylaws of the company.[153] In all three cases, the procedure for the exercise of legal exit rights is similar to that applicable to mergers or divisions.

In Romania, the bylaws list the activities of each company by cross-referencing the relevant categories and code numbers from the Classification of Activities of the National Economy (CAEN). Although the terminology is slightly imprecise, only changes of the main activity should trigger legal exit rights, as opposed to any changes to the often numerous secondary activities listed in the bylaws. Moreover, only *actual* changes of the main activity should trigger legal exit rights and such changes would normally be rare. However, a special situation inadvertently triggered this legal exit right in 2008-2010. When the CAEN was revised effective January 1, 2008, companies had to update their activities listed in the bylaws to conform to the revised CAEN. In this process, the main activity was also sometimes changed (although there had been no factual change in the historic main activity of the company), which triggered legal exit rights, even if the change was purely administrative.

(iii) Transfer of the company seat abroad. Only a transfer of the seat abroad (as opposed to a transfer to a different location within Romania) triggers exit rights, possibly because the legislator believed that only such a transfer could generate financial and fiscal changes that would justify a desire to exit the company.

(iv) Modification of the legal form of the company. Differences in the rules governing different forms of companies may justify a desire to exit the company. For example, it is more difficult to transfer shares of an LLC than of a joint stock company, but, conversely, an LLC has a lower level of minimum share capital than a joint stock company. The law does not distinguish based on whether the new legal form imposes more or less obligations on the shareholder. In other words, an exit right would exist even if the new legal form were more favorable to the shareholder. The result is counterintuitive at first glance but ultimately the only one possible, given that it is nearly impossible to assess whether a particular legal form is, globally, more or less favorable to each individual shareholder.[154]

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trading price of the shares of OMV Petrom SA on the BVB.

152. *See id.* at 75-76 (para. 9).

153. Art. 7(b)-(c) and art. 8(b)-(c) of the RCL.

154. For a discussion of the applicability of the exit right to a change of legal form from joint stock company to LLC, see ÎCCJ, com. div., dec. 1673, May 15, 2008.

2. Exit Rights for Public Joint Stock Companies

Shareholders of public companies have narrower legal exit rights than shareholders of private companies. They have a limited exit right in connection with mergers and divisions, an exit right in case of delisting, and a special exit right in connection with the dissolution of the Rasdaq market. In addition, the RCML and its implementing legislation (Regulation no. 1/2006)[155] provide for squeeze-out exit rights and for an indirect exit right through mandatory offers.

(a) Limited exit right in connection with mergers and divisions. At the time of the adoption of the RCML in 2004, the exit right set forth in art. 134 of the RCL was limited to three situations: change of the main activity; transfer of the company seat; and modification of the legal form. No exit right was provided for mergers and divisions. The RCML adopted no provisions regarding exit rights in these three situations, presumably considering that those scenarios are not problematic for shareholders of public companies as they can sell their shares on the market, an option not available to shareholders of private companies. Instead, art. 242 of the RCML provided an exit right applicable only to shareholders of public companies who receive unlisted shares in a merger or division. As such, art. 242 of the RCML operated as a market-out exception. Subsequently, art. 134 of the RCL was amended, and a general exit right covering all mergers and divisions was added.

This addition created much debate regarding what exit rights apply to shareholders of public companies. Most authors note that art. 134 of the RCL applies to both private and public companies and that art. 242 of the RCML was implicitly repealed.[156] There are irreparably conflicting decisions from Romanian courts on this issue.[157] Just to provide an

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155. Regulamentul nr. 1 privind emitenţii şi operaţiunile cu valori mobiliare [Regulation no. 1 regarding Issuers and Securities Transactions], M.O. 312, Apr. 6, 2006, as subsequently amended.

156. *See, e.g.*, David, *supra* note 125, at 453 (para. 13) (noting that art. 242 of the RCML, as well as the implementing regulations adopted by the CNVM, were implicitly repealed, and art. 134 of the RCL applies to both private and public companies in its entirety); Călin *supra* note 132, at 78 (para. 12); Duțescu, *supra* note 146, at 90-91 (both authors note that, as to scope, art. 134 of the RCL applies to both private and public companies in its entirety, but as to procedure, art. 242 of the RCML and the implementing regulations adopted by the CNVM apply if public companies are involved, to the extent they are compatible with art. 134 of the RCL). *But see* CRISTINA CUCU ET AL., LEGEA SOCIETAȚILOR COMERCIALE NR., 31/1990, (Hamangiu ed., 2007), at 289.

157. Cases concluding that shareholders of public companies have a legal exit right in connection with any of the situations are set forth in art. 134 of the RCL, including any mergers or divisions: ÎCCJ, com. div., dec. 2443, June 22, 2011; ÎCCJ, civ. div. (2nd), dec. 1761, May 20, 2014. Cases concluding that shareholders of public companies have a legal

example, decisions 1761 (from 2004) and 1847 (from 2014) of the ÎCCJ involved the exercise of legal exit rights by different shareholders of the *same* public company in connection with the change of its main activity. The ÎCCJ decided in the first case that the shareholder could exercise exit rights because art. 134 of the RCL applied and in the second case that another shareholder could not exercise exit rights because art. 134 of the RCL did not apply. One of the decisions rendered on this topic is also noteworthy because it documents one of the few attempts at appraisal activism in Romania. In that case, the withdrawing shareholders had purchased shares of the company after the announcement of the merger hoping to make a profit by receiving a higher price (following the exercise of their legal exit right) than the price they had paid to acquire the shares on the market. The court held preliminarily that the speculative intentions of the shareholders were nevertheless "legitimate" because they were based on the exercise of a legal right, but concluded ultimately that the shareholders were not entitled to exercise exit rights.[158]

In our view, both before and after the expansion of the exit rights set forth in art. 134 of the RCL, shareholders of public companies have had and continue to have exit rights only in the limited case set forth in art. 242 of the RCML, which was neither explicitly nor implicitly repealed. Our view is based on a pragmatic approach. Shareholders of public companies do not need exit rights in those other situations not covered by art. 242 of the RCML and, in addition to the situation covered by art. 242 of the RCML, shareholders of public companies have an exit right (discussed below) when they most need it, in case of delisting.

Once the *scope* of the legal exit rights applicable to public companies is established, the next question is what *procedure* applies to the exercise thereof. As adopted in 2004, art. 242 of the RCML (which we believe is still applicable) contained no procedural provisions. It only stated that, in the particular case covered by it, shareholders have "the right to withdraw from the company and to obtain from the company the value of the shares, pursuant to art. [134] of [the RCL]." In 2006, the CNVM adopted procedural provisions (art. 132 and art. 133 of Regulation no. 1/2006), which derogate almost entirely from art. 134 of the RCL and significantly add to it. It is debatable whether or not the CNVM could validly adopt these provisions, given the cross-reference made by the RCML to the

exit right only in connection with the situation are set forth in art. 242 of the RCML (mergers or divisions, only if unlisted shares are received): CA Galați, dec. 528, Oct. 5, 2009 (citing a 2008 interpretation of the CNVM); ÎCCJ, dec. 1847, Apr. 25, 2013 (discussed *supra* note 131).

158. CA Galați, dec. 528, Oct. 5, 2009 (discussed *supra* note 157).

RCL.[159] Our view is that the cross-reference applies only to the last portion of the sentence, regarding the determination of the value of the shares (by an expert, as the average value resulting from at least two valuation methods), and not to the entire procedure set forth in art. 134 of the RCL.

Consequently, in our view, the implementing regulations are still in effect and valid, despite being contrary to art. 134 of the RCL on a significant number of points (other than the determination of the price, which is not addressed). They are better tailored than art. 134 of the RCL to apply to *any* mergers of divisions because they solve some of the technical issues discussed above, fill the many gaps existing in art. 134 of the RCL and result in an expedited process. For example, the implementing regulations provide that the expert[160] report is obtained before the general meeting called to approve the merger or division, that the price determined by the expert is included in the draft terms of the merger or division and that the withdrawal demands must be made within fifteen business days (not thirty calendar days as is in art. 134 of the RCL) from the publication of the draft terms of the merger or division (not from the adoption of the decision of the general meeting approving the transaction by adopting the draft terms as is in art. 134 of the RCL). At the general meeting to approve the transaction, the board must provide a report regarding the exercise of exit rights and the impact thereof on the transaction. The company must pay the price to the withdrawing shareholders within seven business days from the date of the general meeting approving the transaction (no deadline for payment is set forth in art. 134 of the RCL).

Given the continued uncertainty regarding the scope of legal exit rights for public companies, we believe that the legislator should intervene to clarify the cases in which such legal exit rights exist and, with respect to art. 242 of the RCML, remove the cross-reference to art. 134 of the RCL, expressly authorize the ASF to adopt implementing regulations, and amend the current implementing regulations accordingly. That is how the

159. The CNVM did not have express authority to adopt any implementing provisions to art. 242 of the RCML, much less to derogate from art. 134 of the RCL (contrary to the manner in which this technical aspect was regulated by Law no. 151/2014, discussed below). Nevertheless, the CNVM/ASF have broad regulatory powers, pursuant to their statutes and the RCML. *See, e.g.*, art. 234 and art. 290(2) of the RCML (expressing the scope of regulatory authority).

160. The implementing regulations provide that the independent expert will be retained by the board and "registered with the CNVM". We believe that, given the cross-reference to art. 134 of the RCL regarding the determination of the value of the shares, the expert must be appointed by the ORC, at the request of the board, and must be a member of ANEVAR. *See* art. 132(2) and art. 133(3) of the Regulation no. 1/2006 (expressing the need to retain an expert).

legislator acted when adopting regulations in connection with the dissolution of the Rasdaq market.[161]

(b) Exit right in case of delisting. A public company can be delisted as a result of a public offer (potentially followed by the exercise of squeeze-out rights, discussed below), made by the controlling shareholders or by a third party. Art. 87(4)(d) of the implementing regulations, adopted by the CNVM in March 2006, created an additional mechanism for delisting. It provided that a (extraordinary) general meeting of the shareholders could decide the delisting of the shares of a public company, with the only requirement being that shareholders are granted an exit right. Realizing the potential of abuse by controlling shareholders, the CNVM issued an administrative regulation only three months later, in June 2006, suspending the application of art. 87(4)(d) of the implementing regulations and the related procedural provisions regarding the exercise of the exit right[162] (art. 1 of Circular no. 8/2006)[163] and setting forth an alternative mechanism. The suspension has not yet been lifted.

The alternative mechanism is to allow a (extraordinary) general meeting to decide the delisting of the shares of a public company if the shareholders are granted an exit right but only if, as an additional requirement to the prior mechanism, the company has very limited trading activity (art. 2(I)(a) of Circular no. 8/2006). Case law held that the CNVM could create exit rights not otherwise set forth in the RCML (or the RCL).[164]

Detailed provisions regarding the exercise of the exit right were adopted (art. 2(I)(b) of Circular no. 8/2006), which are similar to those adopted under art. 242 of the RCML discussed above and which, consequently, both derogate from and add to art. 134 of the RCL. We will spare the reader of the technical details and note only that there are detailed requirements regarding the independence of the expert (which must be an ANEVAR member), the payment of the evaluation costs and the manner of informing the shareholders regarding the price established by the expert, a longer deadline for the submission of withdrawal demands (forty-five calendar days) with a different starting point, as well as a provision that the

161. *See infra* Section III.A.2.c.

162. For the procedural provisions, see art. 87(5)-(10) of Regulation no. 1/2006.

163. Dispunere de Măsuri nr. 8 [Administrative Circular no. 8], June 15, 2006 (not published in the M.O.), *available at* http://www.asfromania.ro/legislatie/legislatie-sectoriala/legislatie-capital/legislatie-secundara-cnvm/regulamente-cnvm/353-2006-regulamente-capital-legislatie/2432-regulamentul-nr-01-privind-emitentii-si-operatiunile-cu-valori-mobiliare [https://perma.cc/4VP9-BEBK].

164. CA Bucharest, dec. 2279, Sept. 26, 2007 (*aff'd* ÎCCJ, dec. 2535, June 18, 2008); CA Pitești, dec. 1/A-C, Jan. 7, 2009; CA Constanța, dec. 151, Oct. 1, 2008; ÎCCJ, dec. 704, Feb. 13, 2014 (*rev'g* CA Bucharest, dec. 3807, June 6, 2012).

company must pay the price within fifteen days from receipt of a withdrawal demand.

(c) Special exit right in connection with the dissolution of the Rasdaq market. As a result of prolonged controversy concerning the legal status of the Rasdaq market, which was neither a "regulated market" nor a "multilateral trading facility" (MTF) in the sense of the EU definitions,[165] it was dissolved in October 2015 pursuant to Law no. 151/2014.[166]

After Law no. 151/2014 came into effect in October 2014, the boards of Rasdaq companies had to convene general meetings to decide whether to list on a regulated market or MTF, or whether to delist. An exit right was granted to shareholders in the following four situations: (i) the general meeting decided not to apply for the listing; (ii) the general meeting did not adopt a decision due to lack of quorum or the required majority; (iii) the general meeting was not convened within the prescribed deadline; or (iv) the general meeting decided to apply for listing but the application was rejected by the ASF (art. 3, 4 and 7(1) of Law no. 151/2014).

Law no. 151/2014 provided that the exit right was governed by art. 134 of the RCL, except for the express derogation that it had to be exercised within ninety days (art. 3(2) of Law no. 151/2014), as opposed to thirty days under art. 134 of the RCL. The starting point of the ninety-day deadline varied pursuant to which of the four triggers was applicable: the publication of the decision of the general meeting that decided not to apply for the listing of the company's shares; the date of the general meeting in case of lack of quorum or majority; the expiration of the deadline in the third situation and the publication of ASF's decision in the fourth situation. Shareholders were allowed to submit withdrawal requests before or after the expert's report was finalized, provided that the general ninety-day deadline was observed.

The ASF was expressly mandated to adopt implementing regulations to Law no. 151/2014 (art. 9(2) of Law no. 151/2014). The regulations adopted by the ASF (Regulation no. 17/2014[167]) mainly filled gaps in the procedure set forth in art. 134 of the RCL, and expedited the process. For

165. *See* Case C-248/11, Criminal proceedings against Nilaş et al., Mar. 22, 2012, available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-248/11 [https://perma.cc/NQZ2-GTZ2] (establishing that Rasdaq is not a "regulated market").

166. Legea nr. 151/2014 privind clarificarea statutului juridic al acțiunilor care se tranzacționează pe piața RASDAQ sau pe piața valorilor mobiliare necotate [Law no. 151/2014 Regarding the Clarification of the Legal Status of Shares Traded on the Rasdaq Market or on the Market for Unlisted Securities], M.O. 774, Oct. 24, 2014.

167. Regulamentul nr. 17 privind statutul juridic al acţiunilor care se tranzacţionează pe piaţa RASDAQ sau pe piaţa valorilor mobiliare necotate [Regulation no. 17 Regarding the Legal Status of Shares Traded on the Rasdaq Market or on the Market for Unlisted Securities], M.O. 870, Nov. 28, 2014.

example, the board had to request the designation of the expert by the ORC within five days of receipt of the first withdrawal demand (art. 6(1) of Regulation no. 17/2014), the expert had to finalize its report within thirty days of appointment (art. 6(2) of Regulation no. 17/2014), and shareholders were allowed to abandon their withdrawal demands within ten days of the expert's report (art. 6(3) of Regulation no. 17/2014). It was also provided that, in general, the company had to pay the price to the withdrawing shareholders within thirty days of the expert's report (art. 7(1) of Regulation no. 17/2014). The implementing regulations also required companies to publish current reports with the key events: receipt of first withdrawal demands, appointment of the expert, completion of the expert's report, or the expiration of various deadlines (art. 8 of Regulation no. 17/2014). In practice, however, given the lack of clear sanctions, these deadlines were not respected by companies, experts, or shareholders.

Regulation no. 17/2014 also clarified the interplay between the prior CNVM regulations regarding delisting in general (Circular no. 8/2006, discussed above) and the more recent provisions of Law no. 151/2014. Only companies that commenced their delisting procedure pursuant to Circular no. 8/2006 prior to November 14, 2014 (by calling a general meeting prior to such date) could continue to use it and, otherwise, had to use the procedure set forth in Law no. 151/2014 (art. 17 of Regulation no. 17/2014).

The dissolution of the Rasdaq market gave rise to a significant number of cases where shareholders used their exit right. In November 2015, the ASF indicated that the special legal exit right had applied to 64% of the approximately 870 companies that fell under the scope of Law no. 151/2014.[168] At the time of the dissolution of the Rasdaq market, only approximately $30 million had been paid to 4,419 shareholders having exercised their special exit right, a sign that the saga continues. At many of the companies where the special exit right was triggered, both minority and majority shareholders, for various reasons, rejected the evaluation reports.[169] Many shareholders requested re-verification of the report by

168. ASF Press Release, Nov. 27, 2015, *available at* http://www.asfromania.ro/informatii-publice/media/arhiva/4774-rezultatele-procesului-de-restructurare-a-pietei-rasdaq-si-a-pietei-valorilor-mobiliare-necotate [https://perma.cc/F9UE-QBY7].

169. This outcome is unsurprising. Our review of several current reports published by companies that were subject to Law no. 151/2014 shows that the evaluation reports are generally of poor quality. These reports are widely divergent regarding the date as of which the evaluation is made (which, in our view, should be the date of the general meeting or publication of the decision of the general meeting triggering legal exit rights) and the date of the financial information of the company used by the expert (which should be as recent as possible, meaning that it should not be limited to the most recent annual financial

another expert. In addition, ANEVAR undertook to verify all reports in connection with the exercise of the special exit right under Law no. 151/2014 and inform the ASF about their accuracy. The ASF has the power to impose fines or order other measures, and has exercised its power (263 decisions ordering fines totaling over $330,000).[170] However, as discussed above, there is no express legal provision allowing shareholders to dispute the results of the reports in court,[171] which is regrettable given the multiplication of disputes related to the dissolution of the Rasdaq market. Legislative intervention would be necessary in order to provide certainty.

(d) Squeeze-out exit rights. Art. 206 and 207 of the RCML have implemented art. 15 and 16 of the Takeover Directive, which, as discussed above,[172] created a buy-out right, and, respectively, a sell-out right "at an equitable price" if, following an offer made to all the holders of securities of the target for all their securities, the offeror reaches a certain threshold (90% or 95%). Romania opted to increase the threshold from 90% to 95% for the first EU trigger.

The provisions of the RCML regarding squeeze-out exit rights are poorly drafted and not perfectly aligned with the Takeover Directive. Some of the problems were resolved by the implementing regulations,[173] sometimes *contra legem.* Others persist. The implementing regulations set forth a convoluted and relatively long procedure for the exercise of squeeze-out exit rights and payment of the price by the majority shareholder (we will spare the reader the technical details), not reflecting a full understanding of the rationale behind the mechanism, which is to

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information). We also noticed that the market approach is rarely used, presumably because it is more challenging and time-consuming than the other two. If only the other two approaches (the income approach and the cost approach) are used, some experts determine the price as the average of the two values, and some disregard the value obtained under the cost approach, which ANEVAR indicated should be regarded as the "minimum price" (*see supra* Section III.A.1.a.ii), and establish the price to be paid as that resulting under the income approach. Finally, there does not appear to be any pattern of the price established by the expert being generally higher or lower than the trading price on the relevant date.

170. For an example, see ASF dec. 1933, Aug. 17, 2015, *available at* http://www.bvb.ro/info/Raportari/THNI/THNI-Decizia%20ASF%20nr.1933%20din%2017.08.2015.pdf [https://perma.cc/87F5-FPQG] (regarding Tehnoton SA Iași, a company delisting from Rasdaq). After a notification received by the ASF regarding the quality of the evaluation report for a company delisting from the Rasdaq market, ANEVAR reviewed the report and concluded that there were multiple inaccuracies and that the "level of credibility is zero" such that the report should not be updated by the same expert. The ASF agreed and ordered the board of the company to request the appointment of a new expert by the ORC to prepare a new report.

171. *See supra* Section III.A.1.a.ii.

172. *See supra* Section II.A.2.a.iii.

173. Art. 74 and 75 of Regulation no. 1/2006.

eliminate the few remaining shareholders both fast and easily. We note only that, where the presumption regarding the equitable price does not apply and intervention of an expert is necessary, the implementing regulations clarify that the related costs are paid by the minority shareholder if a sell-out right is exercised, and by the majority shareholder if a buy-out right is exercised.[174] Takeover activity is extremely limited in Romania, and these provisions are not often invoked. When they are invoked, it is generally by the majority shareholder (buy-out right).

(e) Mandatory offers. Art. 202-205 of the RCML transposed art. 5 of the Takeover Directive in Romania.[175] Pursuant to these provisions, the threshold for the initiation of a mandatory offer is 33%. Shareholders who were already above the 33% threshold of voting rights when the Takeover Directive was implemented in Romania must initiate a mandatory offer only if they reach or exceed a higher threshold, 50% of voting rights (art. 203 of the RCML), but the RCML does not otherwise impose a mandatory offer where an already significant shareholder augments its participation by small percentages over time.

Romania opted for a period of twelve months prior to the mandatory offer for determining the equitable price (the highest price paid for shares of the target company by the offeror during this period), and also established subsidiary criteria if the price cannot be established in this manner, which are (i) the volume weighted average trading price during the twelve months prior to the mandatory offer; (ii) the net asset value of the company, pursuant to the last audited financial statements; and/or, (iii) the value of the shares, pursuant to an expert valuation performed in accordance with international valuation standards (art. 204 of the RCML). In practice, the price is often established as the highest value between the equitable price and the prices derived using the three subsidiary criteria. Finally, Romania exempted from the mechanism of mandatory offers certain transactions that result in the 33% threshold being surpassed, such as privatizations of state-owned enterprises (art. 205 of the RCML).

B. *Other Legal Exit Rights*

In addition to the legal exit rights discussed above (in connection with extraordinary corporate events), Romanian law establishes general exit rights for commercial companies, other than joint stock companies, (Section 1) and for civil companies (Section 2).

174. Art. 74(6) of Regulation no. 1/2006 and art. 207(3) *in fine* of the RCML.
175. *See supra* Section II.A.2.c.

1. Exit Rights for Commercial Companies Other than Joint Stock Companies

(a) Scope. Pursuant to art. 226 of the RCL, a shareholder may also withdraw[176] from companies other than joint stock companies (LLCs and other forms of commercial companies): (i) in the cases set forth in the bylaws, (ii) with the consent of all other shareholders, or (iii) if there are no provisions in the bylaws or when the unanimous consent cannot be obtained, for "justified reasons" following a judicial proceeding.[177]

The first two withdrawal cases reflect contractual exit rights and, as such, fall outside the scope of this article. With respect to the last withdrawal case, "justified reasons" are not only strictly financial reasons, but also other fundamental changes affecting the company (for example, a change in control or in the structure of the board) or purely personal reasons (for example, major disagreements with other shareholders).[178]

(b) Determination of the price. The value of the shares to be paid by the company can be established by agreement of the shareholders or by an expert appointed either by the shareholders or the court. Here, contrary to art. 134 of the RCL, the principle is amicable determination of the price, and recourse to an expert is the solution of last resort. But, as is the case in art. 134 of the RCL, the evaluation costs are paid by the company.

(c) Frequency of use. We performed a sample review of decisions,

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176. Art. 222 to art. 225 of the RCL provide a procedure for the exclusion of a shareholder in these forms of companies. In case of exclusion, art. 224(2) of the RCL provides that the excluded shareholder is entitled to an amount that represents the value of its pro rata share of the company's assets.

177. By drawing a parallel between these additional withdrawal cases for other forms of commercial companies, an author noted that withdrawal of shareholders of joint stock companies would also be possible, in addition to the situations expressly set forth by Romanian law, in the following particular case. *See* David, *supra* note 125, at 448 (para. 2) (noting that if (i) the certificate of incorporation contains certain share transfer restrictions, (ii) the shareholder has "justified reasons" for wanting to withdraw, and (iii) the other shareholders are blocking the shareholder from transferring its shares, if an agreement among the shareholders with respect to withdrawal is not reached, the aggrieved shareholder could petition the courts to have the certificate of incorporation rescinded (only with respect to the aggrieved shareholder), and the courts could establish the appropriate consideration to be paid to it by analogy with art. 134 or art. 224(2) of the RCL, or by applying other criteria deemed relevant). We agree that an exit right for shareholders of joint stock companies would be useful in the scenario described by this author, but the law (absent future modifications) limited the exit for "justified reasons" to companies other than joint stock companies, and we do not believe such limitation to have been inadvertent.

178. *See* ÎCCJ, civ. div. (2nd), dec. 262, Jan. 29, 2014 (noting that, in case of disagreements with the other shareholders, a shareholder can request withdrawal in court pursuant to art. 226(1)(c) of the RCL, even if the bylaws of the company provide that withdrawal requires the consent of all other shareholders).

from appellate courts and the Supreme Court, referencing the specific exit right set forth in art. 226 of the RCL (applicable only to LLCs and other forms of companies). For example, in 2009, there were approximately thirty-four decisions, which indicates frequent use. When compared with the results of our review of decisions from 2009 referencing art. 134 of the RCL, discussed above,[179] it shows that exit rights are used three times more frequently by shareholders of LLCs and other forms of companies than by shareholders of joint stock companies. This result is in line with the fact that shareholders of joint stock companies can transfer their shares more easily than shareholders of LLCs and other forms of companies (having, therefore, less utility for legal exit rights),[180] and, as we have seen, have narrower exit rights.

2. Exit Rights for Civil Companies

The RCC establishes certain general exit rights, not circumscribed to any specific situations, applicable only to civil companies. The requirements for exit are more lenient if the civil company is established for an unlimited period of time. These provisions came into effect in 2011 and have been rarely (if at all) invoked until now.

(a) Civil company established for an unlimited period of time. Art. 1926 of the RCC provides that a shareholder may withdraw if two conditions are met: (i) the shareholder must offer reasonable notice and act in good faith, and (ii) the withdrawal must not cause imminent damage to the company. There are no provisions concerning an obligation of the company to pay the value of the shares of the withdrawing shareholder. However, such an obligation should exist, especially if the shareholder contributed to the share capital. Authors have noted that the shareholders could reach an agreement as to the price, or that the value could be determined by an expert (appointed either by the shareholders or the court).[181]

(b) Civil company established for a limited period of time. Art. 1927 of the RCC provides that a shareholder may withdraw if two conditions are met: (i) there are "justified reasons" for the withdrawal and (ii) the majority of the remaining shareholders consent.[182] Absent such consent, the

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179. *See supra* III.A.1.a.iii.

180. Piperea, *Commentary under article 226*, *in* Cărpenaru et al., *supra* note 125, at 776 (para. 16).

181. Gheorghe Piperea, *Commentary under article 1926*, *in* Flavius-Antoniu Baias et al., NOUL COD CIVIL. COMENTARIU PE ARTICOLE 2090 (para. 4) (C.H, Beck ed., 2nd ed., 2012).

182. Carolina M. Niţă, *Commentary under article 1927*, *in* Mădălina Afrăsinie et. al., NOUL COD CIVIL. COMENTARII, DOCTRINA SI JURISPRUDENȚA 296 (para. 1) (Hamangiu ed.,

shareholder can petition a court, which may authorize the withdrawal after analyzing "whether there are legitimate and justified reasons, the opportunity of the withdrawal in the circumstances and the good faith of the parties".[183]

In all cases, the shareholder is responsible for any damages caused to the company by its withdrawal. In our opinion, this provision does not exclude the obligation of the company to pay the value of the shares of the withdrawing shareholder, and the shareholders could reach an agreement as to the price or the value could be determined by an expert (appointed either by the shareholders or by the court). The company's obligation to pay the value of the shares to the shareholder could be off-set, totally or partially, against the shareholder's obligation to pay for any damages caused to the company by its withdrawal.[184]

IV. COMPARATIVE REMARKS

The structure of legal exit rights in each of the three countries surveyed, pursuant to the terminology and analytical frame developed in this article is presented in the table below. Below, we further discuss certain particularly important general findings (Section A) and specific points of comparison on certain sensitive and detail-oriented aspects (Section B).

A. *Overview of Main Findings*

Our main findings relate to the correlation between legal exit rights and, on the one hand, the strength of capital markets (Section 1) and, on the other land, the level of shareholder litigation (Section 2).

1. Assessment of Correlation with Strength of Capital Markets

Our analysis indicates that the scope of legal exit rights for public companies is not correlated with the strength of capital markets. For example, legal exit rights for public companies have a similar scope in all three countries analyzed, although there are major differences between the strength of their capital markets. Shareholders of public companies in the U.S. (especially if we take into consideration only Delaware companies) benefit from fewer legal exit rights that shareholders of Romanian or

2012).

183. Art. 1927(2) of the RCC.

184. Art. 1617 of the RCC provides for the automatic off-set of monetary obligations, under certain conditions.

French public companies, despite having the most active and liquid capital markets. Shareholders of French public companies benefit from a relatively broad scope of legal exit rights if the company has a controlling shareholder (in lieu of the U.S. "entire fairness review"), but the exercise of these legal exit rights is generally subject to the discretion of the AMF. Shareholders of Romanian public companies have legal exit rights in connection with certain mergers and divisions, as well as in other cases that lead to the delisting of the company. Lastly, there is no mandatory offer mechanism in the U.S., under either federal or most state laws, while public company shareholders in Romania and France can sometimes benefit from indirect legal exit rights as a result of mandatory offers.

Our analysis also indicates, as was to be expected, that shareholders of private companies are granted a broader scope of legal exit rights than shareholders of public companies. France represents the notable exception from this conclusion. France offers almost no legal exit rights to shareholders of private commercial companies (other than in connection with squeeze-out mergers, or in the particular case of companies in bankruptcy proceedings), but any private company (commercial or civil) may be organized as a variable capital company, in which case legal exit rights are not necessary.

The three countries analyzed are widely divergent regarding the legal exit rights applicable to joint stock companies as opposed to LLCs and other forms of commercial companies. In the U.S. and France, there are practically no legal exit rights for LLCs and other forms of commercial companies, because contractual exit rights are often found in the bylaws or in shareholder agreements. In Romania, there are extremely broad legal exit rights for LLCs and other forms of commercial companies (similar to those for civil companies). Furthermore, our research indicates a frequent use of legal exit rights in these types of companies, almost three times higher than the use of legal exit rights by shareholders of joint stock companies.

With respect to civil companies, the use of this legal form is very different in the three countries analyzed. There is no direct equivalent in the U.S. In Romania, there are very few civil companies, whereas in France the civil company is a legal form used very frequently. Both countries provide for a general legal exit right (in addition to contractual legal exit rights) for "justified reasons", following a judicial proceeding. The Romanian and French provisions are very similar but, because the Romanian provisions are relatively recent, they have not yet been fully put to test and are very infrequently used. In contrast, there is robust case law in France on this subject, which could serve as useful guidelines for Romanian courts in the future.

Finally, our review indicates that the degree of state intervention regarding the determination of the price is higher in all three countries for joint stock companies than for LLCs and other forms of companies, including civil companies. For the former, various mechanisms lead to a rigid method of determining the fair price (appraisal statutes in the U.S. requiring court intervention, mandatory intervention of an expert appointed by the director of the ORC in Romania), especially when public companies are concerned (in which case strict capital markets regulations often determine the method for calculation of the fair price). For the latter, where legal exit rights are available, the price can be freely negotiated by the parties and court intervention occurs only in case of disagreement.

2. Assessment of Correlation with Shareholder Litigation

Our analysis indicates that the frequency of use of legal exit rights is not proportional with the level of shareholder litigation.

Although the U.S. procedure regarding legal exit rights suffered no modifications in the last 50 years, its hidden benefits (above-market interest rate, fair price frequently at a premium to the merger price, favorable timing, informational advantages, etc.) were discovered only recently. This "Eureka!" moment resulted in a dramatic and constant increase, since 2011, in appraisal activism. Despite this increase, the level of appraisal litigation remains significantly lower than the general level of standard M&A shareholder litigation involving public companies.

In France, although there is a general increase in shareholder activism, legal exit rights remain narrow in scope and infrequently litigated. Appraisal activism is unlikely to develop.

Romania has low shareholder litigation in general but there is significant litigation in connection with legal exit rights, regarding private companies (due to illiquidity of the market for private stock), but also, more recently, regarding public companies (due to the legal exit rights triggered in case of delisting, such as the numerous delisting procedures caused by the dissolution of the Rasdaq market). The explanation for the significant legal exit rights litigation in Romania is most likely that the provisions governing legal exit rights have not recently and thoroughly been reassessed, and, in this area, the devil is in the details, as can be seen from the recent developments that took place in the U.S. Appraisal activism could develop in the future.

B. *Particular Findings*

1. Extraordinary Corporate Events that Trigger Legal Exit Rights

Although the types of companies to which legal exit rights in connection with extraordinary corporate events apply differs (private companies principally in the U.S. and Romania, and public companies only in France), the categories of extraordinary corporate events that trigger legal exit rights are quite similar in all three countries.

For mergers and divisions, Romania offers a broad and unrestricted legal exit right. The U.S. and France limit the scope of the legal exit right by providing conditions regarding the corporate structure of the company (the existence of a controlling shareholder or of a squeeze-out context) and the type of merger or division (a legal exit right will only exist if shareholder approval is necessary for the transaction).

Significant sales of assets (spin-offs) trigger exit rights in MBCA states and in a majority of non-MBCA states (if shareholder approval is necessary), but, significantly, not in Delaware. They also trigger legal exit rights in France and Romania.

As for other extraordinary corporate events, both the U.S. (in MBCA states, but not in Delaware) and France offer a somewhat general legal exit right for modifications of bylaws (articles of incorporation), while Romania lists specifically the three modifications that trigger legal exit rights (change of the main activity, transfer of the company seat abroad, and modification of the legal form). This is in line with the tendency observed in Romania to regulate legal exit rights in a rigid and formulaic manner.

2. Determination of Fair Price

The method for determining fair price is the key element with respect to legal exit rights, and controls the utilization and use of these rights by shareholders. We discuss below the qualifications and mandate of the experts that typically intervene (a), the valuation methods that can or must be used by the experts, or by the courts (b), the possibility of determining the price by negotiations or settlements between the shareholders and the company (c), and the interest rate that is added to the price and which many authors deem to be the most important factor for the current rise in appraisal activism in the U.S. (d).

(a) Experts. Various scenarios lead to the involvement of independent experts in all three countries. The legal definitions of "expert" and "independence" vary from country to country. In the U.S., valuations are typically performed by investment banks or appraisal firms, who are

subject to various regulatory requirements. France does not require a formal registration with any particular authority, but requires compliance with certain requirements as to expertise and independence. Romania, in accordance with its general tendency to overregulate, provides that experts must be registered members of ANEVAR and must use ANEVAR's valuation standards.

In the U.S., each party to the appraisal litigation proceedings employs its own expert and the ultimate determination as to fair price is made by the court, after reviewing all the evidence presented before it. The court may substitute its own judgment for that of the experts. In France, the expert can generally be designated by mutual agreement of the parties or, in case of disagreement, by the court. The findings of the expert are binding on the parties. In Romania, except for the cases where the parties may designate an expert by mutual agreement, the expert is appointed by the director of the ORC, and the parties only have a limited right to dispute the appointment, on grounds of lack of registration or independence. There is also no express legal provision allowing shareholders (or the company) to dispute the results of the evaluation in court, having only a possibility to request a re-verification of the expert's report by another expert. After reviewing the U.S. and French mechanisms, we have argued that the possibility to dispute the results of the evaluation should be recognized in Romania, and some courts have agreed to hear such complaints and sometimes appointed their own expert.

(b) Valuation methods. Experts have various degrees of freedom in choosing and applying valuation methods in the three countries. We observed that a higher degree of freedom in this respect appears to generate a better protection of the minority shareholders. For example, in Romania, which has very precise provisions regarding the determination of the price, discontent among the shareholders about the results of the evaluations is common.

The valuation methods are basically the same in all three countries, because the IVS is an international and well-known standard, of U.S. descent. The IVS provides for three main valuation approaches: the market approach, the income approach and the cost approach. Its application is mandatory only in Romania but the same methods are applied on a voluntary basis by American and French experts. A DCF analysis (corresponding to the income approach) appears to be the valuation method privileged by shareholders, experts and courts in all three countries.

In the U.S., courts have discretion to employ a wide range of methods to determine the fair price, and often rely on a DCF analysis. For French private companies, the law allows broad party interference with the valuation methods (for example, parties can establish the criteria to be used by the expert and the reference date for the evaluation). In contrast, for French public companies, regulatory constraints are severe, and each mechanism has specific requirements regarding the fairness of the price, with a corresponding control from the AMF. In Romania, the fair price must be determined as an average value resulting from the application of at least two valuation methods recognized by the law, which are those stated in the IVS. This severely and unnecessarily restricts the evaluation procedure, and has been shown to lead to a poor quality of evaluation reports.

(c) Negotiations. In the U.S., after the appraisal litigation commences (or, in certain U.S. states, as a pre-condition to the availability of appraisal rights), parties are free to negotiate the price and enter into a settlement. In France, parties are generally free to negotiate the price (except where a fair legal price is imposed, which is generally the case for public companies) and it is only in case of disagreement that courts intervene. In Romania, there is debate regarding the possibility of determining the exit price by means of a negotiation between the shareholders and the company (as opposed to the price being established solely by an expert). We have argued that, in our view, such a possibility, which has beneficial practical implications and exists in the other countries analyzed (as well as in EU regulations), should also be recognized in Romania.

(d) Legal interest. Given that the mechanisms for obtaining payment of the fair price can sometimes take a long time, the applicable legal interest rate is important for the shareholders in deciding whether or not to pursue the exercise of legal exit rights.

In the U.S., interest is added to the fair value determined by the court, from the effective date of the merger and until payment. The default (statutory) interest rate in Delaware is 5% over the Federal Reserve discount rate, and therefore significantly above-market. The interest rate is identical irrespective of whether the petitioner is a natural or a legal person. The Court of Chancery has never exercised its discretion to establish a different interest rate, and the Delaware legislature is not currently contemplating a modification.

In France, the current legal interest rate is 1.01% if the creditor is a legal person or a professional, and 4.54% if the creditor is a natural person. It is therefore readily apparent that the exercise of legal exit rights is less appealing to institutional investors in France.

In Romania, the legal interest for the period between the withdrawal demand and the date the expert submits its valuation is 1.75%, and the legal interest for the following period and until payment of the price is received is 5.75%, for both natural and legal persons. The interest rate for this second period is significantly higher than market rates in Romania.

Combined with a broad legal exit right for mergers, and given the illiquidity of both public and private markets for stock, this interest rate creates the necessary premises for the development of appraisal activism in Romania. As we have seen, attempts at appraisal activism already occurred.

CONCLUSION

In all three countries analyzed, legal exit rights are currently being exercised more and more frequently, and are raising passionate debates, commentary and litigation.

Our analysis indicated that the scope of legal exit rights for public companies is similar in all three countries analyzed but that there is a major discrepancy between the U.S. and Romania, on the one hand, and, on the other hand, France, regarding legal exit rights for shareholders of private companies (in the first two countries, shareholders of private companies have broader legal exit rights than shareholders of public companies, while in France we have the exact opposite situation). It is normal for shareholders of public companies to have fewer legal exit rights than shareholders of private companies, because they have the ability to sell their shares on the market if they are dissatisfied with the management or the plans of the company.[185] Our analysis also indicated a major discrepancy regarding exit rights for LLCs as compared to joint stock companies. For LLCs, there are almost exclusively contractual exit rights in the U.S. and France, on the one hand, and, on the other hand, broad legal exit rights in Romania.

Given these national variations, our study can serve as a basis, in all three countries, for reassessing the appropriate scope of legal exit rights depending on the type of company (private versus public, LLC versus joint stock company) and rethinking where to draw the border between legal and contractual exit rights.

185. It is also normal for shareholders of public companies to have fewer contractual exit rights than shareholders of private companies because significant minority shareholders of private companies are typically able to negotiate additional protections and rights, including exit rights.

APPENDIX

<table>
<tr><th rowspan="2"></th><th colspan="2">U.S.</th><th rowspan="2">France</th><th rowspan="2" colspan="2">Romania</th></tr>
<tr><th>MBCA States</th><th>Delaware</th></tr>
<tr><td rowspan="3">Public joint stock companies</td><td colspan="2">No legal exit rights (due to the application of the market-out exception), except in the following cases:</td><td rowspan="3">Only if there is a controlling shareholder:
- Mergers with an affiliate
- Significant sales of assets
- Reorientation of the main activity
- Suppression of dividends
- Significant modification of the bylaws (change of legal form, change of share transfer conditions, change of rights attached to shares, change of company seat, change of main activity, divisions, delistings, etc.)
Other legal exit rights:
- Squeeze-out mergers
- Squeeze-out exit rights (including delisting)
- Bankruptcy proceedings
- Mandatory offers</td><td rowspan="3" colspan="2">- Mergers/divisions, only if unlisted shares would be obtained
- Delistings (including from Rasdaq)
- Squeeze-out exit rights
- Mandatory offers</td></tr>
<tr><td>Extraordinary corporate events:
- If the shareholder must accept anything other than cash or shares in a public or widely-held company in the transaction
- Interested transactions</td><td>Mergers and consolidations:
- If the shareholder must accept anything other than stock in a public or widely-held company in the transaction (i.e. if the price is cash or cash and stock)</td></tr>
<tr><td colspan="2">No mandatory offers (except for control share cash-out right in Pennsylvania, Maine and South Dakota)</td></tr>
<tr><td>Private joint stock companies</td><td>Extraordinary corporate events:
- Mergers/share exchanges/sales of assets (if shareholder vote)
- Amendment to the articles of incorporation
- Domestication
- Conversion to nonprofit or unincorporated entity</td><td>Mergers and consolidations:
- Regular mergers, except statutory mergers where there is no shareholder vote
- Second-step mergers
- Squeeze-out mergers</td><td>- Variable capital companies
- Squeeze-out mergers
- Bankruptcy proceedings</td><td colspan="2">Extraordinary corporate events:
- Mergers/divisions/significant sales of assets, including squeeze-out mergers
- Change of company seat abroad
- Change of main activity
- Change of legal form</td></tr>
<tr><td>Limited liability companies</td><td colspan="2">No legal exit rights
(except for certain MBCA states, e.g. Florida, and certain non-MBCA states, e.g., New York, California, Minnesota)</td><td>No legal exit rights</td><td colspan="2">- Extraordinary corporate events (same as for private joint stock companies)
- For “justified reasons”, following a judicial proceeding</td></tr>
<tr><td>Civil companies</td><td colspan="2">Not applicable</td><td>- Variable capital companies
- For “justified reasons”, following a judicial proceeding</td><td>Unlimited duration:
- If the exit does not cause imminent damage to the company</td><td>Limited duration:
- For “justified reasons”, following a judicial proceeding</td></tr>
</table>