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Loyalty Voting Rights in Belgium: Nothing More than a Control-Enhancing Mechanism?

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Abstract

In 2019, Belgium joined the European trend and allowed listed companies to adopt loyalty voting rights, i.e. double voting rights for shareholders who have held their shares for more than two years. The stated goals were to combat short-termism by rewarding long-term shareholders and to encourage IPOs by allowing founders to retain control over the corporation with a smaller participation. Our paper analyzes these rationales from a conceptual perspective, describes the Belgian legal framework for loyalty voting rights, and presents novel empirical evidence on the use of loyalty voting rights in Belgium. We argue that the Belgian legal framework is designed to favour controlling shareholders and other insiders. In addition, our empirical data supports the view that loyalty voting rights mainly function as a control-enhancing mechanism, as loyalty voting rights are almost exclusively used by insiders.

This is not necessarily a problem, in our view, as controlling shareholders may be able to help combat the short-termism problem where it would exist. However, loyalty voting rights also increase the incentives for insiders to extract private benefits of control by creating a wedge between cash flow rights and voting rights. We find that this wedge in our Belgian sample has been on average 11 percentage points. In addition, our evidence finds that the votes of insiders were often sufficient to adopt loyalty voting rights, and that non-insiders on average vote against loyalty voting rights. This highlights the risk of making it too easy to introduce loyalty voting rights in the midstream. The arguments for allowing loyalty voting rights are the strongest when they are introduced at the IPO stage, but so far, none of the Belgian corporations with loyalty voting rights have introduced them at the IPO.

We conclude that loyalty voting rights are nothing more than a control-enhancing mechanism. This raises the questions: why not allow other types of control enhancing mechanisms, such as dual class share structures? And why not treat the midstream introduction of loyalty voting rights with a similar level of protection as the midstream introduction of dual class share structures? We fail to see the policy reasons for this wide divergence.

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1. INTRODUCTION

1. **European evolution.** Loyalty voting rights – multiple voting rights for “loyal” shareholders that have held their shares for a certain period – seem to be all the hype with legislators in Europe. Such loyalty voting rights have long been possible in France, but in 2014 the *Loi Florange* made them the default rule in French listed companies.² In the Netherlands, loyalty voting rights are not explicitly provided for by company law, but the general flexibility offered by Dutch company law has been used by several Dutch listed companies to offer multiple voting rights to their loyal shareholders.³ When the Italian auto manufacturer Chrysler-Fiat, also in 2014, reincorporated to the Netherlands to benefit from the possibility to introduce loyalty voting rights, the Italian legislator made loyalty voting rights possible quickly afterwards.⁴ The next European country to catch the loyalty voting rights “virus” was Belgium, which introduced this possibility for listed companies when it adopted a new Code for Companies and Associations (“CCA”) in 2019.⁵ More recently, loyalty voting rights have been introduced in Spain.⁶

2. **Justifications.** Two reasons are typically given by European legislators to justify the introduction of loyalty voting rights. First, the most commonly cited rationale for loyalty voting rights is that they can combat “corporate short-termism”, *i.e.*, the sacrifice of long-term value for short-term reasons, by encouraging shareholders to hold their shares for a longer period and

² Art. L22-10-46 *Code de commerce*. See for a discussion: *Marco Becht/Yuliya Kamisarenka/Anete Pajuste*, “Loyalty Shares with Tenure Voting: Does the Default Rule Matter? Evidence from the Loi Florange Experiment”, *The Journal of Law & Economics* 2020, 473-499.

³ *Titiaan Adam Keijzer*, *Vote and Value*, 2020, p. 464-469. The legality of loyalty voting rights is based on several court decisions. See: Hoge Raad (Dutch Supreme Court) 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*) (upholding the validity of loyalty dividend rights); Gerechtshof Amsterdam (Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*) (upholding in principle the validity of loyalty voting rights, but not in this case).

⁴ Article 27quinquies of the Decreto Legislativo No. 58 of 24 February 1998 Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Consolidated law on financial intermediation pursuant to articles 8 and 21 of law No. 52 of 6 February 1996). See also: *Marco Venturuzzo*, “The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat” https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574236 (last consulted 30 January 2023), 3 (stating that the Italian law was a response to the migration of Chrysler-Fiat); *Jeroen Delvoie/Carl Clottens*, “Accountability and short-termism: some notes on loyalty shares”, *Law and Financial Markets Review* 9:1 (2015), 19.

⁵ See article 7:53 CCA.

⁶ Article 527ter of the Ley of 2 July 2010 de Sociedades de Capital (Law on Capital Companies). See about loyalty voting rights in Spain: *Aurelio Gurrea Martínez*, “The Case Against the Implementation of Loyalty Shares in Spain”, <https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/07/case-against-implementation-loyalty-shares-spain> (last consulted 30 January 2023); *Javier García de Enterría*, “Spanish Loyalty Shares: Effects on the General Shareholders’ Meeting, on Takeover Bids and on Significant Holdings”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4017316 (last consulted 30 January 2023).

redistributing power to these shareholders.⁷ A second rationale is that loyalty voting rights can encourage IPOs by allowing the founders to retain control with a smaller participation.⁸

Others have questioned whether loyalty voting rights can really meet these goals. Some argue that “short-termism” does not exist on a systemic scale,⁹ so that loyalty voting rights solve a problem that does not exist. In addition, even if short-termism is a problem, some have argued that loyalty voting rights do little to combat it.¹⁰ In practice, loyalty voting rights seem to be mainly used by controlling shareholders to enhance their control.¹¹ Institutional investors do not seem to use loyalty voting rights and are generally opposed to deviations from one share one vote, including loyalty voting rights.¹²

3. **Aim of this paper.** Loyalty voting rights have been studied in many countries, including by empirical studies in France and Italy.¹³ Loyalty voting rights have also been extensively studied in the Belgian legal literature.¹⁴ This paper is the first to provide extensive empirical evidence on how loyalty voting rights have been used in Belgian practice.¹⁵ It is also the first

⁷ See for example: Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen. Deel 1 (Draft bill introducing the Code of Companies and Associations and miscellaneous provisions. Part I), Parlementaire Stukken Kamer (Parliamentary Proceedings Chamber).2017-18, No. 3119/001, 208 (stating that combatting short-termism was one of the rationales of the Belgian legislator); *Javier García de Enterría*, “Spanish Loyalty Shares: Effects on the General Shareholders’ Meeting, on Takeover Bids and on ‘Significant Holdings’”, <https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/spanish-loyalty-shares-effects-general-shareholders-meeting-takeover> (last consulted 30 January 2023) (stating that combatting short-termism was one of the rationales of the Spanish legislator); *EY*, “Study on directors’ duties and sustainable corporate governance”, Publications Office of the European Union 2020, 91 (arguing that loyalty voting rights could incentivize longer holding periods by shareholders and could therefore combat short-termism); *Mark J. Roe/Federico Cenzi Venezze*, “Will Loyalty Shares Do Much for Corporate Short-Termism?”, *The Business Lawyer* 2021, 469 (“Loyalty shares [...] are increasingly touted to combat stock-market-driven short-termism”); *David J. Berger/Steven Davidoff Solomon/Aaron Benjamin*, “Tenure Voting and the U.S. Public Company”, *The Business Lawyer* 2017, 323 (“tenure voting plans [...] may address real and perceived issues concerning short-termism”). See also *infra* part 2 for a more thorough analysis of this legislative goal.

⁸ Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen. Deel 1 (Draft bill introducing the Code of Companies and Associations and miscellaneous provisions. Part I), *Parl. St. Kamer* 2017-18, No. 3119/001, 208 (stating that encouraging IPOs was one of the rationales for the Belgian legislator); *García de Enterría* (fn. 7) (stating that encouraging IPOs was one of the rationales for the Spanish legislator).

⁹ See, for example: *Mark J. Roe*, *Missing the Target: Why Stock-Market Short-Termism Is Not the Problem*, 2022, 200 p.

¹⁰ See *infra* part 2.1.

¹¹ See *infra* part 2.1.

¹² See *infra* part 2.1.

¹³ See with regards to Italy: *Emanuele Bajo/Massimiliano Barbi/Marco Bigelli/Ettore Croci*, “Bolstering Family Control: Evidence from Loyalty Shares”, *Journal of Corporate Finance* 2020, 1-22; *Chiara Mio/Elise Soerger Zaro/Marco Fasan*, “Are Loyalty Shares an Effective Antidote Against Short-Termism? Empirical Evidence from Italy”, *Business Strategy and the Environment* 2020, 1785-1796. See with regards to France: *Becht/Kamisarenka et.al.* (fn. 2), 473-499; *Francois Belot/Edith Ginglinger/Laura T. Starks*, “Encouraging long-term shareholders: The effects of loyalty shares with double voting rights”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475429 (last consulted 30 January 2023); *Thomas Bourveau/François Brochet/Alexandre Garel*, “The Capital Market Consequences of Tenure-Based Voting Rights: Evidence from the Florange Act”, *Management Science* 2022, 1-22.

¹⁴ See, for example: *Charlotte De Grauwe*, “Het ‘loyaliteitsstemrecht’ en de bescherming van de minderheidsaandeelhouder(s). Wat kan België leren van het Franse, Italiaanse en Nederlandse voorbeeld?”, *TRV-RPS* 2019, 811-830; *Jeroen Delvoie/Steven Declercq*, *From zero to hero: meervoudig stemrecht in NV en BV na het WVV*, in: *Hans De Wulf/Marieke Wyckaert* (eds.), *Het WVV doorgelicht*, 2021, p. 249-303. See also the eight papers in the special issue on loyalty voting rights in Belgium by the “Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés” (issue 2, 2019, p. 125-244).

¹⁵ A recent empirical study analyzes how many companies have made use of loyalty voting rights in Belgium. See: *Filip Lecoutre/Victor Burki/Andreas Depoortere*, “State of the Belgian Listed Companies”, *Tijdschrift voor Belgisch Handelsrecht* 2022, 569–570. A recent article by *Van Der Elst* also provides data on which shareholders use loyalty voting rights. See: *Christoph Van Der Elst*, “Evaluatie van het AVA-seizoen 2022 bij genoteerde vennootschappen”, *Tijdschrift voor rechtspersoon en Vennootschap – Revue pratique des sociétés* 2023, 87–91. However, our data is more comprehensive, for example with regards to the shareholder structure at the moment of introduction of loyalty voting rights, the votes in favor and against the introduction of loyalty voting rights, and the evolution of equity participations after the introduction of loyalty voting rights.

study (to our knowledge) to provide an overview of the Belgian legal framework for an international audience.

4. **Overview.** In the rest of our paper, we first outline a theoretical framework for loyalty voting rights, identifying the potential arguments in favour and against (part 2). Part 3 then briefly describes the legal framework for loyalty voting rights in Belgium. In part 4, we present our novel empirical evidence on loyalty voting rights in Belgium. Part 5 concludes.

2. A THEORETICAL FRAMEWORK FOR LOYALTY VOTING RIGHTS

2.1. LOYALTY VOTING RIGHTS AS A TOOL FOR COMBATTING SHORT-TERMISM?

5. **Short-termism.** Probably the most common argument for loyalty voting rights is that they can help to combat “short-termism”. This argument has been made before by legislators (including the Belgian one) and by the literature.¹⁶ The idea is that loyalty voting rights could help to combat short-termism by encouraging shareholders to hold their shares for longer periods and by shifting power to long-term investors.

Those who claim that short-termism is a problem do not always provide a detailed theory of how short-termism would influence corporate decisions. We see two possible ways in which short-termism could originate among listed companies.¹⁷ First, it is possible that certain shareholders are excessively focused on the short term and that these investors are able to transmit this short-termism to the management of the company, even though other shareholders are focused on long term value maximisation.¹⁸ This model can be called the “investor short-termism model”. Typically, institutional investors and asset managers are considered as the short-termist investors in this model. Short-termism originates because of an agency problem between institutional investors and asset managers, on the one hand, and their clients and retail

¹⁶ Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen. Deel 1 (Draft bill introducing the Code of Companies and Associations and miscellaneous provisions. Part I), *Parl. St. Kamer* 2017-18, No. 3119/001, 208 (stating that combatting short-termism was one of the rationales of the Belgian legislator); *García de Enterría* (fn. 7) (stating that combatting short-termism was one of the rationales of the Spanish legislator); *EY* (fn. 7), p. 91 (arguing that loyalty voting rights could incentivize longer holding periods by shareholders and could therefore combat short-termism); *Roel/Cenzi Venezze* (fn. 7), 469 (“Loyalty shares [...] are increasingly touted to combat stock-market-driven short-termism”); *Berger/ Davidoff Solomon et al.* (fn. 7), 323 (“tenure voting plans [...] may address real and perceived issues concerning short-termism”).

¹⁷ This discussion of the two models of short-termism draws to a large extent on the following paper: *Tom Vos*, “The missing role of controlling shareholders in the short-termism debate”, SSRN, 25 May 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4221137.

¹⁸ See for a discussion of this view of short-termism: *Kim M. Willey*, *Stock-market short-termism. Law, regulation, and reform*, 2019, 155 et seq.

investors, on the other hand.¹⁹ The latter generally have a rational long-term value maximisation horizon, but they have less influence on the governance of the company. Institutional investors and asset managers can transmit their short-termism to managers through shareholder activism and short-term focused executive compensation, for example.

A second model is the managerial short-termism model. In this model, managers are inherently focused on the short term.²⁰ For example, managers may want to show good results during their tenure at the company in order to improve their chance of obtaining an even better position at another company. Alternatively, managers may find it easier to increase their executive compensation by manipulating short-term results rather than by actually creating long-term shareholder value. In this model, managerial short-termism can persist because of a lack of accountability of management towards shareholders – an example of the classic managerial agency problem.

6. Loyalty voting rights as a solution to short-termism? Whether short-termism is truly an important problem is heavily debated.²¹ There is some empirical evidence that short-termism may be a problem, but this evidence can be criticized.²² This paper is not the place to settle this debate. We focus on the following question: if short-termism is a problem (as legislators around Europe at least seem to assume), could loyalty voting rights do anything to alleviate it?

First, if one believes in the investor short-termism model, loyalty voting rights could be defended if they reduce the short-termism problem by encouraging the short-term investors to hold their shares for longer periods or by redistributing power from the short-term investors to the long-term investors. However, in our view, it is unlikely that the reward of extra voting

¹⁹ See for a description of the agency costs associated with asset managers: *Ronald J. Gilson/Jeffrey N. Gordon*, “The agency costs of agency capitalism: activist investors and the revaluation of governance rights”, *Columbia Law Review* 2013, 863.

²⁰ See for a few arguments of why managers and directors could be excessively focused on the short term: *Roe*, *Missing the Target* (fn. 9), p. 117-118.

²¹ Arguing, for example, that short-termism is a problem: *EY* (fn. 7); *Willey* (fn. 18), p. 267 (“research suggests that [stock-market short-termism] results in a reduced trust in the stock market as a capital raising venue, and there appears to be a wealth transfer from future to current asset owners”) Arguing the opposite: *Roe*, *Missing the Target* (fn. 9), p. 2 (“the evidence for stock-market-driven short-termism is much weaker than is usually thought”).

²² See for studies finding evidence of short-termism: *John R. Graham/Campbell R. Harvey/Shiva Rajgopal*, “The economic implications of corporate financial reporting”, *Journal of Accounting and Economics* 2005, 3 (78% of CFOs surveyed responded that they would sacrifice long-term value to meet short-term earnings targets); *Martijn Cremers/Ankur Pareek/Zacharias Sautner*, “Short-Term Investors, Long-Term Investments, and Firm Value: Evidence from Russell 2000 Index Inclusions”, *Management Science* 2020, 4535 (an increase in the number of short-termist investors leads to a decrease in R&D investment); *Alex Edmans/Vivian W. Fang/Katharina Lewellen*, “Equity Vesting and Investment”, *Review of Financial Studies* 2017, 2230 (having more vested equity (which can be sold in the short term) is associated with a reduction in investments, which is in turn associated with positive earnings guidance, after which CEOs sell their shares); *Tomislav Ladika/Zacharias Sautner*, “Managerial Short-Termism and Investment: Evidence from Accelerated Option Vesting”, *Review of Finance* 2020, 305 (vesting of stock options leads to the elimination of investments, which boosts the stock price in the short term, after which CEOs sell their shares). See for a critical review of this empirical evidence: *Roe*, *Missing the Target* (fn. 9), p. 84-112.

rights suffices to convince many short-term investors to hold their shares for longer periods. Institutional investors and asset managers face significant barriers to obtaining loyalty voting rights, because the shares have to be held in registered form, which is especially costly for these type of investors.²³ The costs of obtaining loyalty voting rights are therefore significant, while the benefits are limited: institutional investors and asset managers often do not care very much about their voting rights, among others because they suffer from a free rider problem.²⁴ *Bebchuk, Cohen and Hirst* have shown that this is especially true for diversified investors like index funds.²⁵ Consistent with these arguments, the empirical evidence finds that loyalty voting rights are hardly used by institutional investors and asset managers and have no impact on the average holding periods of investors.²⁶ Institutional investors and asset managers also tend to vote against loyalty voting rights.²⁷

In the investor short-termism model, it seems therefore that loyalty voting rights can only claim to combat short-termism by redistributing power from short-termist institutional investors and asset managers to the broader class of long-term shareholders. This argument is subject to a general criticism of loyalty voting shares, namely that past holding periods are a very crude proxy for a long-term vision for the future, as investors with loyalty voting rights can still sell their shares at any time that they wish.²⁸ But more specifically, the reasons why the “silent majority” of long-term shareholders are passive, are not likely to change even if they or some of them acquire additional votes. It is therefore unclear how loyalty voting rights would translate into corporate behaviour through this channel (absent a change in the shareholder structure: see below).

²³ *Roe/Cenzi Venezze* (fn. 7), 488; *Chiara Mosca*, “Should Shareholders Be Rewarded for Loyalty: European Experiments on the Wedge between Tenured Voting and Takeover Law”, *Michigan Business & Entrepreneurial Law Review* 2019, 272. See also the comments of *Luca Garavaglia* at the ECGI Roundtable on loyalty shares, reported in: *Tom Vos*, ECGI Roundtable Report – Loyalty Shares (18 June 2018), https://ecgi.global/sites/default/files/events/ecgi_roundtable_report_on_loyalty_shares_by_tom_vos_0.pdf (last consulted 30 January 2023).

²⁴ *Roe/Cenzi Venezze* (fn. 7), 486. See also about the free rider problem of shareholders more generally: *Frank H. Easterbrook/Daniel R. Fischel*, *The economic structure of corporate law*, 1991, p. 66-67; *Bernard.S. Black*, “Agents Watching Agents: The Promise of Institutional Investor Voice”, *UCLA Law Review* 1992, 821-822.

²⁵ *Lucian A. Bebchuk/Alma Cohen/Scott Hirst*, “The Agency Problems of Institutional Investors”, *The Journal of Economic Perspectives* 2017, 89-112.

²⁶ *Mosca* (fn. 23), 270–272 (finding evidence that loyalty voting rights are not used by institutional investors and asset managers in Italy, but mostly used by controlling shareholders); *Becht/Kamisarenka et.al.* (fn. 2), 489 (finding no evidence of an effect of loyalty voting rights on average holding periods in France). See also our evidence on loyalty voting rights in Belgium in part 4.

²⁷ *Bajo/Barbi et al.* (fn. 13), 3 and 8; *Becht/Kamisarenka et.al.* (fn. 2), 486-487. See also our evidence on loyalty voting rights in Belgium in part 4.

²⁸ *Alex Edmans*, Response to the European Commission Study on Sustainable Corporate Governance, <https://alexedmans.com/wp-content/uploads/2020/10/European-Commission-Sustainable-Corporate-Governance.pdf> (last consulted 30 January 2023), p. 13-14; *Delvoie/Clottens* (fn. 4), 24; *Roe/Cenzi Venezze* (fn. 7), 484-485. Other authors argue that past holding periods are a reasonable proxy for the long-term orientation of an investor: *Mosca* (fn. 23), 260-261; *P. Alexander Quimby*, “Addressing Corporate Short-Termism Through Loyalty Share”, *Florida State University Law Review* 2013, 402.

Second, if one believes in the managerial short-termism model, loyalty voting rights could be defended if they strengthen the influence of long-term investors, so that they have more power to hold short-termist managers accountable. But upon second thought, it is again unclear how they would achieve this. Assuming a dispersed shareholder base, the problem is not that the shareholders as a class lack voting rights, but that agency costs prevent alignment by management with the long-term value maximization preference of the shareholders. Different types of dispersed shareholders (retail investors, institutional investors, asset managers etc.) may have different reasons for being passive, but the end result is that doubling their voting rights will not change that. Even assuming that the most long-term oriented shareholders among them will end up with some extra voting weight relative to the others, it is hard to see how that realistically impacts management behavior.

7. **Controlling shareholders and short-termism.** Upon closer inspection, the most realistic transmission mechanism for loyalty voting rights in both models is to create or strengthen the control of a controlling shareholder. A truly patient investor can build a controlling stake at lower levels of investment (albeit at the price of the waiting period) in order to capture the money that is supposedly left on the table by the short-termist orientation of the dominant constituency (institutional investors and asset managers in the investor short-termism model, managers in the managerial short-termism model). The empirical evidence also confirms that loyalty voting rights are in practice almost only used by controlling shareholders – or at least large reference shareholders.²⁹

From the perspective of encouraging long-term behaviour, controlling shareholders are not necessarily a bad thing, as they may help to combat short-termism: they hold a large stake in the long-term cash flows of the company, which gives them an incentive to create long-term value.³⁰ The private benefits of control that they enjoy may also “lock” them into their participation for the long-term.³¹ However, these controlling shareholders were holding their shares for the long term anyway, so why would introducing loyalty voting rights change

²⁹ *Mosca* (fn. 23), 270–272 (providing empirical evidence that loyalty voting rights are mostly used by controlling shareholders to strengthen their control in Italy); *Bajo/Barbi et al.* (fn. 13), 2 and 11 (finding that firms with a family controlling shareholder were more likely to introduce loyalty voting rights in Italy); *Belot/Ginglinger et al.* (fn. 13), p. 2 (finding that individual or family controlling ownership is positively associated with the likelihood of adopting loyalty voting rights in France, and that institutional ownership decreases after loyalty voting rights are introduced); *Lynne Dallas/Jordan M. Barry*, “Long-Term Shareholders and Time-Phased Voting”, *Delaware Journal of Corporate Law* 2016, 551 (finding that loyalty voting rights in the US mostly benefit insiders). See also further in part 4 for our evidence on the Belgian experience.

³⁰ *Vos*, SSRN (fn. 17), 13-14.

³¹ *Albert H. Choi*, “Concentrated Ownership and Long-Term Shareholder Value”, *Harvard Business Law Review* 2018. See also: *Vos*, SSRN (fn. 17), 15-16.

anything? One reason could be that the controlling shareholder could use the additional voting rights to further insulate the company from short-termist investors and more easily hold managers accountable for managerial short-termism. This is mainly relevant when the shareholder's voting rights are at a level where control can still be challenged, such as 20% of voting rights, which would become 33% of the voting rights if the controlling shareholder was the only shareholder to benefit from loyalty voting rights.

On the other hand, it is also possible that in some cases loyalty voting rights have a negative impact on the long-term nature of the controlling shareholder. A controlling shareholder could use the loyalty voting rights to keep their voting rights constant, while selling some of their shares. Thanks to the loyalty voting rights, the controlling shareholder can then hold a smaller financial stake in the future cash flow rights of the company. Because the cash flow rights are separated from the control rights, the controlling shareholder's incentive to extract private benefits of control increases.³² The extraction of private benefits may also lead to short-termist behaviour, for example if the controlling shareholder causes the company to cut investment to finance a dividend that will satisfy the controlling shareholder's personal consumption needs.³³ However, the fact that loyalty voting rights allow the controlling shareholder to reduce their equity participation is not necessarily all bad. For example, the company may be in need of additional financing to fund new long-term investments, but the controlling shareholder may block a capital increase if they are not able to participate and do not want to see their control reduced. In that case, loyalty voting rights can help the controlling shareholder to retain control, while the company raises new capital.³⁴

8. Risk of midstream adoption of loyalty voting rights. Loyalty voting rights therefore come with possible benefits and possible risks. The risks are particularly large when loyalty voting rights are introduced in the "midstream phase", *i.e.*, while the company is already listed. At the moment of the IPO, investors can freely decide whether to invest in a company with loyalty voting rights, but this is not necessarily the case in the midstream phase. The risk is that controlling shareholders use their control over the general meeting to adopt loyalty voting rights and strengthen their position, even when this is done for reasons of value extraction rather than

³² *Roe/Cenzi Venezia* (fn. 7), 477-478 (with regards to loyalty voting rights); *Lucian A. Bebchuk/Reinier Kraakman/George Triantis*, *Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights*, in: Randall K. Morck (ed.), *Concentrated Corporate Ownership*, 2000, p. 445 et seq. (with regards to dual class share structures).

³³ See for the argument that private benefits of control can lead to short-termism: *Vos*, SSRN (fn. 17), 14-15.

³⁴ *Roe/Cenzi Venezia* (fn. 7), 477; *Dallas/Barry* (fn. 29), 548 and 575.

value creation. This risk of inefficient midstream adoptions of loyalty voting rights increases when legislators make it easier to adopt loyalty voting rights in the midstream, for example by lowering the threshold for amending the articles of association to introduce loyalty voting rights (such as in Belgium, from 75% to two thirds - see further in part 3) or by making loyalty voting rights the default rule of which companies must opt out with a supermajority (such as in France with the *Loi Florange*).³⁵ This implies that loyalty voting rights can be adopted even if most minority shareholders vote against them, considering the large participation of controlling shareholders, in combination with normal degrees of shareholder absentia at general meetings.

9. **Conclusion.** The analysis above shows that loyalty voting rights could be expected to in practice mainly be used by controlling shareholders as a control-enhancing mechanism. Below in part 4, we also provide empirical evidence consistent with this argument. We also argue that a control-enhancing mechanism can be useful for combatting short-termism, provided that the controlling shareholder is long-term oriented. In fact, the other theories of how loyalty voting rights can combat short-termism are implausible. However, loyalty voting rights come with the same disadvantages as other control-enhancing mechanisms: the separation of cash flow and voting rights increases the incentives for the extraction of private benefits of control. Hence, additional shareholder protection, especially against the introduction of loyalty voting rights in the midstream phase, may be warranted.

2.2. *LOYALTY VOTING RIGHTS AS A TOOL TO ENCOURAGE IPOs?*

10. **Encouraging IPOs.** As mentioned in the introduction, combatting short-termism is not the only rationale for introducing loyalty voting rights. Legislators have also introduced loyalty voting rights to encourage companies to list on national stock exchanges, for example through an IPO.³⁶ The idea is that founders of companies are more likely to list the shares of the company (allowing them to sell some of their shares and diversify their wealth) if they are able to retain control over their company. This desire to retain control may be driven by financial motives, but also by the power, prestige and self-satisfaction that may be associated with

³⁵ See for a discussion of this issue: Tom Vos, “Are loyalty voting rights efficient? - some reflections on the Belgian proposals”, <https://corporatefinancelab.org/2018/07/13/are-loyalty-voting-rights-efficient/> (last consulted 30 January 2023).

³⁶ See for this rationale: Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen. Deel 1, *Parl. St.* Kamer 2017-18, No. 3119/001, 208 (stating that encouraging IPOs was one of the rationales for the Belgian legislator); *García de Enterría* (fn. 7) (stating that encouraging IPOs was one of the rationales for the Spanish legislator).

control.³⁷ If founders can more easily take their companies public, this may also encourage start-up activity.³⁸

Loyalty voting rights can accomplish this goal by boosting the voting rights of the founders, who will typically be long-term shareholders. This can become important if they want to sell some shares or if the company needs to issue additional shares to finance expansion. The same result can be accomplished by other types of multiple voting rights, such as dual class share structures.³⁹ For example, in the US, 30% of all IPOs between 2017 and 2019 provided for a dual class share structure.⁴⁰

Existing empirical evidence has found that loyalty voting rights in France are used in 50% of the IPOs between 2010 and 2014 (before the *Loi Florange*) and 61.4% of IPOs between 2014 and 2018 (after the *Loi Florange*).⁴¹ In Italy, loyalty voting rights have also been used in 6 IPOs.⁴² However, neither of these studies has investigated whether the possibility of loyalty voting rights has led to an increase in the number of IPOs. In Belgium, this has clearly not been the case, as not a single IPO has made use of loyalty voting rights, as we discuss further in part 4.

The benefit of loyalty voting rights in stimulating IPOs should be balanced against the possible risk of increased incentives for the extraction of private benefits, as already discussed above. We do not take a stance in how this balance should be struck by legislators. Investors can protect themselves against the risks associated with loyalty voting rights by not investing in IPOs of companies that have such a legal provision in their articles of association, or only at a discounted price. We do note that if a legislator wants to allow loyalty voting rights to stimulate IPOs, this can be accomplished without compromising the protection of minority shareholders against inefficient midstream adoptions of loyalty voting rights. For example, a requirement that loyalty voting rights are approved by a majority of the minority shareholders does not raise serious obstacles to using loyalty voting rights at the moment of the IPO, when such approval is relatively easy to obtain.

³⁷ *Roe/Cenzi Venezze* (fn. 7), 503.

³⁸ *Roe/Cenzi Venezze* (fn. 7), 502-504.

³⁹ *Dallas/Barry* (fn. 29), 549.

⁴⁰ *Dhruv Aggarwal/Ofer Eldar/Yael V. Hochberg/Lubomir P. Litov*, “The rise of dual-class stock IPOs”, *Journal of Financial Economics* 2022, 123 and 127.

⁴¹ *Becht/Kamisarenka et.al.* (fn. 2), 480.

⁴² *Bajo/Barbi et al.* (fn. 13), 8.

3. THE BELGIAN LOYALTY VOTING RIGHTS REGIME

3.1. INTRODUCTION

11. **Context.** In 1934 the Belgian legislature⁴³ prohibited multiple voting rights in the two most used business company forms (at that time the “*naamloze vennootschap*” (NV) / “*société anonyme*” (SA) and the “*besloten vennootschap met beperkte aansprakelijkheid*” (BVBA) / “*société privée à responsabilité limitée*” (SPRL)).⁴⁴ “One share, one vote” has been a leading principle in these corporate forms ever since. However, in 2019 the new Belgian Code of Companies and Associations ended this long-standing prohibition. Since then, the freedom in non-listed companies to organise multiple voting rights in any shape or form is virtually unlimited.⁴⁵ In listed companies, however, contractual freedom is more restricted.⁴⁶ Listed companies were relegated to an alternative system of loyalty voting rights, in which shareholders that comply with certain loyalty conditions are granted a double voting right. It is easy to see that the French and Italian rules on loyalty voting shares have been an important source of inspiration.

12. **Overview.** We first describe the “loyalty conditions” in order to benefit from double voting right (*infra* n° 3.2). We then give an overview of the basic principles with regard to acquiring and losing the double voting right (*infra* n° 3.3). We conclude that the regime so created benefits insiders on key dimensions (*infra* n° 3.4).

3.2. LOYALTY CONDITIONS

13. **Conditions.** In listed companies, the articles of association may grant to fully paid up shares which have been uninterruptedly registered for at least two years in the name of the same shareholder, a double voting right in comparison to shares with the same par value (art. 7:53, §1, first paragraph, first sentence BCCA). We briefly discuss these conditions.

⁴³ KB No. 36 of 31 October 1934 betreffende het stemrecht in de naamloze vennootschappen (Royal Decree on the voting rights in public limited liability companies).

⁴⁴ For a more detailed overview of the Belgian history of multi voting rights and one share one vote principle: *Carl Clottens*, Proportionaliteit van stemrecht en risico in kapitaalvennootschappen, 2012, p. 35-44, mn. 5-17; *Jeroen Delvoie/Steven Declercq*, From zero to hero: meervoudig stemrecht in NV en BV na het WVV, in: Hans De Wulf/Marieke Wyckaert (eds.), Het WVV doorgelicht, 2021, p. 250-253, mn. 2-4.

⁴⁵ As long as at least one share is entitled at least one vote (art. 7:46 CCA).

⁴⁶ Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen. Deel 1 (Draft bill introducing the Code of Companies and Associations and miscellaneous provisions. Part I), *Parl. St.* Kamer 2017-18, No. 3119/001, 207.

14. **Two years.** The most important criterion is of course the two-year loyalty term during which the shares must be uninterruptedly registered on the name of the same shareholder. The critical date is thus the registration in the share register, even if this date is prior to the date of adoption of loyalty voting rights.⁴⁷ In other words, past holding periods are “grandfathered” at the time of adoption. It is irrelevant that the actual transfer of ownership may have occurred some time prior to registration.⁴⁸ While it is clear that the loyalty term cannot be shortened to less than two years, legal authors disagree on the question whether the loyalty term can be extended to more than two years.⁴⁹

15. **Listed companies.** The loyalty voting regime of article 7:53 BCCA is available for listed companies (*i.e.*, companies of which shares, profit-sharing certificates or certificates relating thereto are admitted to a regulated market),⁵⁰ as well as non-listed companies of which the securities are admitted to a multilateral trading facility designated by the Royal Decree (*i.e.*, Euronext Growth or Euronext Access).⁵¹ Non-listed companies can use their broad contractual freedom with regard to multiple voting rights in general to create loyalty voting rights similar to the listed company regime, but in such case, they cannot benefit from the lower qualified majority available for loyalty voting rights in listed companies (*infra* n° 16).⁵²

16. **Articles of association.** Unlike in French law,⁵³ under Belgian law loyalty voting rights are not granted by default. The adoption of loyalty voting rights requires an amendment of the articles of association. Contrary to the general rule for amendment of the articles, which requires a majority of three-quarters of the votes cast⁵⁴, the midstream adoption of loyalty voting rights in listed companies can be decided by a two-thirds majority (except if the articles of association

⁴⁷ *Carl Clottens/Joris De Wolf*, “Het loyauteitsstemrecht in het Wetboek van vennootschappen en verenigingen”, *Tijdschrift voor Rechtspersoon en Vennootschap - Revue pratique des sociétés* 2019, 157-158, mn. 17; *Carl Clottens/Steven Declercq*, “Commentaar bij artikel 7:53 WVV”, *Vennootschappen en verenigingen: artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* 2021, 8, mn. 8; *Delvoie/Declercq*, *Het WVV doorgelicht* (fn. 44), p. 277, mn. 34.

⁴⁸ *Clottens/Declercq* (fn. 47), 8, mn. 9; *Delvoie/Declercq*, *Het WVV doorgelicht* (fn. 44), p. 277, mn. 34.

⁴⁹ *Pro: Clottens/De Wolf* (fn. 47), 166-167, mn. 32; *Clottens/Declercq* (fn. 47), 8, mn. 8; *Delvoie/Declercq*, *Het WVV doorgelicht* (fn. 44), p. 279, mn. 34. *Contra: Arnaud Coibon/Jérémy Filbiche*, “Le droit de vote double dans les sociétés cotées. Analyse comparatiste de quelques implications en matière d’OPA, de fusion ou scission et d’introduction en bourse”, *Tijdschrift voor Rechtspersoon en Vennootschap - Revue pratique des sociétés* 2019, 218, mn. 33.

⁵⁰ Art. 1:11 BCCA.

⁵¹ Art. 5, sixth paragraph Law of 1 April 2007 on the public take-over bids.

⁵² *André Pierre André-Dumont/Laurent Cloquet*, 7 – L’assemblée générale de la SRL, in: André-Pierre André Dumont/Thierry Tilquin (eds.), *La société à responsabilité limitée*, 2019, p. 218, mn. 38; *Clottens/De Wolf* (fn. 47), 154, mn. 9; *Clottens/Declercq* (fn. 47), 6, mn. 4; *Jeroen Delvoie/Steven Declercq*, “De invoering van meervoudig stemrecht en loyauteitsstemrecht in bestaande vennootschappen”, *Tijdschrift voor Rechtspersoon en Vennootschap - Revue pratique des sociétés* 2019, 135-136, mn. 11; *Delvoie/Declercq*, *Het WVV doorgelicht* (fn. 44), p. 256, mn. 7; *Frank Hellemans/Tom Vos*, *Spelen met stemrechten in de BV en NV*, in: Sofie Cools (ed.), *Vennootschapsrecht. reeks Themis No 117*, 2021, p. 106-108, mn. 13.

⁵³ See art. L22-10-46 Code de commerce (Commercial Code).

⁵⁴ Art. 7:153, fourth paragraph CCA.

would specifically provide for a higher majority).⁵⁵ If loyalty voting rights are introduced in the framework of an IPO, the amendment is technically adopted prior to the IPO and thus does not benefit from the lower majority.⁵⁶ The amendment of the loyalty voting regime as well as its abolition⁵⁷ benefit from the same lowered majority as the midstream introduction in listed companies.⁵⁸

17. **Fully paid-up.** Only fully paid-up shares can grant double voting rights. This deviates from the general rule that the full payment of a contribution is in principle⁵⁹ not a condition for the shareholder to exercise its shareholders rights (including the right to vote).⁶⁰

18. **Shares.** The loyalty voting regime is only open for shares. Profit-sharing certificates (“*winstbewijzen*” / “*parts bénéficiaires*”) may not be granted more than one vote per profit-sharing certificate.⁶¹ Moreover, loyalty voting rights must be applicable to *all* shares. This means that non-voting shares will also be granted a double voting right in the cases in which the law imposes that they can nevertheless vote.⁶²

19. **Registered shares.** Only registered shares are eligible for loyalty voting rights, while dematerialised shares are not. However, it is not required that the person who exercises the voting right in practice has been registered in the share register (for two years). Proxyholders may exercise loyalty voting rights of the shareholder they represent.⁶³ The same goes for situations in which the voting rights are exercised in a more permanent manner by a non-owner, such as usufructuaries and pledgees.⁶⁴

3.3. ACQUISITION AND LOSS OF LOYALTY VOTING RIGHTS

20. **Principle.** The critical date for the calculation of the loyalty term is the date of registration in the share register. This date can be easily verified by the company. Loyalty voting

⁵⁵ Art. 7:53, §1, first paragraph CCA.

⁵⁶ *Clottens/Declercq* (fn. 47), 23, mn. 22; *Delvoie/Declercq*, TRV-RPS 2019 (fn. 52), 148, mn. 36.

⁵⁷ Art. 7:53, §1, fourth paragraph CCA.

⁵⁸ *Clottens/De Wolf* (fn. 47), 168, mn. 36; *Clottens/Declercq* (fn. 47), 23, mn. 23; *Delvoie/Declercq*, TRV-RPS 2019 (fn. 52), 145, mn. 32.

⁵⁹ Only if the shareholder fails to make duly called and payable payments will its voting right be suspended (art. 7:54 CCA).

⁶⁰ Art. 7:4 CCA.

⁶¹ Art. 7:58, second paragraph CCA.

⁶² *Clottens/De Wolf* (fn. 47), 155, mn. 12; *Clottens/Declercq* (fn. 47), 7, mn. 7; *Delvoie/Declercq*, Het WVV doorgelicht (fn. 44), p. 275, mn. 31. Non-voting shares regain voting rights in circumstances such as (i) the modification of class rights, (ii) the conversion of the company, (iii) a cross-border merger in which the company is dissolved; and (iv) a cross-border transfer of the registered office of the company.

⁶³ *Clottens/De Wolf* (fn. 47), 157, mn. 16; *Clottens/Declercq* (fn. 47), 8, mn. 9.

⁶⁴ *Clottens/De Wolf* (fn. 47), 8-9, mn. 9; *Delvoie/Declercq*, Het WVV doorgelicht (fn. 44), p. 277, mn. 33.

rights are forfeited due to (i) conversion of the shares in dematerialised shares (“dematerialisation”), or (ii) the transfer of ownership of the shares.⁶⁵ Although the principle seems rather straightforward at first glance, it gives rise to a number of questions.⁶⁶ The law further complicates things by creating exceptions in both directions: (i) shares which are not yet registered for two years under the name of the same shareholder still granting loyalty voting rights (“constructive loyalty”) or (ii) shares not granting loyalty voting rights although they are registered for more than two years under the name of the same shareholder (“constructive loss of loyalty”). We briefly discuss these exceptions in turn. As one would expect, they give rise to their own interpretation difficulties⁶⁷, administrative burdens and resulting uncertainties.

21. **First exception: constructive loyalty** . First, bonus shares that are issued as a result of a capital increase by means of a conversion of reserves will benefit from loyalty voting rights as from their issuance if and to the extent the shareholder already benefits from loyalty voting rights.⁶⁸ The law remains ambiguous whether the same applies to bonus shares issued because of other “formal capital increases”, *e.g.*, incorporation of issue premiums, and whether the bonus shares also benefit from the running loyalty term. We believe that both questions should be answered positively.⁶⁹

Second the merger or division of the listed company with loyalty voting rights will have no impact on the existing loyalty voting rights if the articles of association of the acquiring company provide for the loyalty voting rights regime.⁷⁰ This means that the new shares issued as a result of the merger or division, immediately benefit from the loyalty voting rights even though they have not been issued for at least two years.

⁶⁵ Art. 7:53, §2, first paragraph CCA.

⁶⁶ See *Clottens/Declercq* (fn. 47), 12-15, mn. 14-16. A few examples: Are loyalty voting rights forfeited as from the request for dematerialisation or only after the dematerialisation is implemented? Is the mere transfer of ownership the triggering event or is it the registration of the transfer? What happens to the loyalty voting rights in case of the division of undivided co-ownership? What happens to the loyalty voting rights in case of a partial transfer or dematerialisation if only part of the shares benefit from loyalty voting rights: “first in, first out” (*i.e.*, the transfer or dematerialisation is first imputed on the earliest registered (“oldest”) shares), “last in, first out” (*i.e.*, case the transfer or dematerialisation is first imputed on most recently registered (“youngest”) shares), proportionally (*i.e.*, transfer or dematerialisation is done *pro rata*) ...?

⁶⁷ *Clottens/De Wolf* (fn. 47), 15-22, mn. 17-21.

⁶⁸ Art. 7:53, §1, fourth paragraph CCA.

⁶⁹ *Clottens/Declercq* (fn. 47), 11, mn. 12.

⁷⁰ Art. 7:53, §2, fifth paragraph CCA.

Third, the law stipulates that certain transfers as a result of inheritance or divorce do not result in losing the loyalty voting rights or the benefit of the running loyalty term.⁷¹ The new owners retain (but technically acquire) the double voting rights.

Fourth, the same goes for “intragroup” transfers between companies controlled by the same shareholder(s) or between the company and its controlling shareholder(s).⁷²

Finally, transfers in connection with certification and decertification⁷³ of shares will in principle not result in the loss of loyalty voting rights.⁷⁴

22. **Second exception: constructive loss of loyalty.** If the loyalty shares are held by a *company*, any change of control over such company will be considered a transfer of ownership, even if the ownership of the shares themselves does not change.⁷⁵ Control includes both control in law and in fact, both direct and indirect control and both exclusive and joint control.⁷⁶ However, as an exception to the exception, a change of control will not result in the loss of loyalty voting rights if the control shifts to the spouse, the legal cohabitant or one or more heirs of the controlling shareholder(s).

3.4. CONCLUSION: BELGIAN REGIME FAVOURS INSIDERS

23. **Conclusion.** The Belgian regime clearly favours controlling shareholders and other insiders along key dimensions. The lower majority for the adoption of loyalty voting rights is the clearest example. Assuming a normal attendance rate of 65%, a block of 43,34% allows a controlling shareholder to push through loyalty voting rights regardless of the other votes. Moreover, the controlling shareholder will immediately benefit from the past holding period and thus (in the typical case) acquire the loyalty voting rights right away. His control is enhanced immediately. Furthermore, the fact that only registered shares are eligible for loyalty voting rights favours insiders, as most other shareholders do not complete the additional formalities to register their shares in the share register. In addition, the favourable treatment of

⁷¹ Art. 7:53, §2, second paragraph, first sentence CCA.

⁷² Art. 7:53, §2, second paragraph, second sentence CCA.

⁷³ Certification is a legal act whereby a shareholder transfers its shares to a legal person (the *administratiekantoor*) in consideration for certificates entitling the holder to all patrimonial rights of the underlying shares. The voting rights (and other membership rights) of the shares will be exercised by the *administratiekantoor*. Decertification is the reverse: exchanging the certificates for the underlying shares.

⁷⁴ Art. 7:53, §2, fourth paragraph, first sentence CCA.

⁷⁵ Art. 7:53, §2, third paragraph CCA.

⁷⁶ Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen. Deel 1 (Draft bill introducing the Code of Companies and Associations and miscellaneous provisions. Part I), *Parl. St.* Kamer 2017-18, No. 3119/001, 209.

certification structures, intra-family and intra-group transfers are tailor-made for typical Belgian control situations. Finally, the Belgian legislator added a provision that the double voting rights do not count towards the threshold of 30% of the securities with voting rights.⁷⁷ This makes it easier for controlling shareholders to make use of loyalty voting rights to increase their voting rights in the company, without triggering the mandatory bid rule.

4. *EMPIRICAL EVIDENCE ON LOYALTY VOTING RIGHTS IN BELGIUM*

4.1. *METHODOLOGY*

24. **Sample.** To assess the practice of loyalty voting rights in Belgium, we hand-collected data for all companies that are incorporated in Belgium and listed on Euronext Brussels (109 companies).⁷⁸ The data was collected in November 2022 and retrieved from multiple public sources. We identified the companies that adopted loyalty voting rights by looking at the articles of association that are available on the company's website. We also collected data on the current shareholder structure for companies with and without loyalty voting rights. For companies without loyalty voting rights, we collected data on the shareholder structure in November 2022 by analysing the transparency notifications published on the website of the Belgian financial supervisor, the Financial Services and Markets Authority ('FSMA').⁷⁹ For companies with loyalty voting rights, we collected data on the shareholder structure at two distinct moments: before the adoption of the loyalty voting rights (based on the most recent annual report published before the relevant extraordinary general meeting)⁸⁰ and in November 2022 (based on the information of the company's website).⁸¹

25. **Insider.** For the estimation of the shareholder structure of all companies, we only coded the data on 'insider' ownership. A shareholder is to be considered a 'significant shareholder' or 'insider' if it owns more than 10% of the voting rights or if it acts in concert with other

⁷⁷ Article 11 of the Bill of 23 March 2019 Introducing the Code of Companies and Associations and miscellaneous provisions (Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen), Belgian Official Journal 4 April 2019.

⁷⁸ We excluded the National Bank of Belgium from the sample, because it is not comparable to the other companies due to its unique function (Belgium's central bank and financial supervisor).

⁷⁹ See <https://www.fsma.be/nl/stori>. However, for some companies the data on the website of the FSMA was not up to date and for those, we alternatively used the data on their website or (if unavailable) the data in their latest annual report.

⁸⁰ This data was further corrected for changes in the period between the annual report and the extraordinary general meeting by using the information of the relevant transparency notifications on the website of the FSMA.

⁸¹ For this analysis, we could not rely on the transparency notifications published on the website of the FSMA given that it only reports on the voting rights and not on the equity participation of the largest shareholders. However, most companies publish on their website an updated ownership structure in which they indicate both the equity participation and the voting rights. For companies that do not provide such information, we alternatively used the data in their latest (semi-)annual report or (if unavailable) personally contacted the company.

shareholders and they jointly own more than 10% of the voting rights. In order to calculate the voting rights and the equity participation of these insiders, we excluded the treasury shares and shares held by subsidiaries from the numerator as the votes of such shares are suspended. However, we did not exclude these shares from the denominator.⁸² Furthermore, we assumed that the voting rights of insiders are equal to their number of shares in case loyalty voting rights are not (yet) adopted.⁸³

4.2. *FEATURES OF COMPANIES WITH LOYALTY VOTING RIGHTS*

26. **LVS companies.** In our sample, 11 companies (about 10% of all companies) adopted loyalty voting rights between 2019 (when loyalty voting rights first became possible) and November 2022 (see figure 1 below). In addition, we note that two other companies outside the sample (Sioen Industries and FNG) adopted loyalty voting rights at some point, but these companies are no longer active on Euronext Brussels due to respectively a delisting and a bankruptcy procedure.⁸⁴ On 23 May 2023, after the data collection for this article was concluded, Miko NV also introduced loyalty voting rights. This company was not included in the data presented below, but it follows the same trends that we have identified below. Furthermore most companies in our sample introduced loyalty voting rights in 2019 and 2020, while only one adoption took place since. All of the companies with loyalty voting rights were already listed on Euronext Brussels (midstream phase adoptions) and none of the IPOs of Belgian companies that occurred since April 2019 (13 in total) deviated from the “one share, one vote” principle. There is only the particular case of the aborted IPO of the football club Club Brugge, in which loyalty voting rights would have been present at the moment of the IPO. Another interesting finding is that in the majority of companies without loyalty voting rights the insiders are able to ‘easily’ adopt loyalty voting rights, but have not (yet) decided to do so.⁸⁵ This finding in combination with the small number of adoptions illustrates that there was no rush among Belgian listed companies to adopt loyalty voting rights.

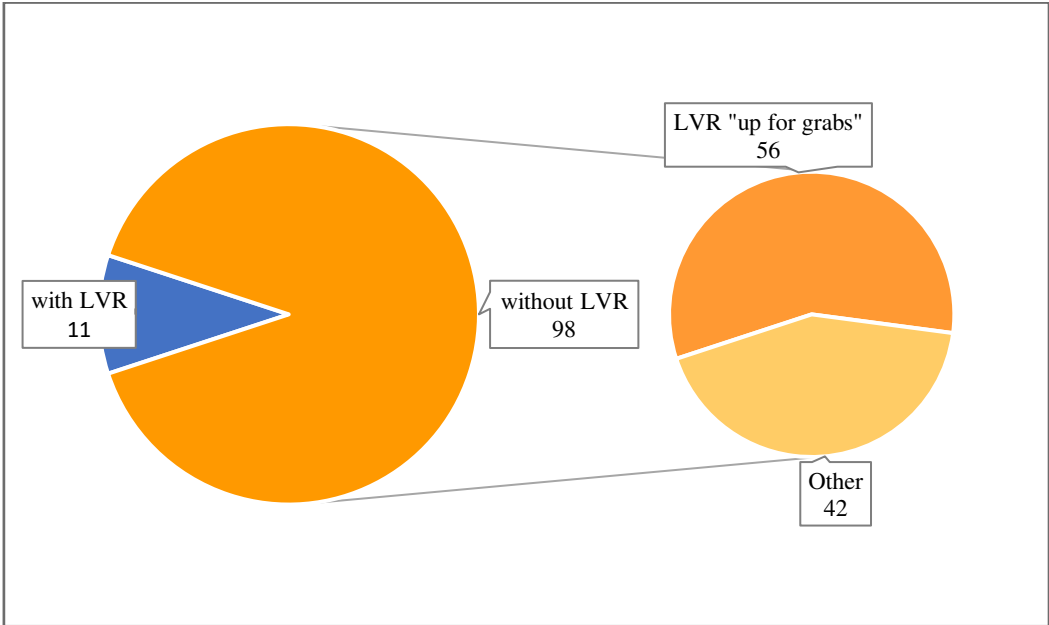
⁸² This was done for practical reasons: companies are obliged to report the denominator (which is the total number of voting rights) in order to calculate the shareholder structure, but do not exclude the suspended voting rights of these shares in their reports. This does not distort the analysis materially, because the number of treasury shares is typically quite limited.

⁸³ This is a reasonable assumption because multiple voting rights are prohibited for Belgian listed companies and because shares without voting rights are not used in practice by listed companies.

⁸⁴ These companies are not part of the sample. However, we included their data for the comparison of the shareholder structure of companies with and without loyalty voting rights (table 1) and for the analysis of the shareholder structure prior to and the voting results of the extraordinary general meeting aimed at approving loyalty voting rights (figure 2 and table 2, respectively).

⁸⁵ The adoption of loyalty voting rights is considered to be ‘easy’ when the voting rights of the insiders are sufficient to obtain the necessary majority given a ‘normal’ attendance rate of 65% (i.e. insiders need to control at least 43,33% of all voting rights).

Figure 1: The usage of loyalty voting rights among Belgian listed companies. The figure shows the number of Belgian companies with and without loyalty voting rights in our sample. For the companies without loyalty voting rights, it is identified if loyalty voting rights can be adopted with only the support of the insiders given a ‘normal’ attendance rate of 65% (‘LVR “up for grabs”’).



27. **Shareholder structure.** Table 1 below compares the shareholder structure of companies with loyalty voting rights prior to the adoption with the shareholder structure of companies without loyalty voting rights as of November 2022 (when our data collection ended). The data show that companies that adopted loyalty voting rights have on average a slightly more concentrated ownership structure (average voting rights of all insiders 51,13% versus 46,34%). The difference is marginally larger if we only include the voting rights of the largest insider (47,54% versus 40,47%). Moreover, the percentage of companies in which the voting rights of all insiders exceed the 25% threshold is slightly larger for the group of companies with loyalty voting rights (84,62% versus 81,63%). In case of a threshold of 50%, the difference becomes more notable although not very large (61,54% versus 46,94%). These results indicate that companies that adopted loyalty voting rights generally have a concentrated shareholder structure, slightly more so than the average.

Table 1: Comparison shareholder structure of companies with and without loyalty voting rights. The table reports the average voting rights/equity participation of the (largest) insiders in companies with loyalty voting rights (status before the adoption) and companies without loyalty voting rights (status November 2022). The percentage of voting rights and equity participation is assumed to be equal. The sample of companies with loyalty voting rights includes both Sioen Industries (currently delisted) and FNG (currently in bankruptcy procedure).

	Companies with LVR (13)	Companies without LVR (98)	Difference
Average voting rights of all insiders	51,13%	46,34%	4,79%
Average voting rights of largest insider	47,54%	40,47%	7,07%
% companies with voting rights of all insiders > 25%	84,62%	81,63%	2,99%
% companies with voting rights of all insiders > 50%	61,54%	46,94%	14,60%

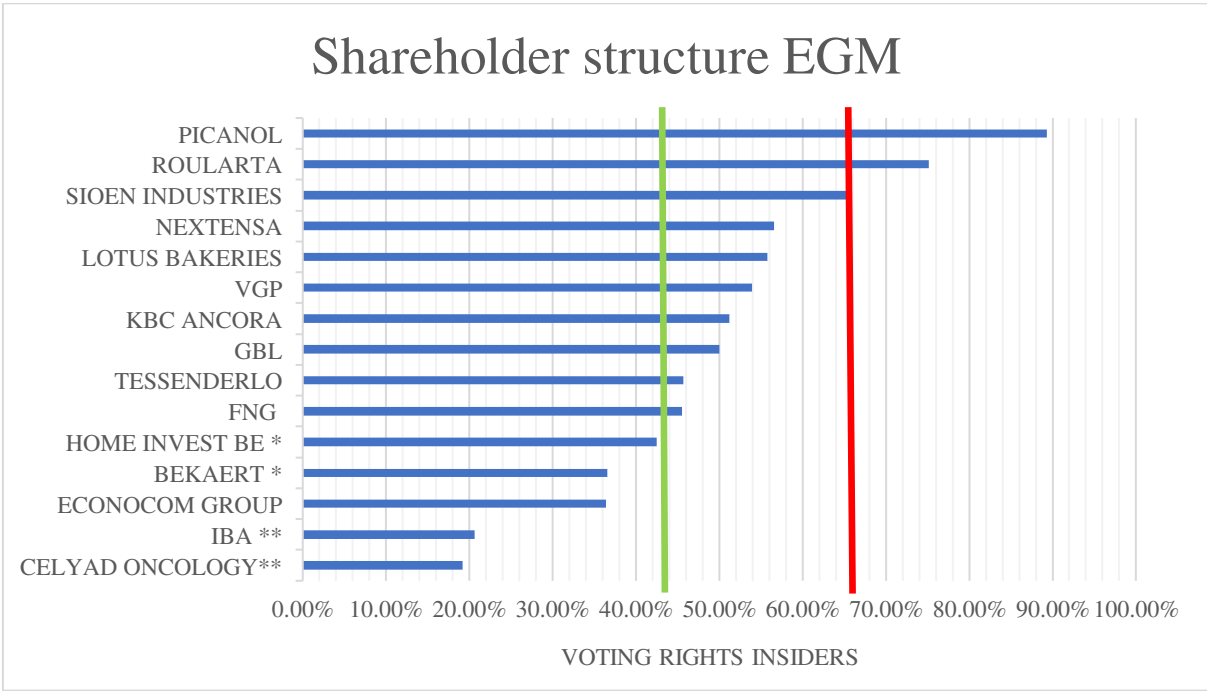
Figure 2 below provides information on the individual ownership structure of the companies with loyalty voting rights prior to the adoption and includes the data of two companies that failed in their attempt to introduce loyalty voting rights (marked with an asterisk).⁸⁶ It also illustrates the required majority given a ‘normal’ attendance rate of 65%⁸⁷ (green line) and a theoretical attendance rate of 100% (red line). The data make clear that in most companies the votes of the insiders exceed the green line, indicating that the insiders’ votes were *ex ante* sufficient to adopt loyalty voting rights given a normal attendance rate. Interesting to note is that out of the five companies below the green line, two companies (marked with *) failed to obtain the necessary majority and two other companies (marked with **) were only able to adopt loyalty voting rights after a second extraordinary general meeting for lack of quorum at the first.⁸⁸ This suggests that it is more difficult to introduce loyalty voting rights in companies with lower levels of insider ownership.

⁸⁶ To our knowledge, these were the only two Belgian listed companies that voted on the adoption of loyalty voting rights (NV Bekaert SA and Home Invest Belgium) and did not obtain the necessary majority. The shareholders of Exmar also put such resolution on the agenda of their extraordinary general meeting, but the resolution was in the end adjourned.

⁸⁷ An attendance rate of 65% of all shares can be considered normal given prior empirical evidence and given our own findings presented in table 2. See for prior empirical evidence on Belgian listed companies: *Christophe Van der Elst*, “Empirisch onderzoek naar de benoeming van bestuurders van genoteerde vennootschappen”, Tijdschrift voor Rechtspersoon en Vennootschap - Revue pratique des sociétés 2017, 633 (average attendance rate varied between 62 and 65%).

⁸⁸ See article 7:153, third paragraph CCA.

Figure 2: Shareholder structure before adoption of loyalty voting rights. The figure reports the sum of the voting rights of all insiders at the moment of the extraordinary general meeting aimed at approving loyalty voting rights. The green and red line indicate the necessary voting majority given an attendance rate of respectively 65% and 100% of all shares. Companies in which shareholders rejected the resolution concerning loyalty voting rights, are marked with *. Companies that needed a second extraordinary general meeting for lack of quorum at the first (article 7:153 CCA), are marked with **.



28. **Voting results.** In line with these findings, table 2 below reports the individual voting results of the extraordinary general meetings.⁸⁹ On average, 63,26% of the capital was represented at the meeting and almost 85% of all votes were cast in favour of the resolution to adopt loyalty voting rights. The data further suggest that the favourable two-thirds majority, which deviates from the classic three-fourths majority, had very little impact on the outcome of the voting process (with the exception of IBA). Interesting to point out is that on average 54,82% of the votes cast by the ‘non-insiders’ (i.e. institutional and retail investors) were against the adoption. In fact, only in three cases would loyalty voting rights have been adopted on the vote of the non-insiders.⁹⁰ More generally, the data indicate that loyalty voting rights are mainly adopted in companies that already have a concentrated ownership structure and that non-insiders generally vote against their introduction.

⁸⁹ The data used in table 2 can be found in the minutes of the extraordinary general meeting that are published on the company’s website.
⁹⁰ The three companies are Sioen Industries, VGP and FNG. However, it should be noted that the result for VGP is strongly influenced by the low attendance rate of non-insiders (about 14,5% of all non-insiders) and by the presence of a party related to one of the insiders which itself is not considered to be an insider under our methodology (voting rights < 5%).

Table 2: Voting results of extraordinary general meeting. The table shows the voting results of the resolution to adopt loyalty voting rights, as reported by the minutes of the extraordinary general meeting. To calculate ‘(the) outcome without (the) votes (of) insiders’, we excluded the votes of insiders both in the numerator and denominator and recalculated the majority.⁹¹ * indicates that the resolution was rejected. ** marks that there was a second extraordinary general meeting required.

Name company	Voting rights insiders (%)	Capital represented (%)	Voting results			Outcome		Outcome without votes insiders (%)
			For (%)	Against (%)	Abstained (%)	2/3 majority	if 3/4 majority	
Bekaert*	36,52	60,85	61,29	38,59	0,12	Fail	Fail	3,18 (Fail)
Celyad Oncology**	19,22	31,94	75,86	22,12	2,01	Pass	Pass	41,47 (Fail)
Econocom Group	36,40	60,36	78,02	21,98	0,00	Pass	Pass	44,62 (Fail)
FNG	45,54	71,34	98,37	1,63	0,00	Pass	Pass	95,49 (Pass)
GBL	50,03	78,50	85,72	14,27	0,01	Pass	Pass	60,66 (Fail)
Home Invest BE*	42,51	51,45	59,88	40,12	0,00	Fail	Fail	<i>Unknown</i>
IBA**	20,59	49,73	73,33	26,67	0,00	Pass	Fail	54,49 (Fail)
KBC Ancora	51,20	62,04	84,06	15,94	0,00	Pass	Pass	8,81 (Fail)
Lotus Bakeries	55,81	60,62	94,40	5,60	0,00	Pass	Pass	29,45 (Fail)
Nextensa	56,59	68,82	87,20	11,92	0,88	Pass	Pass	29,42 (Fail)
Picanol	89,34	89,38	100,00	0,00	0,00	Pass	Pass	<i>Not relevant</i>
Roularta	75,15	71,57	99,99	0,01	0,00	Pass	Pass	<i>Not relevant</i>
Sioen Industries⁹²	65,25	67,92	97,01	2,99	0,00	Pass	Pass	68,26 (Pass)
Tessenderlo	45,67	63,78	78,36	21,64	0,00	Pass	Pass	23,78 (Fail)
VGP	53,97	60,66	98,07	1,93	0,00	Pass	Pass	82,50 (Pass)
Average	49,59	63,26	84,77	15,03	0,20	/	/	45,18

⁹¹ For Picanol and Roularta, the number of represented non-insiders was almost nonexistent and as a result ‘the outcome without the votes of the insiders’ is not relevant. For Home Invest Belgium, the data indicate that one of the two insiders was not present at the extraordinary general meeting or voted against the resolution to adopt loyalty voting rights. Given that it is not known which insider was not present/voted against the resolution, we cannot precisely estimate ‘the outcome without the votes of the insiders’.

⁹² Sioen Industries used to stipulate in its articles of association that the voting rights of any shareholder at the (extraordinary) general meeting were limited to 35% of the voting rights of all shares within the company. Given that the voting rights of the (only) insider were larger than 35%, we adjusted the calculation for the ‘voting results’, ‘outcome’ and ‘outcome without votes insiders’ accordingly.

4.3. *USAGE OF LOYALTY VOTING RIGHTS*

29. **Usage.** Table 3 below shows the shareholder structure as well as the usage of loyalty voting rights by insiders as of November 2022. It is clear from the data that insiders are the main beneficiaries of loyalty voting rights: on average, 94% of all shares with loyalty voting rights in a given company are held by insiders. In most companies, non-insiders do not seem to meaningfully benefit from the additional voting rights. Only the non-insiders of IBA and GBL hold more than 10% of the shares with loyalty voting rights (respectively 26,20% and 13,22%). Furthermore, insiders' loyalty voting rights create an average wedge (i.e. the difference between the insiders' voting rights and cashflow rights) of almost 11 percentage points. The wedge varies greatly across the companies in our sample: some insiders leverage their participation by about 5 percentage points, while for others the wedge is as high as 16 percentage points. Based on a separate analysis of the transparency notifications published immediately after the extraordinary general meeting (not reported in table 3), it can be noted that the initial increase in voting rights and thus the creation of the wedge, occurred for almost all insiders immediately after the introduction of the loyalty voting rights.⁹³ This indicates that insiders held their shares in registered form two years prior to the adoption and made use of the so-called "grandfathering of the past holding period".⁹⁴

More in general, the data support the view that loyalty voting rights mainly serve to leverage the control of insiders and thus function as a control-enhancing mechanism. As mentioned above in part 2, this does not necessarily mean that loyalty voting rights have a negative impact on the long-term orientation of the company. Insiders can use the additional voting rights to counter short-termist investors and hold managers accountable for managerial short-termism. However, the data on the ownership structure prior to the adoption of loyalty voting rights (see figure 2) suggest that in most companies the insiders were already able to effectively control the company and, if they so desired, pursue their long-term vision. Only in the case of IBA and Celyad Oncology can it be argued that the control of the insiders was contested prior to the adoption (insiders held around 20% of the voting rights), so that loyalty voting rights could strengthen the control of insiders to empower them towards short-termist managers or short-termist investors.

⁹³ To estimate the immediate impact of loyalty voting rights, we looked at the first transparency notifications after the extraordinary general meeting aimed at the adoption of loyalty voting rights.

⁹⁴ See *supra* part 3.2.

Table 3: Usage of loyalty voting rights. The table reports the equity participation, the voting rights and the wedge of all insiders as of November 2022. The total amount of shares with loyalty voting rights is compared with the total amount of shares in the company. The percentage of shares with loyalty voting rights that are under the control of insiders is presented in the column ‘held by insiders (%)’.

Name company	Shares insiders (%)	Votes insiders (%)	Wedge (percentage point)	Shares with LVR	
				vs. total number of shares (%)	held by insiders (%)
Celyad Oncology	39,21	44,69	5,48	10,48	96,95
Econocom Group	39,99	52,52	12,53	27,00	98,90
GBL	30,10	44,62	14,52	34,44	86,78
IBA	21,69	32,72	11,03	26,87	73,80
KBC Ancora	50,40	66,70	16,30	51,19	98,54
Lotus Bakeries	50,00	65,00	15,00	53,87	92,85
Nextensa	74,39	78,09	3,70	18,02	98,64
Picanol	89,47	93,87	4,40	73,48	99,86
Roularta	71,56	82,23	10,67	60,17	99,96
Tessengerlo	56,70	71,17	14,47	53,45	98,26
VGP	50,96	63,15	12,19	45,14	90,15
Average	52,23	63,16	10,94	41,28	94,06

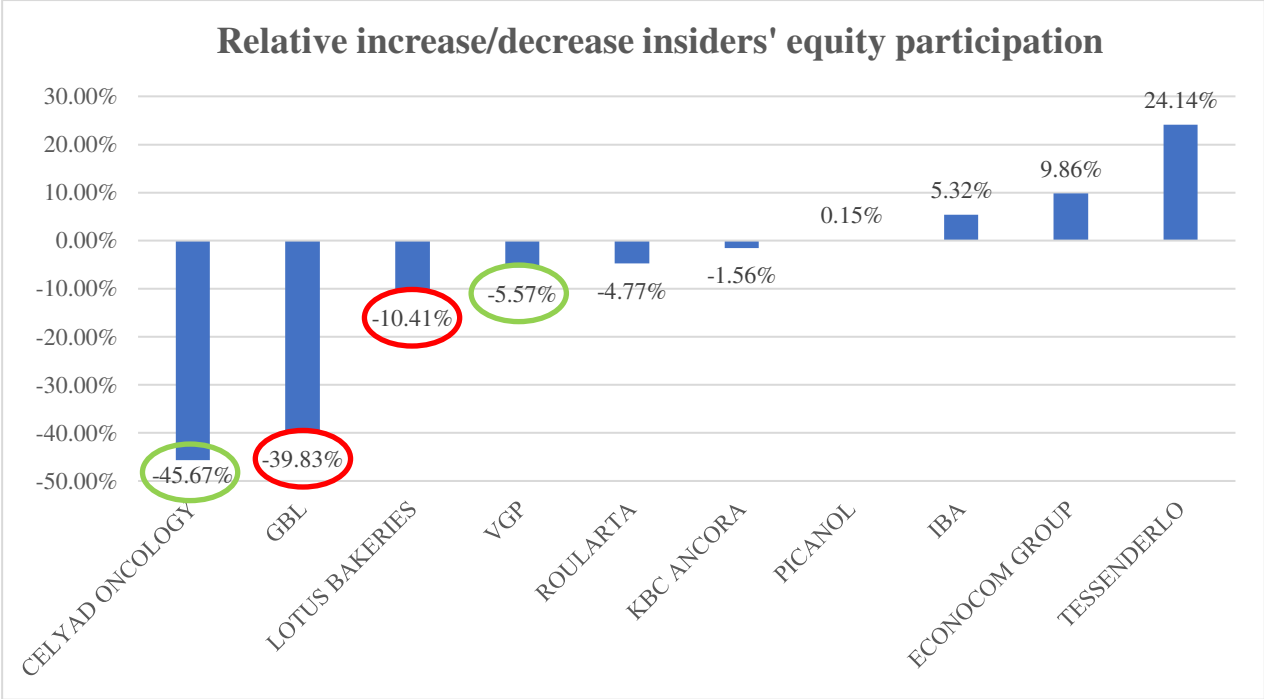
30. **Evolution of insiders’ equity participations.** We also investigated the evolution of insiders’ equity participations. Figure 3 below compares the insiders’ equity participation prior to the adoption of loyalty voting rights with insiders’ equity participation as of November 2022. Note that the figure only uses the data of the insiders that were already an insider before the adoption.⁹⁵ The data report a large variation among the companies in the sample, but on average three distinct groups occur: insiders of four companies significantly decreased their relative equity participation by more than 5%, while insiders of three other companies significantly increased their equity participation. The insiders of the last three companies more or less maintained their equity participation.

Moreover, figure 3 provides an explanation for the significant decreases in equity participations. We see two examples of companies (GBL and Lotus Bakeries), where insiders sold a substantial

⁹⁵ In fact, we only had to exclude one insider (capital participation of 28,77%) for Celyad Oncology – none of the other companies saw an insider emerge in the time period between adoption of the loyalty voting rights and November 2022. For this analysis, Nextensa is no longer part of the sample because the introduction of loyalty voting rights occurred together with a merger which significantly altered the shareholder structure.

part of their shares after the adoption of the loyalty voting rights (39,83% and 10,41% of their equity participation, respectively). In this case, insiders seem to have used the additional control obtained by loyalty voting rights to sell down their stake while retaining control. We also find two examples of companies (Celyad Oncology⁹⁶ and VGP) where insiders decreased their equity participation by not participating (pro rata) in a subsequent capital increase (decreasing equity participation by 45,67% and 5,57% in relation to their existing equity participation, respectively). This could be seen as other examples of insiders diversifying their wealth, although a more positive interpretation is also possible: perhaps loyalty voting rights allowed these companies to effect a capital increase to fund further long-term investments, without insiders losing control. Without loyalty voting rights, these transactions may not have occurred, which illustrates how loyalty voting rights may encourage long-term investment if the insiders are cash-constrained.

Figure 3: Relative increase/decrease of equity participation insiders. The figure reports the relative change in the insiders’ equity participation by comparing their participation before the adoption of loyalty voting rights with their participation as of November 2022. Only insiders that were already an insider before the adoption of loyalty voting rights are presented. For the insiders that decreased their equity participation by more than 5%, it is indicated if the decrease is due to a sale of shares (red circle) or a non-participation in a capital increase (green circle).



⁹⁶ The analysis for Celyad Oncology is based on the data of the only insider that was already an insider before the adoption. However, note that due to a capital increase, a new insider emerged (capital participation of 28,77%) who does not (yet) benefit from loyalty voting rights. This further explains the discrepancy between figures 2 and 3 (which only include the data of the initial insider) and table 3 (which includes the data of both insiders).

5. CONCLUSION

31. **Recap and main findings.** Loyalty voting rights have been all the hype recently in Europe. In this paper, we present empirical evidence on their use in Belgium, where they are legal in listed companies since 2019. We find that as of November 2022, of the 109 companies listed on Euronext Brussels, only 13 companies have adopted multiple voting rights, of which 11 were still listed at the time of our sample. None of these companies adopted loyalty voting rights at the moment of their IPO, which shows that the goal of the legislator to encourage IPOs in Belgium has not (yet) been achieved. In general, loyalty voting rights remain for the time being a relatively modest feature of the Belgian governance landscape. Since the first (timid) wave of 2019-2020, we note only one additional adoption of loyalty voting rights in a listed company.⁹⁷ Tellingly, loyalty voting rights could be quite easily adopted on the vote of the insiders alone in almost 60% of the other listed companies who chose not to do so. In 2 companies, loyalty voting rights were proposed and rejected.

The main goal of introducing loyalty voting rights was to combat short-termism. Setting aside the broader debate on short-termism, the question is how loyalty voting rights would achieve this. We identify two models by which short-termist pressures are supposedly translated into corporate behaviour. In the investor short-termism model, a subset of investors (institutional investors, asset managers, etc.) are excessively short-termist, and disproportionately succeed in influencing corporate actions, against the rational long-term value maximization preferences of management and the shareholders at large (and even of their own economic beneficiaries). In the managerial short-termism model, the short-termism emanates from the managers directly, to the detriment of dispersed shareholders as a class.

How could loyalty votes help? That is less easy to articulate than one may think. In the managerial model, it is unclear what granting even a large part of the dispersed shareholders double voting rights can accomplish. The shareholders as a class already own 100% of the voting rights, but the classic agency problem prevents corporate alignment with their long-term value maximization preference. Even assuming that the most long-term oriented shareholders will end up with extra voting weight, loyalty voting rights will not realistically change this. The only realistic conduit seems to be for a truly patient investor to build a controlling block in order

⁹⁷ However, it should be added that Miko NV (not part of our sample) also adopted loyalty voting rights on 23 May 2023 (see *supra* part 4.2).

to force management alignment. Loyalty shares could allow this at lower levels of investment (but deferred in time due to the loyalty period).

In the investment model, presumably the patient retail shareholders may see their voting weight increase versus the short-termist caucus. But again, it is doubtful that this will make a meaningful difference. The calm sea of passive shareholders is not suddenly going to turn activist by virtue of some shareholders having additional votes. Again, the only realistic scenario would be if an aspiring controlling shareholder builds a larger stake in order to capture the money that is supposedly left on the table by the company not pursuing long-term value maximization.

Our analysis of the Belgian loyalty voting rights regime for listed companies shows that the regime is clearly designed to favour controlling shareholders and other insiders. For example, the law makes it possible to adopt loyalty voting rights with a lower majority threshold than regular amendments to the articles of association (two-thirds majority instead of 75% majority). As such, the connection between loyalty voting rights and controlling shareholders is borne out in the design of the new Belgian regime.

In addition, the intimate connection between loyalty voting rights and controlling shareholders also shows up in the empirical evidence. Companies that have adopted loyalty voting rights generally have a concentrated shareholder structure, slightly more so than the average. The votes of “insiders” (controlling shareholders and associated parties) were often sufficient *ex ante* to approve loyalty voting rights. Non-insiders on average voted against the adoption of loyalty voting rights. Loyalty voting rights are almost exclusively used by insiders and create a significant – and immediate – voting bonus (11 percentage point on average) over their cash flow rights. Our evidence also shows that at least in some cases insiders use loyalty voting rights to decrease their stake while retaining control. While counterintuitive from a “loyalty” perspective, this can also be a positive if it allows financing for long-term investments where insiders are cash-constrained.

32. **Conclusion.** Overall, our empirical data supports the view that loyalty voting rights mainly serve to leverage the control of insiders and thus function as a control-enhancing mechanism. While not fatal from a long-termist perspective, it does raise some questions for

proponents of loyalty voting rights. Loyalty voting rights may facilitate blockholder governance by allowing the blockholder to control the company with a smaller equity stake, but it can also exacerbate the extraction of private benefits of control. The net effect likely varies from one company to the next, which is an argument for allowing experimentation. We do not advocate that loyalty rights should be abolished. However, the argument in favour of loyalty voting rights is the strongest at the IPO stage, when investors can weigh and price the pros and cons, and it is the weakest for midstream changes pushed through unilaterally by a sitting blockholder. In that regard, the Belgian experience so far is not comforting: all adoptions have been of the latter type and none of the former. That should give proponents some pause. At the very least, it means in our view that the law should not “subsidize” midstream adoption, as is often the case (by opt-out regimes like in France or by lowering the regular shareholder majority like in Belgium and, temporarily, Italy).⁹⁸

However, that leads to a more fundamental point. Our findings indicate that in practice loyalty voting rights are much closer to dual class shares than they first appear. The obvious question then becomes: why not allow dual class shares directly?⁹⁹ And perhaps more controversially: is it really warranted that minority protection is so much weaker for loyalty voting rights? Dual class voting structures typically are difficult to create or modify midstream or at least require majority of the minority approval, while the midstream adoption of loyalty voting shares is, to the contrary, often facilitated by the law. If loyalty voting rights are in the end nothing more than a control-enhancing mechanism, we fail to see the policy reasons for this wide divergence.

⁹⁸ Even if the impact of this rule has so far been limited in Belgium.

⁹⁹ It is interesting to note in that regard that a new draft directive recently proposed by the European Commission would *require* member states to allow dual class voting shares for companies who seek admission to trading on a SME growth market. See: Proposal for a directive of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on a SME growth market, 7 December 2022, COM(2022) 761 final – 2022/046(COD).